Army Lawyer

U.S. Army Judge Advocate General's Corps

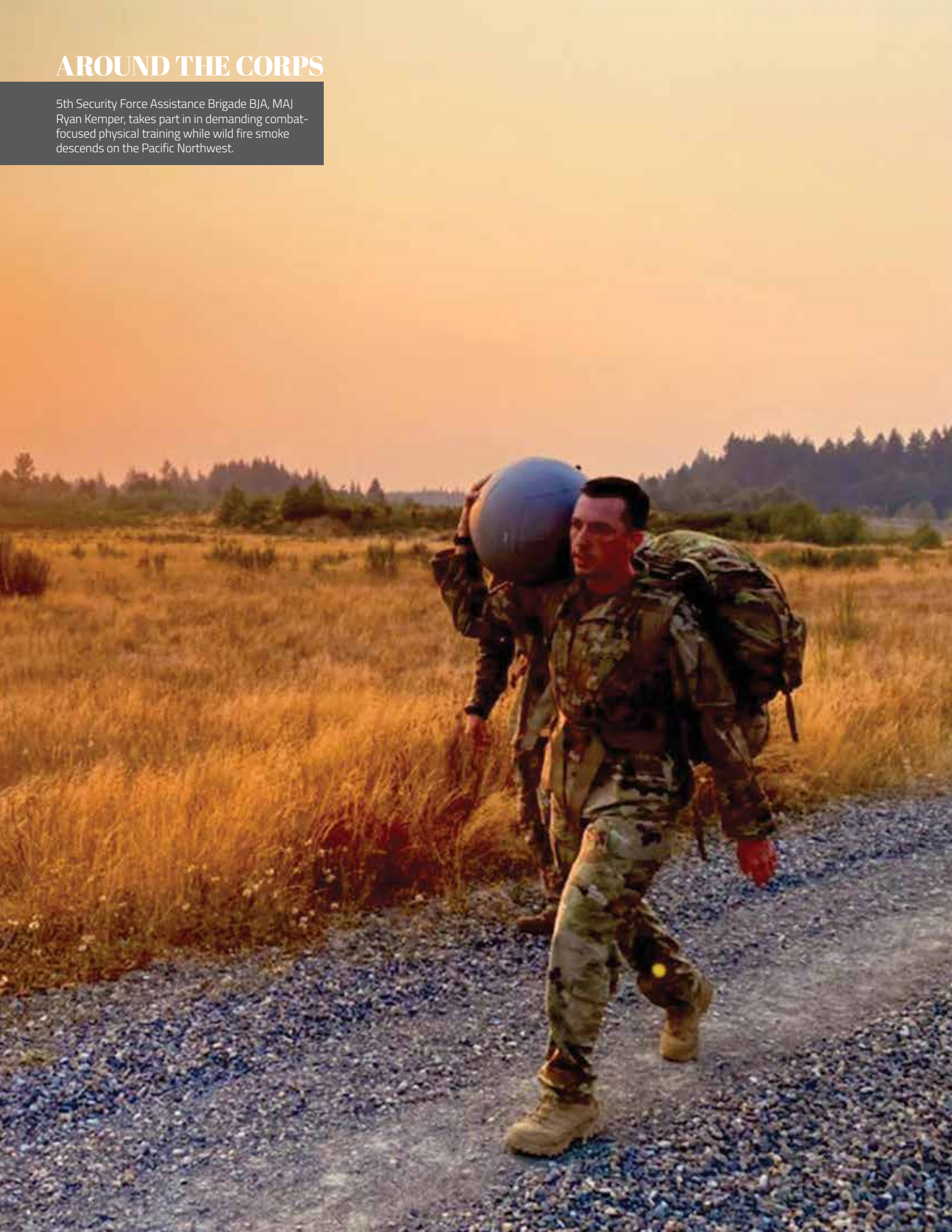
Issue 4 ▪ 2021

APPROVED FOR PUBLIC RELEASE; DISTRIBUTION IS UNLIMITED.

HEADQUARTERS, DEPARTMENT OF THE ARMY. PB 27-21-4

AROUND THE CORPS

5th Security Force Assistance Brigade BJA, MAJ Ryan Kemper, takes part in in demanding combat-focused physical training while wild fire smoke descends on the Pacific Northwest.



AROUND THE CORPS

SFC Christal Jones and MAJ Todd Wayne of 2d Security Force Assistance Brigade (2SFAB) participated in Mission Readiness Exercise 3.0 by conducting short range reflexive fire drills as a notional partner force in anticipation of an upcoming 2SFAB force package deployment to Africa.

Army Lawyer

Editorial Board

Issue 4 • 2021

By Order of the Secretary of the Army

JAMES C. MCCONVILLE
General, United States Army
Chief of Staff

Official:

MARK F. AVERILL
Acting Administrative Assistant to the Secretary of the Army
2134705.

The Army Lawyer (ISSN 0364-1287, USPS 490-330) is a Professional Bulletin published six times a year by Headquarters, Department of the Army, under the auspices of 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://tjaglcs.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: Major Vivek Shah, brigade judge advocate, and Specialist Macy Bidwell, paralegal specialist, 1st ABCT, 3d ID, advise Lieutenant Colonel Scott Stephens, Commander, 1st Battalion, 64th Armor Regiment, 1ABCT, 3d ID, on proportionality in preparation for a series of training exercises on Fort Stewart, Georgia. (Credit: SSG Daniel Guerrero, 1ABCT, 3ID)

Table of Contents

Departments

Features

The Decker Auditorium entrance to The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson/ TJAGLCS)

Court Is Assembled

Can Principled Counsel Be Taught?

By Colonel Sean T. McGarry

There is a new leader in your organization. First impressions are good. The leader projects confidence, charisma, and competence. Initially, the rapport developed across the organization is strong. However, as time goes on, what was initially projected as confidence increasingly gives way to an aggressiveness approaching bullying. The leader vents his frustrations in public, often in a pointed way at particular individuals. As first-impression good behavior wears off in favor of familiarity and comfort, poor language and boorish humor becomes more frequent. The leader's Type-A performance and the results they produce remain top-notch, but organizational morale is significantly slipping. Nobody wants to complain for fear of becoming the next target or becoming embroiled in an investigation that may not end well for anyone. What do you do?

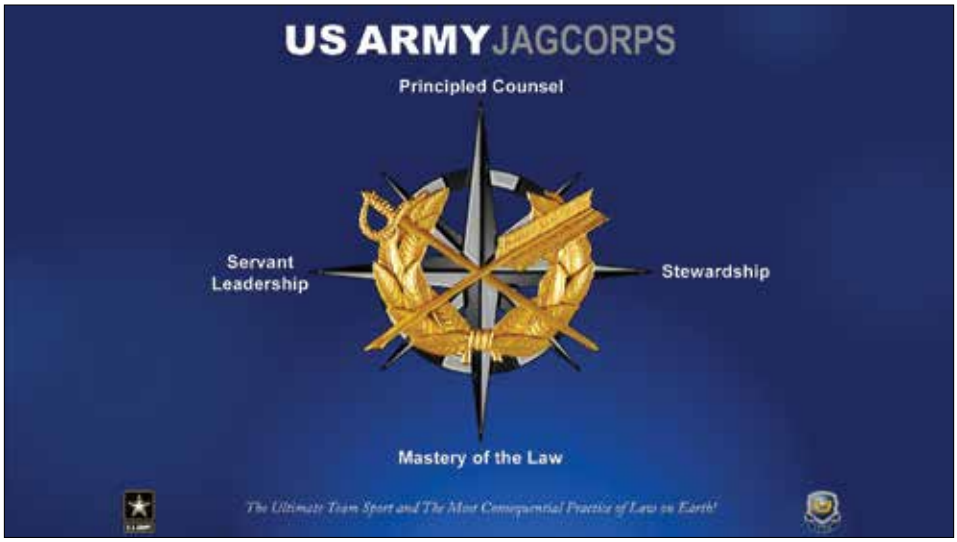
Leadership and Principled Counsel

Every organization needs to know who they are and what they are about. Mission and vision statements are not unique to the military and are ubiquitous across organizations of all types because they provide superordinate goals that bring people together and guide unified effort in the same direction. The Judge Advocate General's (JAG) Corps is no exception. In order to facilitate and sustain our diverse and high performing organization, we need to clearly and repeatedly identify, not just what we do, but how we do it—that is who we are and how we bring our individual teammates together to continue providing the gold standard of legal support across a world-wide practice that is "the most consequential practice of law on earth."[1]

The JAG Corps's identity and core values are firmly rooted in the "North Star of our Regiment—Substantive Mastery, Stewardship, Servant Leadership, and the spirit behind each of them—Principled Counsel."[2] Those Four Constants start with our JAG Corps senior leaders and permeate throughout the Regiment as we collectively develop and grow formal and informal leaders across our formation. The ultimate goal, of course, is to have those North Star elements—our Four Constants—be naturally occurring and instinctive guides for what we collectively do every day across the globe.

Our senior leaders cannot be like the individual described above; instead, they must emphasize and cultivate the Four Constants—especially that of Principled Counsel—to retain and attract the kind of people we want in our Corps. Senior leaders must serve as the reference point for what right looks like—it is through their words and deeds that office and Corps climates will develop and maintain social mores and norms consistent with our organization's identity. In a situation where local leadership behavior is not consistent with senior leader messaging, those local leaders will likely be viewed as paying trite lip service to our Corps's core values, and in turn, to its identity. That effect can increase our teammates' dissatisfaction with "bait and switch" bitterness, which will result in low morale, poor performance, and, ultimately, loss of talent from our ranks. Exit surveys continue to discuss the importance of the Corps's leadership in talent retention, and also how it relates to both personal and professional satisfaction.[3] The Fort Hood Independent Review Committee's report is a recent example of the damage that can

be done within an organization when local culture is seen as inconsistent with institutional values and messaging.[4] The report also further highlights the importance of equipping our leaders to avoid those pitfalls.



Teaching Principled Counsel

So, how do we best prepare our JAG Corps leaders to exemplify our core values for our junior members? The Judge Advocate General's Legal Center and School (TJAGLCS) inculcates Principled Counsel through early and repeated exposure to our JAG Corps's Four Constants—reinforced with Army doctrine[5] and modeled behavior at the organizational and individual level. The process begins with early exposure for our initial entry populations with basic concepts like the Army Values, officership, and the basic premise for Principled Counsel. Acculturation to the important tenets of our Corps is continued at the institutional level throughout JAG Corps-specific Professional Military Education.

During the Graduate Course (GC), students are exposed to a robust leadership curriculum rooted in Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession*; they then continue the transition from student to formal leader through a GC/Officer Basic Course (OBC) crossover program that matches GC and OBC students in a mentor-type relationship. The intent of the crossover is to expose OBC students to basic leadership concepts while further internalizing those same concepts in the GC counterparts as they prepare to assume formal leadership positions when they return to the field. Small GC peer-seminar groups are also key for both substantive material as well as network-building discussion. The seminar highlights more common challenges our newest field-grade officers will face in the field and provides a platform to discuss approaches to those challenges in light of doctrine, leadership lessons, and the experiences brought to the table by seminar participants.

Does this approach work? Anecdotally, yes, it does. The shared reflection of recent GC graduates as well as feedback from JAG Corps leaders who did not have the benefit of a formal leadership professional development program during their GC experience is illustrative.[6] Recent graduates found ADP 6-22 concepts, along with seminar discussions of those concepts, to be powerful tools in recognizing inconsistent behaviors early and formulating an approach to combat them. Similarly, the more seasoned JAG Corps leaders regularly shared how their own developmental experiences would have benefitted from a similar institutional program, especially since they have been responsible for developing Principled Counsel within our junior leaders. It is one thing to intellectually know these concepts, but it is another to utilize them in daily practice. As one recent GC student shared,

> you must now do your part to "clean up" this [negative] behavior by setting a positive example as an informal leader. To this end, you must immediately commit to engaging in civil discourse, rather than disrespect. You must operate with integrity by owning your part in the state of the office.[7]

Recent GC students are more empowered to be effective leaders through their shared experiences and robust discussions during their time at TJAGLCS. Leadership challenges, like legal issues, are generally not completely novel. Whether a particular challenge arises within a brigade, office of the staff judge advocate, or somewhere else, the worldwide JAG Corps network is available to support. Nobody in our Corps is ever alone—when our team is enabled with formal instruction that highlights and reinforces our institutional values, our leaders are best equipped and empowered to ensure Principled Counsel continues to be our enduring hallmark. **TAL**

COL McGarry is the Dean of The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Notes

1. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 41-01, Message to the Regiment (13 July 2021).

2. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

3. This assertion is based on the author's recent professional experiences as the Dean, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, from 15 July 2020 to present, and as the Staff Judge Advocate, 1st Armored Division and Fort Bliss, Texas, from 25 June 2017 to 20 July 2019.

4. Christopher Swecker et al., Fort Hood Indep. Rev. Comm., Fort Hood Independent Review Committee Report (2020). In describing the lack of Fort Hood, Texas, Sexual Harassment/Assault Response and Prevention Program effectiveness, the Fort Hood Independent Review Committee found that "[t]he main cause, however, was the failure of leadership to get the message to the ranks where the lion's share of the violations occurred. Operational imperatives overshadowed the safety and security of the Soldiers who were vulnerable and essentially on their own." *Id.* at 43.

5. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession (31 July 2019) (C1, 25 Nov. 2019).

6. This assertion is based on a subjective assessment of individual professional experiences.

7. Leadership Seminar Vignette, 69th Graduate Course, The Judge Advoc. Gen.'s Legal Ctr. & Sch. (2021).

News & Notes

Photo 1
Members of the 1st Stryker Brigade Combat Team, 4th Infantry Division, Fort Carson, CO, completed the Colorado Springs Spartan Super, a 10-km obstacle course race. Pictured L to R: MAJ Jeremy Watford (Brigade Judge Advocate), CPT Ashley Jesser (Deputy Brigade Judge Advocate), SGT Matthew Pierce (2-1 CAV Paralegal), and SFC Kevin Creel (Brigade NCOIC).

Photo 2
On 12 June 2021, the 79th Theater Sustainment Command hosted a hybrid Article 6 event which included virtual and in-person attendees from the 311th, 451st, 364th, and 103d Expeditionary Sustainment Commands.

Photo 3
Fort Sill interns, a FLEP officer, and a cadet got out of the office and headed to the range for a live fire demonstration with Bravo Battery, 2nd Battalion, 2nd Field Artillery Regiment, 428th Field Artillery Brigade, Fort Sill, Oklahoma. Pictured from L to R: Mr. Henry Harder (intern), CPT Caitlin Anderson (FLEP), Mr. Peter Hess (intern), and CDT Emily Cavanaugh.

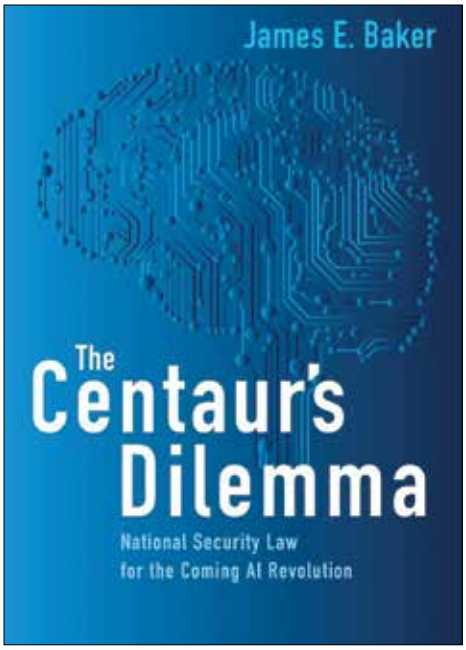
Photo 4
SGM Gail Drummond conducts rappel training at Fort Drum, NY.

Photo 5
Members of the North Carolina Army National Guard JAG Corps come together after an administrative separation board conducted during annual training at Fort Pickett, VA. Pictured from L to R: LTC Brian Blankenship, SPC John Moore, PFC Brian Zody, 1LT Chris Harrell, CPT Tom Murry, and MAJ Scott Somerset.

Photo 6
After months of field exercises, to include a National Training Center rotation, the legal office of the 3d Armored Brigade Combat Team, 4th Infantry Division, enjoys a night at the Colorado Springs Vibes Minor

League Baseball game. Back row pictured from L to R: CPT Chris Gill, CPT Mitch Bailey, MAJ Matthew Bryan, SPC Hwan Seok Oh, PFC Carden Arias. Front row pictured L to R: SPC Kimberly Ayala, SGT Acuzena Vigil, CPT Jori Jasper, CPT Kiara Martinez-Bentley, SSG Kristina Cosme, SPC Kimberly Varela.

Photo 7
Congratulations to SPC Marquise Johnson of the 7th Army Training Command OSJA for his BLC graduation. Pictured from L to R: SSG Sha'davia Newberry, SPC Marquis Johnson, and SGT Blake Howard.



Book Review

The Centaur's Dilemma

Reviewed by First Lieutenant Thomas Rovito

[Artificial Intelligence (AI)] technology will change much about the battlefield of the future, but nothing will change America's steadfast record of honorable military service, individual accountability, and our military's commitment to lawful and ethical behavior. Our focus on AI follows from our long history of making investments to preserve our most precious asset, our people, and to limit danger to innocent civilians. All of the AI systems that we field will have compliance with the law as a key priority from the first moment of requirements setting through the last step of rigorous testing.[1]

In his book, *The Centaur's Dilemma*,[2] renowned national security practitioner and former U.S. Court of Appeals for the Armed Forces Chief Judge James E. Baker contextualizes the expansive development of AI and its emerging legal structure. As in his previous literary works,[3] Baker frames his terms and issues, the most pertinent of which is the "Centaur's Dilemma," or "how to reap the benefit of AI for national security purposes without losing control of the consequences."[4] In other words, the Centaur's Dilemma discusses how to gain the advantage of rapid AI processing speed while preserving the value of human input and control.

Modeled in chess,[5] this "centaur" human-algorithm concept where machines provide processing power and humans provide oversight became widely promulgated in a Department of Defense (DoD) policy speech on keeping a human in or on the loop for weapons using AI.[6] Baker's book is "intended to make AI and the law accessible to national security policy and legal generalists so that they can make wise and strategic decisions about regulating the security uses of AI."[7] Baker notes the broad contours and normative implications of his text as "[identifying] law, or principles of law, that might, do, or should apply to AI by implication or analogy" and proposes looking toward either the law of armed conflict or arms control to provide a framework for AI or using constitutional law as a gap filler.[8]

To provide a roadmap for his readers, Baker divides the book into two parts.[9] The first part "describes AI, its security uses, and risks," with chapters on the history, components, and potential of AI; relevant military and intelligence issues concerning AI; and the risks of AI to security (such as creating unintended consequences, hardening authoritarian governments, triggering a technology arms race, lowering the cost of conflict—thus generating more conflict, and exposing national security decision-making pathologies).[10] Baker also discusses the "central" and normative question of "how, if at all, should we, might we, regulate the national security uses of AI."[11] He looks at the underlying principles behind national security law, constitutional law, statutory authorities, and how they may apply to AI.[12] Baker also looks to existing frameworks and how they may apply to AI, including arms control and the laws of armed conflict.[13] Baker concludes by reviewing regulatory mechanisms outside the legal process, such as ethical codes of conduct, internal review boards, and corporate social responsibility.[14]

Baker is an analytical writer in the truest sense of the word in that he provides context for his AI subject matter, such as the underlying historical currents and pending implications for the topic, and clearly frames his terms by noting common characteristics from other competing definitions. He also keeps the audience engaged by noting real-world examples to illustrate his concepts—such as the technology implications of the dispute between Apple and the Federal Bureau of Investigation following the San Bernardino shooting[15]—and by providing concise explanations of points of constitutional law and statutory analysis, including an in-depth review of the principles of the *Youngstown* case.[16] Perhaps best of all, in takeaways at the end of each chapter, Baker lays out the critical questions that legal generalists and policymakers should concern themselves with while looking toward a normative legal framework concerning AI.

As underlying global affairs push cyber law into a growing, visible, and discussed facet of national security law,[17] such a text is extremely timely and may provide normative and historical guideposts for lawyers and policymakers as they navigate new opportunities and threats. For instance, national security scholars have noted that the latest technologies, including AI, have provided an opportunity for Congress and the DoD to address the risk.[18] One example is provided by the National Security Commission on Artificial Intelligence, which recently promulgated its report on "winning the artificial intelligence era."[19] Another example is provided by the Joint Artificial Intelligence Center, set to execute the DoD's 2018 Artificial Intelligence Strategy.[20] Thus, this text may guide newly-established bureaucracies as they navigate legal issues and AI.

Judge advocates (JAs) should take particular notice of this book because it provides an introduction to AI and the emerging legal frameworks that are being used and developed around it; but, most

importantly, it reinforces the purposes and advancement of national security law as a whole. Baker is able to describe the impact of AI on national security law as "a military force multiplier," with an emphasis on intelligence cycle.[21] He also places AI in the broader changing strategic context, like the advent of the modern battleship, which should enable JAs to better brief and advise commanders and staff personnel on the topic.[22] Baker also discerns the three purposes of national security law, which includes "provid[ing] the substantive authority to act, as well as the left and right boundaries of that action,"[23] the process of its application,[24] and "provid[ing] for, protect[ing], and preserv[ing] our essential legal values.[25] These purposes go beyond AI and are relevant for JAs as a normative guide in any legal practice. The book also provides a concise and precise review of constitutional national security law and its connections to AI, which reads like an easy-to-read law school hornbook on the topic; JAs will welcome this review on the topic.[26] This will enable JAs to better process national security legal issues and to inform their commanders on this developing topic.

Ultimately, *The Centaur's Dilemma* achieves what it sets out to do: it provides a framework for national security policy attorneys and legal generalists, in addition to raising critical questions and potential solutions as AI develops. The book is similar to P.W. Singer's *Wire for War*,[27] insofar as both texts break down complex topics on AI and make it digestible for a relatively novice audience through easy-to-read prose and real world vignettes straight out of the headlines. Such a book is appropriate for those unfamiliar with the topic or are starting to build their national security law framework, such as recently-commissioned lieutenants at The Judge Advocate General's Legal Center and School (who trained with the new Cyber Corps direct commissioned officers at the Direct Commission Course). As such, there is no dilemma with reading *The Centaur's Dilemma* as a guide to the legal and national security implications of AI. **TAL**

1LT Rovito is an Operational Law Judge Advocate for the 371st Sustainment Brigade in the Ohio National Guard in Springfield, Ohio.

Notes

1. *About the JAIC: The JAIC Story*, JAIC, https://www.ai.mil/about.html (last visited July 25, 2021) [hereinafter *About the JAIC*].

2. James E. Baker, The Centaur's Dilemma: National Security Law for the Coming AI Revolution (2021).

3. *See* James E. Baker, In the Common Defense: National Security Law for Perilous Times (2007); W. Michael Reisman & James E. Baker, Regulating Covert Action (2011).

4. Baker, *supra* note 2, at 4.

5. Andrew Lohn, *What Chess Can Teach Us About the Future of AI and War*, War on the Rocks (Jan. 3, 2020), https://warontherocks.com/2020/01/what-chess-can-teach-us-about-the-future-of-ai-and-war/ (noting the interplay of chess with AI and human input).

6. Baker, *supra* note 2, at 4. Human in the loop generally means that a human is the initial decisionmaker for an action. Human on the loop means that the human generally supervises the AI's use with the action ongoing. *See id.* at 41. For more on the background of the "centaur," see Paul Scharre, Ctr. for a New Am. Sec., Autonomous Weapons and Operational Risk: Ethical Autonomy Project ch. IX (2016) (discussing centaur warfighting); Adam Elkus, *Man, the Machine, and War*, War on the Rocks (Nov. 11, 2015), https://warontherocks.com/2015/11/man-the-machine-and-war/. For more on the policy background, consult Matthew Rosenberg & John Markoff, *The Pentagon's 'Terminator Conundrum': Robots That Could Kill on Their Own*, N.Y. Times (Oct. 25, 2016), https://www.nytimes.com/2016/10/26/us/pentagon-artificial-intelligence-terminator.html. For more on "human in the loop" or "human on the loop," see U.S. Dep't of Def., Dir. 3000.09, Autonomy in Weapon Systems (Nov. 21, 2012) (C1, May 8, 2017); Kelley M. Sayler, Cong. Rsch. Serv., IF11150, Defense Primer: U.S. Policy on Lethal Autonomous Weapon Systems (2020).

7. Baker, *supra* note 2, at 5.

8. *Id.* at 5–6.

9. *Id.* at 6.

10. *Id.*at 5–6.

11. *Id.* at 7.

12. *Id.*

13. *Id.* at 8.

14. *Id.*

15. *Id.* at 96–100.

16. Youngstown v. Sawyer, 343 U.S. 579 (1952); Baker, *supra* note 2, at 134–42.

17. For instance, consider the level of coverage for the 2021 U.S. Cyber Command Legal Conference, which was streamed online. General Paul Nakasone et al., U.S. Army, 2021 U.S. Cyber Command Legal Conference (Mar. 4, 2021). Also consider *The Cipher Brief*'s symposium on "The Mission to Integrate Artificial Intelligence into the Military's Future Battle Rhythm," featuring Lieutenant General Michael S. Groen (Director of the Joint Artificial Intelligence Center), the Honorable Katharina McFarland (Commissioner, National Security Commission on Artificial Intelligence), and Alon Jaffe (Director, National Intelligence Division National Security Group, Microsoft Federa). Lieutenant General Michael S. Groen et al., The Cipher Brief Symposium: The Mission to Integrate Artificial Intelligence into the Military's Future Battle Rhythm (Mar. 10, 2021), https://www.thecipherbrief.com/column_article/the-mission-to-integrate-artificial-intelligence-into-the-militarys-future-battle-rhythm. Lieutenant General Groen has echoed several normative points of Baker, including at his recent statements at the Yale Special Operations Conference:

> It's not just about tech, it's about the process, it's about the function. . . . It's enormously educational when you really start asking folks, "Okay, how do you actually make that decision. What data do you use? What data *should* you be using? How is that data presented to you? Could it be presented in a different way. Who actually owns that data?"

Sydney J. Freedberg Jr., *Frontline Geek Squads: SOCOM's Secret Weapon*, Breaking Def. (Mar. 8, 2021, 11:47 AM), https://breakingdefense.com/2021/03/frontline-geek-squads-socoms-secret-weapon/.

18. Elaine McCusker & Emily Coletta, *Who Will Lead the World in Artificial Intelligence?*, C4ISRNET (Mar. 1, 2021, 12:48 PM), https://www.c4isrnet.com/opinion/2021/03/01/who-will-lead-the-world-in-artificial-intelligence/.

19. Nat'l Sec. Comm'n on A.I., Final Report (2021).

20. *About the JAIC*, *supra* note 1; U.S. Dep't of Def., Summary of the 2018 Department of Defense Artificial Intelligence Strategy (2019).

21. Baker, *supra* note 2, at 30–45.

22. *Id.* at 46–65.

23. *Id.* at 70.

24. *Id.* at 74.

25. *Id.* at 89.

26. *Id.* at 95–142.

27. P.W. Singer, Wired for War: The Robotics Revolution and Conflict in the 21st Century (2009).

(Credit: xtock – stock.adobe.com)

Azimuth Check

Judge Advocates and Paralegal Professionals

Charting the Courses, Leading Others, and Serving as Ethical Pathfinders

By Major General (Retired, U.S. Army) Patrick Reinert & Colonel Walter D. Venneman

Over our military careers we contemplated the question, "what makes a person an effective or good leader?" Today, we still ask of ourselves, "how can I become a better leader?" Focused on purely legal and technical missions, one might reasonably ask whether leadership is important to fulfill the duties of Army lawyer or paralegal. While Army doctrine answers "yes" in the maxim that "[e]very Soldier and Army civilian has the duty to be a leader, follower, and steward of the Army profession,"[1] the "how do I become a better leader" part of the equation is less clear.

Our collective experience is that leadership is only partly about achieving or completing a task or mission. Leaders communicate; and they continuously "read about, write about, and practice their profession."[2] Together, we read—and now write—about two pivotal works on leadership: *Leaders: Myth and Reality*[3] and *Army Leadership and the Profession.*[4] Excellent leadership and excellent followership in our Regiment is fundamentally concerned with influencing, charting the courses, and leading the way on ethical paths.

Leaders: Myth and Reality

The first captivating read is *Leaders: Myth and Reality* by General (Retired) Stanley McChrystal, Jeff Eggers, and Jason Mangone.[5] General McChrystal et al. masterfully challenge the concept of leaders as being singularly legendary and engagingly pull apart leadership myths. The authors take us back to river crossings, such as Julius Caesar's crossing of the Rubicon and Washington's crossing of the Delaware, and forward to the brutal reality of Abu Musab al-Zarqawi's leadership journey in the 2000s.

In *Leaders*, General McChrystal sets aside the usual framework of leader-centric

biographies and opens the aperture to show why these figures emerged as leaders, how they led, and how the ecosystem in which they lived contributed to their effectiveness. The text brings to life leaders you will both admire and reject. In it, you will find robust and probing accounts of founders (Walt Disney and Coco Chanel), geniuses (Albert Einstein and Leonard Bernstein), zealots (Maximilien Robespierre and Abu Musab al-Zarqawi), reformers (Zheng He and Harriet Tubman), power brokers (William "Boss" Tweed and Margaret Thatcher), and reformers (Martin Luther and Dr. Martin Luther King Jr.). We encourage you to study it for yourselves and measure its content and lessons against your own experiences.

Published in 2018, *Leaders* does not analyze military leadership in the present day, but it does adeptly describe a full spectrum of leadership realities that can be seen today, identifies several myths about it, and concludes with a new definition of leadership that hits the mark. As opposed to being about specific moments or achieved missions, leadership is: 1) dynamic and contextual; 2) a reiterative directional process that accounts for complex systems and feedback from followers; 3) symbolic; and 4) critical to the selection of the next generation of leaders. *Leaders* helps us to understand why we tend to emphasize and focus on leaders, and yet, it also encourages us to analyze the role of followers, systems, context, and culture. We commend *Leaders* and believe it will pique your interest in leadership and followership theory, as well as enable your practice of it.

Army Leadership and the Profession

When serving as the Deputy Judge Advocate General, then-Major General Stuart Risch's reading list included our paired reading, Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession.* It captures a plethora of lessons that are critical and inspiring. Army Doctrine Publication 6-22 defines the context in which we lead and follow (the Army profession) as the "trusted vocation of Soldiers and Army civilians whose collective expertise is the *ethical* design, generation, support, and application of land power; serving under civilian authority; and entrusted to defend the Constitution and the rights and interests of the American people." [6]

The ethical component of our leadership and followership cannot be overemphasized. One of the twelve principles of joint operations, "legitimacy" is "maintain[ed by] the *legal and moral authority* in the conduct of operations."[7] The commanders that we serve study ADP 6-22 and are directed to engage in ethical reasoning and give lawful, ethical orders. If the questions and decisions our commanders face are complex, they are encouraged to seek legal counsel. Our brand of leadership may be less direct, but our role as ethical influencers—*or ethical pathfinders*—is vital to our practice. Our Army profession, our Regiment's role in the Army, and the legal and moral application of land power depends on our courageous and selfless service as ethical pathfinders.

While our operating environment and context is in a time of cultural and social change, our ethic is timeless. Army Doctrine Publication 6-22 explains that the Army motto—"This We'll Defend"—is grounded in our Constitution and all that comes with it.[8] To defend and advance the Army on an ethical path, as a part of the Judge Advocate General's (JAG) Corps, we put people, selfless service, and principled counsel first. "Principled counsel" is also grounded in the Army ethic.[9] Army Doctrine Publication 6-22 defines the Army Ethic as "the set of enduring moral principles, values, beliefs, and laws that guide the Army profession and create the culture of trust essential to Army professionals in the conduct of missions, performance of duty, and all aspects of life."[10] Putting people first means we "protect the constitutional rights of every American and the basic human rights of all people."[11] As ethical pathfinders, this is our core mission.

Without studying leadership formally through self-study and obtaining leadership experience, one might maintain a false confidence that "achieving" in one's technical work—or meeting deadlines, or completing missions—is all that is required to be an effective leader. Army Doctrine Publication 6-22's definition of leadership as "the activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization"[12] could be used to partially support that view; however, leadership goals like "improving the organization," or defining what gives us "purpose," or "the desire to serve," are relative concepts that cannot necessarily be measured objectively by unit metrics.

Not all will agree with what gives us "purpose," and an "improvement" in an organization may not be universally viewed as an improvement by all within the organization or by those on the outside. While helpful, the Army's definition of leadership arguably misses an essence of what leaders do. In *Leaders*, General McChrystal explains that "leadership is a complex system of relationships between leaders and followers and, in a particular context, that provides meaning to its members."[13] For us as a JAG Corps, meaning comes from the development of ethics-based decisions and the respectful relationships with peers, supported commanders and subordinates (people first), and stewardship of our trusted profession.

Our organization, our context, our measures of success include the Four Constants.[14] Our JAG Corps mission embodies ethical pathfinding in its charge to "[p]rovide principled counsel and premier legal services as committed members and leaders in the Army and legal professions, in support of a ready, globally responsive, and regionally engaged Army."[15] To fulfill this mission (and ourselves) we need to master the law, provide principled counsel, be good stewards of our resources and personnel, and practice servant leadership. To practice servant leadership, we must study it. The two resources we touch upon, *Leaders* and ADP 6-22, can help in leadership development.

Ethical Leadership

The ethical leader must do more than be effective and ethical; they must also positively impact the unit's climate and culture consistent with the Army ethic. A leader can be effective in getting a mission accomplished but, at the same time, engage in counter-productive,[16] tyrannical, and unethical conduct while serving in a leadership position. In the long run, the ethical leaders in our organization will be more effective because the ethical leader does not cut corners, nor do they use Ma-

chiavellian tactics—where the ends justify the means. The end state is important, but how one achieves it is equally important to the ethical leader. Ethical leadership and followership is more than a duty—it is a vital privilege. No matter your component, grade, or position, *your* leadership matters a great deal to your supported clients and subordinates.[17]

While as a Regiment we continue to identify our formal "leaders,"[18] all of us simultaneously support commanders and peers through decision-making on complex legal, moral, and ethical issues. Our Regiment is organized in such a way that most of our formal leadership positions are at the direct level of leadership.[19] In this way, judge advocates at all levels fill the critical leadership role of being the ethical pathfinder for our Soldiers, peers, supported commanders, and those who command our Nation.

For the follower who seeks to be a more ethical and effective leader, General McChrystal suggests that both leaders and followers encourage the "whole organization to become great together."[20] While our Regiment's narrower context includes legal sections, offices, divisions, and commands, as ethical pathfinders, our reach routinely extends well into the organizations we serve—charting new courses along the way. Your positive attitude and ethical pathfinding encourage those who follow you to become more than they envisioned possible.

All of us lead and follow at the same time in a particular era, place, and time. The "how, where, and when" of our leadership and followership frames our mindsets and contributes to how we lead today and shape tomorrow's leaders. It is the people that have led us, the people we have followed, and the people that followed us in a certain place and time that made a large impact on our lives. Books broadened our understanding of leaders, followers, and leadership theory, and they help us to shape ourselves as leaders.

Going forward in your studies and reflection on leadership, you may want to ponder the three myths about leadership advanced by General McChrystal:

> Myth #1: The "Formulaic Myth"[21]—that leadership can be reduced to a set of traits, or a prescription that once filled, yields a leader. Put simply, it is "the desire to tame leadership into a static checklist."[22] We make leaders of those we believe possess the traits or "do" the checklists.
>
> Myth #2: The "Attribution Myth"[23]—this view of leadership sees the leader as a director and the outcomes as causally related to them. It deemphasizes the importance of systems, context, and followers. All successes and failures belong to the leader.
>
> Myth #3: The "Results Myth"—in this equation, "the objective results of the leader's activity are more important than her words or style or appearance."[24] This myth de-emphasizes the art of leadership and overlooks oral and written communication skills. It also disregards the potential impact of a leader on the psyche or climate of the organization.

You may also want to contemplate whether "[w]hen you lead and where you lead has a lot to do with how you lead."[25]

Excellent, effective, ethical leadership can and must be developed. Part of being a leader is learning how to be an effective follower and how to be reflective when time allows. We did not start out with this perspective—once upon a time we were young Soldiers, who were taught that leadership was unwavering, courageous, audacious, brash, bold, and always decisive. We brought our own concept of leadership and tendencies to service at the small unit level, and then gradually learned more about the myths and realities of leadership along our unique paths.

Key Takeaways:

1. Every leader you have had is a role model of either what you want to avoid, or to what you aspire. Keep the good and discard the bad on your "how-to list."
2. As a judge advocate or paralegal, you are an ethical pathfinder for others. You live in a glass house where everyone can see your actions. You set the tone for your unit as the "keeper of the law." Leaders will come to you. Be Ready!
3. Formal leadership courses (officer, civilian, and enlisted) are only part of the process of exposing you to leadership principles. You must also read about leaders and history to help expand your library of skills. The reading lists of The Judge Advocate General and Deputy Judge Advocate General, the Chief of Staff of the Army, and other senior leaders are always great places to start.
4. Expand your experiences in different types of units, in different locations, and in different environments. Leading a unit in a hostile theater presents significantly different challenges than in garrison. Similarly, serving different types of units, combat, combat support, and combat service support, give you a different view of the Army and the challenges of leadership. This will help give you adaptability.
5. Understand yourself. In various leadership courses, you may have taken the Myers-Briggs type indicator test to help you understand why you approach problems a certain way and to help you understand others. Beyond understanding your own tendencies, understanding what you do not know is as helpful in knowing what you do know. Everyone has blind spots; understanding some of yours will help you develop strategies to compensate for them.
6. Empower your team to help make the unit a success. This requires you to train them, trust them to make good decisions, and then give them some ownership in finding solutions. As a leader, especially a senior leader, all the easy problems should be solved long before you even know about them.
7. At some point "[y]our job will not always be to build the ships and steer the wheels. Eventually you must chart the courses to ensure those you lead know where they are headed."[26] In other words, there are times to come when you must *lead and direct the mission.* Be bold and be ethical.
8. Develop others. "Leader development of others involves recruiting, assessing, developing, assigning, promoting, and retaining the leaders with the potential

for levels of greater responsibility . . . . It is the individual professional responsibility of all leaders to develop their subordinates as leaders."[27] Excellent leaders and followers are *present*, actively listen, effectively communicate, timely counsel, and equitably develop one another. Be the leader that learns from subordinates.

9. Both followers and leaders are in constant evolution. Be an ethical and positive influence on others. Avoid the trap of defining yourself or altering your destiny by overweighting one leader or moment in time.
10. Excellent leadership begins with excellent followership.[28] "There is a tendency to think of people as either leader or subordinate but leading and following are simultaneous responsibilities."[29] You can build trust within your team by being ethical and maintaining a "can-do" attitude. Communicate in every word and action and understand that Character, Presence, and Intellect (our core leader attributes) and Leads, Develops, and Achieves (our core leader competencies) are critical at every level of leadership: Direct, Organizational, and Strategic.
11. If you do not know, ask a noncommissioned officer, civilian leader, or warrant officer. They are expert leaders, trainers, counselors, developers, and will always accomplish the mission. Empower them.

Over the years, as we looked back, analyzed, and self-critiqued our own leadership, we came to realize that, almost invariably, we had to charge others with obtaining certain results. The reality is that leaders must accomplish more than one mission contemporaneously while greatly concerning themselves with building and maintaining relationships with subordinates. As subordinates to others, whatever the mission, we recognized that following through on our duties was central to our leader's success, as well as vital to our own success and meaning.

Conclusion

One of the finest points General McChrystal makes in *Leaders* is the importance of meaning and purpose in all that we do. "Sometimes that meaning may take the form of driving and achieving results. Other times it will take the form of achieving some sense of understanding, or hope, or identity."[30] Being ethical and equitable in our stewardship, recruitment, assignments, developmental evaluations, and daily conduct defines and differentiates our organization from others. Whether serving as a formal or informal leader, being generous of spirit, graceful, and forgiving of mistakes empowers those you lead. It is critical to our Regiment's future success and influence on ethical leadership that we continue to serve as ethical pathfinders who are true to our Army ethic and the Army profession. You are the future of the Army JAG Corps. The JAG Corps's success is the Army's success. Embrace the challenge of being an ethical pathfinder. **TAL**

MG (Retired) Reinert retired after 35 years of military service. His general officer assignments included Chief Judge (Individual Mobilization Augmentee), Army Court of Criminal Appeals; U.S. Army Reserve Legal Command; the Rule of Law Field Force/NATO Rule of Field Support Mission; Deputy Commanding General and Commanding General, Combined Joint Interagency Task Force 435; and Commanding General of the 88th Readiness Division at Fort McCoy, Wisconsin. He still works as an Assistant U.S. Attorney in the Northern District of Iowa.

COL Venneman is a faculty instructor at the U.S. Army War College (Department of Distance Education) at Carlisle Barracks, Pennsylvania. Some of his previous assignments include the Deputy Staff Judge Advocate and Staff Judge Advocate for Combined Joint Interagency Task Force Phoenix VII–Afghanistan; Asymmetric Warfare Group Group Judge Advocate; and Commander of the 7th Legal Operations Detachment in New York.

Notes

1. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 1-67 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

2. *Id.* para. 6-12.

3. General Stanley McChrystal et al., Leaders: Myth and Reality (2018).

4. ADP 6-22, *supra* note 1.

5. McChrystal et al., *supra* note 3.

6. ADP 6-22, *supra* note 1, para. 1-8.

7. U.S. Dep't of Army, Doctrine Pub. 3-0, Operations tbl.2-1 (31 July 2019) (emphasis added).

8. ADP 6-22, *supra* note 1, para. 1-47.

9. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., TJAG and DJAG Sends 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

10. ADP 6-22, *supra* note 1, para. 1-44.

11. *Id.* para. 1-16.

12. *Id.* para. 1-74.

13. McChrystal et al., *supra* note 3, at 397.

14. The Judge Advoc. Gen.'s Corps, U.S. Dep't of Army, Four Constants, at slide 2 (2021), https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf.

15. *Id.*

16. ADP 6-22, *supra* note 1, paras. 8-45 to 8-50 (the former moniker "toxic," is now identified as broad "counterproductive leadership" behavior categories that include abusive behaviors, self-serving behaviors, erratic behaviors, leadership incompetence, and corrupt behaviors).

17. *See* Major Patrick R. Sandys, *Assessing Leaders from the Bottom Up*, Army Law., no. 4, 2020, at 60 (2019) (a survey conducted by Major Sandys between 24 October 2019 and 13 November 2019 showed that, "[n]inety percent of respondents agreed that leaders were an important factor when deciding whether to remain on active duty, and nearly two-thirds of respondents agreed that they thought about leaving active duty because of experiences with past or present leaders").

18. *Id.*

19. ADP 6-22, *supra* note 1, paras. 1-24 to 1-27 (the Army recognizes Direct, Organizational, and Strategic, as the three levels of leadership. The direct level leader's span of direct influence may be just a few to several dozen people and the leader's day-to-day involvement is important for climate and successful unit level performance).

20. McChrystal et al., *supra* note 3, at 395.

21. *Id.* at 371–73.

22. *Id.* at 371.

23. *Id.* at 375–76.

24. *Id.* at 378–80.

25. Major General Patrick J. Reinert, *Charting the Courses:* 35 *Years of Army Life and Leadership*, U.S. Army (Sept. 5, 2018), https://www.army.mil/article/210656.

26. *Id.*

27. ADP 6-22, *supra* note 1, para. 6-3.

28. *See* Colonel Walter D. Venneman, *SJA Corner: Excellent Leadership Begins with Excellent Followership*, Operation L.Q., no. 2, 2018, at 3.

29. ADP 6-22, *supra* note 1, para. 1-104.

30. McChrystal et al., *supra* note 3, at 397.

Lieutenant General John J. Tolson, Commanding General XVIII Airborne Corps, presents the Silver Star and Bronze Medal posthumously to Glanor Gay Best and Hugh Best Jr., who are receiving the medals on behalf of their deceased son, Hugh E. Best III, who was killed in action in 1969 in the Vietnam War. (Credit: C. Gene Tyree, 20 June 1969)

Lore of the Corps

Justice Was a "Casualty of War"

A Kidnapping, Rape, and Murder in Vietnam

By Fred L. Borch III

On 17 November 1966, four infantrymen—Sergeant (SGT) David E. Gervase, and Privates First Class Steven C. Thomas, Cipriano S. Garcia, and Joseph C. Garcia—on a five-man reconnaissance patrol in South Vietnam entered a small village and kidnapped a twenty-year-old Vietnamese woman named Phan Thi Mao. The fifth man in the patrol, Private First Class (PFC) Robert M. Storeby, refused to participate in the abduction. He also refused to take part in the gang rape of Mao that followed the kidnapping. Storeby also had nothing to do with the murder of Mao the following day, when she was stabbed and then shot by PFC Thomas to cover up crimes committed against her. What follows is the story of this horrific war crime and how, despite the trials by general courts-martial that followed this kidnapping, rape, and murder, justice very much was a casualty of war.[1]

On 16 November 1966, the five Soldiers, all members of C Company, 2d Battalion (Airborne), 8th Cavalry Regiment, 1st Cavalry Division (Airmobile), were selected by their platoon leader for an "extremely dangerous" mission: reconnoitering an area in the Central Highlands around Hill 192, where it was thought that the Viet Cong were hiding out in a cave complex.[2] The next day, SGT Gervase (the leader of the patrol mission) announced that, for the men to have a good time while on the patrol, "he was going to see that they found themselves a pretty girl and take her along for the morale of the squad."[3]

In the early morning of 18 November, when the five Soldiers began their reconnaissance mission, they entered a village of about a half-dozen "hootches."[4] After finding Mao in a hootch she shared with her mother and sister, the men bound her wrists with rope, gagged her, and took her on the patrol with them.

Later that same day, after setting up headquarters in an abandoned hootch near Hill 192, Gervase announced that it was "time for some fun."[5] Gervase then went into the hut, where Mao was resting, and sexually assaulted her. Private First Class Storeby, who refused to take part in the assault of Mao that day, would later say that during Gervase's rape of her, "a high, piercing moan of pain and despair came from the girl. After several minutes, the moan turned to a steady sobbing; and this did not cease until, after half an hour, Gervase reappeared."[6]

Thomas followed Gervase, and found Mao naked. She was lying on a table, her hands bound behind her back; Thomas raped her. The two Garcias, who were cousins, were the last to gang rape Mao. As for Storeby, he had moved away from the entrance to the hut, and remained seated "on the grassy turf to one side of the structure" during the assault on Mao, which lasted about 90 minutes.[7] Asked later in court what he was thinking about while sat on the grassy turf, Storeby replied: "I was praying to God that if I ever got out of there alive I'd do everything I could to see that these men would pay for what they did."[8]

After the rape, all five Soldiers went into the hootch together. While Mao—whose hands had been untied and was now dressed—cowered in a corner, Gervase, Thomas, and the Garcias "reminisced about their communal feat, comparing Mao with

other girls they had known and talking about how long it had been since they had a woman."[9]

The next morning, the Soldiers got up shortly before 0600. Gervase and Thomas announced that Mao must be killed. If the patrol should encounter the Viet Cong, the woman would only get in the way. Even if the Americans did not run into the enemy, there was a strong possibility that Army helicopters scouting the area would see the squad and want to know why the girl was accompanying them.[10]

Recognizing that Storeby was a danger to himself and the others, Gervase suggested that—after the squad decided how to kill Mao—Storeby must carry out the murder. If Storeby refused, said Gervase, he likely would be reported as K.I.A.—killed in action. After Storeby refused to take part in any killing, Gervase asked the Garcias to commit the crime. When the cousins refused, PFC Thomas volunteered to kill her.[11]

After deciding that the murder should take place on the summit of Hill 192, so that Mao's body could be disposed of by throwing it off a cliff, the patrol set out. Before Gervase, Thomas, and the Garcias could carry out their plan, however, the patrol ran into some Viet Cong. After the firefight that followed, and with helicopters now heading for their location to assist in the fight against the enemy, Gervase and Thomas became worried that Mao was certain to be seen with the patrol. According to the record of trial, Thomas said, "Let's kill her and get it over with." Gervase replied with, "All right, go ahead."[12]

Thomas then took Mao into some nearby bushes and stabbed her three times with his hunting knife. When she did not die, but tried to flee, Thomas caught her and shot her in the head with his M-16 rifle.[13]

Shortly after the murder, SGT Gervase radioed his platoon leader to report that, in the middle of the firefight with the Viet Cong, "a girl was fleeing up the side of" Hill 192."[14] The platoon leader ordered Gervase to "get the girl."[15] A few minutes later, Gervase radioed back that, as he had been unable to catch the girl, "that he had had to shoot her."[16]

Private First Class Storeby, who had refused to take part in any of the criminal activities of his fellow Soldiers, was now determined to report the crime—despite threats against his life from the other four Soldiers, who insinuated that Storeby would be a combat casualty when on a future mission. When Storeby's chain of command—including his company commander—would take no action, Storeby reported the crime to the chaplain located at Camp Radcliff, where Storeby had been transferred for his own safety. The chaplain, shocked at what Storeby told him, immediately called the Criminal Investigation Command (CID) office; this phone call began the process that resulted in general courts-martial against Gervase, Thomas, and Cipriano and Joseph Garcia.[17]

All four men were prosecuted for rape and murder in March and April 1967—with judge advocate Colonel Paul J. Durbin[18] as the law officer and PFC Storeby as the chief witness in all four trials. By the time the four proceedings concluded, Storeby was accused of lying and cowardice. One defense counsel even argued that it was Storeby who had killed Mao.[19] Another defense attorney insisted to the panel members hearing the case that Storeby had "fabricated" the entire story to escape future hazardous assignments, like the reconnaissance mission.[20]

At the trial of Thomas, who had done the actual stabbing and shooting, the trial counsel asked for the death sentence after the panel found Thomas guilty of both premediated murder and rape. The court, however, instead sentenced Thomas to a dishonorable discharge and confinement at hard labor for life. Major General John J. Tolson, the convening authority, approved the sentence on 10 June 1967.[21]

Gervase was found guilty of unpremeditated murder, but not guilty of rape—a strange result given his role in organizing the kidnapping and being the first Soldier to sexually assault Mao. The panel sentenced him to a dishonorable discharge and ten years in jail; Tolson approved this sentence on 10 June 1967, the same day he took action in Thomas's case.[22] As for the Garcias, Joseph Garcia received fifteen years' confinement and Cipriano Garcia was sentenced by the members to eight years' confinement—a good illustration of the disparate sentencing that frequently occurs at court-martial sentencing by panels.[23]

So why was justice a casualty of war? Because the sentences of all four war criminals were drastically reduced after they arrived at the U.S. Disciplinary Barracks (USDB) on 23 August 1967. Thomas, who had been sentenced to life imprisonment, was released on parole on 18 June 1970.[24] Gervase never served much of his ten-year sentence either; on 9 August 1969, the Army released him on parole after he had been at the USDB for less than two years.[25]

And, for the Garcias: On appeal, Joseph Garcia's conviction was set aside by the Army Board of Review on the grounds that Garcia's CID interrogators had failed to properly advise him of his rights under Article 31. While the agents had correctly informed Garcia that he had a right to remain silent and to have a lawyer present during questioning, the agents had failed to tell Garcia that he had the right to "appointed" legal counsel, who would represent him free of charge. At Joseph Garcia's subsequent trial at Fort Leavenworth, he was found not guilty.[26]

Cipriano Garcia's court-martial verdict also was overturned—but by the Court of Military Appeals. The Army Board of Review examining Cipriano's proceedings decided—contrary to the Board of Review that examined his cousin Joseph's record of trial—that the failure to explain the exact meaning of appointed counsel was harmless error.[27] On appeal, however, the Court of Military Appeals disagreed. It determined that the failure to adequately explain the meaning of the right to appointed counsel was a constitutional error that required Cipriano Garcia's findings and sentence to be set aside.[28]

At his second trial, however, Cipriano Garcia decided to plead guilty to unpremeditated murder. The panel sentenced him to confinement for four years. When the convening authority at Fort Leavenworth took action in his case, however, he reduced his imprisonment to twenty-two months. Cipriano Garcia, now having served more time in prison than his approved sentence, was immediately released from confinement and restored to duty.[29]

As for Robert M. Storeby—he left Vietnam in November 1967 and was honorably discharged in April 1968, at the age of twenty-four. Colonel Durbin, who

had sat as the law officer in all four trials, remembered Storeby as the "real hero" in the atrocity.[30] Major General Tolson,[31] the convening authority who had taken action in the cases, thought so as well. He signed an official letter of commendation, which one suspects was authored by the 1st Cavalry Division staff judge advocate's office. It reads in full:

> You are to be commended for the important role you played in seeing that justice was done in the recent court-martial cases involving four soldiers charged with the rape and murder of a young Vietnamese woman. Your prompt reporting of this serious incident to your superiors and subsequent testimony in court were essential elements in the apprehension and trials of the men responsible for this brutal crime.
>
> The great pressures you were subject to during these critical months are appreciated. Yours was not an easy task, but you did your duty as an American soldier. You should know that the courage and steadfastness you demonstrated make me proud to have you as a member of this division.[32]

What conclusions may be drawn from "The Incident on Hill 192," as the war crime was known at the time of the courts-martial? It certainly was not the Army's finest hour, given the reticence of Storeby's chain of command to investigate the event and bring charges against Gervase, Thomas, and the Garcias. Only Storeby's persistence and the intervention of an Army chaplain got the process rolling. While the four court-martial panels did return guilty verdicts, the sentences imposed by the members—except in the Thomas trial—were relatively light for a heinous murder and gang rape. But readers familiar with military justice know that panel members are unpredictable at times.

There is only one word, however, to describe the Army's decision to parole Thomas after he had served fewer than three years of a life sentence: wrong. One wonders if Robert Storeby ultimately decided that "doing the right thing" was really worth it. After all, justice for Mao was very much a casualty of war. **TAL**

Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Notes

1. *Casualties of War* was the title of a *New Yorker* magazine article about this war crime. Published on 18 October 1969, that article was subsequently re-printed as a book with the same title. *See* Daniel Lang, *Casualties of War*, New Yorker (Oct. 10, 1969), https://www.newyorker.com/magazine/1969/10/18/casualties-of-war. A movie about the crime, directed by Brian De Palma and starring Michael J. Fox (as Storeby) and Sean Penn (as Gervase), was released to critical acclaim in 1989. Casualties of War (Columbia Pictures 1989). *The Washington Post* praised it as "a film of great emotional power" and "one of the most punishing, morally complex movies about men at war ever made." *See* Hal Hinson, *The Explosive Power of "Casualties of War,"* Wash. Post (Aug. 18, 1989), https://www.washingtonpost.com/archive/lifestyle/1989/08/18/the-explosive-power-of-casualties-of-war/2598c652-e17c-4821-aa9b-b84b762de21f/.

2. Daniel Lang, Casualties of War 21 (1969).

3. *Id.* at 26.

4. "Hootch" was the slang word used by Americans when referring to the thatched huts that the Vietnamese lived in.

5. Lang, *supra* note 2, at 34.

6. *Id.* at 36–37.

7. *Id.* at 38.

8. *Id.* at 40.

9. *Id.* at 38.

10. *Id.* at 44, 48.

11. *Id.* at 48.

12. *Id.*

13. *Id.*

14. *Id.* at 51.

15. *Id.*

16. *Id.*

17. *Id.* at 62–65.

18. Paul J. Durbin (1917–2012) had a remarkable career as an Army lawyer. Born in Kentucky in 1917, as the youngest of four children, Paul was orphaned at the age of three. However, he always wanted to be a lawyer and worked his way through college and law school at the University of Kentucky. Admitted to the bar in 1940, Durbin served as an Infantry officer in France and Germany during World War II. He entered the Judge Advocate General's (JAG) Corps in 1948 and served in a variety of assignments. Then-Lieutenant Colonel Durbin was the first Army lawyer to serve in Vietnam; he arrived in Saigon in 1959 and served two years with the Military Assistance Advisory Group. Other postings included: Staff Judge Advocate (SJA), 1st Armored and 4th Armored Divisions; SJA, 82d and 101st Airborne Divisions; SJA, 7th Infantry Division; and SJA, III Field Force. No judge advocate today could duplicate this much time as an SJA—five divisions and one corps-equivalent. Durbin's last assignment was as a law officer (the forerunner of today's military judge), U.S. Trial Judiciary, with duty in Vietnam. Colonel Durbin retired in 1968, having been a trial counsel, defense counsel, and law officer in more than 2,000 courts-martial. Paul Durbin then began practicing law as a civilian in Honolulu, Hawaii, where he resided until the time of his death. While in the JAG Corps, Durbin's high pitched voice and distinctive Kentucky twang earned him the nickname "Squeaky" Durbin. Fred L. Borch, Judge Advocates in Vietnam: Army Lawyers in Southeast Asia, 1959–1975, at 2–4, 140–41 (2003).

19. Lang, *supra* note 2, at 88–89.

20. *Id.* at 90.

21. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order No. 21 (10 June 1967).

22. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order No. 20 (10 June 1967).

23. Headquarters, 1st Cavalry Division (Airmobile), Gen. Court-Martial Order Nos. 22, 23 (10 June 1967).

24. Email from Peter J. Grande to author (June 10, 2021, 3:21 PM) (on file with author).

25. *Id.*

26. Lang, *supra* note 2, at 112–13.

27. United States v. Garcia, 38 C.M.R. 625 (C.M.A. 1967).

28. United States v. Garcia, 39 C.M.R. 5 (C.M.A. 1968).

29. *Id.* at 118–19.

30. Borch, *supra* note 18, at 71.

31. John Jarvis Tolson III (1915–1991) had a stellar Army career, which included more than two years as the commander of the 1st Cavalry Division (Airmobile) in Vietnam. It was during his tenure that the division "helped pioneer the use of helicopters as a leading instrument of modern warfare." The roughly 400 helicopters in the division were able to quickly move troops and supplies in military operations against the Viet Cong, thus transforming ground combat into a three-dimensional war and freeing troops from the "tyranny of terrain." Tolson was also a qualified aviator, and logged more than 1,000 hours of combat flying while in command of the 1st Cavalry Division (Airmobile). Tolson was a graduate of West Point (1937) and was decorated with the Distinguished Service Cross for his heroism in the Philippines in World War II. He was the commanding general, XVIII Airborne Corps, when he retired as a lieutenant general. Bruce Lambert, *Gen. John J. Tolson, 76, Dies; Pioneered Army's Helicopter Use*, N.Y. Times, Dec. 6, 1991, at D21.

32. Lang, *supra* note 2, at 105.

Major W. Hays Parks (back row, center) in 1974 while on faculty at The Judge Advocate General's School in Charlottesville, Virginia. (Photo courtesy of The Judge Advocate General's Legal Center and School)

In Memoriam

W. Hays Parks

A Law of Armed Conflict Icon

By David E. Graham

On 2 June 2021, Hays Parks was buried amongst his fellow Marines at the Marine Corps Cemetery in Quantico, Virginia. This was as it should be, for those who knew Hays understood that he was a Marine's Marine and a proud, vocal member of the Semper Fi fraternity. So, how did this dedicated "gyrene"[1] find his way to the Army JAG Corps? And how did he become an internationally-recognized and cited expert and scholar in the field of the Law of Armed Conflict (LOAC) and the definitive U.S. Government voice on essentially all LOAC matters? As someone who knew and taught, worked, and argued with Hays for half a century—or, as the saying goes, "from the beginning"—allow me to answer this question from a more personal, rather than purely professional, perspective.

Hays's early Marine days have been aptly chronicled by Gary Solis (himself no stranger to LOAC).[2] After his graduation from Baylor Law School, Hays entered active duty in 1963 and found his niche as a military prosecutor. In 1968, he volunteered to deploy to Vietnam. Assigned to the 1st Marine Division's Staff Judge Advocate Office, he was appointed chief trial counsel, where he supervised and tried hundreds of cases. Additionally, he volunteered for, and was appointed as, executive officer of one of the 1st Marine

Division's Headquarters reaction companies, which were assigned to quickly respond to enemy attacks against the unit. It was in this capacity that, in February 1969, through what he later described as a very long night, he led the Marines under his command in repelling an attack by North Vietnam Army regular forces. It was largely this experience—one of functioning as a Marine infantry commander, rather than as a judge advocate (JA)—that helped shape his approach to operational legal issues later in his career.

In the summer of 1972, then-Major Parks was selected by the Marine Corps to attend the 21st Advanced Course[3] at the Army's Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia.[4] It was here that I first met Hays. He was among a class of experienced JAs from the various Services, many of whom had served in Vietnam. Having joined TJAGSA's International Law Division faculty in January 1972, as a first-term captain, I inherited the somewhat unenviable task of providing international law instruction—to include LOAC—to this seasoned group. Hays approached me early in the first semester, expressing an interest in writing a thesis on a LOAC subject. And, in what I later came to know as his typical, no-nonsense fashion, he advised me that I need not recommend a topic; he had already selected one: "command responsibility." With the subject thus "decided," we struck an agreement that I would serve as his thesis advisor.

It was apparent early on that Hays was far more serious than the great majority of his classmates when it came to learning all that he could regarding LOAC—its strengths and weaknesses, as well as its many nuances. His was far from a casual interest. As we worked through drafts of his thesis, I once noted that his approach might be a bit too comprehensive and overly ambitious. Without hesitation, he looked at me, and in his typically straightforward manner, he said, "I disagree. You have to understand that I want this to be the seminal work on this subject."[5] And it was, and remains, just that—even all these years later. This work proved to be simply the first of numerous defining statements on complex LOAC issues that Hays would author during the course of his career.

In the spring of 1973, given the similarity of the legal issues faced by both Services, a decision was made to bring a Marine JA on to the TJAGSA faculty. Hays made his interest in this position known; given his classroom performance and the fact that the individual selected would be assigned to the International Law Division, he was a natural choice. Over the next two years, we shared a second-floor office in the old University of Virginia (UVA) Law School (Clark Hall), lived in the same apartment complex, and came to know each other well. At the time, the conflict in Vietnam was still underway, providing much material for discussion. We spent much of our time debating essentially every aspect of LOAC, from both academic and boots-on-the-ground perspectives.

In a time of long hair and mustaches on the Basic Class students (and much of the faculty), Hays stood in stark contrast. He had a weekly appointment with the UVA barber shop, a perfectly-tailored uniform, and a take-no-prisoners attitude. Basic Class students were both suspicious of and awestruck by this recruitment-poster Marine. Once, after a heavy snow on a cold December morning, Hays—with his back to the students—was writing on the blackboard when a snowball from the back of the room whistled four inches from his head and splashed against the board. In dead silence, he paused, slowly turned, looked at the class, and said, "If a Marine had fired that shot, it would have hit me." He then resumed writing. Seconds later, the room erupted into applause. Professionally, Hays benefitted significantly from his time at TJAGSA, using those years to delve deeply into the most contentious of LOAC matters and further hone his interest and expertise in this area of the law. Most importantly, however, from a personal perspective, it was in Charlottesville that Hays met Maria Lopez-Otin, a UVA graduate student who became his wife of forty-five years.

I next encountered Hays in the summer of 1979, during my assignment to the International Law Division, Office of The Judge Advocate General (OTJAG). After his time at TJAGSA, Hays held positions at the Office of the Secretary of the Navy, serving as a congressional liaison, as well as in the International Law Division, Navy OTJAG, where he headed the Law of War Branch. Following these assignments, to the great surprise of many, he made the decision to resign his regular commission, choosing to remain in the Marine Reserve. To those who knew him, however, this move made perfect sense. He was offered the opportunity to assume the civilian position in Army OTJAG's International Law Division, previously occupied by Wally Solf,[6] and to serve as the Special Assistant for Law of War Matters to The Judge Advocate General. We arrived at OTJAG within two weeks of each other. And again, for the next seven years, though Hays focused exclusively on LOAC matters, we dealt with, discussed, and debated a wide range of legal issues associated with U.S. military operations. It was during these years that Hays systematically began to position himself as the fount of LOAC expertise within the Pentagon—an expertise that the Department of State soon recognized as well. His academic reputation was enhanced during these years also, as he was selected to serve as the 1984–1985 Stockton Chair of International Law at the Naval War College. Our frequent conversations over this time resulted in the office establishing a physical presence in—and providing daily legal advice to—the Army Operations Center, and the concept of a unique legal discipline focused exclusively on the conduct of military operations was conceived (later implemented as Operational Law).

Upon my return to OTJAG in 1994, as the Chief of what was then the International/Operational Law Division, Hays had firmly established himself, both domestically and internationally, as the singular U.S. Government spokesman on all matters dealing with LOAC. He had authored definitive opinions or articles on subjects such as assassination and targeted killings, the concept of "unnecessary suffering," perfidy in combat, the wearing of enemy uniforms, and LOAC applicable to air war. He had exercised primary responsibility for the investigation of Iraqi war crimes during that state's 1990–1991 occupation of Kuwait and had served as a principal U.S. delegate for various LOAC negotiations in New York, Washington, Geneva, The Hague, and Vienna. He was frequently called upon as an expert witness in terrorism cases in

the United States and Canada; had provided LOAC-related testimony on Capitol Hill; and was a frequent lecturer at every Senior Service School, as well as at many other U.S. and foreign venues. Along the way, the operational Hays had also managed to collect an impressive array of U.S. and foreign jump wings and sharpshooter badges, and had risen to the rank of Colonel in the Marine Corps Reserve—accomplishments that further served to burnish his credibility with war fighters worldwide.

During my eight years at OTJAG, Hays continued to write, opine, serve as an adjunct professor at George Washington University and American University Schools of Law, and represent the United States in numerous international negotiations. The month rarely passed when he was not traveling abroad, testifying, or lecturing. His work continued to be cited in essentially every law review article dealing with a LOAC topic. When a LOAC issue arose within either the Chairman's Legal Office or that of the Department of Defense (DoD) General Counsel, the question inevitably asked was, "What does Hays say?" Solely responsible for the legal review of proposed Army weapon systems, he consistently dedicated considerable time and effort to this task, and the resulting memorandums on scores of such weapons were unfailingly comprehensive, but always readable. Perhaps his most favored client was the Special Operations community, which he advised from 1979 until his retirement; theirs was a mutual respect. The U.S. Special Operations Command recognized Hays with exceptional honors in 2001 and 2006. And, as always, during these years, Hays continued to work tirelessly on drafting and coordinating, within the DoD, the production of a much-needed replacement for the Army's 1956 Field Manual 27–10 dealing with the Law of Land Warfare—a *DoD Law of War Manual* for which he had become the singular driving force.[7] We debated, and sometimes disagreed; but we always arrived at a way ahead on matters for which Hays, and the office as a whole, were responsible.

After twenty-four years of extraordinary service, Hays departed Army OTJAG in August 2003 to join the International Affairs Division of the DoD Office of General Counsel. As Chair of the Department's Law of War Working Group, his primary goal was the completion and publication of the *DoD Law of War Manual*. By now, it had been an ongoing project for almost three decades. Despite his best efforts, however, it was not to be. With a final draft of the *Manual* finally in hand, politics intervened. Following the 11 September 2001 terrorist attacks, the U.S. Government issued a number of highly questionable interpretations of LOAC's application to various aspects of its "Global War on Terrorism." By 2003, there was a push by certain non-DoD agencies to revise the draft *Manual* to reflect these newly-conceived views. Consequently, upon Hays's retirement in 2010, the mandated substantive re-write of significant portions of the *Manual* was still a work in progress. Its publication would not occur for another five years. And, while the *Manual* makes no mention of the indispensable role that Hays had long played in its development, those who were involved in this initiative over the years are fully aware that, if not for his decades of herculean effort, the *Manual* would never have seen the light of day. It is only fitting that his name appears in its footnotes more than that of any other individual.

Hays was not without his critics. He could be opinionated, stubborn, and, at times, unduly confrontational. He was also the U.S. Government's most skilled and effective advocate on LOAC matters. Those who disagreed with his views and chose to challenge him in international fora came to understand that they must come exceptionally well-prepared to do so; for, over the years, they witnessed him systematically shred positions taken by their fellow delegates. His approach toward LOAC issues was driven by his unmitigated, oft-stated, desire to shield the U.S. warfighter from unwarranted and potentially life-threatening restraints on the means and methods of waging armed conflict. In the years following his retirement, he focused his efforts on producing a book discussing a subject about which he had developed a practiced and frequently-called-upon expertise—ballistics. He was in the midst of extensive research for this book when he passed away. He assured me, as he had regarding his Advanced Class thesis fifty years earlier, that it would be the "definitive" work on this subject. I have no doubt that it would have been. So, Semper Fi, Hays. We look back on all that you accomplished with the deepest of professional and personal gratitude and respect. You were truly one of a kind. **TAL**

Mr. Graham is the former Chair of the International/Operational Law Division, TJAGSA, the former Director of the Center for Law and Military Operations, TJAGSA, the former Chief of the International/Operational Law Division, OTJAG, and the former Executive Director of the Judge Advocate General's Legal Center and School. He retired as a Colonel from the U.S. Army.

Notes

1. The word "gyrene" is slang for someone who is in the U.S. Marine Corps.

2. Gary Solis, *Hays Parks—A Legacy*, Lieber Inst. (June 4, 2021), https://lieber.westpoint.edu/hays-parks-legacy/.

3. This course is now known as the Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

4. This followed after a number of assignments post-Vietnam, to include duty at Camp Pendleton, California.

5. *See generally* Major William H. Parks, *Command Responsibility for War Crimes*, 62 Mil. L. Rev. 1 (1973).

6. Colonel (Retired) Solf occupied a civilian position within the International Law Division, OTJAG, for many years. He was a principal U.S. delegate to the international negotiations that produced the Protocols Additional to the 1949 Geneva Conventions. The annual Solf–Warren Lecture at The Judge Advocate General's Legal Center and School honors his many contributions to the Judge Advocate General's Corps.

7. U.S. Dep't of Army, Field Manual 27–10, The Law of Land Warfare (1956).

AROUND THE CORPS

Leaders from the U.S. Army Trial Defense Service met at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, in August 2021 to attend the Trial Defense Leaders Training where they discussed developments in trial defense. (Credit: Jason Wilkerson, TJAGLCS)

Colonel Luis Rodriguez, Interim Director, Office of Diversity, Equity, and Inclusion, Office of The Judge Advocate General. (Photo courtesy of author)

Practice Notes

Under a Future Shady Tree

A Chat on Diversity, Equity, and Inclusion with Colonel Luis O. Rodriguez

Interview by Chief Warrant Officer 3 Jessica Marrisette

On 1 June 2021, Colonel (COL) Luis O. Rodriguez assumed his current duties as interim director of the Office of Diversity, Equity, and Inclusion (ODEI), Office of The Judge Advocate General (OTJAG). Born and raised in Puerto Rico, he has served in the Army for over forty years, in both the Reserve and Active Components, as an officer and noncommissioned officer. Previously, he served as an associate judge for the Army Court of Criminal Appeals and as the Staff Judge Advocate for the 3d Infantry Division, which included a one-year combat deployment to Afghanistan. Colonel Rodriguez also served as the Chair, Administrative and Civil Law Department, The Judge Advocate General's Legal Center and School; Staff Judge Advocate, U.S. Army South; and Deputy Staff Judge Advocate, 25th Infantry Division, which included a combat deployment to Iraq. One of his most memorable assignments was twenty years ago, while serving as the U.S. Southern Command's Legal Advisor and Liaison Officer in Colombia, establishing a Military Penal Justice Corps and military law school in that nation. Chief Warrant Officer 3 Jessica Marrisette, a member of the JAG Corps Council on Diversity, Equity, and Inclusion (DEIC) interviewed COL Rodriguez.

Buenos días, señor. ¿Cómo estás?
Good morning, mi amiga Jefe.[1]

Thanks for allowing me the opportunity to sit with you today to discuss your appointment as the first Director of the Judge Advocate General's Corps ODEI.

What led to the creation of this new OTJAG directorate?
The short answer is that, while efforts in our military to improve diversity, equity, and inclusion are not new, ODEI is partly the result of the reckoning that has been affecting our republic since the murder of Mr. George Floyd. That murder, as we all know, caused a need to reexamine past behavior—a reckoning, to occur across our nation, a reckoning on racial equity, racial justice, bias, gender, and sexual orientation. That reckoning continues to reverberate and bitterly affect American society and government institutions to this day. It includes (among most in government or industry) a renewed desire to determine how inclusive our workplaces really are, and to assess how fairly we treat each other while at work.

As one of the government agencies affected by the Floyd murder's reckoning, last summer, our Army renewed diversity, equity, and inclusion initiatives that were already under way. *The Army People Strategy*'s annex on diversity notes that the Army is a multiracial and multicultural force, and that the nation's "increasingly complex global responsibilities require" the Army to acquire "people with different experiences, values, and backgrounds."[2] In June 2020, the Army initiated an effort entitled "Project Inclusion" that is operationalizing *The Army People Strategy*'s DEI goals and objectives.[3]

Meanwhile, in our Corps, The Judge Advocate General (TJAG) stood up the DEI Council (DEIC), which began meeting and conducting listening sessions across all the Judge Advocate Legal Services (JALS), and with retired and former JALS personnel by July 2020. Also, in October and November 2020, the Corps con-

ducted a survey to elicit the views of JALS personnel on diversity and inclusion.

By the fall of 2020, a committee appointed by the DEIC began to look in earnest at what an office dedicated to DEI could accomplish for JALS. The work of that committee led the DEIC to brief and recommend to TJAG the creation of a full-time ODEI in JALS. By early 2021, and following a review of the survey's feedback, TJAG approved the concept of this office within OTJAG, working here in the Pentagon and reporting directly to TJAG.

As TJAG stated at the time ODEI was created, we are the nation's premiere law firm, and "we can and must be better" in becoming a more diverse, equitable, and inclusive organization.[4] The ODEI's mission is to lead and guide in creating and managing practices that foster DEI consistent with JALS's core values. That is ultimately what ODEI is about—to try to do better for *all* our people in JALS.

As a starting point, how can people learn more about this topic?

Anyone in JALS who wants to learn more about DEI should review the many documentary sources the DEIC has been posting in its *milSuite* page.[5] Start by learning what is meant by the basic terms we use—by learning the Army's definitions of terms such as "diversity," "equity," and "inclusion." Of course, like all good legal professionals, check out the law and, in particular, recent legislation on DEI contained in the National Defense Authorization Acts for fiscal years 2020 and 2021.[6] Read some of the Congressional Research Service (CRS) reports on diversity and inclusion we have posted in *milSuite*,[7] which provide a solid historical background on racial/ethnic inclusion issues in our military since the Civil War. Next, folks may need to understand what the Army is doing regarding its many DEI initiatives currently afoot. For this, I recommend reading *The Army People Strategy* and its DEI annex.[8]

Again, DEI efforts are not new. Take World War II: various committees, task forces, and commissions began to address desegregation and recommend equal treatment efforts of African-American military personnel through the 1960s. These efforts led to the eventual creation of the Defense Equal Opportunity Management Institute and the investigation of discrimination in the administration of military justice in the 1970s through the 1990s. The most cursory glance or superficial reading of the CRS reports or the many other documentary sources we've posted in *milSuite* reveals that, for many years and across many presidential administrations, our military has consistently sought to address and improve DEI concerns in our ranks. My opinion is that, overall, there has been progress, albeit slow progress. One of my favorite writers, Colombian novelist Gabriel García Márquez, had a saying about justice that now appears to me quite appropriate concerning DEI in our military: "Justice may limp along, but it gets there all the same."[9]

What will a fully-staffed ODEI look like?

The goal is for ODEI to become a three-person office, and to adjust that footprint as the mission progresses. I began to work in the Pentagon in June 2021, and right now I'm just directing myself in carrying out ODEI's vision—which is to enable the transformation of policies, practices, programs, and systems that advance diversity, equity, and inclusion to the fullest extent possible across the breadth (functions) and depth (hierarchy) of JALS. However, soon the office will have a dedicated legal administrator, and I am also working hard on creating a civilian position for a professional to assume the duties of director of our office. Eventually, once a civilian director is ultimately hired, my successor or I will assume the duties of deputy director of ODEI.

How did you prepare for this new role?

When TJAG first approved the ODEI concept and notified me of my selection as the office's interim director, he told me to dedicate time to learning more about DEI and to network broadly. I immediately enrolled in a DEI certification course from the University of South Florida, alongside the executive officer of our DEIC, Lieutenant Colonel Paulette Burton, who also holds a similar certificate from Cornell University. I then began to read and learn all I could on the subject. I also began to contact DEI practitioners in government and industry, and to date I have met with many professionals who have readily shared with me the issues and challenges they faced in enabling DEI in their respective organizations. As a result, I now have a fairly-substantial directory of folks I can consult with concerning DEI and have a pretty good idea of the "what," "how," and "why" of DEI.

In speaking with many DEI experts, it became apparent that one of the main concerns they all had while attempting to further DEI in their organizations was in obtaining genuine "buy-in" for their diversity programs from their leaders. I don't have that problem. Our Corps's strategic leaders have consistently expressed in public and in private their unwavering desire, hope, and commitment to improving diversity, equity, and inclusion in our organization.

Can you tell us a little bit about ODEI's relationship with other Services' legal departments?

The Army is certainly the only one right now with dedicated full-time support toward accomplishing DEI initiatives, but all the legal offices in the other military departments or Services (the Marines, Air Force, Navy, and Coast Guard), have also stood up organizations similar to our DEI Council in scope and responsibility. The DEIC and I have met with the leaders of all these organizations quite frequently, and are coordinating with them "lessons learned" and best DEI practices for our common benefit.

What initiatives have you been working on? Perhaps more importantly, what ODEI-related decisions have been made?

After "liberating" an office and computer at the Pentagon, the first thing I did here a few weeks ago was to submit an office budget request for the next fiscal year. Further, and with the DEIC's help, much work has been done to flesh out the development of a civilian director's position, and I'm now putting some finishing touches on that. I have also begun to network with the various OTJAG divisions and organizations with whom ODEI will work closely in the months ahead, such as the Personnel, Plans, and Training Office, and Labor and Employment. Further, with the DEIC's help, we are looking at JALS policies and assessing fur-

ther DEI training and education initiatives for our personnel.

Right now, my office's focus is internal to JALS, but I envision a point at which ODEI may help provide the Army with some level of legal support in implementing its Army-wide DEI initiatives. Mind you, the Army is moving fast in this regard. For instance, in the last three weeks, I helped coordinate the Corps's response to an Army "tasker" requiring the comprehensive revision of all published Army regulations, policy, field manuals, or published doctrinal guidance for any discriminatory bias, such as providing or allowing preferential treatment to Soldiers or civilian personnel based on race, color, sex (to include gender identity and pregnancy), national origin, religion, or sexual orientation, or other protected categories.

This is really good news, sir. It goes a long way to know that our Regimental leaders did not just give you a title and an office, but that their DEI efforts, our efforts, are in fact genuine and purposeful. We are not just "talking the talk" here, we are walking it!

Before this appointment, your assignment was as a member of the judiciary, and you served on the JAG Corps's Council on Diversity, Equity, and Inclusion. How has your relationship with the Council changed now that you have taken on this new, formal role?
One thing the Corps may want to know is that the Council is not going away just because Luis is now at the Pentagon doing DEI full-time. I remain a member of the Council and take part in its efforts, which will continue in the future. I have already made recommendations on DEI practices and initiatives for the DEIC to consider studying in-depth, developing appropriate courses of action for TJAG to consider so that he can make a well-informed decision regarding their implementation across JALS. Ultimately, I see the formal relationship between ODEI and DEIC as one of co-equals, given that both have direct reporting roles to TJAG on the same topic. I just happen to now have the ability to think about that DEI topic full-time.

What do you hope to accomplish in your time as ODEI Director?
Look, I'm fortunate in being able to talk with my mother daily. She is a truly courageous person, who literally put herself through school despite much adversity in the late 1950s in Puerto Rico, and was about to finish her law degree there when I was born and she had to assume what was deemed a more traditional woman's role in that deeply patriarchal society. I can go on and on about her, but one of the hallmark traits she has that I've tried to emulate is to have the courage to question the "why" of things. She taught me to always question myself, and to also have the wisdom to change my mind or position depending on the facts I uncover.

I realize that many people don't know what DEI is about or even care to understand the need for an office dedicated to this effort, and that there will be many more "long-term wins" for ODEI than "quick wins" ahead. What I hope is that ODEI will become a rich and ready resource for those in the Corps who have the courage to question things, who wish to act in good faith toward the diverse teams they now lead, who want to learn more about DEI, and who maintain a willingness to reexamine past behavior and aim to simply do better.

When I told my mother I was going to do this job instead of retiring from the Corps this summer as I had originally planned to do, she said to me that I was "planting trees whose shade" our young people in the Corps now would one day enjoy. I hope to get the help and advice of our folks in planting these trees. And, perhaps, one day our diverse legal teams will get to rest in their shade. **TAL**

COL Rodriguez is the Director, Office of Diversity, Equity, and Inclusion, Office of The Judge Advocate General at the Pentagon in Washington, D.C.

CW3 Marrisette is a Strategic Communications Officer at the Strategic Initiatives Office, Office of The Judge Advocate General at the Pentagon in Washington, D.C.

Notes

1. "Jefe" means "chief" in Spanish. *Jefe*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english-spanish/chief (last visited Aug. 11, 2021).

2. U.S. Dep't of Army, The Army People Strategy: Diversity, Equity, and Inclusion Annex 1 (2020) [hereinafter DEI Annex].

3. *See U.S. Army Project Inclusion*, U.S. Army (June 29, 2020), https://www.army.mil/standto/archive/2020/06/29/.

4. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG and DJAG Sends, Vol. 40-16—Establishment of the Office of Diversity, Equity, and Inclusion, Office of The Judge Advocate General (25 Mar. 2021).

5. *Council on Diversity, Equity, & Inclusion*, milSuite, https://www.milsuite.mil/book/community/spaces/armyjag/council-on-diversity-equity-inclusion (last visited Aug. 11, 2021).

6. National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 133 Stat. 1198 (2019); William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. 116-283 (2020).

7. *E.g.*, Kristy N. Kamarck, Cong. Rsch. Serv., R44321, Diversity, Inclusion, and Equal Opportunity in the Armed Services: Background and Issues for Congress (June 5, 2019).

8. *See* U.S. Dep't of Army, The Army People Strategy (2019); DEI Annex, *supra* note 2.

9. Gabriel García Márquez, In Evil Hour (1962).

(Credit: ST.art – stock.adobe.com)

Practice Notes

The Domestic Violence Victim Addition to the SVC and LA Programs

By Captain Joshua D. Bell

It is Day 1 in your job as the new special victims counsel (SVC), and you get a call requesting SVC services for a victim of domestic violence. Your automatic inclination is to inquire further as to whether or not the victim is a victim of a sexual offense; otherwise, you are of the belief that they are not eligible for services. But then you remember the training you received on domestic violence at the SVC certification course, which drives you to dig deeper.

The National Defense Authorization Act for Fiscal Year 2020 (FY20 NDAA)[1] brought sweeping changes across the military, especially for the SVC Program. While changes such as advising SVC clients on retaliation and making SVC services available at all installations are important updates to the program, the most impactful change to the SVC Program is that SVCs can now represent victims of domestic violence offenses. Starting 1 December 2020, the Army SVC Program began accepting these clients, subject to the parameters below. This will impact the SVC Program and the legal assistance attorneys (LAAs), as LAAs and SVCs will need to work together on which actions each can take, respectively.

Section 548 of the FY20 NDAA provides that, before 1 December 2020, the Army must implement a program for "legal counsel" for victims of domestic violence offenses that are otherwise entitled to legal assistance under 10 U.S.C. § 1044e.[2] Qualifying offenses include Articles 128(b), 128b(1), 128b(5), and 130 of the Uniform Code of Military Justice (UCMJ), when committed against a spouse, intimate partner, or immediate family member; any other allegation or violation of the UCMJ when committed against a

spouse, intimate partner, or immediate family member; and any attempts of these offenses under Article 80.[3] Used in this context, the terms spouse, intimate partner, and immediate family member, are defined using Article 130(b), UCMJ.[4]

While the term "legal counsel" is not defined in Section 548,[5] this role will primarily be taken on by LAAs—with the Chief of Legal Assistance (CLA) requesting, through the SVC Program office, an SVC to represent the victim in the following cases:

1. [If there is an alleged sexual offense covered under Article 120.][6]
2. If the victim makes a restricted or unrestricted report of aggravated assault under Article 128(b), UCMJ,[7] commission of a violent offense against a spouse, an intimate partner, or an immediate family member under Article 128b(1), UCMJ, or strangulation/suffocation under Article 128b(5), UCMJ.[8]
3. Court-martial charges are preferred, the trial counsel requests an interview with the victim with the intent to prefer charges, or an adverse administrative separation or officer elimination hearing is initiated against the subject.
4. In any other case where the LAA as the primary attorney believes that SVC representation will better serve the client and the [Legal Assistance Office] and SVC Program Manager agrees to assign an SVC to the victim.[9]

In lieu of an LAA, one example of a situation where SVC assistance could further the representation is when Criminal Investigation Division (CID) requests a crime scene examination and the crime occurred in the victim's barracks room. Legal assistance attorneys must be able to recognize these triggering events because they will need to disclose them to their CLA so that the CLA can reach out to the SVC regional manager to detail an SVC—preferably from the same installation.[10] When an SVC cannot be detailed at the same installation, an SVC at the nearest Army installation should be detailed in order to comply with the NDAA requirement to have an SVC available within seventy-two hours of the request.[11]

Sometimes, LAAs will also be certified as SVCs. To alleviate the emotional, physical, and mental burden it can place on a victim, it should be a normal practice for the LAA to continue representation once a triggering event is captured—pending approval from the CLA and SVC regional manager. This will provide the victim much-needed relief in knowing that they have one attorney providing legal services to them, instead of having to go through two attorneys. Today, victims of sexual offenses usually do not have the same SVC from representation onset to case completion; thus, this is a possible solution to allow continuous representation throughout the process. While SVCs and LAAs still rotate out of the positions due to mission and career requirements, the addition of LAAs will result in less common occurrences where the victim has a new or multiple SVCs/LAAs.

On certain occasions, an LAA and SVC will dually represent a domestic violence victim. The LAA will represent the client on issues covered under Army Regulation (AR) 27-3, paragraph 3-5.[12] These issues include, but are not limited to: marriage, legal separation, divorce, financial nonsupport, and child custody and visitation. In accordance with AR 27-3, chapter 7, and the *SVC Handbook*, the SVC will provide all legal services associated with the criminal or adverse administrative cases—with the exception of collateral misconduct.[13] The Trial Defense Service will service collateral misconduct arising out of SVC/LAA representation.

Legal assistance attorneys should know that they will be the primary attorney assigned to represent domestic violence victims, as SVC representation does not automatically trigger.[14] Many of the issues that an LAA will come across can be found in AR 27-3; however, for the LAA that receives a domestic violence client that does not fit in AR 27-3, it is important to know what to do.[15]

Since SVC representation is not automatically triggered, LAAs representing domestic violence victims will need to be aware of their additional responsibilities. For example, the LAA will need to inform clients of scheduled interviews. The LAA will coordinate with law enforcement to attend the interview, and advocate for their client's rights. Legal assistance attorneys will also need to establish relationships with both on-post and off-post law enforcement to ensure the client's rights are protected. These relationships with CID, Military Police investigators (MPI), and local law enforcement will ensure 1) efficient communication and 2) protection of victims' rights.

For SVCs assigned to domestic violence victims once a triggering event occurs, SVCs will coordinate with CID, MPI, and/or local law enforcement for the interview and throughout the military justice process, advocating for clients' Article 6b rights until final case disposition.[16] The investigative process is where most difficulties lie.

The investigative process for both an SVC and LAA can be difficult from the onset of an allegation of domestic violence, and nuances center around the alleged UCMJ article violated and the location of the offense(s). For instance, CID only investigates domestic violence offenses when there is an allegation of strangulation, aggravated assault causing death or grievous bodily harm, and assaults consummated by a battery to children under sixteen years.[17] All other on-post domestic violence offenses are investigated by MPI.[18] When offenses occur off-post, local law enforcement will take the report and require the victim to file a complaint in order for prosecution to occur on the civilian side. Special victims counsel still need to be involved—even if the ability to advocate for victims is limited.

Special victims counsel assigned to represent domestic violence clients must form and continue relationships with military justice advisors, special victims trial counsel, special victims prosecutor teams, CID, and now MPI. Additionally, SVCs must create continuing relationships with other programs associated with domestic violence—including the Family Advocacy Program, local law enforcement, and civilian prosecutors. In forming these relationships, Section 550A in the FY20 NDAA mandates that counsel receive appropriate training in the state criminal justice laws of the state (or states) in which the installation is located.[19] These relationships will be a key foundation in providing domestic vio-

lence victims with the services they need to combat the traumatic event(s) experienced. Special victims counsel should coordinate early and often with these points of contact to foster good relationships for the sake of their clients.

Terminating representation of a domestic violence victim will not change the process of an SVC once a terminating event occurs. The SVC, once a terminating event occurs, will terminate representation just as they would for a sexual offense victim.[20] However, the SVC, if in a dual representation capacity with an LAA, should ensure a warm transfer to the LAA as the sole representative to conclude any final areas of assistance for the victim, such as divorce, family support, or transitional compensation, if applicable.[21]

As SVC caseloads are expected to increase with the addition of domestic violence clients, coupled with an upward trend in domestic violence offenses, it is even more important to ensure proper management of caseloads.[22] Special victims counsel must maintain an accurate report of their number of clients to ensure proper management of caseloads, so that assignment of new cases is fluid and within the limits mandated by Congress.[23] Another suggestion to accommodate the uptick in caseloads is to create more SVC positions to address the NDAA caseload restrictions—of course, this would depend on the installation. While additional billets would not be an instant relief, over time, it will counter the increased caseload of current SVCs.

In response to the addition of domestic violence victims, SVCs and LAAs assisting domestic violence clients will also be required to undergo specific training[24] in legal issues commonly associated with domestic violence offenses.[25] This will include training on issues of domestic violence, representation in intimate partner violence, and other relevant topics. This training for SVCs will come in the form of training blocks during the SVC certification course, with LAAs receiving specialized training through similar blocks of instruction conducted by the Director of Soldier and Family Legal Services in coordination with The Judge Advocate General's Legal Center and School and the Criminal Law Division, Office of The Judge Advocate General.[26]

Another suggestion for Offices of the Staff Judge Advocate (OSJAs) is to continue providing training on the nuances of domestic violence representation, through leader professional development. As this addition to the SVC/LA Programs is a major change, there will be periodic updates that the LAO—and the OSJA—should be aware of to ensure quality representation of victims.

In summary, the addition of domestic violence victims as clients for SVCs and trained LAAs will result in new challenges. But with proper communication and relationship building, coupled with training opportunities, SVCs and LAAs will be ready to address the new clients and provide competent and zealous representation to domestic violence clients. **TAL**

CPT Bell is the Deputy Brigade Judge Advocate for the 1st Armored Brigade Combat Team, 3d Infantry Division at Fort Stewart, Georgia.

Notes

1. National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, 133 Stat. 1198 (2019).

2. *Id.* § 548.

3. *Id.* UCMJ arts. 128b, 128b(1), 128b(5) (2019); UCMJ art. 130 (2019). *See also* UCMJ art. 80 (1950).

4. UCMJ art. 130(b) (2016).

5. National Defense Authorization Act for Fiscal Year 2020 § 548.

6. UCMJ art. 120 (2017).

7. UCMJ art. 128b (2019).

8. UCMJ art. 128b(1), 128b(5) (2019).

9. Policy Memorandum 20-03, The Judge Advoc. Gen., U.S. Army, subject: Domestic Violence Victim Representation Program (19 June 2020) [hereinafter Policy Memorandum 20-03]. *See also* Memorandum from Karen H. Carlisle, Director of Soldier and Family Legal Services to All Judge Advocate Legal Service (JALS) Legal Assistance Practitioners, subject: Business Rules for Implementation of TJAG Policy Memo 20-03: Domestic Violence Victim Representation Program (Nov. 25, 2020) [hereinafter Implementation of Policy Memo 20-03].

10. *See supra* note 9.

11. National Defense Authorization Act for Fiscal Year 2020 § 542.

12. *Id.* U.S. Dep't of Army, Reg. 27-3, The Army Legal Assistance Program para. 3-5 (26 Mar. 2020) [hereinafter AR 27-3].

13. *Id.* ch. 7; U.S. Dep't of Army, Special Victims Crime Handbook 36-37 (5th ed. 2020) [hereinafter SVC Handbook].

14. AR 27-3, *supra* note 12, para. 3(a).

15. *See id.*

16. UCMJ art. 6b (2017).

17. *See* U.S. Dep't of Army, Reg. 195-2, Criminal Investigation Activities tbl.B-1 (21 July 2020).

18. *Id.*

19. National Defense Authorization Act for Fiscal Year 2020 § 550A.

20. *See* SVC Handbook, *supra* note 13, ch. 11. Termination of a sexual assault victim occurs when a special victims counsel (SVC) has a permanent change of station, deploys, has an expiration of term of service, or leaves the position; the continued representation will result in a violation of my State's Rules of Professional Conduct or other law; the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled (the typical example of this is if the SVC has had no contact with client for an extended period of time and SVC cannot reach client after due diligence in attempting contact); or final case disposition, whether it be submission of post-trial matters in a court martial, a not-guilty finding at a court-martial, completion of an Article 15/Administrative Separation, or a non-probable cause/non-prosecution decision. The process of terminating a client occurs by conducting a consultation with the client, explaining the basis of termination, and submitting to the client a termination of representation letter. *Id.*

21. *See* AR 27-3, *supra* note 12, para. 8-5c.

22. Off. of the Provost Marshal Gen., FY2018 Army Crime Report (Sept. 2019) (from fiscal years 2011 to 2018, "the offender rate increased by 5% (310 to 326 offenders per 100,000) and the offense rate increased by 7% (428 to 457 offenses per 100,000).").

23. National Defense Authorization Act for Fiscal Year 2020 § 541(g) ("[T]he Secretary concerned shall ensure that the number of Special Victims Counsel serving . . . is sufficient to ensure that the average caseload . . . does not exceed, to the extent practicable, [twenty-five] cases [at] any given time.").

24. With the onset of COVID-19, training has gone to a distance learning format. As COVID-19 becomes more manageable, in-person attendance requirements may increase.

25. National Defense Authorization Act for Fiscal Year 2020 § 548.

26. Policy Memorandum 20-03, *supra* note 9.

(Credit: nito – stock.adobe.com)

Practice Notes

A Brief Summation on Gender-Based Violence

Military Readiness and Judge Advocates

By Major Dimitri J. Facaros

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[1]

Imagine, as a judge advocate (JA), you are assigned to a world-renowned institute as a teaching fellow. In your first few days, an expert, while physically holding his work in his hands on "Integrating Gender Perspectives into International Operations,"[2] asks you to use a U.S. lens to discuss gender-based violence (GBV)[3] and gender perspectives for an upcoming course. You respond that you will need time to review some resources.[4] You frantically scour the standard JA materials, but you are unable to quickly ascertain an understanding of GBV. Now that you are aware that your standard references do not contain an outline of GBV, how do you respond? How do you prepare your course?[5]

The answer to this hypothetical is complex. The answer is not simply within a regulation or publication; it is more dynamic than a rudimentary understanding of gender rights. Gender-based violence is an umbrella term that includes sexual assault and harassment. Thus, the topic demands a nuanced grasp of international human rights law (IHRL) and international humanitarian law (IHL),[6] an appreciation of the political considerations embodied in gender rights, and a general understanding of military initiatives aimed at preventing GBV. The complexities distil to one word: readiness.

In his 2016 guidance, the Army Chief of Staff defined readiness as the "ability to fight and win our Nation's wars."[7] Judge advocates achieve readiness by being competent. Competence[8] is our lethality, and it "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."[9] Achieving competence may take time, as competence encompasses anticipating and preventing legal problems.

Although GBV may not be in your daily vernacular, reviewing world and military GBV statistics may change that. "[A]bout 1 in 3 (30%) of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime";[10] and, in 2018, the U.S. military reported "an estimated 24.2 [%] of active duty women and an estimated 6.3 [%] of active duty men indicated experiencing sexual harassment."[11] As the statistics[12] highlight the pervasive nature of GBV, JAs should have a reference tool that both provides a brief summation of GBV and, in certain places, correlates the international underpinnings of GBV to military practice. Simply put, this GBV summation seeks to complement your commonly referenced materials.

What Is GBV?

The United Nations High Commissioner for Refugees (UNHCR) defines GBV as "violence that is directed against a person on the basis of gender or sex including acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion and other deprivation of liberty"[13]—such as cruel and degrading treatment, sexual harassment, and physical assault. The U.S. Department of State defines GBV as "any harmful threat or act directed at an individual or group based on actual or perceived biological sex, gender identity and/or expression, sexual orientation, and/or lack of adherence to varying socially constructed norms around masculinity and femininity. It is rooted in structural gender inequalities, patriarchy, and power imbalances."[14] Some examples of this include intimidation at work and community practices, like honor killings. Integrated in GBV is violence, which is defined as "[t]he intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment, or deprivation"[15]—for instance, forms of neglect. Gender-based violence is predicated on violence and inequality—the unequal power relationship between men and women.

As an "umbrella term," GBV describes "any harmful act that is perpetrated against a person's will and that is based on socially ascribed (i.e. gender, race and ethnicity, etc.) differences between males and females"[16]—the gender pay gap or the lack of access to education, for example. Crimes involving GBV may not include sexual violence; however, GBV and sexual and gender-based violence (SGBV) are often used interchangeably;[17] and, as the majority of GBV victims are women, violence against then is often interchangeable with GBV.[18] The UNHCR's use of SGBV is "to emphasize the urgency of protection interventions that address the criminal character and disruptive consequences of sexual violence for victims/survivors and their families."[19] Gender-based violence as an umbrella term is translatable in the military.

Although the Uniform Code of Military Justice (UCMJ) does not specify GBV as a crime, the UCMJ punishes a number of criminal acts commonly associated with GBV. Those may include charging sexual harassment[20] or sexual assault.[21] In an operational environment, finding translatable phrases to describe the underlying criminal conduct may present a challenge. Gender-based violence may be the common vernacular in an operational setting, which normally has an international component.

Although each State has its own penal code, partners may reference the underlying misconduct as GBV when referencing criminal conduct internally or externally to their respective government. This reality is due to an increase of GBV in areas of international and non-international armed conflict. Such violence—perpetrated by military actors—against combatants and non-combatants (primarily women) residing in those areas or working alongside militaries—can arise.[22] That violence may include "torture, sexual violence and forced marriage."[23] However, the concept of "mainstreaming" may combat GBV.

Types of GBV and Mainstreaming

Although GBV and its types vary, women victims remain the majority.[24] Although there is more than one definition, it is helpful to review a violence against women definition to identify the diverse types of GBV. As an example, the Beijing Declaration and Platform for Action defines "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[25] The types described in this definition are not an exhaustive list.[26] Addressing the idiosyncrasies of each type of GBV is a challenge; however, there is a common methodology used to grapple with GBV. Instead of aiming policies targeted at the diverse types, the international community and a variety of States implement the method of "mainstreaming"—a strategic initiative aiming at long-term structural changes.

Mainstreaming is a methodology that serves to combat GBV by identifying that gender plays a crucial part in a political economy.[27] It is a method sensitive to gender roles within a socio-political analysis that aims for equality.[28] It "involves ensuring that gender perspectives and attention to the goal of gender equality are central to all activities—policy development, research, advocacy/dialogue, legislation, resource allocation, and planning, implementation and monitoring of programmes and projects."[29] Although this is one method, it is globally accepted and employed in a variety of different sectors from education to the military.

In the U.S. military, which aims to eradicate GBV in the ranks, mainstreaming is affected by a whole government action approach; examples of this include the recent programs, policies, and amendments implemented to the UCMJ. Amending the procedures and policies of reporting sexual assault and harassment and changing the UCMJ are just two examples of attempts to eradicate types of GBV in the military. There are other examples. The National Center on Domestic and Sexual Violence (NCDSV) comprises a number of military policies aimed at reducing GBV.[30] These attempts primarily focus on efforts to rid GBV from the ranks, but such efforts are translatable to an operational setting. Operationally, although not explicitly highlighted, each U.S. legal brief on the law of war describes GBV as a crime, even if GBV is not discussed directly. That is because GBV is predicated on the breach of the targeting principles of military necessity and distinction. Such violations of IHL can be war crimes and violate IHRL.

GBV: IHRL, IHL, and U.S. Policies

The United Nations (U.N.) defines human rights as "rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status."[31] Rights include "the right to life and liberty [and] freedom from slavery and torture."[32] International Human Rights Law protects these rights.[33] Although IHRL was slow to identify GBV as a human right violation, the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[34] also known as the Global Bill of Rights for Women, captured the global push to eradicate discrimination and helped to ensure women's rights were encompassed in human rights. This was clearer when CEDAW General Recommendation No. 19, as adopted by the CEDAW committee, framed violence against women as a form and manifestation of gender-based discrimination.[35] The General Recommendation No. 19 also identifies risk to those women living in areas of ongoing armed conflicts.[36]

Areas of IHL also address the issue of sexual vulnerability of women in war. Most notably, Additional Protocol I to the Geneva Conventions states, "Women shall be the object of special respect."[37] More recently, U.N. Security Council Resolution (UNSCR) 1325 recognized "the need to implement fully international humanitarian and human rights law that protects the rights of women and girls during and after conflicts."[38] In 2009, the U.N. appointed a Special Representative of the Secretary-General on Sexual Violence in Conflict.[39] The Special Representative has increased awareness of GBV.[40]

If the U.N.'s mission is to strive for peace, it is NATO's job to prepare for war. Nevertheless, NATO recognizes the link between IHRL protections and war-making effectiveness and is implementing policy initiatives to combat GBV. For example, NATO is incorporating UNSCR 1325 into core tasks of collective defense, crisis management, and cooperative security.[41] NATO continues to promote gender equality as a means of combating GBV. Those charged with its implementation are the NATO-appointed Gender Advisors,[42] something the U.S. military has also adopted[43] as it continues to implement UNSCR 1325.

The UNSCR 1325 is a seed; and, although its growth may not be readily recognizable and its effect may not felt on the daily life of a JA just yet, America's gender perspective is growing. Domestically, the United States has worked diligently at inserting gender perspectives into its national action plan. In 2011, then-President Barack Obama announced a national action plan on women, peace, and security.[44] Other national efforts as seen through The Women, Peace, and Security Act of 2017[45] and the new presidential guidance,[46] have paved the way for the Department of Defense to launch its framework and implementation plan for women, peace, and security.[47] The same complexities of GBV definitions are in the solutions, as it takes a number of different initiatives with different approach angles to address the dynamic and murky world of GBV. As seen through the fruits that have fallen on a daily life of a JA, procedural and substantive changes continue to occur. Recently, for example, the Army Command Policy has nested discriminatory harassment within the Army Harassment Prevention and Response Program, as well as the Military Equal Opportunity Policy and Program.[48]

Conclusion

Discussing GBV, with a U.S. lens and within an international environment, is complex. Any person who attempts to provide answers within the complexity might be exasperated when analytical and thoughtful policies aimed at eradicating GBV, either internally or externally, are viewed in the media[49] or defined in a response.[50] The center of these stories, as examples, focuses on GBV; more specifically, it focuses on violence by male military members against women (who may be in the military themselves, or non-combatant civilians). As a result, as an umbrella term, GBV receives attention both internationally and nationally. Indicative of that attention is the JA's responsibility to anticipate and prevent GBV-related problems, highlighting the readiness requirement to train GBV, as well as JAs' responsibility in helping commanders implement new plans and regulatory updates. This GBV summation serves JAs as a reference tool to help maintain their lethality by developing their competency in a dynamic area of the law. **TAL**

MAJ Facaros is the Group Judge Advocate for the 3d Special Forces Group (A) at Fort Bragg, North Carolina.

Notes

1. U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers r. 1.1 (28 June 2018) [hereinafter AR 27-26].

2. Integrating Gender Perspectives into International Operations, A Training Handbook with Commentaries (Gabriella Venturini ed., 2019).

3. The aim of this article is to provide an overview of gender-based violence (GBV) that may be relatable and helpful to judge advocates. The reader may also benefit from a general understanding of GBV in a broader context. *See* Jocelyn Frye et al., *Transforming the Culture of Power: An Examination of Gender-Based Violence in the United States*, Ctr. for Am. Progress (Oct. 31, 2019, 9:01 AM) https://www.americanprogress.org/issues/women/reports/2019/10/31/476588/transforming-culture-power/.

4. Some references of importance, and briefly discussed in this article, include the Department of Defense (DoD) plan toward integrating gender perspectives. *See* U.S. Dep't of Def., Women, Peace, and Security Strategic Framework and Implementation Plan (2020). Relevant to this article is its third objective for "partner national defense and security sectors ensure women and girls are safe and secure and that their human rights are protected, especially during conflict and crisis." *Id.* at 14. Additionally, the reader might find the source document for the DoD's plan useful. *See* S.C. Res. 1325 (Oct. 31, 2000). Last, recent updates to Army Regulation 600-20 provided further aims at integrating gender perspectives within the military. Integrating gender perspectives is predicated on the requirement that commanders must now train to prevent discriminatory harassment, which was recently added to the Army Harassment Prevention and Response Program and the Military Equal Opportunity Policy and Program. U.S. Dep't of Army, Reg. 600-20, Army Command Policy paras. 4-19a(3), 6-6b (24 July 2020) [hereinafter AR 600-20]. Discriminatory harassment is "a form of harassment that is unwelcome conduct based on race, color, religion, sex (including gender identity), national origin, or sexual orientation." *Id.* para. 4-19a(3).

5. Advice, in this context, is broader than what is thought of when discussing it in the context of Trial Defense Service or Legal Assistance work. To advise, in this context, is to be able to speak on a topic in an eloquent and meaningful way that both highlights the value of having trained legal officers within the ranks and the ability to capture the breadth of an internationally recognized principle.

6. The United States refers to International Humanitarian Law (IHL) as the Law of Armed Conflict (LOAC).

7. Memorandum from Chief of Staff, U.S. Army, to All Army Leaders, subject: Army Readiness Guidance, Calendar Year 2016–17 (20 Jan. 2016).

8. Competence is the core tenant of fulling the Judge Advocate General's Corps's mission of providing principled counsel. Principled Counsel is "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions." Colonel Russell N. Parson & Lieutenant Colonel Patrick L. Bryan, *Navigation from the Leadership Center*, Army Law., no. 6, 2019, at 9.

9. AR 27-26, *supra* note 1, r. 1.1.

10. *Violence Against Women*, WHO (Mar. 9, 2021), https://www.who.int/en/news-room/fact-sheets/detail/violence-against-women.

11. U.S. Dep't of Def., Sexual Assault Prevention and Response Office, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2019, at 11 (2020).

12. For more statistics, see *Facts and Figures: Ending Violence Against Women*, UN Women, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures#notes (Mar. 2021) (some national studies show that up to 70 % of women have experienced physical and/or sexual violence from an intimate partner in their lifetime). *See also* Matthew J. Breiding et al., Intimate Partner Violence Surveillance: Uniform Definitions and Recommended Data Elements 1 (2015), https://www.cdc.gov/violenceprevention/pdf/ipv/intimatepartnerviolence.pdf (in the United States, over 1 in 5 women (22.3%) and nearly 1 in 7 men (14.0%) have experienced severe physical violence by an intimate partner at some point in their lifetime).

13. U.N. Refugee Agency, Handbook for the Protection of Internally Displaced Persons 168 (2010), https://www.unhcr.org/4c2355229.pdf (citation omitted). *See also* U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women*, U.N. Doc. A/47/38 (Jan. 29, 1992) (isolating its definition to violence against women).

14. Bureau of Population, Refugees, and Migration, U.S. Dep't of State, *Gender and Gender-Based Violence*, U.S. Dep't of State, https://www.state.gov/other-policy-issues/gender-and-gender-based-violence/#ftn1, n.1 (last visited June 21, 2021). *See also* U.S. Agency Int'l Dev., Gender-Based Violence and HIV: A Program Guide for Integrating Gender-Based Violence Prevention and Response in PEPFAR Programs 7 (2011), https://ovcsupport.org/wp-content/uploads/Documents/GenderBased_Violence_and_HIV_A_Program_Guide_for_Integrating_GenderBased_Violence_Prevention_and_Response_in_PEPFAR_Programs_1.pdf.

15. WHO, World Report on Violence and Health 5 (Etienne Krug et al. eds. 2002).

16. Jeanne Ward et al., Inter-Agency Standing Comm., Guidelines For Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience and Aiding Recovery 5 (2015), https://interagencystandingcommittee.org/system/files/2021-03/IASC%20Guidelines%20for%20Integrating%20Gender-Based%20Violence%20Interventions%20in%20Humanitarian%20Action%2C%202015.pdf.

17. U.N. High Comm'r for Refugees, Action Against Sexual and Gender-Based Violence: An Updated Strategy 6 n.1 (2011), https://www.unhcr.org/4e1d5aba9.pdf.

18. *What is Gender-Based Violence?*, Eur. Inst. for Gender Equal., https://eige.europa.eu/gender-based-violence/what-is-gender-based-violence (last visited July 19, 2021).

19. U.N. High Comm'r for Refugees, *supra* note 17, at 6 n.1.

20. *E.g.*, UCMJ arts. 92–93 (1950).

21. UCMJ art. 120 (2017).

22. *Women's Human Rights and Gender-Related Concerns in Situations of Conflict and Instability*, U.N. Hum. Rts. Off. of the High Comm'r, https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/PeaceAndSecurity.aspx (last visited July 21, 2021).

23. *Id.*

24. It should be noted that individuals whose sex at birth does not match their gender identify are also at risk of GBV. The Lesbian, Gay, Bisexual, and Transgender (LBGT) population face a high number of GBV incidents globally. *See* Saurav Jung Thapa, *Gender-Based Violence: Lesbian and Transgender Women Face the Highest Risk but Get the Least Attention,* World Bank Blogs (Nov. 27, 2015), https://blogs.worldbank.org/voices/gender-based-violence-lesbian-and-transgender-women-face-highest-risk-get-least-attention.

25. Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, ¶ 113, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 4–15, 1995).

26. There are varying definitions of GBV. On one end of the spectrum, definitions aim to isolate violence against women; the other end of the spectrum focuses on the broader term of violence. *See Gender-Based Violence*, U.N. Population Fund, https://www.unfpa.org/gender-based-violence (last visited July 19, 2021); WHO, *supra* note 15.

27. *See generally* Off. of the Special Advisor on Gender Issues and Advancement of Women, U.N., Gender Mainstreaming: An Overview (2002), https://www.un.org/womenwatch/osagi/pdf/e65237.pdf.

28. *See Gender Mainstreaming*, UN Women, https://www.un.org/womenwatch/osagi/gendermainstreaming.htm (last visited July 19, 2021). *See also* Economic and Social Council Res. 1997/2 (July 18, 1997) ("Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies, or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic, and social spheres so that women and men benefit equally, and inequality is not perpetuated.").

29. *See Gender Mainstreaming*, *supra* note 28.

30. *See generally Statistics/Research*, Nat'l Ctr. on Domestic & Sexual Violence, http://www.ncdsv.org/ncd_military_statresearch.html (Feb. 16, 2018, 9:56 PM). *See also The Military's Response to Domestic and Sexual Violence*, Battered Women's Just. Project (Jan. 2014), https://www.bwjp.org/resource-center/resource-results/the-military-s-response-to-domestic-and-sexual-violence.html.

31. *Human Rights*, U.N., https://www.un.org/en/global-issues/human-rights (last visited July 19, 2021).

32. *Id.*

33. *Id.*

34. *See* Convention on the Elimination of All Forms of Discrimination Against Women, arts. 2, 5–6, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981) (often referred to as the "Global Bill of Rights for Women," CEDAW was the first legally-binding international treaty aimed at eradicating gender discrimination and served to place the female half of humanity into the focus of human rights).

35. U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women*, U.N. Doc. A/47/38 (Jan. 29, 1992).

36. *Id.* ¶ 16.

37. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 76(1), June 8, 1977, 1125 U.N.T.S. 3.

38. S.C. Res. 1325, pmbl. (Oct. 31, 2000).

39. S.C. Res. 1888, ¶ 4 (Sept. 30, 2009).

40. *See generally* Yakin Ertürk (Special Rapporteur on Violence Against Women), *15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences* (2009), https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf.

41. *See* Off. of NATO Sec'y Gen.'s Special Rep. for Women, Peace & Sec., NATO/EAPC Women, Peace, and Security: Policy and Action Plan 2018 (2018), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2018_09/20180920_180920-WPS-Action-Plan-2018.pdf [hereinafter Women, Peace, and Security]. *See also* North Atlantic Treaty Organization, Bi-Strategic Command Directive 040-001: Integrating UNSCR 1325 And Gender Perspective into the NATO Command Structure (Oct. 17, 2017), https://www.act.nato.int/images/stories/structure/genderadvisor/nu0761.pdf.

42. *See* Women, Peace, and Security, *supra* note 41. The reader might be interested in a deeper understanding of a Gender Advisor in NATO. *See* Lieutenant Colonel Keirsten H. Kennedy, *Gender Advisors in NATO: Should The U.S. Military Follow Suit?*, 224 Mil. L. Rev. 1052 (2016).

43. Olivia Holt-Ivry, *Mind The Gender Capability Gap*, Def. One (July 3, 2018), https://www.defenseone.com/ideas/2018/07/gender-capability-gap/149477/.

44. Exec. Order. No. 13,595, 76 Fed. Reg. 80,205 (Dec. 19, 2011) (instituting a National Plan on Women, Peace, and Security).

45. The Women, Peace, and Security Act of 2017, Pub. L. No. 115-68, 131 Stat. 1202.

46. Donald J. Trump, U.S. President, United States Strategy on Women, Peace, and Security (2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/WPS_Strategy_10_October2019.pdf.

47. U.S. Dep't of Def., Women, Peace, and Security Strategic Framework and Implementation Plan (June 2020).

48. AR 600-20, *supra* note 4, paras. 4-19a(3), 6-6b.

49. *See* Acacia Coronado, *Army Secretary: Fort Hood Has High Rates of Murder, Assault*, NBCDFW, https://www.nbcdfw.com/news/local/texas-news/army-secretary-to-speak-from-fort-hood-thursday/2421121/ (Aug. 6, 2020, 10:58 PM).

50. Remarks on the Situation in Iraq, 2014 Daily Comp. Pres. Doc. 00602 (Aug. 7, 2014).

(Credit: Mr Doomits – stock.adobe.com)

Practice Notes

Love in the Time of COVID

Rethinking the DoD's Position on Excusable Delays in Contingency Contracting

By Captain Jason M. Floyd

Always remember that the most important thing in a good marriage is not happiness, but stability.[1]

The Novel Coronavirus Disease of 2019 (COVID-19) frustrated certain performance aspects of Department of Defense (DoD) contracts across the world. Among other things, contractors had problems getting their employees into and out of the Combined Joint Operations Area–Afghanistan (CJOA–A). Non-contracting activities[2] were desperate to understand the associated rules, demanding contractors "figure out" a way to solve such entry and exit requirements. Contracts' terms often frustrated the commanders who were to benefit therefrom. The DoD should revise its position on excusable delays—or lack thereof.

An Overview of the FAR's Current Excusable Delay Clauses

Generally, DoD contracts awarded under the Federal Acquisition Regulation (FAR) contain provisions that excuse performance due to circumstances beyond a contractor's control. When applicable, the clause can prevent terminations and the assessment of actual or liquidated damages. In the face of what should be excused-perfor-

mance, if the Government accelerates these tasks, the contractor can refuse to accelerate their performance, or seek recovery of additional compensation for the accelerated part of their performance. Moreover, it is unclear whether the Government can terminate a contract for its convenience based on a contractor's invocation of the excusable delay clause without a resultant breach.

Variety Is the Spice of Contracts

Not all contracts are created equal.[3] That is certainly true with respect to provisions concerning defenses involving excusable delays. The type of excusable delay clause contained in a contract will depend largely on whether the contract is 1) commercial and 2) fixed-price.[4] In non-commercial fixed-priced supply and service contracts,

> [e]xcept for defaults of subcontractors at any tier, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include (1) acts of God or of the public enemy, (2) acts of Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Contractor.
>
> If the failure to perform is caused by the default of a subcontractor at any tier, and if the cause of the default is beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be liable for any excess costs for failure to perform, unless the subcontracted supplies or services were obtainable from other sources in sufficient time for the Contractor to meet the required delivery schedule.[5]

The clause used in fixed-price construction contracts adds to the enumerated list of causes for delay, above, "[d]elays of subcontractors or suppliers at any tier arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and the subcontractors or suppliers . . . ."[6] However, in those contracts, a contractor must also "within [ten] days from the beginning of any delay (unless extended by the Contracting Officer), [notify] the Contracting Officer in writing of the causes of delay."[7]

"Not every fire or quarantine or strike, or freight embargo" excuses delayed performance. The contractor has the burden of proof, first with respect to the existence of the enumerated basis for delay.

The clauses for commercial items,[8] and simplified acquisitions for other than commercial items,[9] are similar to the clause for non-commercial fixed-price service and supply contracts. The former two clauses add an additional basis for "delays of common carriers" and create a requirement for two separate notices—one "as soon as it is reasonably possible" after the excusable delay begins, and another when such delay ends.[10]

Cost-reimbursement type contracts contain similar requirements to fixed-priced supply and service contracts, but go a bit further. In order to terminate the contract, the contracting officer (KO) must have ordered the contractor, in writing, to purchase the supplies or services from other sources (if that was the cause), and the contractor failed to reasonably comply with such order.[11] Otherwise, the delay is excusable.[12]

This may come as a surprise to some, but the DoD's supplement to the FAR (the DFARS) does very little to add to[13] or modify[14] these clauses—even in contingency environments.

Diagnosing the Symptoms of Excusable Delay

"Not every fire or quarantine or strike, or freight embargo" excuses delayed performance.[15] The contractor has the burden of proof, first with respect to the existence of the enumerated basis for delay.[16] The contractor must then establish a causal connection between the basis and its delayed performance.[17] Moreover, only those delays that affect the overall completion of work (referred to as delays affecting the "critical path") are excusable.[18] Finally, the events giving rise to the delay must have been "beyond the control" of, and "without the fault or negligence" of the contractor.[19] For high-dollar non-commercial contracts, the supplies or services must not have been "obtainable from other sources" (i.e., alternate subcontractors).[20]

"Beyond a contractor's control" takes on three explanations. An event is not beyond the contractor's control if 1) the event is considered foreseeable at the time of contracting, and the contractor enters into the contract without making provisions to protect itself—here, the contractor will have been deemed to have assumed the risk;[21] 2) the contractor could prevent it from occurring;[22] and 3) it could have overcome the effects of the event. The first and third applications are relevant to COVID-19.[23] If the contract was awarded before the COVID-19 pandemic disrupted entry and exit pathways,[24] then these circumstances should generally warrant an excusable delay. However, if the contract was awarded after COVID-19 disrupted entry and exit pathways, and if the contractor failed to make proper provisions to ensure it is able to perform in accordance with the delivery dates and/or periods of performance under the contract, then the contractor can be said to have assumed the risk of delayed entry/exit of its personnel. Further facts are necessary, on a case-by-case basis, to determine whether the contractor "could have overcome the effects" of such closures. The facts will vary depending on the KO's direction in the contract regarding mode of transportation,[25]

the availability of commercial air, travel restrictions per country, and the contractor's attempts at negotiating with sovereign nations regarding such restrictions.

"Fault or negligence" refers to acts or omissions of the contractor that cause delay. Courts have held that U.S. Government-caused delay is without the contractor's fault or negligence. In *Sterling Millwrights, Inc. v. United States*, the "United States Department of the Army [contracted for] the first step in a two-step bidding process for the construction of a chrome-plating facility for the inner surfaces of 120-millimeter M256 cannon barrels mounted on the M1A1 tank."[26] When the contractor failed to deliver the chrome-plating facility, the court held that this was due to the Army's delays.[27] For its part, the Army was unable "to review the large volume of highly complex technical shop drawings associated with this project" due to a lack of expert staff.[28] As such, the contractor could not have been "at fault."[29] In the context of COVID-19 and overseas operations, it is important to ensure that commanders are aware that onerous and last-minute public health measures may act to solidify a contractor's non-performance or delayed performance if it sufficiently interferes with the contractor's ability to gain access to the place of performance. For example, a sudden requirement to conduct polymerase chain reaction testing for COVID-19 *before* arriving in theater, a change from a requirement to do so *before or after* arrival, would perhaps result in a delay properly attributable to the Government.[30]

An additional requirement in non-commercial contracts valued at more than the simplified acquisition threshold, is that the supplies or services subject to delay were not available through alternate sources or subcontractors.[31] The term "subcontractors" has been extended to common carriers.[32] Status as a subcontractor is determined by whether "the prime contractor" and its supplier were dealing with each other on a regular and continuous basis in order to fill requirements under contract.[33] Here, if the contractor typically uses a particular carrier to transport its personnel or equipment, such entity may be deemed a subcontractor—even if no enforceable contractual relationship between the two exists. Ergo, all those supplies typically delivered to contingency contractors from FedEx may be subject to an excusable delay.

Government Action in the Face of Excusable Delays

When told by a contractor of its prospective inability to perform, the Government is faced with a choice. By the terms of the contract, the bargained-for exchange of the legal detriment requires that the Government sit on its hands while the contractor deals with the delay. However, if the Government desires delivery or completion in advance of the excusable delay, then the Government can assert its need for an acceleration of performance. Still, because such a demand is akin to a change order, the contractor may be entitled to additional compensation. Less obvious though, is when a contractor decides that they will not comply with the demand for acceleration.[34] What, then, is the Government's remedy (if any)? Can it terminate the contract? That is the hard question.

Acceleration

We'll grow old waiting.[35]

Compensable acceleration occurs when, in the face of an excusable delay, the Government orders the contractor to perform before the legal basis for the delay has concluded.[36] Recently, the Court of Federal Claims reaffirmed the following elements of a constructive acceleration claim:

1. that the contractor encountered a delay that was excusable;
2. that the contractor requested from the government an extension of time due to the delay;
3. that the government denied the contractor's request for an extension of time;
4. that the government demanded completion of the contract in a shorter amount of time than the contractor was entitled to, given the excusable delay; and
5. that the contractor was required to expend additional resources to adhere to the schedule on which the government insisted.[37]

Doubtless, various delays in a contingency environment would be intolerable. For example, delays would not be tolerable for the mobilization of a private security contractor to a place where there are insufficient U.S. and coalition forces to cover camp security. An example of a similarly intolerable delay is where the closing of international air travel has kept a dining facility's contractor employees without leave, without backfill, and working more than the 8-hour shifts without a day off—as required according to their employment agreements—which causes them to go on strike. As such, the Government will typically demand performance where it believes it necessary. And contractors will almost always happily comply.

Terminations for Convenience During Excusable Delays

It is when contractors *cannot* comply, regardless of the amount of added compensation, that the Government has to grapple with what happens next. The Government generally has an inherent, statutory, and contractual right to terminate its contracts with private businesses.[38] In light of these rights, "a proper termination for convenience does not constitute a breach of contract[;] it limits the monetary recovery a contract awardee can collect."[39] However,

> [t]he United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.40

Therefore, terminations for convenience are within the decision-making authority of KOs, but can be deemed breaches based on judicial determinations of bad faith or abuse of discretion.[41] That is to say, the possibility of a convenience termination "is not an open license to dishonor contractual obligations."[42]

Historically, courts allowed terminations for convenience as a manner of "risk allocation." Convenience terminations were a mechanism for "relieving the government of the risk of receiving obsolete or useless

goods. The risk was shifted to the contractor, that it could lose the full benefit of its expectations if circumstances changed too radically."[43]

However, what happens when the Government and its contractors have anticipated the occurrence or risk, and allocated it in writing with sufficient clarity? Can the Government terminate that contract for convenience merely because the contractor responds to a demand to accelerate with, "I'd love to, but can't. And I am excused from doing so?" When the Government terminates a contract for its convenience because the contractor invokes a governmental obligation, "it risks violating one of contract law's most fundamental principles, that all contracts must be supported by consideration."[44] The bargained-for terms of the contract require the Government to excuse performance during the pendency of its cause. It would seem a convenience termination for such a reason, standing alone, would be "like the mirage of the desert with its vision of flowing water which yet lets the traveler die of thirst"—in other words, an illusory promise.[45]

At least, that was the case before the Court of Appeals for the Federal Circuit limited the *Torncello* holding to "the unremarkable proposition that when the Government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by adverting to the convenience termination clause."[46] Meanwhile, in his dissent, Judge Duff noted, "[i]f all that the [*Torncello*] court had to say was that the government should not enter into a contract in bad faith, then the majority of judges in that case expended too great an effort."[47] And so, in 2013, the Court of Federal Claims seems to have swung the pendulum back toward *Torncello*. In *TigerSwan*, the court explained that bad faith and abuse of discretion were two grounds on which to find a termination for convenience improper.[48] But it also named the reasoning in *Salsbury* as a third.[49] Instead of enlarging the Government's authority for convenience terminations as *The Sinking-Fund Cases* and *Lynch* would fear, the court in *TigerSwan* seems to have revived the principles in *Torncello* when it held that *TigerSwan* survived a motion for judgment on the pleadings. The court stated a convenience termination is improper "where the government has engaged in some form of improper self-dealing for its own benefit."[50] That is all to say, that the law with respect to the propriety of convenience terminations in response to contractors invoking their contractual rights is as clear as mud.[51]

To say that the DoD is dependent upon contractors is an understatement. In areas of armed hostilities where a minimum force posture exists, the DoD's reliance on contractors for private security; intelligence, surveillance, and reconnaissance capabilities; base life support activities; construction; general maintenance and repair; improvised explosive device detection; and information technology support is a threat to the success of the mission where contractors can forego performance due to an excused delay.

Excusable Delays Are Sometimes Insufferable

The effect of delays in contracting could be devastating. As of the fiscal year (FY) 2020 4th quarter U.S. Central Command census, there were 22,562 contractor employees in Afghanistan.[52] That's a slight reduction from the same time in 2016 (25,197),[53] 2017 (23,659),[54] 2018 (25,239),[55] and 2019 (24,202).[56] However, the number of contractor employees have consistently dwarfed troop levels over the same period: there were 9,800 troops in 2016,[57] 11,100 in 2017,[58] 14,000 in 2018,[59] approximately 13,000 in 2019,[60] and approximately 2,500 as of 15 January 2021.[61] And, during the drawdown, contractors were spread thin.[62] There are few, if any, redundancies.

To say that the DoD is dependent upon contractors is an understatement. In areas of armed hostilities where a minimum force posture exists, the DoD's reliance on contractors for private security; intelligence, surveillance, and reconnaissance capabilities; base life support activities; construction; general maintenance and repair; improvised explosive device detection; and information technology support is a threat to the success of the mission where contractors can forego performance due to an excused delay.[63]

The Government Accountability Office found that, during FY10 to FY12, the "DoD awarded 16 [non-competitive] contracts, valued at $1.2 billion," because of urgent operational needs.[64] That signals that the DoD was unwilling, or unable, to take action to fill the gaps using U.S. troops, coalition forces, or DoD civilians. Instead, the DoD relied on contractors to quickly mobilize and begin performance. And that was long before COVID-19.

Inexcusable, Merely Compensable, and Stable Performance

Life . . . was nothing more than a system
of atavistic contracts,
banal ceremonies, preordained words, with
which people entertained each other . . .
The dominant sign in that paradise of
provincial frivolity
was the fear of the unknown.[65]

The DoD should deviate from the generally applicable clauses in the FAR: these excusable delay clauses have no place in a war zone. These "atavistic contract" terms only obscure the desires of the parties. Commanders do not want to deal with delays, and their wartime contractors want to perform (for additional compensation). Other mechanisms can sufficiently address any issues stemming from subjects enumerated in these clauses. If performance becomes more expensive, the contractor should request an equitable adjustment for increased costs. If performance becomes more difficult, the contractor can engage

in discussions with the KO to determine the best course of action. Finally, if performance is commercially impracticable, convenience terminations should be clearly available to the Government.

Self-Executing Accelerations with Provision for Payment

In place of delays, the default position should be an increase in compensation. As discussed above, when a contractor asserts a valid basis for an excusable delay, the Government's bargained-for exchange leaves it with allowing for a delay in performance as a default position. The KO can then choose either to accept that delay or accelerate performance. Still, the Government has to take an affirmative act to accelerate such performance. However, if the Government always chooses to accelerate performance—as is currently the case across the contracting enterprise overseas—why not make that its default position?

Suppose a contractor is confronted with a valid excusable delay. First, the contractor's logistics coordinator determines that they are unable to confirm transportation for employees and equipment in sufficient time to meet the start of performance. That logistics coordinator immediately phones the logistics manager. The logistics manager digests the information immediately and asks others within the company to verify alternate arrangements. There are alternate arrangements, but at a much higher cost because of extra-contractual requirements and the airline's booking policies requiring a decision within twenty-four hours. After preparing a sufficient summary of the facts, the logistics manager reaches out to the contracting officer's representative (COR), informing them that the contractor is unable to meet the deadline due to the excusable delay, but that there are alternate travel arrangements if the KO would agree to modify the contract to allow for the alternate. The COR emails the contract specialist, who is in a different country because of the withdrawal of U.S. forces. After the specialist arrives to work and reads the email, they send it to the KO to determine a course of action. The KO, having no previous experience with excusable delays, sends it to the contract law attorney. The attorney immediately responds that the contractor is entitled to the delay, but the KO can modify the contract with additional funding after it has been certified by the resource manager. All of this communication takes three days. The modification would take another three days. So the contractor is unable to meet the deadline and unwilling to make alternate arrangements because it fears it would not be repaid its increased costs.

In a universe where the excusable delay clause is modified to allow for additional compensation in lieu of additional time, this back-and-forth could be avoided. Instead of gathering data sufficient to justify a delay (recall the notice requirement of certain provisions), the contractor could be gathering data sufficient to justify an increase in its compensation—and all the while continuing performance. "Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract."[66] The DFARS could modify the FAR clauses to only allow for equitable adjustments when performance becomes more expensive due to what would be an excusable delay. Instead of allowing delay, this approach allows contractors to recover the costs of these alternate travel arrangements through the submission of a request for equitable adjustment. Increased compensation, not excused delay in performance, would be the "corrective measure utilized to keep a contractor whole."[67]

The current equitable adjustment principles generally require government action. "An equitable adjustment is the difference between the cost of the work required by the contract and the cost of the *changed* work . . . ."[68] Work can be changed either through Government action (such as a change order or a constructive change) or changed conditions (including failure by the Government to accurately describe work).[69] In the context of excusable delays, the Government action needed is an order to accelerate. As described above, requiring an affirmative act by the Government is often time-consuming and can interfere with diligent performance. Therefore, it is necessary to modify the clauses concerning excusable delays to allow for equitable adjustments. For example, the following modification to the non-commercial fixed-priced supply and service contracts[70] would be beneficial:

> Except for defaults of subcontractors at any tier, the Contractor *may submit a request for equitable adjustment under DFARS 252.243-7002 if it can establish that it would have failed to perform the contract, and such failure would have arisen* from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include . . . [71]

This modification would direct a contractor, faced with what would be an excusable delay, to continue performance and submit a request for equitable adjustment under existing contract provisions. It would not serve to modify existing case law regarding excusable delays. Rather, it would work to weave the applicable prerequisites for the existence of an excusable delay into whether compensation is available under this DFARS deviation.

Clarifying the Availability of Convenience Terminations

As described above, when faced with a contractor who cannot accelerate performance when ordered to by a KO, the Government's right to terminate for its convenience is unclear. Telling a contractor to "go pound sand,"[72] when the parties agreed to allow (properly) excusable delays at the time of award, seems to violate something that the contract presupposes should be done. If the Government and the contractor did not agree—i.e., if the clause was lacking from the contract—then there would be no dispute that the Government could terminate its contract for convenience. There would be nothing on which the contractor could rely to say that the Government agreed to wait whenever it experienced delay. Removing these excusable delay clauses would clarify that the Government can terminate its contracts for convenience.

Conclusion

The war is in the mountains . . .
For as long as I can remember,
they have killed us in the
cities with decrees,
not with bullets.[73]

In government contracting, common law doctrines should give way when detrimental to the public interest.[74] The roots of the doctrine of excusable delays are sensible in normal times. However, in a contingency environment, where the DoD relies on its contractors as a part of the total force, COVID-19 has taught us that excusable delays are misunderstood, unwanted, and often unbearable. When informed of a contractor's notice of delay, commanders are generally disappointed that the Government cannot demand action without incurring additional cost; and, even if willing to bear the cost, demanding action will take some time. They are incensed when told that contractors do not have to comply with demands for acceleration. A more accurate depiction of what occurs in contingency environments should be given to defense contractors at the time of contract formation. The DoD should deviate from the allowance of a delay and, instead, default to the allowance of additional compensation in the face of what would otherwise be an excusable delay.

Gabriel Garcia Marquez once remarked "[i]n reality the duty of a writer—the revolutionary duty, if you like—is that of writing well."[75] The DoD's duty to its contractors is to give them realistic expectations of its actions when faced with excusable delays. Department of Defense policy—or rather the absence of a DoD exception from the FAR—currently expresses a willingness to excuse certain delays in performance. These "decrees" are fine in the cities, but the "war in the mountains" leaves room for neither excuse nor delay in contingency contracting. **TAL**

CPT Floyd is a battalion judge advocate with the 10th Special Forces Group (Airborne), and was recently deployed as the Command Judge Advocate for the Army Contracting Command in Afghanistan.

Notes

1. Gabriel Garcia Marquez, Love in the Time of Cholera 415 (Edith Grossman, trans., First Vintage Int'l ed. 2003) (1988).

2. In addition to some acquisition professionals.

3. *Compare* Krell v. Henry, [1903] 2 K.B. 740, *with* Blakely v. Muller, [1903] 2 K.B. 760 (collectively, the *Coronation Cases*).

4. Some contracts may have specific exceptions or additions to their *force majeure* clauses. However, those are beyond the scope of this article.

5. FAR 52.249-8(c)–(d) (2021).

6. FAR 52.249-10(b)(1)(xi) (2021).

7. FAR 52.249(b)(2) (2021).

8. FAR 52.212-4(f) (2021).

9. FAR 52.213-4(e) (2021).

10. FAR 52.212-4(f), 52.213-4(e) (2021).

11. FAR 52.249-14 (2021).

12. *See id.*

13. The Defense Federal Acquisition Regulation Supplement (DFARS) does add an excusable delay provision for job order contracts, consistent with the other types of contracts. DFARS 252.217-7009(b) (July 2021). It also adds one for the replacement of counterfeit electronic parts. DFARS 252.246-7008 (July 2021).

14. There are very few provisions which, if read consistently with the FAR's excusable delay clauses, would seem to act on them. *See* DFARS 252.217-7004 (July 2021) (allowing a contracting officer to order contractors to perform work on "vessels" within their ability, regardless of an excused delay, but only in a job order contract); DFARS 252.229-7004 (July 2021) (disallowing excusable delay in cases where contractors face delays in obtaining appropriate licensure as a U.S. contractor when importing articles into Spain, as delays are "common"); DFARS 252.247-7023 (July 2021) (disallowing as "compensable" delay, the failure of a contracting officer to approve the use of a foreign-flag vessel for transportation of supplies by sea, in time for a sailing date. However, there is an open question as to whether it's "excusable"); DFARS 252.251-7000 (July 2021) (disallowing as "excusable delay" the time granted in response to a contracting officer's decision to terminate for a failure of a contractor to pay a U.S. Government source of supply in a timely manner).

15. United States v. Brooks-Callaway Co., 318 U.S. 120, 122 (1943) (averring "[a] quarantine, or freight embargo, may have been in effect for many years as a permanent policy of the controlling government. A strike may be an old and chronic one whose settlement within an early period is not expected. In any of these situations there would be no possible reason why the contractor, who of course anticipated these obstacles in his estimate of time and cost, should have his time extended because of them.").

16. Non-enumerated bases for delay are sometimes analyzed under general contract principles, including whether the contract was written to exclude any other causes of delay, and whether and to what extent a defense of impossibility or commercial impracticability apply. *See generally* 6 Government Contracts: Law, Administration & Procedure ch. 36A (Walter Wilson ed., 2021). Non-enumerated bases are beyond the scope of this article. Notwithstanding excusable delay language, certain contracts may allocate the risk of performance to the U.S. Government via an express warranty. In such cases, even if the cause of the delay is not enumerated, the contractor's non-performance may still be excused. *See* Swinerton & Belvoir, ASBCA No. 24022, 81-1 BCA ¶ 15 (wherein the U.S. Government advised bidders that "aliens may require up to [ninety] days before issuance of" entry documents, and the board held the government liable for damages resulted from actual clearance times exceeding ninety days).

17. Morganti Nat'l v. United States, 49 Fed. Cl. 110, 132 (2001).

18. *Id.*

19. John Cibinic Jr. et al., Administration of Government Contracts 489 (4th ed. 2015).

20. *Id.*

21. Fraser Constr. Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004); R.P. Wallace, Inc. v. United States, 63 Fed. Cl. 402, 409 (2004).

22. Fox Constr., Inc. v. General Servs. Admin., 93-3 BCA ¶ 26,193 ("Had [the contractor] properly discharged its responsibility . . . [the contractor] could have [taken steps] to avoid the freeze damage that ultimately occurred.").

23. At the time of this writing, the Centers for Disease Control and Prevention only recently acknowledged that the virus "can be spread through airborne particles that can linger in the air 'for minutes or even hours'—even among people who are more than 6 feet apart." Maria Godoy, *CDC Acknowledges Coronavirus Can Spread Via Airborne Transmission*, NPR (Oct. 5, 2020, 5:44 PM), https://www.npr.org/sections/health-shots/2020/10/05/920446534/cdc-acknowledges-coronavirus-can-spread-via-airborne-transmission. Therefore, it is difficult—at least now—to say that a contractor could prevent the effects of COVID-19 from impacting their performance.

24. Although the clauses refer to "epidemics" as bases for excusable delays, in Afghanistan, it was usually a series of governments' responses to the COVID-19 pandemic that resulted in the delays. For example, Kuwait closed its airport to commercial travel for five months, along with limiting visa processing, resulting in an inability to get many contractor employees transported from the United States to Afghanistan without delay. *Kuwait International Airport to Resume Commercial Flights*, Arab News (July 31, 2020, 8:54 AM), https://www.arabnews.com/node/1712546/middle-east. All contracts awarded by DoD activities, with performance in Afghanistan, should contain the disrupted entry clause at DFARS 252.225-7995 (Deviation 2017-O0004), which states that contractors accompanying the force shall "process through the deployment center designated in the contract, or as otherwise directed by the Contracting Officer, prior to Deploying . . . [and] use the point of departure and transportation mode directed by the Contracting Officer." All contracts awarded by DoD activities, with performance in Afghanistan, should contain the exit clause at DFARS 252.225-7997 Contractor Demobilization (Deviation 2013-O0017). This clause states "[g]enerally, the Contractor is responsible for demobilizing all of its personnel and equipment from the Afghanistan Combined Joint Operations Area . . . . The Contractor shall demobilize and return its personnel to their point of origin or home country . . . . [Finally,] the Contractor is not authorized to use Government-furnished transportation unless specifically authorized in this contract." *Id.* For more information on the deviations listed above, see *DPC Defense Pricing and Contracting*, Dep't of Def., https://www.acq.osd.mil/dpap/dars/class_deviations.html.

25. *See* DFARS 252.225-7995 (Deviation 2017-O0004), *supra* note 24; DFARS 252.225-7997 Contractor Demobilization (Deviation 2013-O0017), *supra* note 24.

26. Sterling Millwrights, Inc. v. United States, 26 Cl. Ct. 49, 51 (1992).

27. *Id.* at 112.

28. *Id.* at 68.

29. *Id.* at 112.

30. That is not to say that it might be a worthwhile delay, especially in the face of mandatory quarantine restrictions on the remainder of the aircrafts' passengers upon the discovery of a positive testing of one passenger.

31. Culligan Water Conditioning, ASBCA No. 29624, 85-3 BCA ¶ 18,405.

32. *See, e.g.*, Owen & Son, IBCA No. 590, 67-1 BCA ¶ 6105 (holding that a trucking company decision to await an adequate load was not excusable); Jamsar, Inc., GSBCA No. 3472, 72-2 BCA ¶ 9555 (holding that a ten-day delay caused by slow common carrier was not an excusable delay).

33. Emerson-Sack-Warner Corp., FAA–CAP No. 66-2, 65-2 BCA ¶ 5003.

34. An issue that is beyond the scope of this article, but is interesting nonetheless, is whether the period of performance of a contract for services affected by an excusable delay can be extended.

35. Marquez, *supra* note 1, at 73.

36. That is to say, not just when the enumerated cause has ceased to exist, but rather when one of the elements required for a court to deem the time period excused, can no longer proven. *See supra* "Diagnosing the Symptoms of Excusable Delay."

37. Armour of Am. v. United States, 96 Fed. Cl. 726, 757 (2010).

38. *See* United States v. Corliss Steam-Engine Co., 91 U.S. 321 (1875) (holding that the Secretary of the Navy's "suspension" of work that had become "unnecessary from the termination of the war" was in his "general authority"); De Laval Steam Turbine Co. v. United States, 284 U.S. 61, 73 (1931). *See also e.g.*, FAR 52.249-2 (2021).

39. TigerSwan, Inc. v. United States, 110 Fed. Cl. 336, 344 (2013).

40. Sinking-Fund Cases, 99 U.S. 700, 719 (1878). *See also* Lynch v. United States, 292 U.S. 571, 580 (1934) ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors.").

41. *TigerSwan,* 110 Fed. Cl. at 344.

42. Maxima Corp. v. United States, 847 F.2d 1549, 1553 (Fed. Cir. 1988).

43. Torncello v. United States, 681 F.2d 756, 765 (Ct. Cl. 1982).

44. *Id.* at 768.

45. *See id.* at 769 (quoting I Corbin on Contracts § 145 (1963)).

46. Salsbury Industries v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990).

47. *Id.* at 1523 (Duff, J., dissenting).

48. TigerSwan, Inc. v. United States, 110 Fed. Cl. 336, 345 (2013).

49. *Id.* ("[I]n addition to the foregoing grounds for breach, the Federal Circuit has recognized that the government may be liable for breach of contract for an improper termination for convenience when the government 'contracts with a party knowing full well that it will not honor the contract.'") (quoting Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1543–44 (Fed. Cir. 1996)).

50. *Id.* at 347.

51. Some may point to some of the default-provisions that have language enabling the Government to convert improperly executed terminations for default into convenience terminations, as support for the idea that terminations for convenience are certainly proper in these circumstances. However, there are two problems with this assertion. First, this does not implicate a scenario where the Government proposes a convenience termination from the outset. The default provisions are broadly applicable. They cover any kind of default, and then explain that if the Government decision to execute a default termination was improper, then such termination will be deemed a convenience termination. This allows the contractor to be made whole, since they were not at fault for whatever caused the Government's ire. Second, as far as the author can tell, no court has reconciled the case law regarding bad-faith convenience terminations with these termination conversion provisions. Again, the plain language of these provisions only allows a conversion after a default termination is executed; it does not stand for the proposition that a contractor waives all rights to errors in convenience terminations.

52. Off. of Deputy Assistant Sec'y of Def. for Logistics, Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility (2020), https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/FY20_4Q_5A_Oct2020.pdf.

53. Deputy Assistant Sec'y of Def. (Program Support), Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility (2016), https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/FY16_4Q_5A_Oct2016.pdf.

54. Deputy Assistant Sec'y of Def. (Program Support), Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility (2017), https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/FY17_4Q_5A_Oct2017.pdf.

55. Off. of Deputy Assistant Sec'y of Def. for Logistics, Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility (2018), https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/FY18_4Q_5A_Oct2018.pdf.

56. Off. of Deputy Assistant Sec'y of Def. for Logistics, Contractor Support of U.S. Operations in the USCENTCOM Area of Responsibility (2019), https://www.acq.osd.mil/log/PS/.CENTCOM_reports.html/FY19_4Q_5A_Oct2019.pdf.

57. Heidi M. Peters, Cong. Rsch. Serv., R44116, Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007–2020, tbl.1 (2021).

58. *Id.*

59. Ellen Mitchell, *Mattis: US to Send* 3,000 *More Troops to Afghanistan*, Hill (Sept. 18, 2017, 4:09 PM), https://thehill.com/policy/defense/351222-mattis-us-to-send-3000-more-troops-to-afghanistan.

60. Susannah George, *U.S. Has Begun Reducing Troops in Afghanistan, Commander Says,* Wash. Post (Oct. 21, 2019), https://www.washingtonpost.com/world/us-has-begun-reducing-troops-in-afghanistan-commander-says/2019/10/21/d17a9e30-f3f1-11e9-8cf0-4cc99f74d127_story.html.

61. Jim Garamone, *U.S. Completes Troop-Level Drawdown in Afghanistan, Iraq,* U.S. Dep't of Def.: News (Jan. 15, 2021), https://www.defense.gov/Explore/News/Article/Article/2473884/us-completes-troop-level-drawdown-in-afghanistan-iraq/.

62. Employees of Fluor International went on strike for a few hours at Bagram Airfield, "after some workers assumed the duties of higher-paid colleagues who returned to their home countries because of the coronavirus pandemic." Phillip Walter Wellman, *African, Asian Bagram Workers Protest US Contractor over Allegations of Pay Discrimination,* Stars & Stripes (July 28, 2020), https://www.stripes.com/news/middle-east/african-asian-bagram-workers-protest-us-contractor-over-allegations-of-pay-discrimination-1.639068.

63. *See* Comm'n on Wartime Contracting in Iraq & Afg., Transforming Wartime Contracting: Controlling Costs, Reducing Risks (2011).

64. U.S. Gov't Accountability Off., GAO-14-304, Noncompetitive Contracts Based on Urgency Need Additional Oversight 16 (2014).

65. Marquez, *supra* note 1, at 293.

66. 4 Government Contracts: Law, Administration & Procedure § 28.280[1][a] (Walter Wilson ed., MB 2021) (quoting Tibetts Mech. Constr., EBCA 433-11-90, 90-3 BCA 23055 (1990)).

67. *Id.*

68. *Id.* (emphasis added).

69. 2 Henry L. Goldberg, Federal Contract Management § 9.01 (2020).

70. FAR 52-249-8.

71. This is a deviation from FAR 52-249-8. *See id.*

72. Meaning to go somewhere else, "buzz off" or "get lost"; condensed from "[h]e wouldn't know enough to pound sand in a rat hole." *See* William Safire, *The Way We Live Now:* 3-31-02*: On Language; Pound Sand*, N.Y. Times (Mar. 31, 2002), https://www.nytimes.com/2002/03/31/magazine/the-way-we-live-now-3-31-02-on-language-pound-sand.html.

73. Marquez, *supra* note 1, at 107.

74. *See, e.g.*, FAR 52.214-7 (2021) (modifying the common law rule that an offeror may withdraw her bid any time before acceptance, to any time before the deadline for receipt of bids); FAR 15.208 (2021) (modifying the common law mailbox rule regarding the timing of acceptance).

75. Thomas Pynchon, *The Heart's Eternal Vow,* N.Y. Times (Apr. 10, 1988), https://archive.nytimes.com/www.nytimes.com/books/97/05/18/reviews/pynchon-cholera.html.

Army War College spouses had the privilege of sitting down and discussing important issues with Mrs. Ellyn Dunford, spouse of the Chairman, Joint Chiefs of Staff. (Photos courtesy of author)

Practice Notes

Leadership and JAG Corps Military Spouses

By Kerry L. Erisman

Leaders who have heart will also have the hearts of those they lead.[1]

You and your spouse anxiously await word from the Personnel, Plans, & Training Office (PPTO) on your next assignment. Your spouse is hoping to obtain a highly sought-after staff judge advocate (SJA) or other leadership position. Will all the hard work, dedication, and time apart be worth it? Will it be rewarded with a coveted leadership position?

Great news: you get word from PPTO that your spouse will become an SJA next summer. Through the excitement and celebration, our instincts as military spouses kick in. We think of all the things we need to do before our upcoming permanent change of station. Except this time, it's different. This time, there is one other area we start contemplating. What is our role as an experienced military spouse? What, if anything, is expected of us?

This article addresses the contemporary role of spouses who choose to assume leadership roles while their spouses are in leadership positions. It will focus on leadership and influence, critical thinking and how you can use it to your advantage, effective communication, and team building.

Misperceptions Debunked

To begin, let's clear up a common misperception. As a military spouse, whether you assume a leadership role is entirely up to you.

There is no outside pressure and your spouse will not be penalized if you choose not to participate. Long gone are the days where the efforts of the spouses were mentioned in their partner's evaluations/fitness reports ("great command team" or, spouse was "instrumental in creating a solid command team").[2] Our role is vastly different than it was twenty or thirty years ago.

Today, over 50 percent of military spouses work, while others are pursuing educational opportunities and exploring their own interests.[3] Military leaders actively advocate for military spouses' employment rights and the easy transfer of professional licenses between states so that spouses may continue their careers without interruption or costly fees.[4] For example, in 2018, the Secretaries of the Army, Air Force, and Navy sent letters to all state governors asking them to give reciprocity from state to state for military spouses for their licensing—this would ensure their ability to continue their careers uninterrupted.[5] It is a crucial retention issue; therefore, it benefits the military to assist with spouses' employment rights and opportunities.[6]

The bottom line is, the role of the military spouse in today's military service is whatever you make it. If you decide to actively participate, it must be for the right reasons. Don't do it out of a sense of obligation. Don't do it because you believe it is expected. Don't do it because you believe it will further your spouse's career. If you choose to actively participate, do it because it is something you desire to do and you can handle the time commitment. If you choose to participate, take time to think about your leadership style, how you can positively influence others, how you can use critical thinking skills to benefit the spouse groups, and the importance of communication and team building in developing an effective and cohesive group.

Leadership and Influence

When I teach leadership to experienced military spouses, I start by asking, "who in this room considers themselves a leader?"[7] A few raise their hands, but most do not. I tell them the following: By virtue of your experience as military spouses, you are all leaders. Younger spouses will look to you for advice and mentorship. The day you show up at a new installation, you will be looked at as having all the answers and experiences, even though you have no idea where anything is on post. Once I explain this, their heads nod, and a few military spouses will provide examples of their experiences to further emphasize the point.

If you choose to take on the role of an experienced leader spouse, think about leadership and the type of leader you want to be. What is leadership? Leadership is a catchword. There are thousands of books on leadership and just as many definitions. For our context, leadership is motivating others to achieve a common purpose. Competent, experienced spouse leaders take care of people, are flexible (i.e., not afraid to think outside of the box), maintain a positive attitude, and never compromise their credibility.

As an experienced spouse leader, ask yourself, how will I encourage participation and influence others in a nonthreatening manner? How will I lead without being overbearing? We must be cognizant of the fact that we are married to a Service member leader; so, if we are threatening and overbearing, spouses will be intimidated and feel they have no choice but to participate.[8] Be clear from day one that participation is strictly voluntary and that you understand the challenges and competing interests spouses face today. Let spouses know that it is entirely okay not to participate at all or to participate on a limited basis. Also, let spouses know that if you call them for help, it is okay to say no.

There is a changing dynamic in the role of spousal groups today, including what people need and what they want from the group. You will face a diverse membership that includes active male spouses and spouses of same-sex marriages in larger numbers than ever before. What will you do to ensure all spouses feel welcome? What will you do to encourage participation from those spouses who are interested in participating but may be reluctant? These are all issues that you will face as a senior spouse leader that did not exist in the past.

You also need to ask yourself the following: How will you lead a group of spouses in the twenty-first century? To do so, you must understand the changing dynamic of today's spouses. In the past, spouses relied on coffees, meetings during the day, and wives' clubs consisting of stay-at-home moms, with the primary form of information sharing being face-to-face communication. Today, it is much different. Now, spouses rely heavily on social media as the main source of connections and information gathering. Spouses also work in much greater numbers than in the past, decreasing the time available for participation in yet another outside activity. Also, the changing face of military leaders has an accompanying increase in the diversity of spouse groups. As both female Service members and Service members with same-sex spouses continue to increase in number, male spouses are increasingly present. Today, there are also more single parent Service members that may need assistance on short notice.

How will you make all spouses feel welcome? How will you ensure your group is inclusive to all? Begin by looking at the invitation's message. Does it suggest that all are welcome? An event entitled "Ladies Night Out–Bunco!" or "Wives Meet and Greet" is obviously not inclusive and welcoming to all. Also, look at your theme. Gown shopping for the upcoming post ball will probably not attract male spouses. As a leader, don't be afraid to speak with individual military spouses and ask them what they would like to see.

Given the heavy reliance of online platforms, senior military spouses must adapt to the greater use of social media and phone applications for group text messaging. For example, use online invitations. They are free and easy to use. If you find this intimidating, ask the younger spouses for help. Many are knowledgeable about social media and will be happy to assist. Also, consider developing a Facebook page to share non-sensitive information and post pictures of events.[9] Using these online resources will reach a larger audience and make more people feel included and likely to participate.

By starting to think about these issues now, you will feel much more comfortable when confronted with them. The key is establishing open communication with all spouses to develop an understanding of the needs and concerns of the new and diverse group of spouses present today.

Critical Thinking

From time to time, military spouse groups will face issues and disagreement, and military spouse leaders should be available to assist in resolving these conflicts. Conflicts left unresolved may cause dissention and can threaten the cohesiveness of the group. For example, consider the following: your military spouse group has fundraised money for local charities but now can't decide which charitable organizations should receive the money. There are several proposals on the table, but there is no consensus. As the senior military spouse, how can you help resolve this?

A key component of leadership is the ability to problem solve through critical thinking.

What is critical thinking? *The Oxford Dictionary* defines critical thinking as "[t]he objective analysis and evaluation of an issue in order to form a judgment."[10] Critical thinking helps to analyze and evaluate information, and it provides the best opportunity to reach the correct decision. As senior spouses, we need critical-thinking skills to effectively lead because it will produce more effective results. A key to critical thinking is ensuring we don't jump to conclusions. Take your time and gather the facts, analyze them in a logical manner, and always keep an open mind during the process.

In terms of the fundraising for local charities scenario, it would behoove you to ask the spouses questions about each of the proposals to gather the facts. Have someone write down the answers. How will each charitable organization use the money? Who will benefit from the money? Does the organization have ties to the military and local installations?

Next, take the answers and organize them so you can evaluate the facts in a logical manner. To help evaluate the facts, look back at the original intent of the fundraising. What are the fundraising goals? Do any of the missions of the charitable organizations better meet the original fundraising goals? Ensure that the group is not unnecessarily restricting solutions to only a couple of choices. Are there other solutions not yet proposed which may be a better fit?

Finally, encourage all involved to keep an open mind throughout the process. Be open to alternative solutions and consider other possibilities, and don't be afraid to consider newly-presented information. Now that you have completed the steps above, discuss the findings with the group and see if there is better consensus on what to do with the money. If all seem like viable options, consider splitting the money among charitable organizations.

As the scenario illustrates, critical thinking helps to resolve issues. When you are faced with a group who cannot reach a consensus, talk through the issues with the group using critical thinking and the ideas discussed in this article. The discussion itself is often the most important part of reaching a decision. If everyone feels as though their position was heard, it will be easier for them to get behind an ultimate decision with which they do not necessarily fully agree. This will help to resolve issues that otherwise may cause disagreement and threaten the unity of the group.

Communication and Team Building

Imagine the manager of the New York Yankees telling his baseball team that they cannot communicate during a game. That includes talking, hand signals, or other gestures. How effective will the team be without communication and team work? Not very. Communication is key in sports, and it is also key in delivering your message as senior military spouses. Likewise, team building is another key component of effective military spouses' groups.

Senior military spouse leaders must be able to effectively communicate. Ensure your message is clear and geared toward your audience. For example, if you are speaking with local residents with no affiliation with the military, be careful not to use military jargon and acronyms. The same jargon and acronyms, however, will be more easily understood when speaking with a group of military spouses—unless, of course, they are newer spouses.[11] The key is to always know your audience.

While communication can be verbal, it can also be non-verbal. Remember that body language can detract from your message, so be cognizant of your non-verbal gestures. We all have listened to people speak while they are fidgeting with their hands or holding a pen and clicking it, so be careful to avoid these distractors while speaking.

Effective internal communication is also important for groups of military spouses. One method of ensuring effective communication is through team building to establish connections and trust within the team. Working together as a team and effectively communicating will build a strong, motivated team with a solid bond. Team building gives spouses the opportunity to learn from each other.

There are many types of team building activities, including games and social gatherings. One way to start this before the team members know each other well is through the use of icebreakers. Icebreakers give spouses the chance to learn about each other and find things they have in common. There are many types of icebreakers, so check the Internet for a few that sound interesting to you.[12] There are also games that build camaraderie. The focus of these games is on working together and bonding. Team scavenger hunts and escape rooms, for example, require teams to work together toward a common cause.

Social gatherings are also an effective way to build a team. For example, consider going to a place that has a karaoke machine. Encourage everyone to participate, as this will bring a closeness and bond among the group. Another type of social gathering is through physical activity. If you are stationed in Hawaii, for example, schedule a nonstrenuous hike for the group. Whatever you schedule, just remember that—as the purpose of team building is to include all members and ensure they all benefit from the activity—all members of the group need to complete it. As a leader, ensure that the same small groups do not always hang out together so there is a mix and the entire group bonds. You know the group, so ensure you choose an activity that everybody can comfortably participate in and complete.

Conclusion

To wrap up, this article reviewed the contemporary role of spouses who choose to assume leadership roles while their partners are in a leadership position; leadership and influence; critical thinking and how best to use it to your advantage; and, finally, effective communication and team building. Using the skills and strategies discussed in

this article will help lead to a great team with many unforgettable experiences! **TAL**

Mr. Erisman has been a military spouse for the past twenty-three years. He retired from the Army after twenty-eight years of service as a judge advocate and military police officer, and is now an Associate Professor of Legal Studies at the American Military University in Charles Town, West Virginia.

Notes

1. Michael G. Rogers, *Leaders—Never Underestimate the Power of This One Thing*, Teamwork & Leadership, https://www.teamworkandleadership.com/2014/07/leaders-never-underestimate-the-power-of-this-one-thing-video.html (last visited July 1, 2021).

2. *See* U.S. Dep't of Army, Reg. 623-3, Evaluation Reporting System para. 3-22 (14 June 2019) ("Evaluation comments, favorable or unfavorable, will not be based solely on a rated Soldier's marital status. For example, statements such as the following will not be permitted: 'LTC Doe and his wife make a fine command team' . . . . Evaluation comments will not be made about the employment, education, or volunteer activities of a rated Soldier's spouse. For example, statements such as the following will not be permitted: 'Mr. Doe's participation in post activities is limited by his civilian employment' or 'Mrs. Doe has made a significant contribution to our Soldiers' morale through her caring participation on the hospital volunteer staff.'").

3. Council of Econ. Advisors, Exec. Off. of the President of the U.S., Military Spouses in the Labor Market (2018), https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/05/Military-Spouses-in-the-Labor-Market.pdf.

4. *See, e.g.*, 315 U.S. Dep't of Def., Instr. 1400.25, DoD Civilian Personnel Management System: Employment of Spouses of Active Duty Military para. 4a (19 Mar. 2012) (C1, 1 Mar. 2019) ("The spouse of an active duty member of the Military Services . . . who relocates via a permanent change of station . . . move as a sponsored dependent to the military sponsor's new permanent duty station, is entitled to military spouse preference . . . for all positions in the commuting area of the new duty station being filled under competitive procedures.").

5. Memorandum from the Sec'ys of the Army, Air Force, & Navy to the National Governors Association, subject: Consideration of Schools and Reciprocity of Professional Licensure for Military Families in Future Basing or Mission Alternatives (Feb. 23, 2018) ("Facilitating military spouses in continuing their work in a new place of residence without delays or extra expense is also important. Spouses in professionally licensed fields . . . face challenges due to delays or cost of transferring licenses to a new state or jurisdiction.").

6. U.S. Chamber of Com. Found., Military Spouses in the Workplace: Understanding the Impacts of Spouse Unemployment on Military Recruitment, Retention, and Readiness (2017), https://www.uschamberfoundation.org/sites/default/files/Military%20Spouses%20in%20the%20Workplace.pdf.

7. The author has taught leadership issues to senior military spouses at the U.S. Army War College, Carlisle Barracks, Pennsylvania; the Staff Judge Advocate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; and at the Joint Spouses Conference in Hawaii.

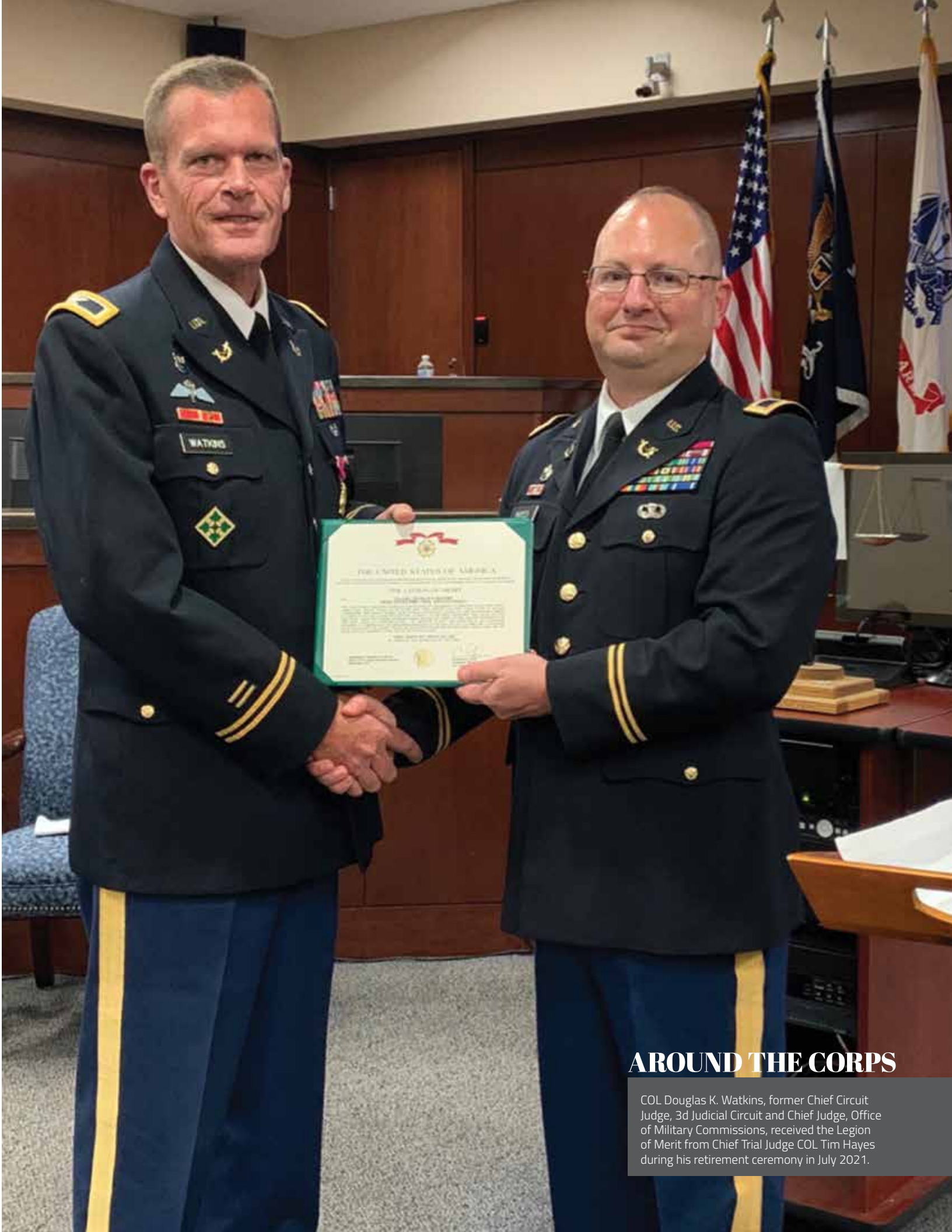
8. Also, as it can easily be misinterpreted and come across as improper pressure, you should not ask your military spouse to send out emails regarding upcoming spouse events.

9. Always remember operations security and the posting of sensitive information that may endanger our Soldiers. *See, e.g.*, *Do's and Don'ts for Social Media Posts*, U.S. Army, https://www.army.mil/socialmedia/soldiers/ (last visited July 1, 2021) (scroll down or click "Security" on the right hand side of the screen).

10. *Critical Thinking*, Lexico, https://www.lexico.com/en/definition/critical_thinking (last visited July 1, 2021).

11. Remember when you were a newer spouse and every other word was an acronym? You may use acronyms, but ensure you explain them to the newer spouses. For example, use an acronym, but then explain what it stands for and what it means.

12. Many popular icebreakers may be found online. *See* Susan Box Mann, *23 Best Ice Breaker Games for Adults [+Group Activities]*, Icebreaker Ideas (Mar. 25, 2019), https://icebreakerideas.com/best-icebreaker-games-adults/.



AROUND THE CORPS

COL Douglas K. Watkins, former Chief Circuit Judge, 3d Judicial Circuit and Chief Judge, Office of Military Commissions, received the Legion of Merit from Chief Trial Judge COL Tim Hayes during his retirement ceremony in July 2021.

The courtroom in Fort Riley, Kansas, sits in the U.S. Army's 3d Judicial Circuit. (Credit: Bethany Boutte, Fort Riley, Kansas)

No. 1

Conversations with the Last Five Chief Trial Judges of the Entire[1] U.S. Army

Interviews by Colonel Fansu Ku

If you're going to be a lawyer and just practice your profession, well you have a skill, so you're very much like a plumber; but if you want to be a true professional, you will do something outside yourself, something to repair tears in your community, something to make life a little better for people less fortunate than you. That's what I think a meaningful life is—one lives not just for oneself, but for one's community.[2]

Each of the five Chief Trial Judges (CTJ) that I have had the privilege of working with in my two tours as a military judge is a true professional, just as Justice Ginsburg envisioned. Their reverence for the Trial Judiciary is uniform even if their individual judicial philosophies diverge. Most of all, they have exemplified The Judge Advocate General's (JAG) Corps's four constants in all that they do: Principled Counsel, Mastery of the Law, Stewardship, and Servant Leadership. Each have dedicated themselves to those they lead and believes that judges must maintain decisional independence, master their craft, and better our profession and Corps. I asked each of them the same questions—questions designed to capture what they chose to do with the opportunities they were given, and their advice for those who may seek to follow the same path. I thoroughly enjoyed my conversations with five giants of our Trial Judiciary and hope you take away insights for your own practice. Below is a brief summary of the career paths that led them to the Trial Judiciary, followed by their answers to my questions[3]:

Colonel (Retired) Stephen Henley (2006–2011)

Colonel Henley served as Trial Counsel, 2d Infantry Division, Camp Casey, Korea; Training Officer, Trial Counsel Assistance Program, Arlington, Virginia; Special Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia; Chief, Administrative Law, U.S. Military Academy, West Point, New York; Senior Defense Counsel, 2d Infantry Division, Camp Casey, Korea; Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; Military Judge at Fort Hood, Texas, Mannheim, Germany, and Fort Bragg, North Carolina; and CTJ, Arlington, Virginia. He served as CTJ for over five years until he retired in 2011.

Colonel (Retired) Michael Hargis (2011–2014)

Colonel Hargis served as Trial Defense Counsel, 2d Armored Division, Fort Hood, Texas; Administrative Law Attorney, III Corps, Fort Hood, Texas; Chief, Military Justice, 6th Infantry Division (Light), Fort Wainwright, Alaska; Senior Defense Counsel, Fort Hood, Texas; Professor, Criminal Law Department, The Judge Ad-

vocate General's Legal Center and School, Charlottesville, Virginia; Military Judge at Fort Drum, New York, Fort Carson, Colorado, and Fort Bliss, Texas; Staff Judge Advocate, the U.S. Army Special Forces Command (Airborne), Fort Bragg, North Carolina; Chief Circuit Judge at Fort Bliss and Kuwait/Afghanistan/Iraq; and CTJ, Fort Belvoir, Virginia. Judge Hargis served as CTJ for three years.

Colonel (Retired) Tara Osborn (2014–2017)
Colonel Osborn served as Chief, International Law, Deputy Officer-in-Charge, and Trial Counsel/Assistant S3 Operations Officer, 1st Armored Division, Germany, and Southwest Asia; Chief, Administrative Law, Military District of Washington; Litigation Attorney, Senior Litigation Attorney, and Chief of Military Personnel Branch at Litigation Division; Chief, Military Justice, III Corps, Fort Hood, Texas; Deputy Staff Judge Advocate and Staff Judge Advocate, 2d Infantry Division, Camp Red Cloud, Korea; Strategic Planner, Joint Staff, District of Columbia; Military Judge, Fort Stewart, Georgia; Chief Circuit Judge, Fort Bragg, North Carolina; and CTJ, Fort Belvoir, Virginia. Judge Osborn served as CTJ for three years.

Colonel Mark Bridges (2017–2019)
Colonel Bridges served as Trial Counsel and in other positions at Fort Stewart, Georgia; Appellate Attorney, Defense Appellate Division, Arlington, Virginia; Chief, Military Justice, Fort Bliss, Texas; Senior Defense Counsel, Hawaii; Defense Counsel, Office of Military Commissions, District of Columbia; Assistant Professor of Law, U.S. Military Academy, West Point, New York; Staff Judge Advocate, 25th Infantry Division, Schofield Barracks, Hawaii; Military Judge at Fort Carson, Colorado, Korea, and Hawaii; Chief Circuit Judge, Hawaii; and CTJ, Fort Belvoir, Virginia. Judge Bridges served as CTJ for two years.

Colonel Tim Hayes (2019–Present)
Colonel Hayes served as Administrative Law Attorney and Trial Counsel, Fort Sill, Oklahoma; Officer-in-Charge at Giessen Law Center, Germany; Chief of Operational Law, 1st Armored Division, Baghdad, Iraq; Senior Defense Counsel, Fort Hood, Texas; Deputy Staff Judge Advocate, Fort Sill, Oklahoma; Military Judge, Fort Hood, Texas, and Fort Bliss, Texas; Staff Judge Advocate, 2d Infantry Division, Camp Casey, Korea; Chief Circuit Judge, Joint Base Lewis-McChord; and CTJ, Fort Belvoir, Virginia. Judge Hayes has been serving as CTJ since 2019.

What was your vision for the Trial Judiciary when you became the CTJ?

Colonel (Retired) Stephen Henley
For Judge Henley, who is the only one in this group who had not served as a Chief Circuit Judge before becoming the CTJ, this job was not about one person, but what he could do for the entire Trial Judiciary. He was the CTJ for more than five years until he retired because he loved the job and what he could do for the institution. His vision was to leave the Trial Judiciary in a better place than when he came in. To that end, he wanted to maintain the Trial Judiciary's reputation as fair and impartial, while ensuring decisional independence—the ability to rule as the judge sees fit without professional or personal consequences. Judges may err, but there is a judicial remedy that does not include commanders or staff judge advocates calling for the removal of a particular judge. As Chief Justice Roberts famously said, "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them."[4] Similarly, in the military context, we do not have government judges or defense judges; we have judges who are doing their level best to ensure fairness of the proceedings. Judge Henley had to envision what the Trial Judiciary was going to look like in five years and prepare people now to take the bench.[5] Part of that was to grow the bench with competent, qualified judges who could make the right decisions under pressure; recognized that they could not be the story; and knew that, if they became the story, they had lost control of the courtroom.

Colonel (Retired) Michael Hargis
When Judge Hargis took over from Judge Henley, he felt like the kid that had been given the key to the family car by his father; he had to make sure he did not wreck it. As he inherited a fabulous organization, he started by ensuring he did not break it. His vision later morphed to focus on the individual judges within the Trial Judiciary and the tools they needed to do their job effectively and well. He famously told Malcolm (Mac) Squires, Army Court of Criminal Appeals (ACCA) Clerk of Court, that his goal was to put ACCA out of business. While he recognized that eliminating mistakes was an impossible goal (he was dealing with people, and any organization dealing with people is going to make mistakes), he hoped to reduce them to the lowest number possible. To that end, he sought to have the judges embrace a trial philosophy of "fair, right, and once." Institutionally, he thought it best to structure the Trial Judiciary into three equal tiers: 1) people who came into the Trial Judiciary for their three-year tour (allowing them to decide the Trial Judiciary was not for them, or for the Trial Judiciary to decide that the bench was not for them); 2) people who were good judges, but wanted to go do something else and then return at a later date; and 3) judges—some "returnees" from the second group—who are in the Trial Judiciary for the rest of their career. Judges in the last group are the backbone of the Trial Judiciary. In his view, it was absolutely vital that the Trial Judiciary have this one-third "greybeards" because these are the judges who could try anything and everything. Borrowing from a special operations "truth," competent judges cannot be created after a capital or high profile case arises.

Colonel (Retired) Tara Osborn
When she became the CTJ in 2014, the Judiciary was (and still is) near and dear to Judge Osborn's heart. By that time, she had served in the Judiciary for over seven years. In those seven years, she learned—as all the other judges did—that judging is first and foremost a human endeavor. Therefore, identifying and bringing in the right judges, training them, and putting them in the right places was critically important. She also believes in the Trial Judiciary as an institution and the importance of main-

taining its proper role and independence; of preserving its integrity in its policies, day-to-day decisions, and commitments; and increasing the stature of the Trial Judiciary both within the Army JAG Corps and outside of the Army with sister Service judiciaries, civilian judge counterparts, and through community outreach with bar associations and academia.

Colonel Mark Bridges
"Fair and efficient" was Judge Bridges's mantra. Fairness is non-negotiable. A judge must be fair, and appear fair, to litigants and the public. It is not about giving the parties what they want; instead, it's about what the law requires based on the judge's best understanding and the facts. Judges must render their decisions without fear of what may occur on appeal. Efficiency is equally critical to our court-martial practice. Part of a military judge's responsibility is to get cases to trial as quickly as fairness demands. Military justice is designed to be swift and efficient to ensure good order and discipline. If court-martial practice is not efficient, commanders will find a different way to achieve good order and discipline.

Colonel Tim Hayes
"Independent but invested" is the vision that Judge Hayes has impressed upon the Trial Judiciary—you will see the motto printed on the Trial Judiciary's newest coins. When he became the CTJ, the Trial Judiciary was just hitting its 50th anniversary mark. By this point, the Trial Judiciary had transformed itself from law officers appointed by the convening authority to an independent Trial Judiciary where judges answer only to other judges in their rating chain. There is freedom for judges to do what they think is appropriate within the law. Nonetheless, judges are still senior members of the firm—the JAG Corps. Judge Hayes wants to ensure that judges do not become so independent that they cease to appreciate their responsibility to steward our Corps. All members of the Corps have a responsibility to improve the profession and the Corps. Judges have a vested interest in ensuring that the counsel who appear before them improve. Better counsel become better supervisors and better staff judge advocates. He wants judges to be a presence in our greater communities and to look for opportunities to impartially mentor counsel, whether it is done in the form of bridging the gap, gateway sessions, or leader professional development programs. His core belief is that judges can maintain independence and still be invested in the people comprising the greater law firm that is the JAG Corps.

What was your proudest moment or accomplishment as the CTJ?

Colonel (Retired) Stephen Henley
After serving as the CTJ for more than five years, he left the Judiciary having selected more than three-quarters of those on the bench; none had been censured or removed.

Colonel (Retired) Michael Hargis
Similar to Judge Henley, Judge Hargis was most proud watching people he mentored take over and knowing that the organization he loves dearly is in good hands.

Colonel (Retired) Tara Osborn
From an institutional standpoint, Judge Osborn was most proud of securing authorizations for additional judges. With all the changes in military justice, cases were becoming increasingly more complex and requiring more time to litigate. Case numbers were not as high, but time spent in trials and motions practice had increased significantly. There was a resurgence in capital cases. Formalizing the authorizations on the Army's books ensured the Trial Judiciary has a sufficient number of judges to "answer the docket," is geographically available worldwide for timely justice, and is flexible enough to respond quickly to whatever contingencies arise. She was also proud of those moments when judges she trained tried their first case, tried it well, and came to her beaming with pride for what they had done. She was proud because she remembers that moment herself.

Colonel Mark Bridges
The transition into the Military Justice Act of 2016 defined Judge Bridges's tenure as the CTJ. The transition was an intensive and time-consuming effort that took up most of his time and energy. Current and new judges had to be trained, especially the incoming judges who had to learn how to operate under two different systems. The *Military Judges' Benchbook*[6] also had to be completely revamped so that judges and counsel could navigate between the legacy system and the new system.

Colonel Tim Hayes
Judge Hayes knew he wanted to be a military judge since he was a freshman in college. He always remembers the moment when he was cold-called by Personnel, Plans, and Training Office (PPTO) and asked if he wanted to stay at Fort Hood for an additional year to be a judge. The answer was, of course, yes. As a CTJ, he was most proud of his ability to identify others whose dream and passion was also to be a judge and give them the same opportunity. Working hard to see deserving judges get promoted after joining the Trial Judiciary was the icing on the cake.

What was your favorite part about being the CTJ?

Colonel (Retired) Stephen Henley
Colonel (Retired) Henley's favorite part was the opportunity to mentor and support the judges in the field so they could do their job. The responsibilities of a CTJ were challenging and could fill the entire day, but he believed that CTJs must also lead from the front and be willing and able to take the hard cases and not just be a manager. His goal was to travel to all the different installations to see how the Trial Judiciary is supporting the Army mission. He also treasured the relationship between judges and court reporters; they drive how judges view the job. Court reporters are a military judge's best friend, or worst enemy, and are so important to the success of the military justice system in the Army. They become part of your family; he has missed that since retiring.

Colonel (Retired) Michael Hargis
He loved watching people succeed and recognizing them for their hard work. As a CTJ and judge, he strived every day to pay it forward by doing something for someone else, as others had done for him. He felt he could best make a difference by helping others improve and succeed.

Colonel (Retired) Tara Osborn
There is an art to judging and a way that judges think. She loved the judge's mindset. She also loved seeing young judges develop that mindset, the direct impact that judges can have on people, and their opportunity to make weighty decisions and do what they think is right for the system and those in it.

Colonel Mark Bridges
His favorite part was planning and executing the Military Judge Course each year. It was always professionally and personally rewarding to bring a new crop of judges onto the bench. The professors in the Criminal Law Department at The Judge Advocate General's Legal Center and School were fantastic. It was also rewarding because he got to work with and become friends with the CTJs from the other Services.

Colonel Tim Hayes
He enjoys being the person that gets to protect the autonomy of trial judges and resourcing them to succeed. When he is able to preside over cases, he especially enjoys seeing counsel improve. He described it as having a free ticket to the big game and the best seat in the house when presiding over a trial.

What was your toughest challenge as a CTJ?

Colonel (Retired) Stephen Henley
For him, the toughest challenge as CTJ was the responsibility of identifying the best people for the bench, which is also his advice to the next CTJ—find the best and get them on the bench. He had a really good working relationship with the Chief of PPTO and The Judge Advocate General (TJAG). He actively recruited people who the other senior leaders also wanted in their organization. His relationships with the Chief of PPTO and TJAG were crucial in making a case for why it was in the best interest of the Army for those individuals to come to the bench. If he waited for people to go to him, he would not be getting the best people—half of them might have really wanted to be a judge while others were simply choosing location. During his tenure as the CTJ, he felt that while he did not get everybody he wanted, he was never forced to take someone he did not want. He firmly believed that recruiting and retaining talent was how a CTJ could have a real impact on the Trial Judiciary and the JAG Corps.

Colonel (Retired) Michael Hargis
For Judge Hargis, the toughest challenge for a judge is sentencing. He frequently told his judges that if—at any point—they close the door for deliberations and think to themselves that this is easy, they should call him because that would mean it is time for them to find a new job. From a supervisory perspective, it was also tough to manage people—whether it was selecting people to be judges or managing people who were judges (with discipline being a subset of that management). Finally, as the CTJ, defending the Trial Judiciary from those who wanted to interfere with the institution was a challenge. It frustrated him that there were people who wanted to interfere with the institution he held dear, and he believed his job as the CTJ included strapping on the armor and stopping those interferences.

Colonel (Retired) Tara Osborn
Similar to Judge Hargis, Judge Osborn believes the toughest challenge for an individual judge is sentencing. The weight and responsibility of those decisions are enormous. She was reminded of one judge she knew who would visit a confinement facility every year as a concrete reminder of what a sentence to *X* amount of confinement truly means. The toughest challenges for her as the CTJ involved addressing allegations of judicial misconduct. No parent wants that complaint about one of their kids, and no CTJ wants that complaint about one of the Army's judges. There is a lengthy process and framework in place to investigate and resolve these matters. The CTJ must follow the process, and deal with a host of issues—accountability, appropriate discipline, and guarding the institutional integrity of the court.

Colonel Mark Bridges
Once again, as with other CTJs, the toughest challenge for Judge Bridges was sentencing, as well as managing and identifying talent. The wide range of discretion in sentencing was a lot of weight on the judges' shoulders in determining what an appropriate sentence should be. Like Judge Hargis, he would tell other judges that if sentencing ever becomes easy, look for a different job. Similarly, it was never easy managing judicial misconduct. It was bad for the institution and something no CTJ wants to encounter. Further echoing Judge Henley, maintaining an appropriate level of experience on the bench and recognizing that the JAG Corps might need the people he had requested to do other jobs was always a balancing act. The CTJ has to identify talent early and keep those people on the bench.

Colonel Tim Hayes
As with all CTJs, Judge Hayes hopes never to have to deal with judicial misconduct because it tarnishes the reputation of the institution. It is also extremely challenging when he has to have tough conversations with judges who do not have the judicial aptitude or temperament necessary for continued service on the bench. He further agreed with the other CTJs (and most judges) that sentencing is never easy, and it should never become comfortable. Judges should agonize over sentencing. And, of course, keeping courts open and safe during a pandemic has been a challenge. Training new judges remotely and not gathering for training has been less than ideal.

What was the strangest or funniest moment you have seen in the courtroom?

Colonel (Retired) Stephen Henley
When he was a judge, he enjoyed mentoring counsel and speaking openly with counsel during bridging the gap sessions about how they could improve their courtroom performance. After a series of guilty pleas, he remembers telling defense counsel during one such session that they should distinguish their clients during sentencing and try to show what makes their client unique to the Army at large. In the next series of trials, defense counsel accepted the advice and got creative. In one case where the accused was a cook, (from the bench) Judge Henley saw that there was something covered up at the counsel table, but he did not know what it was. During sentencing, defense counsel got up and said words to

the effect of, "Your Honor, my client wants to show you something." The accused had baked Judge Henley a cake and asked, "Can I cut you a slice, Your Honor?" Judge Henley then turned to the trial counsel and asked for his thoughts on how to memorialize the cake for the record and how to get the cake to Mr. Malcolm Squires at the Army Court of Criminal Appeals. Other unique presentations included a musician who played the trumpet; a computer specialist who wrote a computer program on how a company could track supplies; and, best of all, an original rap song from an aspiring rapper. These experiences were gratifying to him because it showed that counsel took what he said to heart.

Colonel (Retired) Michael Hargis
During a guilty plea to a kidnapping charge, the accused told Judge Hargis that "Brian" told him to do it. Naturally, Judge Hargis asked who Brian was. "Brian is my imaginary friend, Your Honor." Judge Hargis prided himself on keeping a straight face during trial, but he is certain that his eyes got big at this. He turned to the accused's civilian defense counsel and said, "I think we have a problem. Do you want a recess?" Civilian defense counsel got up and said, "Your Honor, this is the first time I'm hearing about Brian; so yes, we'd like a recess."

Colonel (Retired) Tara Osborn
The strangest moment touches on one of her greatest concerns for the Trial Judiciary—courtroom security. During one of her first cases at Fort Stewart, Georgia, a fight broke out in the courtroom when the grandmother of the child victim started banging the accused over the head with her purse and yelled, "I told you never to touch her!" It taught her early on how quickly something can go wrong in the courtroom.

The funniest moment also occurred in one of her earliest cases when a Nigerian witness who, after he testified, stepped down from the witness stand and—as customary in his country when addressing the court—bowed and said to Judge Osborn, "Thank you, your Ladyship, your Excellency, my Lord." During recess, the court reporter came back and said that the trial counsel, who was brand new, wanted to know if that is how he also should address Judge Osborn.

Colonel Mark Bridges
The strangest moment came during his very first court-martial as a trial counsel. During the sentencing proceeding of the guilty plea, the defense counsel put on evidence that the accused believed he was a vampire. The accused had made a coffin, which he kept in the basement and slept in. The accused also went to his dentist and requested that his teeth be sharpened. His dentist declined.

Colonel Tim Hayes
Two times, and in two different courtrooms, someone walked onto the bench from the judge's entrance while the court was in session. One time it was a panel member and another time it was some random guy who wanted to pay his parking ticket or something. Needless to say, it is extremely disconcerting.

What was your most memorable case?

Colonel (Retired) Stephen Henley
Each of the 1,000-plus cases which he presided over were memorable because they were important for the practitioners, parties, witnesses, spectators, panel members, and victims. For most of the individuals involved, nothing was more unforgettable than that case on that day. He strived to treat all who appeared before him the same, regardless of rank, offense, or publicity.

Colonel (Retired) Michael Hargis
As a judge, each time he took the bench, he tried his utmost to do his job well; but several instances stood out. First, most judges like him do not know what happens once they have adjudged a sentence. In one case, the accused pled guilty to absence without leave while his unit was downrange. Based on the extenuation and mitigation evidence, he recommended suspension of the bad-conduct discharge and most of the confinement, on the condition that the accused return downrange and perform without incident. He found out later that the convening authority accepted his recommendation, the accused went downrange, performed without incident, and was subsequently promoted. In another instance, he had the father of an accused come up to him after the trial was over to thank him for taking the time to listen and give his son a fair trial. He took that to heart because, in his mind, there are few higher compliments to a judge than to be called "fair."

Colonel (Retired) Tara Osborn
Each case is memorable in some way, and certainly for the accused and victims involved, it is very likely the most important or memorable occurrence in their lives. That is something a judge can never lose sight of. Personally, for Judge Osborn, it was the very first case she presided over. It was a misdemeanor case, and she can remember what it was about, who was in the courtroom, and everything about the proceedings. Also especially memorable were the capital cases she presided over. Anytime death is on the table, it is different. All the issues you might face in a case are magnified, more challenging, and take longer to resolve.

Colonel Mark Bridges
He typically forgets about a case two weeks after it is done. He, however, remembers a capital resentencing case he presided over for two reasons; first, there were so few capital cases in the military and second, its sheer complexity was unparalleled. The case took four weeks, and was the longest case he ever presided over. He also remembers the case because it was an Air Force case; and, even though the offense occurred more than a decade earlier, the emotions were still very raw.

Colonel Tim Hayes
As with Judge Hargis, Judge Hayes believes that every time you step on the bench, you can make a difference. It is why he wanted to be a judge—the ability to have a positive effect on someone's life and the greater community. He remembers a case where the accused pled guilty to absence without leave. The accused presented compelling extenuation and mitigation evidence that led Judge Hayes to adjudge no punishment. He further recommended in writing to the convening authority that they not administratively separate the accused, but give

him a medical discharge if necessary. The convening authority accepted his recommendation, and the unit treated the accused with an eye toward retention, even promoting him. While the accused was ultimately medically retired, this case demonstrated to Judge Hayes the human drama of every case, that everyone has a story, and there is no such thing as a simple case.

Is there a right path to the Trial Judiciary?

Colonel (Retired) Stephen Henley
No, and he would advise against anyone who plans out their entire career with that one goal in mind as they may be disappointed if they do not get it in the end. Those who are interested in the Trial Judiciary can certainly make their interests known, but should focus on doing what they like and like what they are doing. Go with your passion. If it is criminal law, so be it. For instance, he never planned his career with the Trial Judiciary or becoming the CTJ as the end goal. Half-jokingly, he was told that Judge Denise Vowell, his predecessor as the CTJ, had gathered all the Army trial judges at a joint training conference and told them that she was retiring in a couple of months and needed to submit a name to TJAG as her replacement. She said that anyone who does not want to be nominated should take a step back. Everybody stepped back but him, since he was presiding over a court-martial and not at the conference. Judge Vowell then called him later that day and said "Congratulations. The vote was unanimous!" The moral of the story is this: When the opportunity arises, be ready to accept it, but do not plan your entire career around it.

Colonel (Retired) Michael Hargis
Yes, there is a right path to the Trial Judiciary. When he was the CTJ, he looked for those with extensive military justice experience; and, while not a controlling factor, experience on both sides of the aisle. To him, experience on only one side may indicate a philosophical bent—in either direction—that he did not want judges to have. To him, it was also important that judges have experience on both sides so that they could understand, firsthand, how both sides operate. Most of all, he looked for those with a fire in their belly to be a judge—period, not judge only at a specific location. He wanted those who were 110 percent invested in being a judge because judges are not on the bench to win a popularity contest. They have to be able to make hard decisions based on the facts and law as best they can know it, even if those decisions are contrary to the prevailing wind.

Colonel (Retired) Tara Osborn
No, there is no right path to the Trial Judiciary. Cases are about real people, and not abstract legal theories. She therefore looked for those who had a broad array of experiences, personal and professional. From a professional standpoint, criminal law experience is key; but it is not the only professional experience that makes a good judge. Lawyers handling civil cases in our litigation divisions, for example, are consistently drafting and filing motions, operating under the rules of evidence and civil procedure, and appearing in federal court. They may very well be some of our best trial practitioners. For leadership jobs in the JAG Corps, it is important to understand Soldiers, commanders, and good order and discipline. From a personal standpoint, every experience broadens one's perspective. We instruct panel members to evaluate the evidence using their knowledge of human nature and the ways of the world. That knowledge will be different if your life experiences are different. This diversity of experience and perspective enhances the legitimacy of the court. Good judges are those with uncompromising character and integrity, have an ability to make tough and often unpopular decisions, are fair-minded, can operate independently, and understand and reflect the military community the judiciary serves. Good judges want to be a judge for the right reasons—not for prestige or post-military employment prospects, nor as a consolation prize because they did not get their choice of assignment elsewhere. So yes, we are looking for judges with criminal law experience, but we are not looking for criminal law automatons—there is so much more to being a judge than that, and there is more than one pathway to get there.

Colonel Mark Bridges
Yes, there is a right path to the Trial Judiciary. Since military judges only deal with criminal law cases, judges need to be steeped in criminal law to be effective. More than any other job in the JAG Corps, the position of military judge requires technical expertise. When a judge is in the courtroom, they are a judge of one. Judging is not a team sport, and you really have to know what you are doing because you do not always have the time or ability to phone a friend. People who want to be judges should therefore look to get military justice jobs that get them into the courtroom. The trial advocacy piece is crucial. Judge Bridges preferred those with experience on both sides of the aisle, in addition to appellate experience. Basically, the more military justice experience you have, the more prepared you will be.

Colonel Tim Hayes
While there are differing schools of thought, the ideal path to the Trial Judiciary for him would be someone who has extensive criminal law experience on both sides of the aisle. He further prefers to bring a military justice practitioner to the bench early in their career as an O5 for one tour and send them back out for nonjudicial leadership assignments, with the possibility of returning to the bench for the remainder of their career. This way, people will get their first judicial experience early enough so that they can still be of use to our Corps and also the Trial Judiciary afterwards. We need O6s with experience to remain on the bench for sufficient periods of time to try the hard cases and train the newer judges, but that only happens when we start identifying them early.

Do you have any advice for those aspiring to be a judge?

Colonel (Retired) Stephen Henley
One, be prepared to live in isolation. Judging is a lonely existence which suited him since he is, by nature, more reserved. Judges must be cognizant of the concerns people would have if they became intimately involved with the local JAG Corps community. While judges can engage with people, they must always be conscious of

the perception that they are favoring one side or the other. Two, while it is easy as a trial or defense counsel to be an advocate for one side or the other, as a military judge, you must be comfortable making quick decisions—then living with the consequences and taking the criticisms that come with making mistakes. All judges are eventually reversed. It is hard for some people to see their name in appellate decisions along with the words "plain error" and "abuse of discretion." As a military judge, expect little thanks but much criticism.

Colonel (Retired) Michael Hargis
It is a hard job and a lonely one. While you can talk to other judges, no one is going to decide the case for you. This can be frightening for brand new judges, but judging should be hard. As mentioned before, he felt if a judge ever closed the door on sentencing deliberations and thought "this is an easy one," that judge should ask for another job.

Colonel (Retired) Tara Osborn
Be prepared to work hard and shoulder the weight of making decisions that affect people's lives every day. Being a judge was the hardest job she ever had. Because judging is ultimately a human endeavor, you should seek a broad and diverse array of experiences. Courtroom experience is important, but so is leadership experience. Similarly, criminal law experience is important, but so is experience in other disciplines that hone your trial and legal skills. As the CTJ, Colonel Osborn also thought it important that the Trial Judiciary reflects the diversity of the Army that it serves. If you want people to aspire to be on the bench, they must be able to look at the Trial Judiciary and see people who look like them, who share similar backgrounds, and to know that the pathway is open.

Colonel Mark Bridges
Get as many different assignments in the criminal law arena as you can, especially those that get you into the courtroom. Let the judges you appear before know that you are interested in the bench since the Trial Judiciary is always tracking people and their interest in joining the Trial Judiciary. It is also critical that you think about your approach to the jobs you have had and how they reflect on your temperament and ability to work with other people. The JAG Corps is a small place. You either know people or have heard of their reputation. If you have a scorched earth policy as an advocate, that will not do well for you. There is a way to advocate zealously for the side you are representing and yet be an easy person to work with. You should always think beyond the immediate case at bar. This is true of any job but especially important as a judge.

Chief Trial Judge Colonel Timothy Hayes stands next to photos of the previous four Chief Trial Judges: Colonel Stephen Henley (upper left), Colonel Michael Hargis (upper right), Colonel Tara Osborn (lower left), and Colonel Mark Bridges (lower right). (Photo courtesy of author)

Colonel Tim Hayes
Besides getting experience on both sides of the aisle and letting your boss know of your desire to be a judge, seek out mentorship from a judge or judges. You should do this not just for a recommendation when the time comes, but for mentorship along the way as to which jobs to take, how to approach issues, et cetera. You cannot talk about current cases with the judge you appear before, but there is a lot of mentoring a judge can do that is not *ex parte*. This can be a continuing relationship as long as you are not regularly appearing before that judge.

Do you have any advice for justice leaders?

Colonel (Retired) Stephen Henley
Remember that military justice is our Corps's core mission. We cannot contract out military justice. When he started out in 1987, it was litigation and criminal law that were attracting the talent because you could make a career out of it. If we do not make military justice an attractive career field, we will end up with a group of transients who are simply checking the block before they go somewhere else.

Colonel (Retired) Michael Hargis
Train, train, and train some more. Be prepared, be prepared, and be prepared. Military justice is serious business and must be viewed that way. You must instill in people the sense to do what is right all the time. You are not there to win, but to do justice (for the government) and zealously represent your client within the boundaries of the law (for the defense). Do not play hide the ball; most judges do not tolerate gamesmanship. Understand that justice is a process, not a result. It is not about getting

a conviction or an acquittal. As he was once told by his staff judge advocate: "Do a thorough investigation, complete preparation, and a professional presentation in court. If you have done those three things, I don't care about the result because the result is just the system doing its job." Because process is so important, do not force people into the courtroom. It is not good for the system, that person, or our Corps. Plug and play does not work for criminal law, and particularly for the Trial Judiciary, as expertise is crucial.

Colonel (Retired) Tara Osborn
Be aware that when you criticize a judge or the Judiciary, you create an environment and culture where that is acceptable. There are a number of negative consequences that can flow from that. It becomes a blame game and that is not healthy for the military justice system, or the integrity of the institution. Uphold the institution of the Trial Judiciary and our military justice system. Promote the institution by accepting, and respecting, your losses as well as your wins.

Colonel Mark Bridges
Train, train, and train some more. You have to train your counsel and do it on a weekly basis. Focus on evidentiary issues. Remember that you do not have to do it all yourself every week. You can designate your counsel for specific training each week. For instance, a counsel who just handled a DNA issue at trial can lead training on that topic. You must also go to court and see what your counsel are actually doing in the courtroom. If judges hold bridging the gap or other training sessions, you must attend. You must stay connected so you can experience what your counsel are going through. That is part of leading by example. Get in the courtroom and be an advocate yourself.

Colonel Tim Hayes
Develop a military justice philosophy and inculcate it in your team. Like the Trial Judiciary's vision of independent but invested, you have to know where you want to go. Your counsel need to know what right looks like and what your expectations are. Justice is a process, not a result. If you focus on the process, the results will take care of themselves. Finally, train your counsel and observe them in court, and ask the judges to participate in your training program.

What is your advice to the next Chief Trial Judge?

Colonel (Retired) Stephen Henley
Get the right people to put on the robe and keep them there.

Colonel (Retired) Michael Hargis
It is a thankless job and you may not want to do it, but you must because the team is that important. The Trial Judiciary needs someone who is willing to be its cheerleader and defender. Recognize that you may not have time to do what you want to accomplish when you assume the position because you may be putting out brushfires constantly. Provide judges with the tools to do their job and stay ahead of changes to the legal landscape. Run interference with higher so that your judges can do their job. It may be unpleasant sometimes to have to do that, but you need to have the backbone to do it. You are not there to be liked. Being a CTJ is like being a parent; it is not for the faint of heart.

Colonel (Retired) Tara Osborn
She did not want to presume to give advice to the next CTJ—publicly, that is. But she makes the same offer that she suspects other CTJs have made: it is a relatively small group of judges who have held the CTJ job and understand its unique challenges and demands, so the next CTJ should always feel free to reach out and brainstorm with any of them. In fact, if she had to give advice, it would be just that—reach out for advice anytime needed. And remember that all of us who have held the job are hoping for your success, because your success is the Trial Judiciary's success.

Colonel Mark Bridges
Do not get sucked into the D.C. vortex and lose focus and connection with the military judges in the field. The CTJ still needs to know what is going on in the courtroom. The position is not about you. You were advanced into the job to ensure the efficiency and independence of the Trial Judiciary. Try not to dictate too many policies on what the judges are supposed to do.

Colonel Tim Hayes
Run! If you cannot run away from the position, start scouting talent. Start talking to people who would make good judges and those who are good judges now. You need good people to come to the bench and stay. You should also find a confidant, somebody who understands what you are going through. This person can be a current judge or a former judge, in or outside of the Army. Be intentional about getting out to observe judges in trial, and talk to the leadership and train the counsel during those trips. It is more valuable and more enjoyable than anything you will do in your office, and we all know the Court Administrator runs the Trial Judiciary anyways—thanks, Carol!

Is there anything you would do differently?

Colonel (Retired) Stephen Henley
He had an opportunity when he was CTJ to reduce the size of the Trial Judiciary, but he did not. At the time, the thought process was to prepare for the next World War—If we went to war now, would we be able to run a justice shop? In hindsight, he should have reduced the size of the Trial Judiciary by half, both the active and reserve component. Judges need trials (not guilty pleas) to obtain and maintain proficiency, and we are trying fewer and fewer cases. Judges have to always think about handling objections and arguments, maintaining control of the courtroom, dealing with panel members, and handling the internal and external pressures that accompany any given case. With the opportunity of presiding over fewer and fewer cases, why would someone want to go into justice and stay there? We may also reach a point where we have regular cross-service justice because there are simply not enough cases across the Services. He never regretted his personnel decisions or trial decisions because you cannot live in the past. He, however, regretted not taking the opportunity to reduce the size of the Trial Judiciary in order to ensure judges' long-term competency.

Colonel (Retired) Michael Hargis
When judges leave the Trial Judiciary, they are typically given a statue of lady justice. If

he had to do it again—and this may sound insignificant, but to him it is important—he would hand them out when the judges graduate from the Military Judge Course, not at the end of their term as a judge. He would expect the judges to place the statue somewhere within eyesight of their desk, as a constant reminder that while a judge may be assigned to TJAG, a judge works for lady justice.

Colonel (Retired) Tara Osborn

She regrets not having done more to ensure courtroom and judicial security. There has been an alarming and disturbing increase in the number of threats and attacks on judges in the United States, and military judges are not immune simply because our courtrooms are on gated military installations. This applies to court reporters and court personnel too. We have not done enough and are woefully behind when compared with our civilian counterparts, and it is merely a matter of time before something truly tragic happens inside or outside the courtroom. The greatest security risks are often not in the high-profile cases, but in the more "routine" cases where emotions among the parties run high and day-to-day complacency among court personnel sets in. In addition to security technology and design, the Trial Judiciary needs greater awareness and a comprehensive security plan for all of its courtrooms.

Colonel Mark Bridges

He regretted not getting out to the field more to visit the judges or getting into the courtroom more. He had looked at his CTJ duties as 1) representing the Trial Judiciary on military justice policy issues, to include being advisor and liaison to the Office of The Judge Advocate General and TJAG; 2) the selection and training of new judges; and 3) revising the *Military Judges' Benchbook* and the *Rules of Practice Before Army Courts-Martial*[7]—the policy documents judges live by. It is not enough for CTJs to rely on their chief circuit judges. Chief Trial Judges must get in the courtroom themselves. If a CTJ has been in the job for three years without being in the courtroom, they lose the ability to know what is going on in the courtroom. He said this having been warned by his predecessors about the dangers of getting caught up in his daily duties.

Colonel Tim Hayes

Get more sleep. He came to the job with a lot of ideas and recognized he only had a certain amount of time to implement them. If he has ten ideas, maybe only three are good, and only one gets implemented. But that beats doing nothing. Judge Hayes is pursuing initiatives that include providing clerk support to trial judges, the creation of magistrate judge positions to give junior judge advocates judicial opportunities, and increasing security measures in our courtrooms. He acknowledges he is still learning to flex the muscles of the job to see what he can do to improve the organization and looks forward to continuing to do that. He has been pleasantly surprised by the opportunities he has had thus far to make positive changes, and credits supportive JAG Corps leadership, great mentors, and a fantastic team of judges for making that possible. **TAL**

COL (Retired) Ku recently retired after 22 years in the U.S. Army as a judge advocate. She served as a military judge from 2011 to 2012 in the National Capital Region and then from 2017 to 2021 at Fort Bragg, North Carolina.

Notes

1. When Colonel (COL) (Retired) Stephen Henley was teaching evidence at The Judge Advocate General's Legal Center and School, he used to joke with a fellow instructor—whose teaching portfolio included the 4th Amendment—that the 4th Amendment was effectively unnecessary in the military and that it would be best if that instructor's platform time was reduced and his expanded; he still feels that way. That fellow instructor later rose through the ranks to become The 40th Judge Advocate General and took to calling COL Henley (and each of his successors) the Chief Trial Judge of the *Entire* U.S. Army (emphasis added).

2. Ruth Bader Ginsburg, Associate Justice, U.S. Sup. Ct., Stanford University Rathbun Lecture: On a Meaningful Life (Feb. 6, 2004).

3. While these answers are not verbatim, each judge had the opportunity to review and verify the contents of this article.

4. *See* Pete Williams & Associated Press, *In Rare Rebuke, Chief Justice Roberts Slams Trump for Comment About "Obama Judge,"* NBC News, https://www.nbcnews.com/politics/supreme-court/rare-rebuke-chief-justice-roberts-slams-trump-comment-about-obama-n939016 (Nov. 21, 2018, 4:19 PM).

5. In 2008, Judge Henley created the Judicial Apprenticeship Program as part of his efforts to grow the bench. The author had the privilege of participating in this program from 2011 to 2012 before the program ended. This program was designed to increase the military justice experience level of judge advocates (JAs) so there would be a bigger pool of judicial candidates. It was a one-year program where select Army JAs first attended the Military Judge Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Upon graduating from the course, these JAs were certified as qualified to preside over courts-martial, including general courts-martial. These JAs then worked under the supervision of more senior military judges at various installations. At the end of the year, they were reassigned to a nonjudicial assignment and could apply at a later time for a regular tour in the Trial Judiciary, not as an apprentice. As they returned to field assignments after the apprenticeship, it was hoped and expected that they would share their experience on the bench with younger JAs and train them on how to become better trial advocates, thus increasing the pool of future judicial candidates.

6. U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook (2020).

7. *See* Trial Judiciary, U.S. Dep't of Army, Rules of Practice Before Army Courts-Martial (2020).

(Credit: fran_kie – stock.adobe.com)

No. 2

Avoiding the Pitfalls of Investigating Federal Civilian Employees Pursuant to Army Regulation 15-6

By Eric R. Hammerschmidt

Obtaining testimony from federal civilian employees during an administrative investigation pursuant to Army Regulation (AR) 15-6[1] can be difficult. If approached improperly or without careful analysis, it can adversely affect both the investigation and any follow-on corrective action. This article examines some of the legal protections afforded to Department of the Army (DA) Civilian employees being interviewed as part of an AR 15-6 investigation, specifically when employee misconduct or criminal activity is suspected. This article is not focused on the AR 15-6 Board of Officers procedures, where a designated respondent has very specific procedural representational rights (including the right to an attorney),[2] but rather on investigating officers' (IO) administrative investigations into allegations of administrative misconduct against a Civilian.[3]

This article is a basic primer for judge advocates (JAs) and IOs interviewing[4] DA Civilians (both as witnesses and as subjects of AR 15-6 investigations). This article first summarizes the applicable portions of AR 15-6 dealing with Civilians. Next, outlining the relevant statutes and case law concerning the investigatory examinations of civilian employees facilitates a discussion of how to analyze and apply that law. The article concludes with a section on "best practices" when dealing with unions and civilian employees. Although this article focuses on investigations of DA Civilians through the lens of AR 15-6, many of the rules and suggested techniques apply to investigations in all the DoD Services and across the Federal Government. Finally, while much of this article may be "common sense" to experienced labor and employment law practitioners, it provides basic knowledge and understanding for military officers who may have limited experience investigating alleged Civilian misconduct.

Civilian Protections Enumerated in AR 15-6

Army Regulation 15–6 is the DA's primary non-law enforcement investigative tool. It establishes procedures for preliminary inquiries, administrative investigations, and boards of officers when such procedures are not established by other regulations or directives. Even when not specifically made applicable, this regulation "may be used as a general guide for investigations or

boards authorized by another regulation or directive . . . ."[5] It may surprise Army practitioners that AR 15-6 is specifically applicable to DA Civilian employees.[6] However, as with many Army regulations, it is written primarily for Service members—rather than expounding upon (or even outlining) the unique protections and processes involving DA Civilian employees. Judge advocates and Service member IOs may have experience investigating other military members' misconduct under the AR 15-6 procedures; however, investigating civilian witnesses and subjects/suspects[7] involves issues not specifically enumerated or fully explained in AR 15-6.

Although much of AR 15-6 focuses on the rights of Service members, the regulation does contain some minimal explanations of the rights afforded to Civilian employees. For example, according to AR 15-6:

> When a civilian employee is a member of a bargaining unit, the exclusive representative of the bargaining unit shall be given the opportunity to be present when an employee in the bargaining unit reasonably believes that the examination may result in disciplinary actions against the employee and the employee requests representation.[8]

These are commonly known as *Weingarten* rights, named after the seminal private sector case.[9] However, the regulation does not explain who can represent the employee, how that representation should proceed, when the questioning can continue with or without the presence of that representative, and other options available to the IO.

Fifth Amendment rights against self-incrimination[10] for Civilian employees are minimally mentioned in AR 15-6.[11] However, it does not discuss *Kalkines* rights,[12] *Garrity* rights,[13] the affirmative procedures for notifying civilian employees of these rights, or the potential criminal immunities that may be inadvertently granted to a civilian suspect by an unwitting IO or JA legal advisor.[14] This is important for a JA and IO to understand to avoid unintentionally preventing the Department of Justice from later being able to prosecute criminal misconduct. Although the regulation contains a paragraph on the use of DA Form 3881, *Rights Warning Procedure/Waiver Certificate*,[15] this form is more properly used when there is a specific investigation into a Service member's criminal conduct (which violates the Uniform Code of Military Justice), rather than criminal misconduct that is tangential to an AR 15-6 investigation of a Civilian employee for workplace misconduct.[16] Notably, DA Form 3881 was last updated in 1989,[17] and the rights it covers are more geared to a criminal investigation rather than an administrative investigation. Therefore, a *Garrity* or *Kalkines* warning statement[18] would be more appropriate than using DA Form 3881 for the majority of AR 15-6 investigations into Civilian employee misconduct.

When compared to the explanation of Service members' constitutional and statutory rights,[19] the practical and procedural explanation of civilian rights is clearly lacking. Without this knowledge, a new JA assigned to serve as a 15-6 legal advisor is ill-prepared to properly advise the IO on handling civilian interviews. What follows is a detailed explanation of two major, common issues in dealing with DA Civilians in an AR 15-6 (or general civilian personnel) investigation: *Weingarten* rights and *Garrity/Kalkines* rights.

Weingarten Rights for Bargaining Unit Employees[20]

Statutory Protections

Weingarten rights are the rights of bargaining unit employees to have union representation available at certain investigatory interviews as long as all the conditions discussed below are met.[21] The term "*Weingarten* rights" is somewhat misleading for federal civilian employees because the underlying 1975 case analyzes protections for employees in the private sector, not in the federal public sector.[22] In *National Labor Relations Board v. J. Weingarten, Inc.*, the Court found a violation of Section 7 of the National Labor Relations Act[23] when an employee requested and was refused union representation in an investigatory interview that the employee reasonably believed might result in disciplinary action.[24]

Although the employee was not disciplined as a result of the meeting, the Court held that "a 'well-established current of arbitral authority' sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him."[25] Congress considered this case when drafting the new Federal Service Labor-Management Relations Statute[26] just a few years later in 1978.[27] The applicable part of the statute mandates:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation.
>
> (3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.[28]

Subsection (a)(2)(A) deals with formal discussions.[29] Subsections (a)(2)(B) and (a)(3), discussed below, contain the codification of *Weingarten* rights for the federal public sector.

Case Law Analysis

The Vesting of Weingarten Rights

Case law further articulates the *Weingarten* rights and obligations of the

management representative, the exclusive representative, and the bargaining unit employee. A JA should be generally familiar with four conditions to determine whether a federal employee is entitled to union representation under *Weingarten*:

1. the meeting between the employee and management must be an examination;
2. the examination must be in connection with an investigation;
3. the employee must reasonably believe that disciplinary action may result from the meeting; and,
4. the employee must request representation.[30]

The four parts of this test are applied to AR 15-6 investigations as follows.

Meetings Between an Employee and Management Official

First, an IO conducting an oral or written interview of a bargaining unit employee would be considered a management official and representative of the agency for purposes of this test. This is *per se* true if the IO is in a supervisory position, but there are situations in which even bargaining unit members can be considered representatives of the agency.[31] If a legal advisor is drafting an appointment memorandum for the appointing authority in a case involving suspected DA Civilian misconduct, the best practice is to ensure a supervisory management official is designated as the IO or an assistant IO.[32]

Examinations in Connection with an Investigation

Second, an IO appointed pursuant to AR 15-6 is conducting an examination in connection with an investigation when they interview a bargaining unit employee.[33] For AR 15-6 and the COVID-19 pandemic, it is important that *Weingarten* rights attach to an investigative examination that occurs outside of an employee's duty time,[34] over the telephone,[35] or with written questions and answers.[36] In fact, using written questions and answers in an AR 15-6 investigation is common, and it can ensure that the information the witness or suspect gives is accurately recorded.

Reasonable Belief of Discipline

Third, and most important for a legal advisor to an IO, it must be determined that the employee subject to the investigative examination has a reasonable belief that disciplinary action might result from the meeting. This is the only factor that can feasibly be used to deny union representation to a Bargaining Unit Employee (BUE) in an interview conducted pursuant to AR 15-6. As stated in AR 15-6, "the IO or board president will consult the servicing civilian personnel office and SJA or legal advisor before denying such a request" for union representation.[37] Therefore, it is important that the legal advisor understands *Weingarten* so they can properly advise the IO. The term "reasonably believes" in the statute is an objective test.[38] The employee (not the investigator) must have an objective belief that discipline could result from the investigatory examination.

It is also irrelevant whether discipline actually results from the AR 15-6 investigation or if it is even contemplated at the time of the interview.[39] When AR 15-6 investigations are used to investigate DA Civilian misconduct, the employer may not have any indication as to whether adverse action will be warranted. The IO certainly has no control over future adverse actions against Civilian employees. However, the outcome of the AR 15-6 investigation does not negate an employee's reasonable belief of discipline.[40] In fact, it has even been held that some promises of administrative immunity do not negate an employee's reasonable fear of discipline.[41] The legal advisor should always determine whether the employee "reasonably believes" that discipline will arise from the investigatory interview, not whether the employer intends to actually pursue disciplinary action against the employee. Ultimately, a legal advisor and IO should err on the side of caution rather than denying a request for union representation.

Request for Union Representation

Fourth, the employee must affirmatively request union representation for the investigatory examination to be statutorily entitled to union representation,[42] unless something contrary is stated in the BUE's collective bargaining agreement (CBA).[43] It is not a high bar to request union representation, as the request does not explicitly have to mention the union or *Weingarten*. For example, in an unfair labor practice case before the Federal Labor Relations Authority (FLRA), a BUE "requested an attorney, and then said, 'I want somebody to talk to.'"[44] The authority held that the agency violated 5 U.S.C. § 7116(a)(8) (committed an unfair labor practice) by failing to comply with 5 U.S.C. § 7114(a)(2)(B). "The Authority, like the [National Labor Review Board], looks to see whether, in all the circumstances, the request for representation was sufficient to put the respondent on notice of the employee's desire for representation."[45] Generally requesting representation or an attorney was sufficient to meet the fourth element of the *Weingarten* statutory test because it put the employer on notice to at least clarify if the employee wanted union representation.[46]

> If an employee makes a valid request for representation [i.e., he or she meets all four elements to vest the statutory right to union representation], . . . an agency has three options: (1) grant the request, (2) discontinue the interview, or (3) offer the employee the choice between continuing the interview without representation or having no interview.[47]

If an investigator offers the employee the choice to continue the interview without representation or have no interview, there can be no coercion.[48] The legal advisor to an IO should counsel the IO before this choice is offered to a bargaining unit employee to ensure that the IO is not inadvertently dissuading an employee from union representation. Any waiver of union representation by an employee must be clear, unequivocal, and un-coerced.

Participatory Rights, Interference, and Exclusion of Union Representatives

The FLRA and courts have carved out certain participatory rights for union representatives at investigatory examinations—far more than union representatives receive at formal discussions. Union representatives can take an active, but not belligerent or obstructive, role in the investigatory examination. The best summary

of the participatory rights of the union, the employer, and the employee is contained in the FLRA's decision in *National Treasury Employees Union, Chapter 208*.

> The Authority has held that "the purposes underlying [§] 7114(a)(2)(B) can be achieved only by allowing a union representative to take an active role in assisting a unit employee in presenting facts in his or her defense . . . . A union representative's right to take an 'active role' includes not only the right to assist the employee in presenting facts but also the right to consult with the employee[.]" In this connection, the Authority has held that "for the right to representation to be meaningful, the representative must have freedom to assist, and consult with, the affected employee."[49]

However, the union's representative cannot overly interfere with the investigation. The employer has a "legitimate interest and prerogative in achieving the objective of the examination," and the union is not permitted to compromise the employer's interests in that examination.[50] "In *Weingarten*, the Court . . . stated that an employer 'is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.'"[51] Because discussions with union representatives can take on an adversarial tone, "[t]his wording from *Weingarten* has been interpreted as being 'directed toward avoiding a bargaining session or a purely adversary confrontation with the union representative and to assure the employer the opportunity to hear the employee's own account of the incident under investigation.'"[52] Accordingly,

> where a union representative disrupts an interview by engaging in interruptions that are "verbally abusive" and "arrogantly insulting," an employer does not violate *Weingarten* rights by limiting the representative's participation . . . . In addition, an employer does not violate *Weingarten* rights when it limits the union representative's participation after the representative has counseled an employee to answer a question only once and has prevented the employer from questioning the employee by engaging in persistent objections and interruptions.[53]

However, JAs should be aware that some "interference" is allowed by the union representative.[54] The union representative is allowed to make official statements on the record that must be considered by the investigator.[55] The union representative is allowed to meet and confer with the employee prior to the interview.[56] A union representative is permitted to advise and counsel the employee in front of the investigator, as long as they do not prevent the employee from answering the investigator's questions.[57] This might be done through clarifying or rephrasing the questions, or helping the employee to emphasize beneficial facts or answers. There is no bright-line rule or entitlement allowing the employee and union representative to meet in private after the interview has started.[58] Unless there are compelling reasons to prevent such a private meeting (such as a concern that the union representative will encourage false answers by the employee), a seasoned labor counselor would likely recommend that the IO and legal counsel allow short private conferences to avoid unduly burdensome *Weingarten* litigation over the issue.

It is unlikely that an IO or legal advisor will be able to exclude all union representation from an AR 15-6 investigative interview if the employee's situation meets the four-part *Weingarten* test. However, there are ways to exclude specific union representatives from AR 15-6 investigative interviews. First, if the employee's requested union representative is unavailable to attend the interview, it is not a *per se* unfair labor practice to continue with the interview with a different authorized union representative. Nevertheless, if possible, it would be advisable for the JA to recommend the IO delay the interview for a short amount of time[59] so that the specific union representative can attend the interview if the employee refuses to designate a different representative.[60]

Second, the employer can establish that "special circumstances" exist that would create a conflict of interest if the employee's designated union representative attended an investigatory interview.[61] There are no bright-line rules for meeting the "special circumstances" test; however, if the designated union representative is also a subject of the investigation, this would likely rise to the level of "special circumstances," possibly allowing the union representative to be excluded from the interview. Excluding a union representative will always be a very fact-specific inquiry, and the legal advisor must be prepared to make a risk determination before instructing the IO on how to proceed. If a union representative is excluded from the investigatory interview, the agency must give a reasonable amount of time for the employee or union to designate an alternate representative.

Best Practices

With the *Weingarten* rules and case law in mind, the following are several practice tips for preparing and conducting an investigatory interview of a DA Civilian pursuant to AR 15-6. Practitioners should be able to identify whether an employee is in a bargaining unit, familiar with the applicable collective bargaining agreement, and prepared to respond to requests for representation and obstructive union behavior. The following responsibilities should be divided between the IO and the legal advisor based on their working relationship.

First, when preparing to interview a DA Civilian, check to see if they are a member of a bargaining unit[62] and covered by a CBA.[63] If the civilian is not in a designated bargaining unit, then *Weingarten* rights are inapplicable. The easiest way to check is to look at an employee's most recent Notification of Personnel Action (Standard Form 50),[64] which should be readily available from the DA Civilian's servicing Civilian Personnel Advisory Center (CPAC) under the Civilian Human Resources Agency (CHRA). On this form, the IO or legal advisor should look at block 37, Bargaining Unit Status. If "8888" is listed, then the employee is not eligible[65] to be in a bargaining unit.[66] If "7777" is listed, that means the position is eligible to be in a bargaining unit, but no petition for representation has been

filed with the appropriate FLRA regional office.[67] If any other numbers are listed, that means that the employee is in a bargaining unit and is eligible for *Weingarten* rights.[68] Also, the legal advisor or IO must determine the bargaining unit status at the time of the AR 15-6 interview, not at the time of the events leading up to the interview.[69]

Second, the legal advisor or IO must determine if there are any additional rules in a CBA that might be applicable to the employee being interviewed. In addition to the annual notice required by the statute, a common rule would require the employer to give affirmative notice of *Weingarten* rights prior to each investigative examination.[70] This is a negotiable topic,[71] but agencies should avoid agreeing to this when negotiating a new CBA.

Third, give advance notice of the interview to the subject of the AR 15-6 investigation. That way, if they want a union representative, they can have one lined up. This will save time down the road and will allow the legal advisor to make plans to attend the interview. Also, the union representative can submit a request for information (RFI)[72] prior to the interview so that they have the appropriate background information to better represent the BUE. It also means that the IO and other management officials can spend less time during the investigatory examination fetching documents and answering simple background questions, among other tasks. Depending on the timelines in the CBA and the AR 15-6 appointment memo, the examination of a DA Civilian may have to be slightly delayed to respond to the RFI.

Fourth, prior to the interview, the legal advisor and the IO should determine whether to 1) grant a request for union representation, 2) forgo (or discontinue) the interview, or 3) offer the employee the choice between continuing the interview without representation or having no interview at all. Often, there will be no harm in having a union representative present at the interview. Although they will try to present the facts in the light most favorable to the suspected employee, they cannot obstruct the investigatory examination or compel the employee to lie or to refuse to answer questions (subject to the *Garrity* and *Kalkines* issues discussed below). However, if a legal advisor and IO have had particular difficulties with a union representative in the past, there may be a good reason to proceed with option two or three, above. Often, there will be enough information from other witnesses or physical evidence to complete the AR 15-6 investigation, and an interview with the subject of the investigation may be unnecessary to fully answer all the questions and issues in the appointment memorandum. If adverse action is eventually proposed against the DA Civilian, they will have due process response rights and can give "their side of the story" at that time.[73]

Fifth, the investigatory examination with the DA Civilian should be set at a time the legal advisor or another labor management official can attend. The legal advisor should not unduly participate in the interview process,[74] but should be available to ensure that the employee is properly afforded their rights and to ensure that the union official does not overstep their rights and authority by interfering with the investigation.

Sixth, great care should be taken before excluding any specific union representative from the investigatory examination if the employee has requested that representative or if the union has designated that representative. If necessary, use the "special circumstances" exception discussed above in "Case Law Analysis."

Seventh, the legal advisor should be prepared for a union representative to engage in "robust" representation of the BUE.[75] Union representatives have much leeway when engaging in their duties as the exclusive representative of the bargaining unit.[76] A union official or employee engaging in protected activity cannot be disciplined for their actions as long as it does not rise to the level of flagrant misconduct.[77] However, an appropriate response to inappropriate behavior might be to end the interview and forgo the chance for the subject to provide any input into the AR 15-6 investigation.

Appendix A and Appendix B[78] contain sample annual notices of *Weingarten* rights that can be used to meet an agency's statutory obligation under 5 U.S.C. § 7114(a)(3). In situations of an investigation involving a civilian witness or subject, legal advisors should familiarize themselves with these rights and be prepared to advise the IO.

Garrity *and* Kalkines *Fifth Amendment Protections*[79]

Having discussed the protections specifically applicable to bargaining unit members, this article now turns to protections available to all federal civilian employees. Criminal and administrative investigations can often intersect.[80] This is especially true for public employees (local, state, and federal) where there is both an employer-employee relationship, as well as the employer being a governing sovereign body. However, more often with civilians, there is an administrative investigation into conduct that could be construed as a criminal act, but for which a criminal proceeding is not reasonably foreseeable.[81] In other words, these administrative investigations might have criminal overtones although no criminal action is being investigated, and no criminal proceedings are pending or reasonably foreseeable. Witnesses who are not the subjects of AR 15-6 investigations may also be reluctant to provide a truthful statement for fear that they may incriminate themselves—for example, giving a sworn statement about drug use by themselves and others in an investigation with a drug dealer as the suspect.

It is important to note that the terms "*Garrity* rights" and "*Kalkines* rights" are often used interchangeably in practice, but the information below illustrates how they are distinguishable.

Case Law

In general, federal "[e]mployees have a duty to speak with agency investigators unless criminal proceedings are reasonably feared."[82] The duty to cooperate is significantly curtailed due to an employee's Fifth Amendment right against self-incrimination—i.e., the right to remain silent. This issue was first examined in a case dealing with New Jersey state employees: *Garrity v. New Jersey*.[83] In *Garrity*, the appellants were police officers under investigation for the alleged fixing of traffic tickets.[84]

> Before being questioned, each appellant was warned (1) that anything he said might be used against him

> in any state criminal proceeding; (2) that he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but (3) that if he refused to answer he would be subject to removal from office. Appellants answered the questions. No immunity was granted, as there is no immunity statute applicable in these circumstances. Over their objections, some of the answers given were used in subsequent prosecutions for conspiracy to obstruct the administration of the traffic laws. Appellants were convicted and their convictions were sustained over their protests that their statements were coerced, by reason of the fact that, if they refused to answer, they could lose their positions with the police department.[85]

In overturning the convictions, the Court held that "the protection of the individual . . . against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."[86]

In 1973, the U.S. Court of Claims issued the *Kalkines* decision, which made *Garrity* specifically applicable to federal employees; considered several intervening cases;[87] and explained the circumstances in which an employee can be compelled to answer questions that may incriminate the employee.[88] In *Kalkines*, the plaintiff was removed from his position at the Bureau of Customs of the U.S. Department of the Treasury for failing to answer questions at four different interviews related to accepting a bribe.[89] A criminal investigation was occurring at the same time as the first three interviews, although (unbeknownst to the plaintiff) the U.S. Attorney had decided not to proceed with prosecution by the time of the fourth interview.[90] The court held that an employee "can be removed for not replying if he is *adequately* informed both that he is subject to discharge for not answering and that his replies (and their fruits) cannot be employed against him in a criminal case."[91] Because the plaintiff was not given this information, the court overturned plaintiff's discharge from the federal service and granted back pay.[92]

Distinction

It is important for AR 15-6 legal advisors to understand the primary differences between *Garrity* and *Kalkines* warnings, especially since the terms are mistakenly used interchangeably.

> *Garrity* warnings are given when an employee is requested to give information on a voluntary basis in connection with [their] own administrative misconduct, and the answers might also be used in a future criminal proceeding. The employee is informed of [their] right to remain silent if the answers may tend to incriminate [them]; that anything said may be used against [them] in a criminal or administrative proceeding; and [they] cannot be disciplined for remaining silent.[93]

A *Garrity* warning is used to ensure that statements made by a suspect in an AR 15-6 investigation are not accidentally immunized. Immunity under *Garrity* "will be found if an employee has an objectively reasonable belief that he or she will be disciplined if he or she refuses to answer questions."[94] The *Garrity* warning ensures that immunity is not inadvertently granted as a matter of law, and it quashes any objectively reasonable belief that an employee would be disciplined for refusing to answer questions that might incriminate them under the Fifth Amendment.

On the other hand, the *Kalkines* warning is used when the investigator plans to offer criminal use immunity to the employee under investigation.[95]

> [A] *Kalkines* warning informs the employee that: [They are] going to be asked a number of specific questions concerning the performance of [their] official duties. [They have] a duty to reply to these questions, and agency disciplinary action, including dismissal, may be undertaken if [they] refuse[] to answer, or fail[] to reply fully and truthfully. The answers [they] furnishe[d] and any information or evidence resulting from those answers may be used in the course of civil or administrative proceedings. Neither [their] answers nor any information or evidence gained by reason of such statements can be used against [them] in any criminal proceedings, except that if [they] knowingly and willfully provide[] false statements or information in [their] answers, [they] may be criminally prosecuted for that action.[96]

Therefore, the primary distinction is whether the investigator is prepared to allow the employee to refuse to answer incriminating questions or is prepared to grant immunity.

Best Practices

With the *Kalkines* and *Garrity* rules and case law in mind, the following are several practice tips for preparing and conducting investigatory interviews of a DA Civilian suspect pursuant to AR 15-6 when the individual is suspected of criminal misconduct.

First, it is important to remember that *Kalkines* and *Garrity* rights should not be used in custodial interviews by Criminal Investigation Division, Military Police, the Federal Bureau of Investigation, or other law enforcement investigations. They are used in administrative interviews such as an AR 15-6 investigation or an administrative Inspector General (IG) investigation. If a DA Civilian is suspected of criminal misconduct, and is in a custodial interview, a *Miranda*[97] warning would be more appropriate.[98]

Second, unlike *Weingarten* rights, the onus is on the government (the IO or the legal advisor) to determine whether a *Kalkines* or *Garrity* rights form is necessary prior to or even during the AR 15-6 interview of a civilian suspect. Although an AR 15-6 suspect must specifically and affirmatively invoke any protections afforded by the Fifth Amendment, the IO and legal advisor must determine whether to give a *Kalkines* or *Garrity* notification to the suspect. Any notification of *Kalkines* or *Garrity* rights should be planned well in advance of the AR 15-6 interview, and a *Garrity* warning form should be used if the IO or legal advisor believes there is any likelihood of

criminality regarding the subject of the AR 15-6 investigation and interview. This is the best way to avoid the accidental granting of immunity to the suspect of an AR 15-6 investigation.[99] However, it is possible that criminal implications could become apparent during the investigatory interview, and the IO and legal advisor will need to adapt. The risk-averse approach is to provide *Garrity* warnings to all subjects of AR 15-6 investigations when there are even minor criminal overtones.

Third, if the IO or legal advisor desires to grant prosecutorial "use immunity"[100] to the suspect of an AR 15-6 investigation, they cannot do this in a vacuum. Instead, these individuals must discuss immunity with the Department of Justice.[101] The relevant statutes[102] note that Attorney General approval is required before granting testimonial immunity.[103] After Attorney General approval, the agency may grant the testimonial immunity "only if in its judgment—(1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of [their] privilege against self-incrimination."[104] The Army procedures for implementing this statute are contained in AR 27-10, *Military Justice*.[105] It is unlikely that an IO will be familiar with the detailed process of requesting testimonial immunity, so the legal advisor must be intimately involved with any interviews that may require the grant of testimonial immunity. A JA legal advisor should be aware that the process for granting immunity to individuals subject to the Uniform Code of Military Justice, is different from granting immunity to DA Civilians (or anyone not subject to it).[106]

Fourth, the IO and legal advisor must remember that concurrent criminal investigations may hinder the ability to interview civilian suspects, even if a *Kalkines* or *Garrity* warning is given.[107] Criminal investigations should (but do not have to) take priority over an AR 15-6 investigation in most situations.[108] If a civilian is suspected of criminal misconduct, but an AR 15-6 investigation cannot yet be conducted into the matter due to a criminal investigation, the use of paid investigative leave[109] or an indefinite suspension without pay[110] may be appropriate. This will allow time for the completion of any criminal investigation, and may even allow the IO to adopt some of the evidence and findings of the criminal investigation. Also, if a criminal investigation has concluded and there are no recommendations to prosecute, it may be easier to acquire authorization to issue a *Kalkines* warning.

Fifth, similar to the discussion in the *Weingarten* rights section above,[111] most AR 15-6 investigations can be thoroughly completed without the cooperation of the suspect. The grant of immunity under *Kalkines* should be extremely rare. Instead, it is much more likely that practitioners will use the *Garrity* warning form when the suspect of an AR 15-6 investigation is also suspected of criminal wrongdoing. When *Garrity* warning forms are used, the IO and legal advisor should expect the suspect to refuse to answer any questions.

Last, although JAs are keenly aware that Fifth Amendment protections cannot be raised on behalf of others or used to refuse to incriminate a friend or colleague,[112] the IO may be unfamiliar with the rules of Fifth Amendment protections. The legal advisor must educate the IO regarding the bounds of Fifth Amendment protections. In general, witnesses who are not suspects of an AR 15-6 investigation do not need *Kalkines* or *Garrity* rights, and these witnesses cannot refuse to answer questions that may implicate their coworkers. Thus, IOs must be able to identify these basic Fifth Amendment issues and immediately raise any refusal to answer questions to the legal advisor.

Sample *Garrity* and *Kalkines* warnings are contained in appendices A and B. These forms can either be adopted or adapted to meet an organization's needs, although consulting the labor counselor is always advisable.

Conclusion

Army Regulation 15-6 glosses over some of the imperative issues that arise when investigating and interviewing DA Civilian employees. Statutory rights, such as *Weingarten* rights, exist to ensure that a member of the bargaining unit is properly represented in an investigatory interview. Constitutional rights created through case law, such as *Garrity* and *Kalkines* warnings, exist to ensure that DA Civilian employees can effectively protect their Fifth Amendment interests against self-incrimination. They also exist to ensure that administrative investigations, such as AR 15–6 investigations, can be conducted without the exclusion of evidence or the inadvertent granting of "use immunity." These rights are not something to fear or avoid. However, an IO and legal advisor must ensure that these statutory and constitutional rights are properly administered and afforded to all applicable interviewees. Properly considering *Weingarten*, *Garrity*, and *Kalkines* will ensure a smooth and efficient AR 15-6 investigation when dealing with DA Civilians. The best practices contained within this primer will help IOs and legal advisors avoid the pitfalls of investigating federal civilian employees pursuant to AR 15-6. **TAL**

Mr. Hammerschmidt is a general attorney for Army Materiel Command at Tobyhanna Army Depot, Pennsylvania.

Notes

1. U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers para. 1-1 (1 Apr. 2016) [hereinafter AR 15-6].

2. *Id.* ch. 7.

3. *Id.* para. 1-11 ("A suspect or subject of an inquiry or investigation is not a designated respondent, and the procedural requirements set forth in chapter 7, section II, of this regulation do not apply.").

4. Searches of civilian workplaces can also be a major part of Army Regulation (AR) 15-6 investigations, which is beyond the scope of this article. For a thorough analysis of administrative searches and Fourth Amendment protections for federal civilian employees, it is highly recommended that an Investigating Officer (IO) and legal advisor read about warrantless searches of Government employees. *See* Bryan R. Lemons, *Public Privacy: Warrantless Workplace Searches of Public Employees*, 7 U. Pa. J. Bus. L. 1 (2004) (discussing cases such as Katz v. United States, 389 U.S. 347, 361 (1967); United States v. Simons, 206 F.3d 392 (4th Cir. 2000); Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir. 2002); O'Connor v. Ortega, 480 U.S. 709 (1986); Leventhal v. Knapek, 266 F.3d 64 (2d Cir. 2001); Nat'l Treasury Emp's Union v. Von Raab, 289 U.S. 656, 671 (1989); Am. Postal Workers Union v. U.S. Postal Serv., 871 F.2d 556 (6th Cir. 1989)).

5. AR 15-6, *supra* note 1, para. 1-1. As a resource in general for conducting any kind of administrative investigations, AR 15-6 contains several useful appendices with investigatory tools and tips.

6. *Id.* at i.

7. Army Regulation 15-6 uses both the terms "subject" and "suspect" to refer to the individual being investigated or simply of interest in the investigation. This

article uses the terms interchangeably, since many of the quotations from AR 15-6 will use only one of the terms.

8. AR 15-6, *supra* note 1, para. 3-4 (explaining representation rights for subjects of an investigation). *See also id.* para. 3-8(a)(2) (explaining *Weingarten* rights for witnesses).

9. NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975). *See infra* "Statutory Protections" for a more thorough discussion of *Weingarten* rights. *See also* Brigham M. Cheney, *FAQ re Employees'* Weingarten *Rights to Representation*, AALRR: Lab. Rels. L. Blog (Mar. 16, 2018), https://www.aalrr.com/Labor-Relations-Law-Blog/faq-re-employees-weingarten-rights-to-representation (discussing *Weingarten* rights in the private sector); U.S. Fed. Lab. Rels. Auth., Part 3: Investigatory Examinations, https://www.flra.gov/Guidance_investigatory%20examinations_part%203#55 (last visited May 14, 2021) [hereinafter U.S. Fed. Lab. Rels. Auth.] (discussing *Weingarten* rights in the Federal sector).

10. U.S. Const. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

11. AR 15-6, *supra* note 1, para. 3-7(d)(7)(b) ("No witnesses or respondents not subject to the Uniform Code of Military Justice (UCMJ) will be required to make a statement or produce evidence that would deprive them of their rights against self-incrimination under the Fifth Amendment of the U.S. Constitution."). *See also id.* para. C-3 ("Witnesses cannot be compelled by commanders, supervisors, or IOs to incriminate themselves; to make a statement or produce evidence that is not material; or to make a statement or produce evidence that might tend to degrade them.").

12. Garrity v. New Jersey, 385 U.S. 493 (1967).

13. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

14. *See* AR 15-6, *supra* note 1, para. 3-7(d)(7)(f) ("In certain cases, the appropriate authority may provide a witness or respondent a grant of testimonial immunity and require testimony notwithstanding Article 31, UCMJ, or the Fifth Amendment. Grants of immunity must be made under the provisions of AR 27-10 and any local supplements to AR 27-10.").

15. U.S. Dep't of Army, DA Form 3881, Rights Warning Procedure/Waiver Certificate (1 Nov. 1989) [hereinafter DA Form 3881].

16. *See id.* ("For use of this form, see AR 190-30."). *See generally* U.S. Dep't of Army, Reg. 190-30, Military Police Investigations (1 Nov. 2005). When investigating civilian employees, the military police or U.S. Army Criminal Investigation Division will handle any criminal aspects of the investigation, and the IO will handle the investigation into employee misconduct pursuant to Title 5 of the United States Code. *See, e.g.*, 5 U.S.C. ch. 75; 5 C.F.R. pt. 572 (2021).

17. DA Form 3881, *supra* note 15.

18. See appendices A and B for sample statements. Appendix A is a sample *Garrity* Warning. Appendix B is a sample *Kalkines* Warning.

19. *See, e.g.*, AR 15-6, *supra* note 1, para. 3-7(d)(7)(d) ("A Soldier who is suspected of an offense under the UCMJ will be advised of his or her rights under Article 31, UCMJ, before being asked any questions concerning the suspected offense. The Soldier, whether a witness or respondent, will be given a reasonable amount of time to consult an attorney, if requested, before answering any such questions. No adverse inference will be drawn against witnesses or respondents who invoke their rights under Article 31, UCMJ, or the Fifth Amendment. The IO or board should use DA Form 3881 (Rights Warning Procedure/Waiver Certificate) to explain the rights, and to memorialize the explanation and the suspect's decision."). *Id.* para. 3-7(d)(7)(a), (9).

20. Although *Garrity* and *Kalkines* warnings affect all federal employees whereas *Weingarten* rights affect only bargaining unit employees, *Weingarten* rights are discussed first in this article as they are far more common in AR 15-6 investigations.

21. *See* 5 U.S.C. § 7114(a)(2), (3); H.R. 3793, 95th Cong. (as reported with amendments, Mar. 3, 1978), *reprinted in* Legislative History of Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Act of 1978, at 926 (1979), https://www.flra.gov/system/files/webfm/Authority/Archival%20Decisions%20&%20Leg%20Hist/LEG%20HIST%20OF%20THE%20FSLMRS%20Nov%2019%201979.pdf [hereinafter Legislative History].

22. Eldridge v. Dep't of Veterans Affs., No. DC-315H-20-0220-I-1, 2020 MSPB LEXIS 248 (Jan 22, 2020) (citing Lim v. Department of Agriculture, 10 M.S.P.R. 129, 130 (1982)) ("The holding in *Weingarten* regards the National Labor Relations Act, which does not apply to the appellant or most other federal employees. Nevertheless, Congress afforded federal employees similar rights under the Civil Service Reform Act.").

23. 29 U.S.C. § 157.

24. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 252–53 (1975).

25. *Id.* at 267 (citing Chevron Chemical Co., 60 Lab. Arb. 1066, 1071 (1973)). The holding of the *Weingarten* case emphasizes the fact that it is the employee's reasonable belief of discipline that determines whether *Weingarten* rights attach, not whether discipline actually results from the investigatory meeting or interview. *Id.*

26. Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101–7135. *See generally A Short History of the Statute*, U.S. Fed. Lab. Rels. Auth., https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/short-history-statute (last visited July 22, 2021) (offering a brief history of the statute).

27. Legislative History, *supra* note 21, at 926.

28. 5 U.S.C. § 7114(a)(2), (3).

29. *See generally* Am. Fed'n of Gov't Emps. Council 236, 48 F.L.R.A. 1348, 1354–56 (1994).

> In order for a union to have a right to representation under the Statute, all the elements of section 7114(a)(2)(A) must exist. There must be: (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment . . . . [W]e have advised that the totality of the circumstances presented must be examined, but that a number of factors are relevant: (1) the status of the individual who held the discussions; (2) whether any other management representatives attended; (3) the site of the discussions; (4) how the meetings for the discussions were called; (5) how long the discussions lasted; (6) whether a formal agenda was established for the discussions; and (7) the manner in which the discussions were conducted.

Id. See also Am. Fed'n of Gov't Emps. Local 1709, 57 F.L.R.A. 304 (2001) (holding that nonsupervisory attorneys can be considered representatives of the agency for purposes of formal discussions). Although formal discussions are beyond the scope of this article, it is important to be familiar with the subject as there is an affirmative obligation to notify the exclusive representative of the bargaining unit before a formal discussion is held with bargaining unit employees. This is in sharp contrast to 5 U.S.C. § 7114(a)(2)(B) and 5 U.S.C. § 7114(a)(3) discussed below, which contain the codification of *Weingarten* rights for the federal public sector and do not contain the same notice requirements.

30. Am. Fed'n Gov't Emps. Local 1941 v. FLRA, 837 F.2d 495 (D.C. Cir. 1988).

31. *See, e.g.*, Nat'l Treasury Emps. Union, 15 F.L.R.A. 626 (1984).

32. *See* AR 15-6, *supra* note 1, para. 2-3 (discussing Assistant Investigative Officers). The use of assistant IOs can be particularly important in joint investigations between the military services or when Service members and Civilians are being investigated as part of the same AR 15-6 investigation. *See generally* Captain Balaji L. Narain & Captain Dustin L. Banks, *Administrative Investigations and Nonjudicial Punishment in Joint Environments*, JAG Reporter (May 23, 2019), https://www.jagreporter.af.mil/Post/Article-View-Post/Article/2546326/administrative-investigations-and-non-judicial-punishment-in-joint-environments/.

33. Off. of Gen. Couns., U.S. Fed. Lab. Rels. Auth., Guidance on Meetings (2015), https://www.flra.gov/system/files/webfm/OGC/Guidances/MEETINGS%20GUIDANCE%208-28-15%20final_1.pdf [hereinafter OGC Guidance].

> [The FLRA] examines the totality of circumstances surrounding each particular meeting and considers such factors as whether the meeting was: (1) designed to ask questions and solicit information from the employee; (2) conducted in a confrontational manner; (3) designed to secure an admission from the employee of wrongdoing; and/or (4) designed for the employee to explain his/her conduct.

Id. at 21. This FLRA resource contains a vast amount of information on formal discussions and *Weingarten* meetings, much of which is beyond the scope of this primer. The cases of particular importance for a Judge Advocate (JA) and service member IO are discussed throughout this primer.

34. *Id.* (citing Nat'l Treasury Emps. Union, 15 F.L.R.A. 626, 637 (1984)).

35. *Id.* (citing Nat'l Treasury Emps. Union v. FLRA, 835 F.2d 1446, 1451 (D.C. Cir. 1987)).

36. *Id.* (citing Am. Fed'n Gov't Emps., Nat'l Border Patrol Council, Local 2366, 46 F.L.R.A. 363, 363 (1992)).

37. AR 15-6, *supra* note 1, para. 3-8a(2).

38. *See* Nat'l Treasury Emps. Union, 4 F.L.R.A. 237, 252 (1980) ("This approach, which focuses on the interview and its surrounding circumstances, clearly removes from inquiry the individual's subjective belief and places it on reliable, objective considerations."); Am. Fed'n Gov't Emps. Local 2544 v. FLRA, 779 F.2d

719, 724 (D.C. Cir. 1985) ("The FLRA has also defined the 'reasonably believes' requirement in § 7114(a)(2)(B) as an objective standard. The relevant inquiry is whether, in light of the *external* evidence, a reasonable person would decide that disciplinary action might result from the examination.").

39. Am. Fed'n Gov't Emps. Local 2328, 51 F.L.R.A. 1741, 1748–49 (1996) (citing Am. Fed'n Gov't Emps. Local 2544 v. F.L.R.A., 779 F.2d 719, 723 (D.C. Cir. 1986)) ("The *Weingarten* right applies 'whenever the circumstances surrounding an investigation make it reasonable for the employee to fear that his answers might lead to discipline. The possibility, rather than the inevitability, of future discipline determines the employee's right to union representation.'"). Even if no discipline results from the meeting, a violation of *Weingarten* rights can still lead to a union filing a successful Unfair Labor Practice or Grievance. *See, e.g.*, Am. Fed'n Gov't Emps., Nat'l Border Patrol Council, 41 F.L.R.A. 154 (1991).

40. Am. Fed'n Gov't Emps. Local 2544 v. FLRA, 779 F.2d 719, 724 (1985) (noting that "A union has a right to represent an employee even if the employer does not contemplate taking any disciplinary action against the employee at the time of the interview, since disciplinary action will rarely be decided upon until after the results of the inquiry are known.").

41. *See* OGC Guidance, *supra* note 33, at 25–26.

42. 5 U.S.C. § 7114(a)(2)(A)(ii). Interestingly, this affirmative obligation was almost placed on the employer, rather than the employee, in a similar manner as the employer's notification requirement in formal discussions. *See* Legislative History, *supra* note 21, at 229–31 (proposed amendment by Congresswoman Gladys Spellman that would have required an employer to provide a written advisement to an employee under investigation that he or she had the right to seek a representative of his or her choice).

43. *See infra* "*Weingarten* Rights for Bargaining Unit Employees: Best Practices" regarding CBA obligations.

44. Am. Fed'n Gov't Emps. Council of Prison Locals, 55 F.L.R.A. 388, 389 (1999).

45. *Id.* at 394.

46. Id.

47. Tidewater Virginia Fed. Emps. Metal Trades Council, 35 F.L.R.A. 1069, 1077 (1990). *See also* Am. Fed'n Gov't Emps. Local 3148, 27 F.L.R.A. 874, 880 (1987); Am. Fed'n Gov't Emps. Local 0033, 20 FSIP 019 (2020).

> In order for the section 7114(a)(2)(B) investigatory examination right to exist . . . the following rules apply: Rule 1—The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request. Rule 2—After the employee makes the request, the employer must choose from among three options: Grant the request and delay questioning until the union representative arrives and (prior to the interview continuing) the representative has a chance to consult privately with the employee; Deny the request and end the interview immediately; or Give the employee a clear choice between having the interview without representation, or ending the interview. Rule 3—If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal.

Id.

48. *See* Am. Fed'n Gov't Emps., Nat'l Border Patrol Council, 42 F.L.R.A. 834 (1991) as an example where *Weingarten* rights were offered, but the bargaining unit employee was subtly coerced into not having his union representative present for the interview.

49. Nat'l Treasury Emps. Union Chapter 208, 65 F.L.R.A. 79, 84 (2010) (quoting Am. Fed'n Gov't Emps., Local 171, 52 F.L.R.A. 421, 432–33 (1996)).

50. *Id.* (citing Am. Fed'n Gov't Emps. Local 3434, 50 F.L.R.A. 601, 607 (1995)).

51. *Id.* (citing NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)).

52. *Id.* (citing NLRB v. Texaco, 659 F.2d 124, 126 (9th Cir. 1981)).

53. *Id.* (citing Yellow Freight Sys., Inc., 317 N.L.R.B. 115, 124 (1995)).

54. *Id.* (citing Nat'l Treasury Emps. Union, 5 F.L.R.A. 297, 307 (1981)).

> [T]he Authority [has rejected the position that] an investigator "was entitled to obtain a statement from the employee without interruption from her representative." Specifically . . . "some interruption, by way of comments re[garding] the form of questions or statements as to possible infringement of employee rights, should properly be expected from the employee's representative." In this connection, "[t]he employer always retains the option to refrain from conducting the examination in the event it decides that the interview, in the presence of a union representative, is not efficacious." In addition, the judge found that even prohibiting the union representative from "pass[ing] notes" to the employee during the interview would impermissibly "circumscribe the effectiveness of the representative." (citations omitted).

Id.

55. *Id.* (citing Nat'l Fed'n Fed. Emps. Local 589, 48 F.L.R.A. 787, 798, 799 (1993), *on recon.* 49 F.L.R.A. 171, *recon. denied*, 49 F.L.R.A. 701 (1994)) ("[E]ven where a representative has been permitted to confer with an employee and make statements 'off the record,' the Authority has found no 'meaningful representation[]' where there was no indication that off-the-record statements would be considered in making a final determination regarding discipline.").

56. *See* U.S. Fed. Lab. Rels. Auth., *supra* note 9.

57. *Id.*

58. Am. Fed'n Gov't Emps. Local 171, 52 F.L.R.A. 421, 432–38 (1996).

59. Hours or days, not weeks or months.

60. *See generally* Am. Fed'n Gov't Emps. Local 197, 46 F.L.R.A. 1210, 1223 (1993).

61. Am. Fed'n Gov't Emps. Local 709, 54 F.L.R.A. 1502, 1513 (1998).

> To effectuate an agency's legitimate concerns regarding the integrity of its investigation and the union's right to designate the representatives for purposes of section 7114(a)(2)(B) of the Statute, it is necessary to accommodate these interests. Our framework of accommodation is governed by the presumption that a union can designate the individual it wants as its representative during a Weingarten examination . . . . By adopting this presumption, we continue to recognize the agency's interest in preserving the integrity of its investigation. Therefore, an agency can rebut this presumption. We hold that an agency may preclude a particular individual from serving as the union's designated representative only where the agency can demonstrate "special circumstances" that warrant precluding a particular individual from serving in this capacity. . . . "Special circumstances" will, consistent with its application in the private sector, be construed narrowly to preserve the union's normal prerogatives. We emphasize, in addition, that even if an agency can demonstrate such special circumstances, a union nonetheless may exercise its right of representation by designating another individual to serve as a representative. (citation omitted).

Id.

62. Although the "bargaining unit" is the foundational element of the Federal Service Labor-Management Relations Statute (FSLMRS), it is not actually defined in the statute. However, the FSLMRS does list the criteria for determining appropriate bargaining units and the types of employees that must be excluded from bargaining units. *See* 5 U.S.C. § 7112. *See also* 5 U.S.C. § 7103(a)(2), (10), (11), (13), (15).

63. 5 U.S.C. § 7103(a)(8) ("'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter"); 5 U.S.C. § 7103(a)(12).

> "Collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

5 U.S.C. § 7103(a)(12).

64. U.S. Off. of Personnel Mgmt., SF 50, Notification of Personnel Action (July 1991).

65. See 5 U.S.C. § 7112(b)–(c) for a list of positions not eligible to be in a bargaining unit.

66. *Bargaining Unit*, U.S. Off. of Personnel Mgmt., https://dw.opm.gov/datastandards/dataStandard/1406 (last visited July 27, 2021).

67. *Id.*

68. Remember that in determining whether an employee is entitled to *Weingarten* rights, it is irrelevant whether the employee is a dues-paying member of the union. All that matters is that the employee is a member of the bargaining unit.

69. *See* Fed. Emps. Metal Trades Council of Charleston, S.C., 32 F.L.R.A. 222 (1988) ("Nothing in the plain wording of the section supports the conclusion that 'the unit' referred to in section 7114(a)(2)(B) means the bargaining unit which encompasses an employee's

position at the time of the events which are the subject of the examination.").

70. 5 U.S.C. § 7114(a)(3).

71. *Weingarten* rights are still being litigated today at the Federal Service Impasse Panel—specifically whether an Agency must affirmatively provide notice of *Weingarten* rights to each individual employee under investigation. *See, e.g.*, Am. Fed'n Gov't Emps. Local 0033, 20 F.S.I.P. 019 (2020).

72. 5 U.S.C. § 7114(b)(4).

73. Interestingly, AR 15-6 states, "Various statutes and regulations govern adverse personnel actions against Department of the Army civilian employees. Supervisors should consult with the servicing civilian personnel office and servicing SJA or legal advisor if formal disciplinary action is contemplated against a civilian employee (see AR 690-700)." AR 15-6, *supra* note 1, para. 1-12b. However, at the time of publication of this article, AR 690-700 is not available for reference. According to the Army's Publication Directorate, revisions to the regulation have been in legal review since 13 August 2020. *FY21 Over 20 Year Old Publication Status as of 15 JUL 2021*, Army Publ'g Directorate, https://armypubs.army.mil/pdf/administrative_pubStatus.pdf (last visited July 27, 2021). 5 U.S.C. § 7503 and 5 U.S.C. § 7513 contain some of the due process rights afforded to civilian employees, including the right to respond to proposed adverse actions.

74. AR 15-6, *supra* note 1, para. C-2 ("The legal advisor's role, however, is to provide legal advice and assistance, not to conduct the investigation.").

75. For a general list of actions which an exclusive representative may and may not take with respect to an investigatory examination, see U.S. Fed. Lab. Rels. Auth., *supra* note 9.

76. *See* Am. Fed'n Gov't Emps., 59 F.L.R.A. 767 (2004) (analyzing the flagrant misconduct standard).

77. *Id.*

78. This notice has been adapted from U.S. Department of Agriculture, Office of Human Resources Management, Annual Weingarten Notice, https://www.dm.usda.gov/employ/labor/weingarten.htm (last visited Dec. 17, 2020).

79. Advanced labor and employment law practitioners may be interested in an older, but still relevant, deep dive into the historical evolution of case law regarding self-incrimination in investigative interviews. *See generally* Luther G. Jones, III, *The Privilege Against Self-Incrimination of the Public Employee in an Investigative Interview*, Army Law., Nov. 1985, at 6.

80. AR 15-6, *supra* note 1, para. C-2(c).

81. An administrative investigation examines underlying conduct that may or may not constitute a crime. By using an administrative investigation, the agency is not necessarily looking at the criminality of the conduct but instead at the alleged underlying misconduct as it relates to the efficiency of the service.

82. Taylor v. USPS, 49 M.S.P.B. 155, 160 (1991).

83. Garrity v. New Jersey, 385 U.S. 493 (1967).

84. *Id.* at 494.

85. *Id.* at 494-95.

86. *Id.* at 500.

87. *See, e.g.*, Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 426 F. 2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961 (1972).

88. Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973).

89. *Id.* at 1391–92.

90. *Id.* at 1392, 1396–98.

91. *Id.* at 1393 (emphasis added). *See also* Luna v. Dept. of Homeland Security, No. DA-0752-15-0498-I-1, 2017 M.S.P.B. LEXIS 1813 (Apr. 20, 2017) (citing *Kalkines*, 473 F.2d at 1393).

92. *Kalkines*, 473 F.2d at 1398.

93. Christine M. Bulger, *Know the Difference Between* Garrity, Kalkines *Warnings in Investigations*, CyberFeds (Sept. 18, 2015), https://www.cyberfeds.com/CF3/index.jsp?contentId=22699348 (discussing the use of *Kalkines* and *Garrity* warnings by the Office of Inspector General; website requires a subscriber login).

94. Memorandum from Christopher A. Wray to All Federal Prosecutors, subject: The Increasing Role of the Offices of Inspector General, and Uniform Advice of Rights Forms for Interviews of Government Employees (6 May 2005) [hereinafter Wray Memo].

95. Anjali Patel, *Provide* Kalkines *Warning Before Criminal Investigation Interview*, Cyberfeds (Jun. 7, 2013), https://www.cyberfeds.com/CF3/index.jsp?contentId=158312 ("A *Kalkines* warning grants employees 'use immunity,' which means that any truthful statements made in response to the investigation are immune from subsequent use in a criminal prosecution against them"; website requires a subscriber login).

96. *Id.*

97. Miranda v. Arizona, 384 U.S. 436 (1966).

98. *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. Crim. L. & Criminology 621 (1996).

99. *See* United States v. Veal, 153 F.3d 1233, 1239 n.4 (11th Cir. 1998) ("The Fifth Amendment protection afforded by *Garrity* to an accused who reasonably believes that he may lose his job if he does not answer investigation questions is self-executing; that is, it arises by operation of law; no authority or statute needs to grant it."). *See also* Sher v. U.S. Dep't of Veterans Affs., 488 F.3d 489, 500–05 (1st Cir. 2007) (analyzing *Garrity* immunity).

100. U.S. Dep't of Just., Criminal Resource Manual §§ 716–717.

> Title 18 U.S.C. § 6002 provides use immunity instead of transactional immunity. The difference between transactional and use immunity is that transactional immunity protects the witness from prosecution for the offense or offenses involved, whereas use immunity only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness—except in a subsequent prosecution for perjury or giving a false statement.

Id.

101. Many *Kalkines* and *Garrity* references omit this important step and instead infer that an agency has sole discretion to grant testimonial immunity. *See, e.g.*, Lieutenant Sara Black, *Administrative Investigations—Civilian Personnel Warnings*, Advisor, Oct. 2018, at 3 https://www.jag.navy.mil/documents/THE_ADVISOR_OCT2018.pdf .

102. 18 U.S.C. §§ 6001–6005.

103. 18 U.S.C. § 6004.

104. *Id.*

105. AR 15-6, *supra* note 1, para. 3-7(f) ("In certain cases, the appropriate authority may provide a witness or respondent a grant of testimonial immunity and require testimony notwithstanding Article 31, UCMJ, or the Fifth Amendment. Grants of immunity must be made under the provisions of AR 27-10 and any local supplements to AR 27-10."). Army Regulation 27-10 was updated on 20 November 2020, with an effective date of 20 December 2020; however, the section regarding the procedure for granting testimonial immunity remains substantially the same. *Compare* U.S. Dep't of Army, Reg. 27-10, Military Justice para. 2-4(c) (11 May 2016) [hereinafter AR 27-10 (2016)], *with* U.S. Dep't of Army, Reg. 27-10, Military Justice para. 2-4(c) (20 Nov. 2020) [hereinafter AR 27-10].

106. *Compare* AR 27-10, *supra* note 105, para. 2-4(b), *with id.* para. 2-4(c).

107. AR 27-10, *supra* note 105, para. 2-5 ("Prior to initiating an investigation in support of administrative action into a matter that is subject to a pending Department of Justice criminal investigation or prosecution, the investigative agency will coordinate with and obtain concurrence from the appropriate Department of Justice prosecutor or investigative agency."); AR 15-6, *supra* note 1, app. C-2 ("Criminal investigations and administrative investigations conducted using AR 15-6 can occur simultaneously and share information, provided that the administrative investigation does not conflict with the criminal investigation.").

108. AR 15-6, *supra* note 1, para. C-2 ("An investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency . . . . [Investigating Officers] must ensure that investigations do not . . . interfere with criminal investigations. . . . In cases of concurrent investigations, IOs should coordinate with the other command or agency to avoid duplication of effort . . . . [Investigative Officers] should request any relevant information that the other organization has obtained. The IO may incorporate and consider the results of other available investigations into the AR 15-6 investigation. . . . Additionally, an IO should immediately coordinate with the legal advisor and inform the appointing authority if he or she discovers evidence of serious criminal misconduct.").

109. 5 U.S.C. § 6329b.

110. 5 C.F.R. § 752.402 (2021); Rittgers v. Dep't of the Army, 2011 M.S.P.B. 101 (2011).

111. *See supra* "*Weingarten* Rights for Bargaining Unit Employees."

112. AR 15-6, *supra* note 1, para. 3-7(d)(7)(e) ("The right to invoke Article 31, UCMJ, or the Fifth Amendment, is personal. No one may assert the right for another person, and no one may assert it to protect anyone other than himself or herself.").

Appendix A

Garrity Warning

You are being asked to provide information as part of an administrative investigation being conducted by [insert office, unit, appointing authority, etc. that ordered the investigation] regarding [Provide overarching subject matter of investigation, i.e., harassment, discrimination, misconduct, missing property, etc.]. This investigation is being conducted pursuant to [Army Regulation 15-6 or other statute/regulation].

The investigation involves the following: [Provide a one or two sentence description of the investigation, i.e., the who, what, when, where, why, and how (if known and applicable)].

You are going to be asked a number of specific questions regarding the subject matter of this investigation, as described above.

This interview is strictly voluntary, and you may leave at any time. You have the right to remain silent if your answers will incriminate you.

Anything you say or do may be used as evidence in any future potential administrative or criminal proceeding involving you. If you refuse to answer any questions, no adverse action will be taken solely for remaining silent. However, your silence can be considered in an administrative proceeding for the evidentiary value that is warranted by the facts surrounding your case.

ACKNOWLEDGMENT

I understand the warnings and assurances stated above, and I am willing to make a statement and answer questions. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

_____	_____
NAME Investigator's Signature	NAME Interviewee's Signature
Witness:_____ (if applicable)	Date:_____
Time:_____	Location:_____

Appendix B

Kalkines Warning

You are being asked to provide information as part of an administrative investigation being conducted by [insert office, unit, appointing authority, etc. that ordered the investigation] regarding [provide overarching subject matter of investigation, i.e., harassment, discrimination, misconduct, missing property, etc.] This investigation is being conducted pursuant to [Army Regulation 15-6 or other statute/regulation].

The investigation involves the following: [Provide a one or two sentence description of the investigation, i.e., the who, what, when, where, why, and how (if known and applicable)].

The purpose of this interview is to obtain information which will assist in the determination of whether administrative action is warranted.

You are going to be asked a number of specific questions regarding the subject matter of this investigation, as described above. You have a duty to reply to these questions truthfully and completely, and agency adverse action may be initiated as a result of your answers. However, neither your answers nor any information or evidence which is gained by reason of such statements can be used against you in criminal proceedings. You may be subject to adverse action up to and including dismissal if you refuse to answer or fail to respond truthfully and fully to any questions. If you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action.

ACKNOWLEDGMENT

_____	_____
NAME Investigator's Signature	NAME Interviewee's Signature
Witness:_____ (if applicable)	Date:_____
Time:_____	Location:_____

AROUND THE CORPS

TJAGLCS rededicated the Regimental Reading Room as the Sergeant Major John H. Nolan Reading Room in August 2021 in honor of the late SGM Nolan. Friends and family were present for the ceremony. (Credit: Jason Wilkerson, TJAGLCS)

(Credit: respiro888 – stock.adobe.com)

No. 3

Cross-Examining Convention

A Hypothetical Test of Pro-Convening Authority Discretion

By Lieutenant Colonel Daniel Maurer

This article is intended to do one thing: encourage the military justice community of practice to grapple with the arguments typically made when justifying the value and utility of commanders as court-martial convening authorities. To do that, this article uses the same simple method I have employed in a class I teach[1] to West Point cadets. To those cadets, most of whom are majoring in Law and Legal Studies, I propose a hypothetical set of realistic facts and ask them to determine how a convening authority could justify taking action against those facts in light of the factors listed in the President's non-binding disposition guidance to commanders and judge advocates (JAs).[2] However, unlike the real-world practice on "CG appointment" days with which staff judge advocates and their chiefs of justice are familiar,[3] this exercise deliberately imposes some constraints on what permissible arguments can be made. If a particular kind of argument is made, this exercise further demands specific follow-on answers implied by those choices. When done thoughtfully and honestly, an uncomfortable truth is laid bare: some defensive positions not only have gaps, but they also create obstacles in front of the claim that the military justice system properly balances the needs of "justice" against good order and discipline.[4]

Why Ask Why?

Judge advocates may be technical experts in an idiosyncratic criminal law system, but as a recent symposium on "legal ethics and modern military justice" made clear, JAs must also be prepared to explain to commanders at all echelons military justice's moral, pragmatic, and prudential elements—and why they theoretically must be different than civilian models.[5] One such key element is why commanders are, should be, or (someday) might *not* be intimately involved in making key decisions about military justice. This is not an academic exercise any longer: as this article goes to press, it is the primary reform to the UCMJ just enacted in the National Defense Authorization Act for Fiscal Year 2022,[6] and it—among other things—divests traditional convening authorities of their traditional prosecutorial authority. But, as discussed below, only for some cases some of the time, and not for another two years. Congress remains interested in alternative ways to address military sexual assault—for example, finding that contemporary efforts either lack the full support of the commands (or the institutional military), or that commands are just not capable and equipped to prevent, prosecute, and punish these offenders.[7] Such changes would dramatically alter day-to-day military justice operations and upend centuries of practice. Ironically, however, such changes would be consistent with the decades of "civilianization"[8]

of process and procedure that have occurred since the enactment of the Uniform Code of Military Justice in 1950.

This skepticism from Congress is nothing new.[9] Most recently, the Senate Armed Services Committee held a hearing to discuss the influence and role of the commander relative to victims of sexual assault, hearing exclusively from victims and victim advocates, all of whom were skeptical and critical of the commander's traditional role that is both central to and atop of the military justice system.[10] In the fiscal year 2020 National Defense Authorization Act, Congress tasked the Department of Defense (DoD) to conduct a feasibility study of a proposed "alternative" justice system, including the feasibility of a pilot program to test beta versions of such a system.[11] This alternative would remove court-martial convening authority for all "felonies" from commanders and shift it to senior, experienced JAs. As Michel Paradis wrote, this would be a significant paradigm shift with dramatic practical consequences.[12]

But this proposal was still actually quite limited in scope. For example, Congress did not ask the DoD to differentiate UCMJ crimes based on anything more than the felony/misdemeanor distinction. This ignores potentially relevant differences between "martial" and "non-martial" offenses. In this article, "martial offenses" are those military-nexus offenses with *no civilian analogue*—like absent without leave, malingering, trainee abuse, disobedience, conduct unbecoming an officer, and various others that may be "prejudicial to good order and discipline."[13] Nor did Congress task the DoD to critically analyze *or* justify the myriad other investigative, prosecutorial, and quasi-judicial authorities currently vested in commanders *other than* court-martial convening authority. These include the power to authorize searches and seizures,[14] arrest, detain, order pre-trial confinement,[15] decide what to charge,[16] dismiss charges,[17] approve plea deals,[18] and select panel members.[19] Similarly, Congress did not require the DoD to conduct any empirical survey or study to collect and quantify relevant data (e.g., do commanders—at all echelons—actually *understand* their legal authorities, or do they default to reliance on their JAs anyway; moreover, do they *want* those legal authorities?). In response to this tasking, the DoD's Joint Service Committee's ad hoc Subcommittee for the "Prosecutorial Authority Study" (PAS) completed and submitted its report, concluding that no such change should be made and that even a pilot study would be infeasible.[20]

The PAS report appears to have largely repeated the same core arguments that the Service Chiefs of Staff and their Judge Advocates General have given in Congressional testimony over the last decade. To paraphrase, the arguments are as follows:

1. commanders need obedient, disciplined Soldiers, Sailors, Airmen, and Marines to accomplish the *raison d'être* of a military—to prepare to fight, to fight if necessary, and to win;
2. commanders need the UCMJ to ensure they have an adequate pool of obedient, disciplined soldiers;
3. commanders need to be the sole authorities making decisions within the UCMJ system because commanders understand the effect of crime on their unit and their unit's mission;
4. if commanders are not the sole UCMJ decision-making authorities, troops will lose confidence in their commanders and in each other, morale will decrease, unit cohesion will be stretched to the breaking point, and, ultimately, readiness will suffer;
5. commanders are aided and advised by attorneys, and are bound by the same rules, regulations, and criminal laws as their troops; and
6. ultimately, if Americans can entrust the lives of their sons and daughters to commanders' care, then surely we can entrust them with the duty to carefully and fairly investigate, prosecute, and punish crime allegedly committed by their sons and daughters.[21]

This multi-prong argument, or at least the bulk of it, certainly seems to have support in a long line of Supreme Court cases,[22] even after the adoption of the UCMJ and the beginning of military justice's bumpy road of "civilianization."[23] Not surprisingly, the PAS characterized the proposed "alternative" as profoundly unsettling because it would disturb long-held beliefs about both the role and ability of commanders, and because it would disturb a significant number of existing processes and policies. To the PAS members, such a plan would be "the most sweeping change to military justice in the United States since the inception of the UCMJ in 1950."[24]

Unfortunately, the PAS rebuttal failed to account for the possibility that the purpose of the feasibility study was precisely to challenge the status quo's rationale where convening authorities are vested with disposition and referral power for any offense under the Code, regardless of its actual or possible connection to martial matters. Given that the Supreme Court already discarded the unworkable "service-connection" test and upheld a simple status-based jurisdiction, the Services consider the validity of the status test to be unimpeachable. That historical example, however, was not concerned with the question the DoD faces today: the extent to which a commander ought to be involved in making quasi-investigative, quasi-prosecutorial, and quasi-judicial decisions about *any* cases, not just sexual assault cases.

The two questions at issue—which crimes should be addressed by courts-martial, and to what extent should commanders have prosecutorial-like discretion—are actually related. A demonstrated, plausible connection between the alleged offense's *victim* and the commander's designated professional interests and objectives strengthens the argument in favor of commander involvement. That is, a commander is best positioned to judge the blameworthiness of an act or omission when that act or omission prejudiced their ability to plan, train for, or execute military missions. That argument in favor of commander involvement is likewise *weakened* the farther away the act or omission is from prejudicing what the commander is professionally obligated to do. This was recognized even by one of military justice's most ardent skeptics, Senator Kirsten Gillibrand, whose oft-proposed Military Justice Improvement Act would relieve commanders of their court-martial convening authority only for those offenses that are not traditional military offenses, like absent without leave or disrespect.[25]

Senator Gillibrand has since introduced a more comprehensive reform bill[26] that would do what the fiscal year 2020 National

Defense Authorization Act considered and what the PAS rejected: place disposition authority, referral authority, and panel selection authority in the hands of JAs for all "felony-type" crimes—except for those that are purely "military in nature."[27] It would have, in effect, created the inverse of the current JA-commander relationship. In other words, based on its view of the crime's impact on the victim, good order and discipline, morale, cohesion, and mission readiness, the chain of command would make recommendations to the specialized, centralized senior JA prosecutors.[28] In contrast, Representative Jackie Speier introduced a more modest reform proposal[29] that makes this shift in *referral* authority only for sexual offenses, but also creates an "Office of the Chief Prosecutor" and an enumerated "sexual harassment" offense under the UCMJ.[30] Notably, the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the President Biden all publicly supported reforming the UCMJ, but with consequences for traditional General Court-Martial Convening Authorities limited to cases of sexual offenses.[31] Though a dramatic shift nonetheless, this incremental reform is what the Secretary of Defense ordered the Department and the Services to start planning for in the Summer of 2021.[32] In the end, Congress passed a bill with large bipartisan support that did not achieve all that Senator Gillibrand and others hoped.[33] The actual fiscal year 2022 NDAA[34] did take away prosecutorial discretion from convening authorities, but only for the most serious sex crimes (plus murder, manslaughter, kidnapping, stalking, retaliation, and child pornography), and transferred it to a newly-created "Office of Special Trial Counsel" (one for each Service). These independent Counsel—all judge advocates—will report directly to the Secretary of each Service rather than a staff judge advocate, commander, or even the Judge Advocate General of their respective Services.[35] It is important to acknowledge that, while this departure from centuries of practice is indeed significant, it is far less than what could have been changed consistent with decades of gradual "civilianization" of military law. For example, there are still *nearly one hundred* offenses under the UCMJ that remain within the jurisdictional reach of traditional lay officer convening authorities. These offenses range from the martial (e.g., disobeying an order, desertion, AWOL, fraternization, misconduct before the enemy) to the serious "civilian"-type misconduct that needs no nexus to military affairs: arson, burglary, perjury, forgery, larceny, animal abuse, drug possession/use/distribution, negligent homicide, rioting, and "indecent conduct"). Clearly, there remains significant debate about just how many, and what type of, offenses ought to be within the purview of the traditional chain-of-command's disposition and referral discretion.

The Test Case

Can traditional arguments about why commanders are necessary for good order and discipline, justice, and efficiency and effectiveness[36] account for a Service member's off-post, off-duty, economic crime? When answering this question, assume the following facts:

- An Army private first class, age 23, male, married, assigned as a combat engineer in the 1st Cavalry Division at Fort Hood, Texas. He lives off-post in Killeen, in an apartment he shares with his wife, who is unemployed and pregnant.
- He is arrested by civilian law enforcement (the county sheriff's department), on suspicion that he set his car aflame in a public field, called in a false police report alleging his car had been stolen, and later fraudulently filed an insurance claim.
- The Soldier is arrested after he posts an incriminating photograph and less-than-cryptic note on his public Twitter page, both of which are viewed by his apartment manager (who happened to be owed two months' worth of rent by said private first class) who subsequently calls the sheriff's office.
- Assume that the suspect's Division Commander has General Court-Martial Convening Authority over this particular Service member per the current UCMJ and 2019 *Manual for Courts-Martial* (*MCM*).
- Assume that Fort Hood has concurrent jurisdiction with Killeen and Bell County, Texas, and exclusive jurisdiction only for misconduct occurring on military property.

Consider whether this hypothetical fact-pattern illustrates a clear basis for questioning, or even repudiating, the arguments made consistently by the Armed Services and whether the logic of that repudiation applies more generically than in just sexual assault cases.

The Challenge and Its Conditions

With these facts, defenders of the commander's prosecutorial status quo must explain *why* a hypothetical division commander, rather than the local civilian jurisdiction, is an appropriate authority to determine whether *this* Soldier should be exposed to possible stigma and consequences of a federal conviction and punishment through a court-martial. Put another way, why is a generic military general officer in command better positioned and a more appropriate law enforcement official to act with respect to *this* kind of offense and this kind offender than civilian criminal authorities? To answer this question, the status quo defender must answer it *without* relying on any of the following:

- Historical convention or custom
- Anecdotal experience
- Norms of practice at Fort Hood
- Preferences of the Bell County, City of Killeen, or State of Texas law enforcement or public officials
- Preferences of the Commanding General, or any other leader in the Soldier's chain-of-command
- Preferences of the office of the staff judge advocate
- Resources (time, personnel, funding, etc.) of Fort Hood's Criminal Investigation Division and office of the staff judge advocate or those of Bell County, City of Killeen, or State of Texas
- Conviction rates for similar offenses in civilian jurisdictions compared to military jurisdictions

These conditions might seem unfair, as if this hypothetical's restrictive parameters are so narrow that only one possible conclusion is likely. To that, consider that none of the circumstances above are listed among the fourteen factors that the President and Secretary of Defense think are reasonable in making a disposition decision.[37] A reason-

able argument in favor of this Commanding General's discretion for this off-post, off-duty offense might start with looking at the "purposes of military law," described briefly in the Preamble to the *MCM*: "to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment."[38] But nobody, including the Supreme Court, really has any idea what these terms mean definitively, nor whether they are in any sort of priority order.[39] But if the answer *includes* the phrase "good order and discipline" anywhere in it, you must—for the sake of this exercise—do three other things implied by that answer. First, you must define this phrase (and you will not find a definition in the UCMJ or *MCM* or case law).[40] For reference and comparison, though, the PAS had this to say about the relationship between commander and "discipline":

Military discipline, simply put, is the respect for authority and absolute obedience to lawful orders. The purpose of discipline stems from the necessity of combat. Against their natural instincts and personal risk, service members must adhere to the orders of their superiors to kill other human beings and risk being killed in harsh and chaotic battlefield conditions . . . . [M]ilitary justice is meant to inculcate service members in the necessity of good order and discipline. The UCMJ must be an effective tool for commanders to quickly reinforce the absolute necessity for their unit personnel to follow orders.[41]

Second, you must explain *how this* alleged misconduct actually undermines the good order and discipline in the Division. Try to be specific; after all, the prosecution would have to be, as would the accused if he chose to plead guilty.[42] Third, explain *how* the use of military justice authorities, rules, and resources to investigate, prosecute, and potentially punish *actually* will positively affect "good order and discipline." If you can only speculate as to the probability of such a positive effect, what is the *empirical basis* of support for that claim?

If your answer includes a reference to the commander's accomplishment of a military mission, readiness to execute that mission, or obedience to lawful orders, it comes with two more obligatory tasks. First, you must explain *how this* alleged misconduct damages the commander's ability to accomplish a military mission. Again, try to be specific. Second, explain *how* the use of military justice authorities, rules, and resources to investigate, prosecute, and potentially punish with a punitive discharge and incarceration, *actually* will positively mitigate that damage or reduce its risk.

If your answer is, instead, not *premised* on assuring a commander's accomplishment of a military mission, readiness to execute that mission, or obedience to lawful orders, then you must justify why you are ignoring the rationale underlying the very constitutionality of the separate military justice system, described in *Parker v. Levy*.[43]

If your answer includes a reference to cardinal military values and virtues of honesty, trust, or integrity, you must explain why any breach of such *professional values* warrants criminalization by that profession, and why it is warranted in *this* case.

For the sake of this exercise, you are not relegated to answering only in terms of the "good order and discipline" purpose of military law. If, instead, your answer includes "justice," and you want to develop a valid, coherent, and persuasive case, you must define this word first (again, you will not find it in the UCMJ, *MCM*, or case law). Be careful to explain from whose perspective or point of view this "justice" is gauged. Is it the victim's interest we care about? The accused's? The command's? The community's (and which one)? You must then explain how the use of military authorities, rules, and resources to investigate, prosecute, and potentially punish *actually* protects, serves, or improves this "justice" from that point of view. Finally, you must explain *how* this would be distinguished by the "justice" achieved through civilian prosecution.

If you answered that last question by saying that the "justice served" is essentially indistinguishable between the two systems, you have walked yourself right into a corner. This claim would mean you are accepting the rationale of the Court in its relatively recent *Ortiz v. United States*,[44] which explicitly equated the "integrated court-martial system" to state criminal law systems in their functions and purpose (they are both "for justice"). However, the Court clearly also stated that "discipline" and "obedience to orders" are positive outcomes from the use of the court-martial system, but only in the sense that these are agreeable and helpful by-products incidental to the workings of "justice."[45] In so doing, the Court de-emphasized the interest of the commander, and ignored all the procedurally distinct characteristics of military justice—including the investigative, prosecutorial, and quasi-judicial roles that commanders and convening authorities play. You must therefore explain how to square your answer with the reasoning in *Ortiz*.

If you find it difficult to articulate a coherent, reasoned, and persuasive defense for giving the Commanding General the opportunity to exercise court-martial convening authority over this private first class and his arson-based insurance fraud, in light of these constraints and the follow-on prompted explanations, take heart: one can infer that the PAS had difficulty, too. They did not attempt to rationalize their disagreement with Congress's proposed alternative in either a hypothetical or real context. Of course, one counterargument is that these hypothetical facts are simply unrealistic or, perhaps, that it is unrealistic to assume that the Division Commander would even want "to take the case" at all.

However, the law currently affords that commander the authority to make a discretionary call; whether they do so often, or ever, is largely beside the point. And if *this* fact pattern has no obvious or easy explanation, then *no* fact pattern involving "non-martial" misconduct has an obvious or easy explanation. This means that Congress's call for a study about excising commanders from felony cases was an inadequate tool of congressional oversight and discovery. The analysis it called for, and the analysis it got in return, was limited and resulted in a recapitulation of the same, now-well-rehearsed, arguments: 1) commanders are by law responsible for "suppressing indiscipline and disobedience"; 2) the actions of those under their command can be influenced by the use, or threat of use, of criminal law; 3) only commanders know how, when, why, and whom to influence in this way; 4) even if commanders are uncertain, they have competent legal advisors, and any abuse or

misuse of commander power is checked by both higher command authorities and the courts; 5) commanders' lawful use of their power is already constrained by rules and limits imposed by statute or regulation; 6) if commanders lose this authority, they will lose the trust and confidence of their subordinates, loosen cohesion, and lead to military defeat; and, finally, 7) "trust us."

This, unfortunately, assumes far too much. It assumes that all Service member misconduct has similar characteristics and consequences *from the perspective of the commander and mission*. It assumes that criminal law is, in its use or threat of use, a reasonable and legitimate way to induce the adoption of *professional values and norms* that are distinctive and not prescriptive in civilian society. It assumes that criminal misconduct of any kind reflects on the professional values and martial ideals expected of Service members. It assumes, wrongly, that criminal misconduct of any kind is inherently prejudicial to good order and discipline simply because of who committed it.[46] It assumes that advice regarding military justice from professional military experts must be heeded by their non-expert civilian principals as a matter of trust. Judge advocates do not expect commanders to heed all legal advice on a case-by-case basis, so why expect political leadership—ultimately responsible and accountable to the public—to unquestioningly adopt the military's view? Finally, it assumes we can all agree on the "purpose" of military justice; and that, whatever it is, it is something that remains static and non-contextual—in other words, military justice exists in order to do *X*; neither where the offense happened, nor what kind of offense it was, nor who committed it, nor what or who was "victimized" has any bearing on this purpose. Not only is this an assumption, it is contrary to the long history of justifying military justice's separateness based on precisely these factors.[47]

If that fundamental, usually underappreciated, question is still open to reasoned and nuanced debate, then *everything* that follows from that purpose is open to reasoned and nuanced debate. These seven assumption-based justifications for a commander-centric military justice system listed above may very well be objectively true and supported by empirical fact. But, beyond reflexively defending the system with calls to "trust us based on our experience," nobody has yet *demonstrated* that they are all true or at least supported by something beyond speculation. Congress certainly could have asked this of DoD, and the PAS certainly could have provided it and made a convincing, nuanced case for retaining a commander's convening authority when and where it matters. As JAs counseling our commanders on the mechanics and the purposes behind this system, we can do better. If we assert that such a unique system of law, so different from its civilian counterparts, deserves to be cared for, or at least not tampered with for the sake of change alone, we should do better.[48] **TAL**

LTC Maurer is an Assistant Professor of Law at the U.S. Military Academy in West Point, New York.

This article expands on an earlier version, originally published as Dan Maurer, An Open, but Difficult, Challenge: Finding the Rationale for a Commander's GCMCA for all Offenses, CAAFLog, Oct. 2, 2020, https://www.caaflog.org/home/maurer-an-open-but-difficult-challenge-finding-the-rationale-for-a-commanders-gcmca-for-all-offenses.

Notes

1. The class is an upper-level elective seminar called "Military Justice: Foundations and Legitimacy." It supplements and expands significantly on the brief introduction cadets receive to military justice (primarily Article 15 non-judicial punishment and administrative discipline) in the cadets' core course on "Constitutional and Military Law" that all West Point cadets must take to graduate. The author will gladly make available the course syllabus for this first-of-its-kind military justice course to anyone interested.

2. Manual for Courts-Martial, United States pt. IV, app. 2.1 [hereinafter MCM] ("Non-Binding Disposition Guidance" pursuant to 10 U.S.C. § 833).

3. At least in the Army practice with which the author is familiar, most Commanding Generals with General Court-Martial Convening Authority seem to prefer a weekly one-on-one discussion with their staff judge advocate to discuss on-going cases and to determine—among other things—whether to refer a particular matter to a court-martial in accordance with Article 34, Uniform Code of Military Justice (UCMJ).

4. The principal drafter of the UCMJ made this claim the centerpiece of his argument when explaining the new code to Congress before they enacted it. Professor Edmund Morgan testified that "we [the drafting committee] have tried to prevent courts-martial from being an instrumentality and agency to express the will of the commander." *The Uniform Code of Military Justice: Hearing Before a Subcomm. of the H. Comm. on Armed Servs. on H.R.* 2498, 81st Cong. 606 (1949) (statement of Professor Edmund F. Morgan, Jr., emphasizing being forced to reconcile with a genuine need to balance a commander's need for discipline, as a means to the end of mission accomplishment, and Service member's rights and expectations for "justice").

5. *See generally* Symposium, *Legal Ethics and Modern Military Justice*, 49 Hofstra L. Rev. 1 (2020) (featuring articles by U.S. Air Force retired judge advocate Joshua Kastenberg, Lieutenant Colonel Christopher E. Martin, Colonel Timothy P. Hayes Jr., Major Robert Murdough, and U.S. Air Force judge advocate Lieutenant Colonel (Retired) Rachel E. VanLandingham).

6. Savannah Behrmann, *Congress OKs $770B Defense Spending Bill. Here's What's In It, and What's Not*, USA Today, https://www.usatoday.com/story/news/politics/2021/12/15/ndaa-defense-spending-bill-clears-congress-heres-whats-it/6417412001/ (Dec. 15, 2021, 4:18 PM).

7. Missy Ryan, *Pentagon Leaders Have Opposed Plans Overhauling the Military System for Trying Sexual Assault for Years. Has the Time Come for Change?*, Wash. Post (Apr. 10, 2021, 4:30 PM), https://www.washingtonpost.com/national-security/sexual-assault-military-reform-pentagon-resistance/2021/04/10/e5a98a92-96f7-11eb-8e42-3906c09073f9_story.html. *See also* Lieutenant Colonel (Retired) Rachel VanLandingham, *Professional Criminal Prosecution Versus the Siren Song of Command: The Road to Improve Military Justice*, Just Sec. (June 21, 2021), https://www.justsecurity.org/77025/professional-criminal-prosecution-versus-the-siren-song-of-command-the-road-to-improve-military-justice/.

8. *See generally* Fredric I. Lederer, *From Rome to the Military Justice Acts of* 2016 *and Beyond: Continuing Civilianization of the Criminal Legal System*, 225 Mil. L. Rev. 512 (2017).

9. For summaries of the legislative efforts to investigate and drive change in military sexual assault prevention and prosecution, see Rodrigo M. Caruço, *In Order to Form a More Perfect Court: A Quantitative Measure of the Military's Highest Court's Success as a Court of Last Resort*, 41 Vt. L. Rev. 71 (2016). *See also* Barbara Salazar Torreon & Carla Y. Davis-Castro, Cong. Rsch. Serv., R43168, Military Sexual Assault: Chronology of Activity in the 113th-114th Congresses and Related Resources (2019); Kristy N. Kamarck & Barbara Salazar Torreon, Cong. Rsch. Serv., R44944, Military Sexual Assault: A Framework for Congressional Oversight (2021).

10. *To Receive Testimony About Sexual Assault in the Military: Hearing before the S. Comm. on Armed Serv.,* 117th Cong. (2021).

11. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 540F, 133 Stat. 1198, 1367–68 (2019) ("Report on Military Justice System Involving Alternative Authority for Determining Whether to Prefer or Refer Changes [sic] for Felony Offenses Under the Uniform Code of Military Justice").

12. Michel Paradis, *Is a Major Change to Military Justice in the Works?*, Lawfare (May 4, 2020, 11:30 AM), https://www.lawfareblog.com/major-change-military-justice-works.

13. There are seven characteristics that might be used to help identify "martial offenses," which in the process explains why a commander would be well-positioned to understand the offense's seriousness and effect. *See* Dan Maurer, *The "Shadow Report" on Commanders' Prosecutorial Powers Raises More Questions Than Answers*, Lawfare (May 11, 2020, 11:07 AM), https://www.

lawfareblog.com/shadow-report-commanders-prosecutorial-powers-raises-more-questions-answers.

14. MCM, *supra* note 2, Mil. R. Evid. 311–316.

15. *Id.* R.C.M. 302–305.

16. *Id.* R.C.M. 306. *See also id.* app. 2.1.

17. *Id.* R.C.M. 401c.(1).

18. *Id.* R.C.M. 705.

19. 10 U.S.C. § 825(e)(2).

20. *See generally* Joint Serv. Comm. on Mil. Just., Report of the Joint Service Subcommittee Prosecutorial Authority Study (JSS-PAS) (2020), https://dacipad.whs.mil/images/Public/10-Reading_Room/00_Policy-Materials/13_JSC_Report_Alternative_MJSystem.pdf [hereinafter PAS Report].

21. *See, e.g.*, Chris Jenks & Geoffrey S. Corn, *The Military Justice Solution in Search of a Problem*, Hill (July 8, 2020, 11:00 AM), https://thehill.com/opinion/national-security/506205-the-military-justice-solution-in-search-of-a-problem. The authors, both retired military judge advocates and now civilian law professors, wrote:

> Prosecutorial authority is arguably the most important tool commanders possess to ensure a disciplined, effective fighting force and is inextricably linked to the commander's responsibility to ensure the military readiness essential for mission accomplishment. Divesting commanders of this authority would degrade not only U.S. military combat capabilities but also the military's response to sexual misconduct in the ranks.

Id.

22. *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953); Orloff v. Willoughby, 345 U.S. 83 (1953); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955); Parker v. Levy, 417 U.S. 733 (1974); Rostker v. Goldberg, 453 U.S. 57 (1981); Chappell v. Wallace, 462 U.S. 296 (1983).

23. Edward F. Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3 (1970); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, *in* The Constitution and the Future of Criminal Justice in America 287 (John T. Parry & L. Song Richardson eds., 2013); Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?*, Lawfare (July 13, 2018, 10:00 AM), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts.

24. PAS Report, *supra* note 20, at 64. Also, it should not go unnoticed that PAS consisted of fifteen members that included a mix of JAs and former commanders from all the armed services, and civilian attorneys. Though the primary effects of the alternative would be felt as a reduction in legal power and discretion by those commanders with General Court-Martial Convening Authority, no members of the PAS have ever held such authority.

25. *Gillibrand, Grassley & Cruz Offer Military Justice Improvement Act as Amendment to* 2021 *NDAA*, Protect Our Defenders: News Blog (July 1, 2020), https://www.protectourdefenders.com/gillibrand-grassley-cruz-offer-military-justice-improvement-act-as-amendment-to-2021-ndaa/.

26. Military Justice Improvement and Increasing Prevention Act of 2021, S.1520, 117th Cong. (read twice and referred to H. Comm. on Armed Servs. 2021). This bill proposes to reform the disposition of charges and convening of courts-martial for certain offenses under the Uniform Code of Military Justice and to increase the prevention of sexual assaults and other crimes in the military. The bill has gathered significant bipartisan support (with more than sixty co-sponsors as of this writing), and also has wide support from various interest groups: Protect our Defenders; Iraq and Afghanistan Veterans of America; Veterans of Foreign Wars; Vietnam Veterans of America; National Alliance to End Sexual Violence; National Coalition Against Domestic Violence; Common Defense; Veterans Recovery Project; Service Women's Action Network; and the National Institute of Military Justice.

27. *Id.*

28. *See, e.g.*, Ellen Mitchell, *Gillibrand Makes New Push for Military Sexual Assault Reform*, Hill (Apr. 29, 2021, 2:48 PM), https://thehill.com/policy/defense/550999-gillibrand-makes-new-push-for-military-sexual-assault-reform; Leo Shane III, *Major Overhaul in How the Military Handles Sexual Misconduct Cases May Finally Happen*, Mil. Times (Apr. 29, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/04/29/major-overhaul-in-how-the-military-handles-sexual-misconduct-cases-may-finally-happen/; Michel Paradis, *Congress Demands Accountability for Service Members*, Lawfare (June 1, 2021, 9:28 AM), https://www.lawfareblog.com/congress-demands-accountability-service-members.

29. I am Vanessa Guillén Act of 2020, H.R. 8270, 116th Cong. (referred to H. Comm. on Armed Servs. 2020).

30. For a comprehensive comparative review of the various reform bills and the larger context of "civilianization" of military justice, see Daniel Maurer, *A Comparative Analysis of UCMJ Reform Proposals*, CAAFlog (June 4, 2021), https://www.caaflog.org/home/maurer-comparative-analysis-of-ucmj-reform-proposals.

31. *See, e.g.*, Rebecca Kheel, *Top General: Military Justice Overhaul Proposed by Gillibrand "Requires Some Detailed Study,"* Hill (June 10, 2021, 11:37 AM), https://thehill.com/policy/defense/557774-top-general-military-justice-overhaul-proposed-by-gillibrand-requires-some; W.J. Hennigan, *Pentagon Directs Major Overhaul to Military's Handling of Sexual Assault Cases*, Time (July 2, 2021, 12:45 PM), https://time.com/6077840/pentagon-overhaul-sexual-assault-cases/; Lara Seligman, *Biden Backs Major Reform to Military's Handling of Sexual Assault*, Politico (July 2, 2021, 11:35 AM), https://www.politico.com/news/2021/07/02/biden-military-sexual-assault-497816.

32. Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Department of Defense Actions and Implementation Guidance to Address Sexual Assault and Sexual Harassment in the Military (2 July 2021).

33. *Gillibrand Statement on the Gutting of Bipartisan Military Justice Reforms by House and Senate Armed Services Leadership*, Kirsten Gillibrand: U.S. Sen. for N.Y. (Dec. 7, 2021), https://www.gillibrand.senate.gov/news/press/release/gillibrand-statement-on-the-gutting-of-bipartisan-military-justice-reforms-by-house-and-senate-armed-services-leadership.

34. National Defense Authorization Act for Fiscal Year 2022, S. 1605, 117th Cong. (2021). *See also* Staff of H. Armed Servs. Comm., 117th Cong., Final Text Summary of the National Defense Authorization Act for Fiscal Year 2022 (2021).

35. The NDAA made other changes besides affecting the discretion of convening authorities: it also mandated that the President prescribe "sentencing parameters" and "sentencing factors," and that all sentencing (regardless of offense) will be done by military judges alone. The NDAA also added a new "sexual harassment" offense under Article 134, and finally removed the "and a gentleman" from the name of the Article 133 offense.

36. MCM, *supra* note 2, pt. I, ¶ 3.

37. MCM, *supra* note 2, app. 2.1.

38. *Id.*

39. *See, e.g.*, Colonel Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 Clev. St. L. Rev. 123 (2017) (discussing why no single and widely accepted definition of "good order and discipline" is problematic); David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 Mil. L. Rev. 1, 74 (2013); Parker v. Levy 417 U.S. 733, 781–89 (1974) (Stewart, J., dissenting).

40. However, there are clues. We might consider the illustrations of what it means to be "prejudicial to good order and discipline" in the *MCM*'s section on "extramarital sexual conduct," a violation of Article 134, UCMJ. *See* MCM, *supra* note 2, pt. IV, ¶ 99.c.

41. PAS Report, *supra* note 20, at 18–19.

42. United States v. Care, 40 C.M.R. 247 (C.M.A. 1969).

43. 417 U.S. 733.

44. Ortiz v. United States, 138 S. Ct. 2165 (2018).

45. *Id.* at 2176 n.5.

46. *See* United States v. Miller, 67 M.J. 385 (C.A.A.F. 2009) (holding that neither the "prejudicial to good order and discipline" nor the "of a nature to bring discredit upon the armed forces" elements of Article 134 "general article" are necessarily subsets or fairly implied by any and all of the enumerated UCMJ offenses; in other words, an Article 134 offense is not a *per se* lesser included offense of the enumerated offenses).

47. *See, e.g.*, United States Manual for Courts-Martial 151 (1917 ed.) ("While courts-martial are the judicial machinery provided by law for the trial of military offenses, the law also recognizes that the legal power of command, when wisely and justly exercised to that end, is a powerful agency for the maintenance of discipline"); Parker v. Levy, 417 U.S. 733, 743–44 ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history"); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian.").

48. For the author's more philosophical take on the underlying principles that may (or may not) justify the on-going civilianization of military law and the areas that remain idiosyncratic, see Daniel D. Maurer, *The Veil (or Helmet) of Ignorance: A Rawlsian Thought Experiment About a Military's Criminal Law*, 55 U. Rich. L. Rev. 945 (2021).

AROUND THE CORPS

The 214th Judge Advocate Officer Basic Course participated in their pre-graduation award ceremony in July 2021 at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

(Credit: Library of Congress, LC-DIG-pga-12930)

JOHN ADAMS Esq.r

No. 4

Certain Principles Are Eternal

The Boston Massacre Trial and the Moral Courage of John Adams

By Kenneth A. Turner, with Introduction by Lieutenant Colonel Tanasha N. Stinson

"Principled Counsel is professional advice on law and policy grounded in the Army Ethic and the enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."[1] Although this particular definition is new to our Corps, principled counsel has been at the heart of our legal practice throughout our nation's history.[2] "Principled Counsel is the north pointing direction on our Corps's North Star—designed to remind each of us—constantly—the origin of our advice and counsel—which are our shared values sourced from timeless virtues."[3]

John Adams, in his determination to do the right thing, regardless of the personal cost that might accompany his decision, represents the epitome of principled counsel. Adams was the professor of William Tudor, our first Judge Advocate General, and would later serve as the second President of the United States. The following article is not about the Army or military law, but it does provide a shining example of leadership and a profound belief in principled counsel, which resonates throughout our Corps.

Moral Courage

On the night of 5 March 1770, British troops opened fire on hundreds of civilians on the streets of Boston, Massachusetts. What started as a clash between a British sentry, Private (PVT) Hugh White, and a large crowd, escalated into one of the most controversial events of early American colonial history. Responding to PVT White's call for help, Captain (Capt) Thomas Preston arrived at the Customs House on King Street with seven soldiers of the 29th Regiment of Foot.[4] During the conflict, a fire bell rang out in the night, prompting hundreds of more civilians to come running to King Street. It is uncertain why the soldiers opened fire on the growing crowd, or how many fired. What is certain is the night ended with three civilians dead—Samuel Gray, Crispus Attucks (also known as Michael Johnson), and James Caldwell—with six others wounded. Two of the wounded men later died of their injuries, Samuel Maverick on 6 March and Patrick Carr on 14 March.[5]

John Adams was one of the American colonists who responded to the fire bells that cold March night. Although he arrived too late to witness the height of the unrest, as the days passed, he found himself inextricably drawn into the tumultuous events resulting from the clash on King Street. In the ensuing murder trial, Adams defended Capt Preston and his soldiers in a profound act of moral courage. Adams risked his and his family's personal safety, his livelihood, and his social reputation to courageously confront an injustice and uphold his moral principles.

Adams believed in the intrinsic rights of man. He described his defense of the British soldiers as "one of the most gallant,

generous, manly, and disinterested Actions of my whole life, one of the best Pieces of service I ever rendered my Country."[6] In Adams's mind, the rule of law, informed by facts and evidence, not the passions of a cause, should govern the affairs of freemen in a society.[7] His actions demonstrated his belief that every freeman had the right to a fair trial and representation in his defense, and it would be an injustice to deny these rights to Preston and the British soldiers. These men deserved a fair trial and sound representation in their defense. Adams's actions demonstrated the trial was about the guilt or innocence of the defendants and the inherent rights of freemen in a society. These were eternal principles.

In standing up for what he believed was right, Adams demonstrated exceptional moral courage, which William Miller terms "lonely courage."[8] Moral courage is the ability to take a stand for what you believe in, informed by your ideals, principles, or convictions. Moral courage also entails physical or emotional risk, or perceived risk. If there is no risk in the action, then there is no courage. Miller further defines moral courage as "the capacity to overcome the fear of shame and humiliation in order to admit one's mistakes, to confess a wrong, to reject evil conformity, to denounce injustice, and to defy immoral imprudent orders."[9] John Adams took action informed by his moral principles, to prevent injustice, overcoming the perceived risk to his safety, family, business, and reputation, in support of his deeply held principles.

Two-hundred-and-fifty years after the Boston Massacre, the ultimate responsibility for the deaths is still a matter of debate. However, on the night of the conflict, Lieutenant Governor Thomas Hutchinson acted swiftly to determine the guilt of those involved, while calming the crowd of people crying out for justice on the steps of the Customs House. Arriving on the scene, Hutchinson moved to the second floor of the council chamber overlooking King Street. He spoke to the crowd and assured them the law would prevail. He pled with them to peaceably disperse and leave justice to the civil courts of the Commonwealth. He told the crowd, "The law shall have its course. I will live and die by the law."[10] Eventually, Hutchison's efforts helped disperse the troops and the crowd without further physical conflict. By two o'clock in the morning, Sheriff Greenleaf (the Sheriff of Suffolk County) served a warrant for Capt Preston's arrest. By three o'clock in the morning, Preston was in jail. The next morning, the eight soldiers involved in the incident surrendered to the civil authorities.[11] The Superior Court of Suffolk County charged the British soldiers—William Wemms, James Hartegan, William M'Cauley, Hugh White, Matthew Killroy, William Warren, John Carrol, and Hugh Montgomery—with the murders of Crispus Attucks, Samuel Gray, Samuel Maverick, James Caldwell, and Patrick Carr.[12]

British Soldiers in Boston

In the years preceding the winter of 1770, economic troubles dominated the relationship between England, its American Colonies, and the Crown. To raise revenue to satisfy debts from the Seven Years War and reassert its imperial control over the colonies, England levied various taxes on colonial goods, passing the Stamp Acts of 1765 and, later, the Townshend Acts of 1767. The colonists were able to force the repeal of the Stamp Acts through civil unrest and violence against the King's representatives. However, soon after repeal of the Stamp Act, the new Chancellor of the Exchequer, Charles Townshend, took several measures to bring the colonists in line and extract more revenue for England. One of these measures was the Townshend Acts of 1767.

In the summer of 1767, Townshend developed and worked an omnibus bill through Parliament reaffirming the legality of the writs of assistance, establishing new admiralty courts, and setting up a five-member Board of Customs Commissioners in Boston reporting directly to the British Treasury. The Board of Customs was responsible for commerce, navigation, coast guard, customs, the admiralty courts, and allied services in seventeen colonies of the mainland and the Caribbean.[13] The customs official's headquarters was in Boston on King Street. Townshend also imposed a new series of duties on specific goods coming into the colonies including tea, glass, lead, paints, and paper.[14] These duties caused angst throughout the colonies, particularly in Boston due to its vibrant commercial activity.

In response to the Townshend Acts, leading citizens of Boston held a town meeting on 28 October 1767 and declared their opposition. The citizens vowed to boycott "dutied" articles and to persuade the merchants to stop importing British goods. The citizens also appointed a committee to draw up a circular letter persuading other colonies to support the ban.[15] In response to these antagonistic acts, Francis Bernard (the Royal Governor of Massachusetts), reluctantly called the General Court Legislature into session. The legislature quickly devolved into turmoil—arguing with the governor over its rights, framing petitions, and drafting circular letters to other legislative assemblies calling on support of the non-importation movement. Governor Bernard denounced the circular letter as seditious and dissolved the assembly.[16] By the summer of 1768, many Boston importers joined the economic protest and refused to pay the import fees. In support of the circular letter, American coastal cities from New England to Georgia refused to import goods from England.[17]

At a loss to enforce the acts and suffering from reduced revenue, customs officials sent a request to Lord Hillsborough (the Secretary of the Colonies) expressing their concern for their safety. Lord Hillsborough requested help from the War Office. The War Office directed General Thomas Gage, the commander of all British forces in the American Colonies, to "strengthen the ends of government in the Province of the Massachusetts Bay, enforce due obedience of the law, and protect officials of the colony in the discharge of their duties."[18] The customs officials did not have the power to enforce Parliament's directives and obtain compliance. They needed British soldiers to compel the colonies. The War Office responded and occupied Boston with British Regulars.

In August 1768, General Gage received word from London to move troops to Boston to enforce royal decrees, ensure order, and reduce unrest. General Gage sent one of his aides, Capt William Sheriff, to confer with Governor Bernard on the use of the troops. At a meeting on 3 September 1768, Capt Sheriff and Governor Bernard agreed

they needed two regiments in Boston to enforce the royal decrees. The plan called for one regiment stationed in the town and the other in Castle William, three miles from the town center. The 29th and 14th Infantry Regiments arrived in Boston on 1 October 1768.[19]

In the next eighteen months, between the arrival of the soldiers in 1768 and the fateful night of 5 March 1770, a bitterness grew over the presence of British soldiers in Boston. Residents resented the presence of the British soldiers for a variety of reasons. The soldiers competed for many lower-paying jobs during their off-duty time, often accepting menial jobs for less pay than civilians. With high unemployment due to the ongoing economic turmoil, residents resented the competition for scarce jobs. Additionally, the Colonies shared the English tradition of opposing the military occupation of cities in peacetime.

The soldiers' role in enforcing the King's policies was starkly different from the role of British soldiers in the past. The British Government sent these soldiers expressly to enforce royal decrees and maintain law and order. The soldiers were not in Boston to protect the colonists from outside threats, making these regiments distinctly different from the British forces formerly serving in the American colonies. Before this, British soldiers fought to defend the colonies against mutual threats involving the French, Spanish, and various Indigenous tribes. Now the soldiers represented the colonists' government, enforcing British economic policy and interests against British citizens. Previously, the colonists supported British military interests, and about 8,000 colonists served in the British army during the French and Indian War.[20] This occupation was different. It was another example of England treating the colonists differently from the subjects in Britain and as lower-class freemen. The resentment continued to grow. Members of the Non-Importation Association and other "radical" groups continued to foment unrest to force Parliament to revoke the Townshend Acts.

Turmoil Increases

Several noteworthy events occurred in the winter of 1770, leading up to the shootings on King Street. These activities ranged from public protests and confrontations to persuasive commentaries intended to arouse unrest. One of the confrontations occurred on 22 February 1770, when radicals erected a painted, wood head on a post in front of Theophilus Lillie's importation business. The sign marked Lillie's business as a violator of the non-importation ban and stood as a signal for patrons to boycott his goods. Later in the day, Lillie's neighbor, Ebenezer Richardson,[21] saw the sign and used an ax to try to cut it down. As he tried to destroy the post, a crowd of boys surrounded him. The boys threw ice and snowballs at him and chased him into his house. They surrounded the house and threw stones and bricks through his windows. In response, Richardson fired a musket into the crowd killing an eleven-year-old boy named Christopher Snider. After the shooting, a crowd entered Richardson's house and pulled him and another man, George Wilmot, from the house. The crowd took them to Faneuil Hall and presented the men to three magistrates: Richard Dana, Edmund Quincy, and Samuel Pemberton. The authorities placed Richardson in confinement to stand trial.[22]

On 26 February, Boston held a public funeral for Snider. Commencing at three o'clock near Liberty Tree, the line of mourners stretched a quarter of a mile from the town center to the burial ground, and it included 400 to 500 boys from several schools and other members of the town—an estimated 1,300 people.[23] John Adams, who was sympathetic to the cause, if not the means, of the radicals, participated in the march and commented on his experience in his diary.[24]

> When I came into Town, I saw a vast Collection of People, near Liberty Tree—enquired and found the funeral of the Child, lately kill'd by Richardson was to be attended. Went into Mr. Rowes, and warmed me, and then went out with him to the Funeral, a vast Number of Boys walked before the Coffin, a vast Number of Women and Men after it, and a Number of Carriages. My Eyes never beheld such a funeral. The Procession extended further than can be well imagined.[25]

Adams also commented on the crowd and the socio-political public atmosphere of Boston:

> This Shewes, there are many more Lives to spend if wanted in the Service of their Country. It Shews, too that the Faction [*illegible*] is not yet expiring—that the Ardor of the People is not to be quelled by the Slaughter of one Child and the Wounding of another.[26]

Tensions continued to rise as the Sons of Liberty capitalized on the unrest to compel the British to remove the regulars from Boston.[27]

On Friday, 2 March, shortly after Snider's funeral, another incident occurred adding to the already tense mood in Boston. Two soldiers from the 29th Regiment got into a brawl with the dockworkers along John Gray's Ropewalk.[28] The fight broke out when PVT Patrick Walker of the 29th Regiment got into a verbal confrontation with a rope maker, William Green. The fight escalated with other workers joining the fray using rocks, clubs, and cutlasses. Sam Gray (who was later shot on King Street) and PVT Matthew Kilroy (one of the soldiers involved in shooting into the crowd) joined the fight. The fight escalated as additional workers and up to forty soldiers joined the brawl. Eventually, the civilians pushed the soldiers back to their barracks.[29] Immediately afterward, rumors flew through town that the workers and soldiers would renew the fight on Monday, 5 March.[30]

On Saturday, 3 March, another brawl arose by the docks between soldiers of the 29th Regiment and workers in the ropewalk. Private John Carrol and sailor James Bailey were among those who returned to the ropewalks to challenge the civilian workers. Several soldiers and civilians were injured in the ensuing brawl.[31] The same day, Reverend Andrew Elliot mentioned many people were looking forward to "fighting it out with the Soldiers on Monday."[32] It was also widely known that the bells summoning the militia would

toll to bring the people together. Anxiety continued Sunday as rumors of another large confrontation persisted.[33] All of these actions increased tensions, making further confrontations almost inevitable. As soldiers and civilians clashed on King Street the next night, this played out in what became known as the Boston Massacre.

The clash of Monday, 5 March, resulted in five deaths and immense political upheaval. The events also provided an opportunity to demonstrate the importance of the rule of law in the maelstrom of public emotions. John Adams was one of many who responded to the bells tolling that cold March night; the next morning, he became directly involved in its aftermath.

No One Will Take the Case

On the morning after the clash on King Street, a Boston merchant, James Forrest, visited John Adams in his residence. Forrest, a Tory merchant, was a known companion of the British officers. On the night of 5 March, he was sharing drinks with Capt Jeremiah French of the 29th Regiment.[34] Forrest pled with Adams to defend Preston and the soldiers in the upcoming trial. According to Forrest, no one else would take the case.[35] Forrest told Adams the three Crown lawyers refused to represent the accused men. Even Robert Auchmuty Jr., the Admiralty Court Judge, refused to become involved, but he admitted he would help represent Preston if Adams would assist. Forrest also stated he had spoken to barrister Josiah Quincy. Quincy said that if Adams stepped forward, he, too, would assist.[36] No lawyer, either royalist or radical, would face the hatred of the Boston populace unless Adams led the way. Adams had the respect of the community; however, it would require exceptional moral courage to defy the vocal and active radicals and defend the unpopular British amid the civil unrest confronting Boston. Adams could have shut the door and dismissed Forrest. However, Adams was a man of strong principles. He would weigh those principles against the risk of Forrest's request and, in the end, demonstrate commendable moral courage.

Adams was genuinely concerned about representing the British soldiers, and his concerns were well-founded. He was a prominent member of Boston society and held in high esteem by leading figures in Boston. Taking the case entailed considerable risk to his family, his business, and his standing in Boston society. Balancing his ideals against the safety of his business and the personal welfare of his family was a major source of anxiety. These concerns likely weighed heavily on his decision.

His wife Abigail's emotional state and the added stress of taking the case also caused Adams much concern. There was already considerable stress in the family because of the loss of a child.[37] Abigail took the death extremely hard, becoming listless and depressed. When Adams would come home, he would find her sitting alone in the dark, staring out the window, motionless and unresponsive to his appeals.[38] The combination of taking the case and Abigail's current condition troubled him, and he discussed it with her. He related his anxiety in his diary three years after meeting with Forrest:

> I . . . devoted myself to endless labour and Anxiety if not to infamy and death, and that for nothing, except, what indeed was and ought to be all in all, a sense of duty. In the Evening I expressed to Mrs. Adams all my Apprehensions: That excellent Lady, who has always encouraged me, burst into a flood of Tears, but said she was very sensible of all the Danger to her and to our Children as well as to me, but she thought I had done as I ought, she was very willing to share in all that was to come and place her trust in Providence.[39]

In addition to the anxiety over the personal safety of his family, Adams was concerned about the effect of the case on his continued success as a lawyer. Adams was a particularly successful lawyer when he moved his family from Braintree into the city in 1768 to be closer to his office and courts. Amid a thriving and growing practice, he had much to lose in opposing the popular view. Given the current unrest in Boston, fueled by the hatred of the British soldiers and tough economic times, accepting this case would likely result in public scorn—which would damage his reputation and have financial repercussions. By his own account: "At this time I had more business at the bar than any man in the Province."[40] Adams later related in his writings that his role in defending the soldiers resulted in the instantaneous loss of more than half of his business.[41]

Another factor affecting Adams's decision was the influence of the Sons of Liberty. The Sons were behind much of the unrest in Boston. Their major objective was to force the expulsion of the British troops. The Sons of Liberty included influential members of society from notable merchants, artisans, and tradesmen. John Gill—the *Boston Gazette* editor,[42] and Benjamin Eades—the printer of the *Gazette,* were members of the Sons of Liberty.[43] Other supporters included Paul Revere, Alexander Hamilton, and John Adams's cousin, Samuel Adams. John Adams was a member of the group and attended some of their meetings.[44] He was sympathetic to the radical group's cause, but he questioned their methods. Sam Adams, being a prominent member of the Sons and an ardent radical, opposed Adams taking the case. John Adams's loyalty to his family and his sympathy for the radical cause factored in his decision to represent the men. If he defended the hated British soldiers, he could expect tension between his cousin and his acquaintances in the Sons of Liberty.

Adams's views on freedom and his principles overrode his concerns. His later writings provide insight into his thoughts at the time. He wrote, "[N]o man in a free country should be denied the right to counsel and a fair trial, and convinced on principle, that the case was of utmost importance."[45] The importance of the case was not solely in the guilt or innocence of the soldiers or civilians. This case was important to Adams because of the ideal it represented. Adams passionately believed every freeman deserved a trial and representation in his defense by sound counsel. These concepts were inherent rights of every freeman.

Adams's past writings offer insight into what he believed about the significance of the rule of law and the rights of man as he weighed his decision. While a resident of Braintree, Massachusetts, in October 1765, Adams provided his ideas on the impor-

tance of the rule of law in his development and circulation of a document entitled the *Braintree Instructions*.[46] He wrote *Braintree Instructions* in support of the colonial opposition to the Stamp Acts and provided the document to the delegates of the legislative body of Massachusetts. In these instructions, Adams repudiated the authority of the Admiralty Court to collect taxes in the colonies. He based his objections on the fact that the courts did not employ juries and, therefore, violated the principle of just representation inherent in the rights of Englishmen. Forty towns across New England adopted the *Braintree Instructions*.[47]

According to Adams, the Stamp Acts also violated the right to consultation in the levee of taxes:

> We have always understood it to be a grand and fundamental principle of the constitution, that no freeman should be subject to any tax to which he has not given his consent, in person or by proxy. And the maxims of the law, as we have constantly received them, are to the same effect, that no freeman can be separated from his property but by his act or fault. We take it clearly, therefore, to be inconsistent with the spirit of the common law, and of the essential fundamental principles of the British constitution, that we should be subject to any tax imposed by the British Parliament; because we are not represented in that assembly in any sense, unless it be by a fiction of law, as insensible in theory as it would be injurious in practice, if such a taxation should be grounded on it.[48]

In rejecting the authority of the Admiralty Courts, Adams reaffirmed his commitment to the inherent right of freemen for a trial by their peers. During the same period, Adams continued his opposition to the Stamp Acts by writing a series of articles for the *Boston Gazette* entitled "The Dissertation on Feudal and Canon Law."[49] In these articles, he reiterated his beliefs about individual rights and asserted these rights came from "our Maker" and are "indisputable, unalienable, and indefensible" as well as "inherent, essential, and divine."[50]

Adams's writings provide insight into the principles that guided his actions in assuming the case. His writings reveal his belief that God gave men their rights and that no man could take away those rights. Only through a "social contract" could these rights be limited. This ideal helped explain Adams's commitment and his belief he had a duty to defend Preston and the British soldiers. Adams knew the Crown-appointed lawyers refused to take the case because of the danger posed by a passionate element of the populace, but he would not let that danger prevent him from standing on principles.

Adams took the case because he believed the law, founded on the facts and the truth, must govern the outcome, not the emotions of a cause, regardless of how just the cause might be. As he told Forrest, he would rely on facts, evidence, and the law. The rule of law would determine the soldiers' innocence. Adams would not stoop to the use of tricks or deception.[51]

Adams's concerns over his safety and reputation in the community immediately came to fruition. While he talked to Forrest, a group gathered outside his home. He was instantly pressured by the local crowds, composed of members of the Sons of Liberty. After Forrest left the house, Adams met the crowd outside his door. Benjamin Eades asked Adams what Forrest was doing in his house. Adams announced to the crowd, "Forrest came to me from the jail. Ben Eades, you may tell whom you please that I have agreed to act as counsel for Capt Preston, who is held for murder. You may say also that I will defend the British soldiers lying in the stone jail under capital charges."[52]

Word spread immediately about Adams taking the case, and he suffered the catcalls, humiliating words, and taunts of the populous when he appeared in public. The more aggressive radicals even assaulted him by throwing mud.[53] In another incident, three boys threw stones through the windows of his house.[54] On 6 March, on his way home, members of the Sons of Liberty stopped Adams on the street to ask if he would defend the murderers. He replied forcefully he would take the case and the men were innocent until proven guilty.[55]

Yet, while Capt Preston and his men would have defense counsel, there was no certainty of a quick trial. The radicals and the Royal Authorities swiftly worked to use the trial to achieve their political ends: the radicals vying for a swift trial and the Royal Authorities working to delay justice. With emotions running high in Boston, Lieutenant Governor Hutchison worked hard to delay the trials, hoping the emotions and passions would subside. He thought that, with the passing of time, reason would prevail and the delay would facilitate a fairer trial.

On the other hand, the radicals—afraid the passions of the public would diminish with time—pushed for a quick trial, working to influence public opinion in their favor. On Monday, 12 March, at a meeting "of the freeholders and other inhabitants of the Town of Boston,"[56] Boston selectmen appointed a committee to write an account of what happened on King Street. The men produced their report, including ninety-six depositions from eyewitnesses. On the following Monday, 19 March, they delivered their account to the town meeting. The town leaders directed the publication of the report as a pamphlet titled *A Short Narrative of the Horrid Massacre in Boston*.[57] Members of the Sons of Liberty, Eades, and Gill produced the pamphlet.[58]

Adams persevered with his preparation for the trial. However, the tumultuous political environment of Boston would not allow for a quick and, in Adams's mind, fair trial. He mentioned to Abigail in March, "If Preston's trial is not postponed, we shall have no chance at all. No judge will sit and no jury dare give a fair verdict."[59]

The Trial

As the radicals pushed to rouse the furor of the public and attain a quick trial, on 12 March 1770, Chief Justice Lynde of the Suffolk County Superior Court postponed the trial until June, citing the absence of two of the Superior Court justices as the reason. Justice Towbridge was sick, and another was recovering from a fall from his horse. Lynde believed a trial of such significance deserved the presence of all four of the justices and delayed the trial.[60]

The radicals also resorted to physical means to assert their demands for immediate

trials. When they heard the court delayed the trials until June, Sam Adams and John Hancock led a crowd into the court proclaiming the "necessity of proceeding to the trial of the Criminals this Term, particularly those concerned in the late bloody Massacre."[61] When the radicals referred to "the Criminals," they meant both Richardson for the murder of the Snider boy and the soldiers for the clash on King Street. These bullying tactics had their intended effect. The justices, claiming "duress and afraid to offend the town," agreed to try the Richardson and other cases in April instead of June.[62]

The Court tried Richardson on 11 April 1770. Josiah Quincy defended Richardson, and Josiah's brother Samuel Quincy served as prosecutor. The court found Richardson guilty. However, the justices did not render a punishment and adjourned until 29 May.[63] The justices did not mention the trial of Preston and the soldiers, but many people expected them to address this issue when they reconvened in May.

When the court reconvened in May, Judge Trowbridge was still sick, and Judge Oliver was still recovering from his injury. Unable to convene the court without all four superior justices, Chief Justice Lynde again adjourned without specifying a day to reconvene. The law did not require the court to sit in Boston until 28 August; and, since the court conducted its circuit in Maine from June through July, the earliest possible trial date would be after this circuit. [64] Hutchinson obtained his delay.

In early September 1770, the justices met with the jury of the Richardson case for sentencing. The justices felt the evidence did not justify a guilty verdict in the case. They understood the threat of violence unjustly influenced the jury, but the sanctity of the jury verdict and the law tied the justices' hands. Once again, faced with the threat of violence, the justices put off sentencing Richardson.[65] Unwilling to sentence Richardson, they turned their attention to the arraignment of Preston and the soldiers.

On 7 September 1770, the Suffolk County Court arraigned the defendants. Each man pled not guilty and elected for a trial "by God and my country,"[66] meaning by jury. The court once again deferred the trial until 23 October and adjourned the next day.[67] While previous delays were in his favor, at this point, Preston wanted a trial soon, understanding that if the superior court found him guilty, he would need time for an appeal of pardon from the King. He was running out of time. The winter storms prevented travel to England and would delay his anticipated request for pardon.[68]

As the Superior Court session approached, the question of separating Preston's trial from the trial of the soldiers arose. The soldiers petitioned the court to secure a joint trial. The soldiers asked the court to "be so good as to lett us have our Trial at the same time as our Captains, for we did our Captains orders and if we don't Obay his Command we should have been Confine'd and shott for not doing of it."[69] They went on, stating, "[W]e only desire to Open the truth before our Captains face for it is very hard he being a Gentleman should have more chance for saving his life than we poor men that is Obliged to Obay his command."[70] There are no surviving notes or correspondence to determine how the court acted on the soldiers' petition. However, subsequent actions reveal the decision. On 23 October, the records of the court indicated there would be one trial for both the soldiers and Capt Preston. Yet, despite these written records, at eight o'clock in the morning on 24 October, Preston stood in the dock alone.[71] The Superior Court would hold two separate trials.

John Adams based his strategy for defending the British soldiers on the principle that, under English Common Law, freemen had the inherent right of self-defense. He understood the defense of Preston and the soldiers relied on convincing the jury of the difference between killing someone and murder. In Adams's mind, freemen had the right to self-defense and, if assaulted, could defend to the death. The right of self-defense applied to civilians and soldiers alike. By English law, an attack on a soldier standing his post was an illegal act. Adams recognized this belief ran counter to the understanding of many of the people of New England, who based their interpretation of the law on biblical tenets. It was a common fallacy in Massachusetts that soldiers could not fire on civilians, except in time of war, and Adams's task was to overcome this misperception.[72] He knew overcoming this deeply-held belief was an arduous task.

Another misconception was that, during times of peace, soldiers needed permission from the civil magistrate to fire. Adams had to overcome this myth as well. Adams based his defense on the intrinsic right of a freeman to defend himself against a threat. This basic right was inherent to every freeman and not reliant on a state of war or the presence of a magistrate. Furthermore, Soldiers did not abdicate their rights of freemen by becoming soldiers. These basic ideas served as the foundation for Adams's defense of the British soldiers.

Preston's trial began on Wednesday, 24 October 1770, and ended on 30 October 1770. For the defense, John Adams, Josiah Quincy, and Admiralty Court Judge Robert Auchmuty Jr. quickly established that, in the confusion of the night, it was impossible to conclude whether Capt Preston gave the order to fire. The jury deliberated for three hours and returned with a not guilty verdict. The court acquitted Preston.[73] The acquittal increased the public's desire for vengeance on the soldiers who fired their weapons. The Sons of Liberty reacted to the acquittal by pursuing prosecution of various civil actions in support of the people wounded during the conflict. Because of the threats to his safety, Preston retired to his regimental garrison at Castle William. He wrote a thank-you note to Auchmuty, but not to his lawyers Adams and Quincy.[74]

Preston's acquittal complicated Adams's defense of the soldiers by increasing the emotions tied to their case. The acquittal also intensified the social pressure against Adams. The Monday before the second trial, the *Boston Gazette* published the following commentary: "Is it then a dream, murder on the 5th of March, with dogs greedily licking human blood in King Street? Some say that righteous Heaven will avenge it. And what says the law of God, Whoso sheddeth Man's blood, by Man shall his blood be shed!"[75] The unrelenting rhetoric, coupled with religious overtones, made John Adams's defense of the soldiers based on the rule of law even more challenging. Emotions continued to rise, causing difficulties for John Adams's pursuit of the truth based on reason.

Jury selection for the soldiers' trial occurred from 20 November to 27 November. The trial began the afternoon of

27 November and ended on 5 December 1770. Samuel Quincy and Robert Treat Paine prosecuted the case for the Crown. John Adams, Josiah Quincy, and Sampson Blowers sat for the defense.[76]

To Adams, the trial was not a political opportunity as some believed, or a chance to expel the British from Boston. The trial was about the rule of law and individual rights. To Adams, the jurors should disregard the passions they felt based on their loyalties to a cause, either loyalist or radical. Only the facts must prevail. He stated in his closing arguments,

> Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence: nor is the law less stable than the fact; if an assault was made to endanger their lives, the law is clear, they had a right to kill in their defence; if it was not so severe as to endanger their lives, yet if they were assaulted at all, struck and abused by blows of any sort, by snow balls, oyster-shells, cinders, clubs, or sticks of any kind; this was a provocation, for which the law reduces the offence of killing, down to manslaughter, in consideration of those passions in our nature, which cannot be eradicated. To your candour and justice I submit the prisoners and their cause. The law, in all vicissitudes of government, fluctuations of the passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations and wanton tempers of men.[77]

When Adams finished, the prosecution again addressed the jury in rebuttal. The evening adjournment interrupted the prosecution's closing arguments, so Paine finished his comments in two hours the next day. At ten o'clock in the morning, Paine finished, and the four justices addressed the court for three-and-a-half hours. The justices' address included legalities and formalities with no visible effect on the outcome. For all practical purposes, Adams won the case after his closing remarks.

He had eloquently made his case, and the rule of law prevailed. With no sophistry, tricks of the trade, or lurid objections, he rebuked the passions of the political turmoil with the facts. The justices excused the jury to deliberate at half-past one o'clock. The jury returned at four o'clock and rendered a verdict. The jury found Montgomery and Kilroy guilty of manslaughter and the other six soldiers not guilty. According to the jury, the prosecution proved that only Montgomery and Kilroy fired their weapons.[78] Montgomery and Kilroy immediately pleaded "Benefit of Clergy."[79] The two soldiers read from the Bible and were branded on the thumb with an "M" for manslaughter before the court dismissed them.[80]

Conclusion

The ordeal took a great toll on Adams, both physically and emotionally. After the trial, he moved from Boston back to Braintree, Massachusetts. He moved for two reasons. First, he was exhausted from the trial. Second, he had work to do as a representative to the provincial legislature for a year. He suffered chest pains, a general malaise, and a desire for a long rest.[81] He related the weariness in his diary:

> Before or after the Tryal, Preston sent me ten Guineas and at the Tryal of the Soldiers afterwards Eight Guineas more, which were . . . all the pecuniary Reward I ever had for fourteen or fifteen days labour, in the most exhausting and fatiguing Causes I ever tried: for hazarding a Popularity very general and very hardly earned: and for incurring a Clamour and popular Suspicions and prejudices, which are not yet worn out and never will be forgotten as long as History of this Period is read . . . . It was immediately bruited abroad that I had engaged for Preston and the Soldiers, and occasioned a great clamour.[82]

John Adams did not assume the defense of the British soldiers for any personal gain. He emerged from the ordeal exhausted. He defended them because it was the right thing to do, and that took moral courage. Recall that moral courage is the ability to take a stand for personal beliefs or values, informed by one's principles, involving physical or emotional risk, either real or perceived. In the case of John Adams, the physical risk was real. As the violence of both the radicals and the Tories displaced reason on the streets of Boston, John Adams was resolute in his ideals. He passionately believed the rule of law—not the passions of a mob, no matter how justified they may feel—must inform the affairs of freemen in a society. More importantly, he acted based on this belief and manifested his beliefs in morally courageous action. He stood up for the intrinsic rights of the British soldiers because they were freemen, entitled to a fair trial, representation in court, and the right to defend themselves against a dangerous mob.

While this may be an idealized vision of Adams, the concept of moral courage is wrought with idealism. Adams moved from an idealized version of what a virtuous man should do, guided by the rule of law and the inherent rights of man, to what a virtuous man could do. He acted on his principles. He could have easily asked Forrest to leave his house on the morning of 6 March 1770. Instead, he defended the soldiers because he knew it was the right action to take. He demonstrated the courage of his convictions. Adams could have effortlessly continued with his life, improving his prosperous and growing law practice, maintaining his positive relations as a rising member of the social-political clubs in Boston, and taking care of his family. His inaction would have made living with his cousin Sam Adams, and the other Sons of Liberty, much easier. On the other hand, shutting the door on Forrest would have made it difficult for Adams to live with himself. For John Adams, certain principles proved eternal. **TAL**

Mr. Turner is an Assistant Professor of Leadership in the Department of Command and Leadership at the Command and General Staff College at Fort Leavenworth, Kansas. He retired in 2008 after serving for over twenty-six years in the U.S. Army in a variety of command and staff positions, to include commanding at the battalion and group level.

Notes

1. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., TJAG and DJAG Sends, Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

2. Major General (Retired) Thomas J. Romig, *The Calm in the Storm*, Army Law., no. 4, 2020, at 102.

3. Lieutenant General Charles N. Pede, *The Significance of the Nuremberg International Military Tribunals on the Practice of Military Law,* 229 Mil. L. Rev. 253 (2020).

4. Hiller B. Zobel, The Boston Massacre 187–94 (1970).

5. Boston-Gazette & Country J., Mar. 12, 1770, at 2, https://www.masshist.org/dorr/volume/3/sequence/101; Boston-Gazette & Country J., Mar. 19, 1770, at 3, https://www.masshist.org/dorr/volume/3/sequence/106; Zobel, *supra* note 4, at 199–200; William Emmons, The Trial of the British Soldiers of the 29th Foot: for the Murder of Crispus Attucks, Samual Gray, Samual Maverick, James Caldwell and Patrick Carr on Monday Evening, March 5, 1770, Trial Report 4 (1824).

6. 2 John Adams, Diary and Autobiography of John Adams, 1771–1781, at 79 (L.H. Butterfield et al. eds., 1961).

7. The term "freemen" is used throughout the article to represent the historical application of the term. In eighteenth-century, western society, this was an exclusive word to refer to men who were not subject to indentured servitude, slavery, or legal confinement. The use of freemen also did not include females. Replacing this word with individuals would be inaccurate for the period.

8. William Ian Miller, The Mystery of Courage 255 (2002).

9. *Id.* at 254.

10. I Page Smith, John Adams, 1735–1784, at 118 (1962).

11. Zobel, *supra* note 4, at 204–05.

12. Emmons, *supra* note 5, at 3.

13. O.M. Dickerson, *The Commissioners of Custom and the "Boston Massacre,"* 27 New Eng. Q. 307, 307 (1954).

14. Smith, *supra* note 10, at 93.

15. *Id.* at 94.

16. *Id.* at 96.

17. Catherine Drinker Bowen, John Adams and the American Revolution 342 (1950).

18. Smith, *supra* note 10, at 96.

19. Zobel, *supra* note 4, at 89, 96, 99.

20. *Id.* at 94.

21. Dickerson, *supra* note 13, at 310.

22. Mass. Gazette: and The Boston Wkly. News-Letter, Mar. 1, 1770, at 3, http://www.masshist.org/dorr/volume/3/sequence/93; Bowen, *supra* note 17, at 346–47.

23. Mass. Gazette: and the Boston Weekly News-Letter, Mar.1, 1770, at 3, http://www.masshist.org/dorr/volume/3/sequence/93.

24. Bowen, *supra* note 17, at 347–48.

25. John Adams, *John Adams Diary* 1, 18 *November* 1755–29 *August* 1756, Mass. Hist. Soc'y, https://www.masshist.org/digitaladams/archive/doc?id=D1 (last visited Aug. 4, 2021).

26. *February* 1770, *from the Diary of John Adams*, Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/01-01-02-0014-0002.

27. The Sons of Liberty was a radical political group that grew from the colonies' fight against the Stamp Act and other perceived injustices of the Crown. The Sons were a decentralized collection of societal clubs, which operated independently throughout the colonies. Sam Adams was a prominent member of the Boston Club, and John Adams occasionally attended some of their meetings.

28. A ropewalk is a common feature along many docks that serves as a place for the manufacture and repair of ropes for the shipping industry. The workers would lay the raw material out to make ropes, conduct inspections, and repair ropes.

29. Zobel, *supra* note 4, at 182.

30. Smith, *supra* note 10, at 117.

31. *Looking for Trouble, Even on the Sabbath*, Boston 1775 (Mar. 4, 2020), https://boston1775.blogspot.com/search/label/ropemaking.

32. Zobel, *supra* note 4, at 183.

33. *Id.*

34. *Id.* at 196.

35. John T. Morse Jr., American Statesman: John Adams 37 (1890). Mr. Morse refers to him as Mr. Forrest. Other sources use the name Mr. Forrester. Mr. Forrest is the most common spelling.

36. Bowen, *supra* note 17, at 355–56. Bowen refers to him as Mr. Forrester. *Id.*

37. Bowen, *supra* note 17, at 346. In February, the Adams family lost their one-year-old daughter, Susanna, to a lengthy illness. Complications in burying his daughter added to the anxiety and anguish. When Susanna died, John and his two brothers—Elihu and Peter—took her to his birthplace in Braintree, Massachusetts, to bury her in the churchyard. However, the frozen ground prevented Elihu and Peter from digging her grave. Elihu covered the small coffin with pine boughs and promised John he would watch the area daily and return to bury Susanna as soon as the ground thawed. To add to the trauma, a pregnant Abigail did not have the stamina to make the journey to Braintree. *Id.*

38. *Id.*

39. 2 John Adams, The Works of John Adams, Second President of the United States 232 (Charles Francis Adams ed., 1850).

40. *Id.*

41. Peter Shaw, The Character of John Adams 58 (1976).

42. Smith, *supra* note 10, at 86.

43. *Id.* at 110.

44. *Id.* at 86.

45. David McCollough, John Adams 66 (2002).

46. John Adams, Instruction of the Town of Braintree to Their Representative, 1765, *reprinted in* The Revolutionary Writings of John Adams ch. 3 (C. Bradley Thompson, ed., 2000).

47. McCollough, *supra* note 45, at 61.

48. Adams, *supra* note 46.

49. Alan Axelrod, Revolutionary Management: John Adams on Leadership 7 (2008).

50. *Id.* at VIII.

51. Smith, *supra* note 10, at 121.

52. Bowen, *supra* note 17, at 357.

53. Hugh P. Williamson, *John Adams: Counsellor of Courage*, 54 A.B.A. J. 148, 149 (1968).

54. Bowen, *supra* note 17, at 365.

55. *Id.* at 358.

56. A Short Narrative of the Horrid Massacre in Boston 3 (Edes & Gill 1770), https://www.masshist.org/database/viewer.php?item_id=337&mode=transcript&img_step=13&pid=2#page3.

57. *Id.* at 13.

58. *Id.*

59. Bowen, *supra* note 17, at 361.

60. Zobel, *supra* note 4, at 222.

61. *Id.*

62. *Id.*

63. *Id.* at 226.

64. *Id.* at 231.

65. *Id.* at 239.

66. *Id.*

67. Boston Gazette & Country J., Sept. 10, 1770, at 1, http://www.masshist.org/dorr/volume/3/sequence/274.

68. Zobel, *supra* note 4, at 239–40.

69. *Id.* at 242.

70. *Id.*

71. *Id.* at 242–43.

72. Bowen, *supra* note 17, at 379.

73. The Boston Gazette & Country J., Nov. 5, 1770, at 1, http://www.masshist.org/dorr/volume/3/sequence/339; Morse, *supra* note 35, at 39.

74. Zobel, *supra* note 4, at 265–66.

75. Bowen, *supra* note 17, at 384–85.

76. *Id.* at 386; Smith, *supra* note 10, at 123.

77. Emmons, *supra* note 5, at 117.

78. Boston Gazette & Country J., Dec. 10, 1770, at 2, http://www.masshist.org/dorr/volume/3/sequence/365; Zobel, *supra* note 4, at 293–94.

79. *See generally* Linda Rowe, *The Benefit of Clergy Plea*, 19 Colonial Williamsburg Interpreter, no. 1, 1998. The Benefit of Clergy was an old English law that evolved from a time when both civil and church officials presided over the Shire Courts. As English monarchs separated the body of civil and canon law, Benefit of Clergy evolved to protect ecclesiastic officials from persecution in secular courts under civil law. The law allowed clergy to invoke the benefit if facing charges in a secular court. The Benefit of Clergy originally only pertained to officials of the church, including monks and nuns; but, with various modifications from the 12th century on, it evolved to include layman. By 1770, it further evolved to include all freemen who could read since the ability to read was often restricted to clergy. The Benefit of Clergy was part of the American Judicial System until abolished by congress in 1790. *Id.*

80. Smith, *supra* note 10, at 125; McCollough, *supra* note 45, at 68.

81. John R. Galvin, Three Men of Boston 218 (1997).

82. Adams, *supra* note 39, at 231.

Then-Sergeant Manaure Tovar, Fort Leavenworth Trial Defense Service noncommissioned-officer-in-charge, provides counsel at a JAGEX at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson/TJAGLCS)

Closing Argument

Principled Counsel and the Paraprofessional

By Command Sergeant Major Michael J. Bostic

Principled Counsel: Professional advice on Law and Policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and morale courage, that influences informed decisions.[1]

Principled counsel is expected of military paralegals, paralegal noncommissioned officers (NCOs), and civilian paraprofessionals. Doctrinal responsibilities demand principled counsel from NCOs—and all leaders. These responsibilities are outlined in Army Regulation (AR) 600–20, *Army Command Policy*;[2] Army Doctrine Publication 6–22, *Army Leadership and the Profession*;[3] Training Circular 7–22.7, *The Noncommissioned Officer Guide*;[4] Army Techniques Publication (ATP) 6–22.1, *The Counseling Process*;[5] and Field Manual 1–04, *Legal Support to Operations*[6]—just to name a few.

Imagine working in a profession where almost every time you speak to someone, the words you say matter. Imagine a profession where people come to you for advice or guidance toward some end—a profession where you often have to keep a calm demeanor regardless of the situation. This is exactly what we do in the Judge Advocate General's Corps!

Principled Counsel for NCOs, Junior Enlisted, and Paraprofessionals

We know our Four Constants[7]—we know how our most senior leaders define principled counsel as quoted above; but, do we all understand it? It is my assumption that many do not truly *realize what it means.* Why is this? Perhaps it's because they cannot explain it. When you truly understand something—you can usually explain it in simple terms. If you confuse yourself trying to explain or execute; then you may *not know what you should know.* Principled counsel seems easy to understand for our judge advocates and civilian attorneys in its definitive prose as they execute it; but for legal administrators and paralegal NCOs and specialists, it may not be as clear. I believe that I have practiced principled counsel my entire career, regardless of position—whether trainer, coach, mentor, leader, follower, or even peer. I have found myself providing or needing *appropriate candor and moral courage to influence informed decisions.*

As an Army paralegal NCO, principled counsel is in the leadership doctrine we begin to study as E-4s preparing for unit promotion boards and competitions. We advance this study throughout each level of our NCO professional military education. Principled counsel is also found throughout the NCO Creed that many of us live by—for example, "I will be fair and impartial when recommending both rewards and punishment."[8] Simply put, NCOs advise commanders and officers on adverse actions and decisions that affect junior personnel and organizations. Noncommissioned officers must stay informed on policy, standards, discipline, and people. Any principled counsel from an NCO to an officer is important because of the role that NCOs play within organizations—a role found in the authority derived from commanders in AR 600–20 and venerated in our NCO Creed.

One way to understand principled counsel is by its key term "counsel." Our

Service has manuals and guides devoted to it. It simply means "to give advice." When we tie in "principle," we get moral and legal advice. Paralegal NCOs must become well-versed in ATP 6–22.1, *The Counseling Process*. Studying ATP 6–22.1 will help you become better at providing counsel and principled counsel for a variety of military professional and personal situations.

Leaders counsel often—sometimes in writing, other times verbally and nonverbally (if you're good). Some may think that invoking "principled counsel" is reserved for heavy situations when we must become expert or key to a decision or outcome. Ultimately, as NCOs, principled counsel should be infused in what we do in our profession on a daily basis—care for our people and look out for each other.

Principled Counsel in Action

We provide principled counsel in all our legal functional areas: military justice, administrative law, legal assistance, contract and fiscal law, and national security law. Paraprofessionals and military paralegals provide principled counsel in support to most of our legal functional areas. Whether it's the teammate supporting a military justice action by informing a witness or victim about procedural matters, helping with documents and forms, or a defense paralegal assisting a Trial Defense Service client with an adverse action proceeding, paraprofessionals still must provide principled counsel. Other times, our teammates in legal assistance offices enable their clients to solve some personal and complex matters due to their ability to understand principled counsel and enable them to make decisions on a different scale. Or maybe the teammate in administrative and civil law is advising the investigating officer on how to properly assemble an investigative product or complete a DA Form 3881. Then there is the national security law paralegal informing a teammate of the location and protected status of a building near a key target on a map/screen during an exercise. Military and civilian paralegals and paraprofessionals leverage principled counsel when interpreting and guiding others in our profession of arms.

Our doctrine, law, regulations, and policy inform our appetite for new information. You may recall an anecdote I once shared about fundraising, when the paralegals from my brigade legal team provided me with principled counsel on what I was allowed to do in an instant.[9] These teammates succeeded because they were prepared and competent. Through institutional learning, organization training, and self-development programs, they acquired and sustained the knowledge necessary to communicate to a senior leader and enabled me to make an informed decision. Lifelong learning enables us to stay ready and knowledgeable in providing principled counsel when the time arises.

Senior leaders leverage principled counsel when they develop subordinates. We use it in reception, integration, and retention. We support our teammates through sage and accurate advice that often influences them to pursue short- and long-term goals: to resign or not re-enlist, or to reenlist and "Stay Army Strong." Think of that first moment when you considered leaving the U.S. Army. Which leader aided you in making an informed decision to stay on the team longer? Was their counsel principled? When was the first or most recent time you provided principled counsel for a subordinate, Family member, or client? What would you change now that you have understood principled counsel as one of our Corps's core constants?

Solving Problems and Recommending Solutions

Within NCO spheres of influence, we provide principled counsel to our peers. We provide principled counsel to unit platoon sergeants, first sergeants, and sergeants major—mostly this consists of guidance that enables them to understand the commander's authority and intent more clearly through our ability to research and analyze information. I think we even provide principled counsel in routine on-the-spot corrections. (Yes—think about that for a moment—I think I am right.) No, it isn't the rule of law—instead it's standards and discipline. It may even be life or death when it relates to performing maintenance services on unit equipment or an individual weapon in a hostile area of operations.

Much of what I offer in this Closing Argument is not focused on regulation or the rule of law; it is, however, supported on the ethic of our service. As military and Civilian paralegal paraprofessionals and NCOs, we support this constant of principled counsel daily in most of our duties and responsibilities. While military and Civilian paralegals and paraprofessionals are not the ones giving legal advice, it is vital that we ready ourselves to give principled counsel to our judge advocates and comrades in arms. For it is through that principled counsel that we ensure our people are cared for and the mission is accomplished.

Ready Now! **TAL**

CSM Bostic is the Regimental Command Sergeant Major of The Judge Advocate General's Corps at the Pentagon in Washington, D.C.

Notes

1. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., TJAG and DJAG Sends, Vol. 40-16—Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

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

3. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession (31 July 2019).

4. U.S. Dep't of Army, Training Circular 7-22.7, The Noncommissioned Officer Guide (1 Jan. 2020).

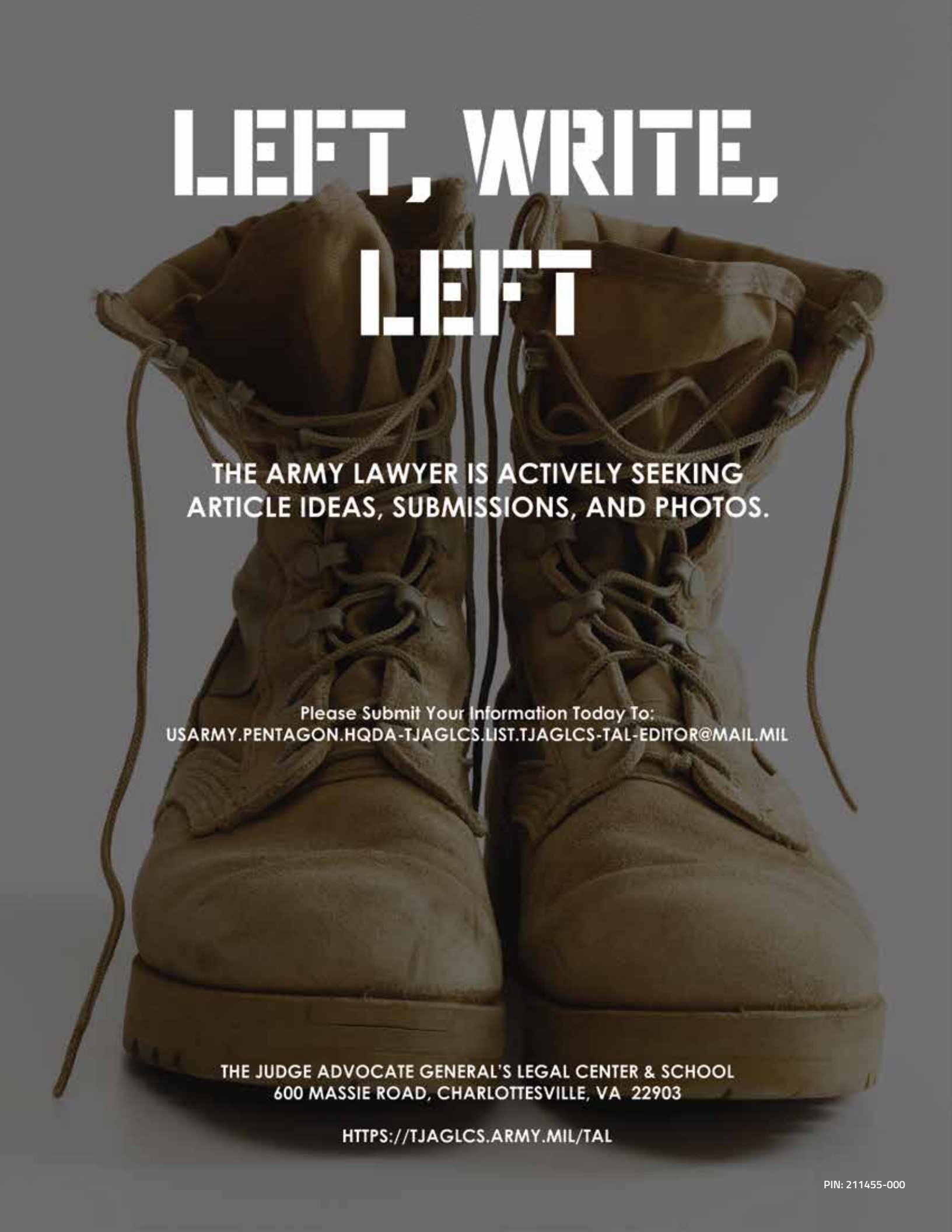
5. U.S. Dep't of Army, Army Techs. Publ'n 6-22.1, The Counseling Process (1 July 2014).

6. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations (8 June 2020).

7. The Judge Advoc. Gen.'s Corps, U.S. Dep't of Army, Four Constants, at slide 2 (2021), https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf (the four constants are Principled Counsel, Servant Leadership, Stewardship, Mastery of the Law).

8. *NCO Creed*, U.S. Army, https://www.army.mil/values/nco.html (last visited Aug. 6, 2021).

9. Command Sergeant Major Michael J. Bostic, *Tactically and Technically Proficient: Balancing Lethality with Technical Competence in a Comprehensive Field*, Army Law., no. 1, 2021, at 40, 43.


LEFT, WRITE,
LEFT
THE ARMY LAWYER IS ACTIVELY SEEKING
ARTICLE IDEAS, SUBMISSIONS, AND PHOTOS.
Please Submit Your Information Today To:
USARMY.PENTAGON.HQDA-TJAGLCS.LIST.TJAGLCS-TAL-EDITOR@MAIL.MIL
THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL
600 MASSIE ROAD, CHARLOTTESVILLE, VA 22903
HTTPS://TJAGLCS.ARMY.MIL/TAL
PIN: 211455-000