

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 1 • 2021

Bridging the Voir  
Dire Gap

**25**

Why We Must Train in the  
Constitution

**37**

The Sigonella Stand-Off

**60**

Red Teaming & Court-Martial  
Success

**78 & 90**





## AROUND THE CORPS

COL Joseph Kurz, Chief of Staff, 1st TSC, introduces LTG Charles Peede, The Judge Advocate General, to members of the 1st TSC Office of the Staff Judge Advocate in April 2021 at Fort Knox, Kentucky. (Credit: SSG Nahjier Williams)

# Army Lawyer

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Issue 1 • 2021

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On the cover: The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, in January 2021. (Credit: BG Joseph B. Berger)

## Table of Contents

### Departments

#### Court Is Assembled

2 **Substantive Mastery of the Law**  
*By Brigadier General R. Patrick Huston*

#### News & Notes

#### Book Review

6 **Legal "Deep Work" in a World of Distraction**  
*Reviewed by Major C. Cal Walters*

#### Azimuth Check

11 **Sharing Expertise**  
JAGC Senior Civilians Continue to Develop Themselves and Others  
*By William J. Koon*

#### Lore Of The Corps

13 **Stranger Than Fiction**  
The GI Who Flew to North Korea for Forty Years  
*By Fred Borch III*

#### In Memoriam

17 **Remembering Recently Departed Members of the Regiment in 2020**  
*By Fred L. Borch III*

### Practice Notes

25 **Bridging the Voir Dire Gap**  
A Practitioner's Guide to Winning Voir Dire  
*By Major Todd C. Gately, Major Jordan C. Stapley, Major Mitchell M. Suliman, & Colonel Timothy P. Hayes Jr.*

37 **Support and Defend**  
Why the Military Must Train Service Members in the Constitution  
*By Lieutenant Colonel Alexander G. Douvas*

40 **Tactically & Technically Proficient**

Balancing Lethality with Technical Competence in a Comprehensive Field  
*By Command Sergeant Major Michael J. Bostic*

44 **Are Mercenaries the Future of Warfare?**  
*By Colonel Jeffrey S. Thurnher*

49 **Defending Your MAVNI Client**  
Security Clearance Revocations and Separations  
*By Captain Vy T. Nguyen*

56 **A PR Scenario**  
Responsibilities of Supervisory and Subordinate Lawyers  
*By Colonel Mark Sydenham & William Martin*

### Features

60 **The 1985 Sigonella Episode and the Limits of the United States-Italian Relationship**  
*By Peter Brownfeld & Ginevra Baino*

68 **Legal Risks of Explosives in Urban Areas**  
*By Lieutenant Colonel Matthew A. Krause & Captain Jennifer L. Bryer*

78 **Litigate Like We Fight**  
Using Joint Planning Doctrine to Succeed at Your Next Court-Martial  
*By Lieutenant Colonel Shaun B. Lister & Major C. Cal Walters*

90 **Using Red Team Techniques to Improve Trial Advocacy**  
*By Lieutenant Colonel Robert E. Murdough*

### Closing Argument

102 **Mastering Military Justice Advocacy During a Pandemic**  
*By Lieutenant Colonel Phil M. Staten & Lieutenant Colonel Jeremy Stephens*



BG R. Patrick Huston discusses the JAG Corps profession with the 69th Graduate Course at TJAGLCS. (Credit: Jason Wilkerson, TJAGLCS)

# Court Is Assembled

## Substantive Mastery of the Law

By Brigadier General R. Patrick Huston

**This issue of the *Army Lawyer* pays homage to the concept of substantive mastery of the law.** It is one of the foundational constants for the U.S. Army Judge Advocate General's Corps, alongside *stewardship*, *servant leadership*, and *principled counsel*.

At its core, substantive mastery is our expertise in the law. It is the very essence of being a lawyer or paraprofessional. Regardless of the legal discipline in which you currently practice—administrative law, national security law, criminal law, legal assistance, or contract and fiscal law—you must be proficient in the substantive law. Our criminal law practice, for example, requires an absolute command of the *Manual for Courts-Martial* and developing case law. Those working in administrative law must be the Army's ethics sentinels, guarding both the spirit and letter of the ethics regulations, and must also master the art of conducting quality, thorough investigations, which are arguably "Adlaw's" bread-and-butter. National security law practitioners must have a firm and complete comprehension of International Humanitarian Law, as well as

their operational authorities in order to help preserve commanders' legal maneuver space on the battlefield. To develop these skills, you must research, read, study, and learn. There are no shortcuts. The subject matter must be doggedly reviewed, rehearsed, and practiced. As the law is ever-evolving, our obligation to stay ahead of the curve as legal professionals is lifelong, and it must be continuous and relentless.

Nevertheless, knowing the law is only one aspect of substantive mastery. It is essential, but alone it is insufficient. Substantive mastery entails not only the knowledge of the black letter law, but it equally requires knowing how to advocate. Knowing the rules is essential, but we must also put those rules into practice and communicate effectively. Many can cite a statute or quote a regulation, but the masters can provide clear, timely, and persuasive legal counsel to demanding clients under extreme time constraints. This is the true art of our practice. We must know the law, and we must master our craft.

This talent is even more critical when faced with legal gray zones, where the law is

less definitive or clear. True master lawyers guide their client or commander through the rules, processes, and procedures to achieve the intended mission, and also help maneuver through the legal gray areas, while remaining on the right side of the law and our ethics.

This tradesmanship part of substantive mastery demands instinct, intuition, judgment, and experience. The question often turns on how to gain such experience when we are expected to be well-rounded advisors, and not singularly dedicated to one discipline. The answer is not to passively wait for experiences to be handed to you, but to actively seek opportunities. Experiences can be made through study, observation, and practice. Trial and defense counsel, as well as their supporting paralegals, cannot wait for the courtroom to perfect their presentations, which is why separation boards and military justice advisor roles are so valuable. Observing and assisting with other attorneys' cases shows that you are a good teammate and develops your arsenal of skills. Similarly, we can also learn vicariously from the experiences of more seasoned practitioners in the field. Within national security law, most field-grade officers, legal administrators, and senior paralegals have been combat-tested. They are our actual and institutional knowledge reservoir. They know how to fight and win our nation's wars, effectively and lawfully. Learn from them. The Corps, the Army, and the country cannot afford to wait until the onset of war for you to develop your substantive mastery as a judge advocate or a paraprofessional. As The Judge Advocate General would say, "sharpen your swords in the calm before the battle."

Ultimately, in your pursuit for substantive mastery in each of our core legal practices, you will also mature as a well-rounded and dexterous attorney or paralegal, ready and able to meet the ever-changing challenges of our Army and our country in times of peace and war. **TAL**

*BG Huston is the Assistant Judge Advocate General at the Pentagon in Washington, D.C.*



1

# News & Notes

## Photo 1

The All-American Division OSJA wants to congratulate the three officers who were recently accepted in to the U.S. Army Judge Advocate General's Funded Legal Education Program. This was the first application cycle that enlisted Soldiers were eligible to apply, making this year's selection board exceptionally competitive. These paratroopers will begin law school in Fall 2021 and will be on their way to becoming the newest group of judge advocates! AATW! Pictured from left to right: COL Jeffrey Thurnher (SJA, 82d ABN DIV), 1LT William White (FLEP applicant, 3BCT), 1LT Angelique Margve (FLEP applicant, 82d ADSB), 1LT

William Ratliff (FLEP applicant, 1BCT), and CPT John Reyes (Chief, Contract & Fiscal Law, 82d ABN DIV).

## Photo 2

The Installation Legal Office (ILO) hosted the Fort Hamilton Tax Center Opening Ceremony on 25 January 2021. COL Craig Martin, USAG-FH Commander, cuts the ribbon while flanked by ILO personnel: Roderick O'Connor, Alma Whitelaw, Patricia Ingao, and Michael Huber. Four Fort Hamilton tax volunteers stand on the stairs. The two Adopt-A-Base tax attorneys (Mark Allison & Aaron Esman) are pictured in the forefront.



2

## Photo 3

On 22 January 2021, the Joint Readiness Training Center and Fort Polk OSJA hosted the installation tax center



ribbon-cutting ceremony. The Commanding General, BG David Doyle joined in celebrating the tax center being open for business. The ribbon was cut by the tax center OIC, CPT Jenekwa Harrison (left), the Commanding General, BG David Doyle (center), and the Staff Judge Advocate, COL Tiffany Chapman (right). Also pictured are Soldiers that will assist in preparing taxes this year, each representing a unit assigned to Fort Polk.

**Photo 4**  
OSJA Soldiers with the 311th Signal Command (Theater) participate in January Battle Assembly with a trip through the gas chamber at Schofield Barracks. Pictured left to right: SPC Perez (TPU), MAJ Schmidt (AGR), SGT Michaud (AC), SGT Carter (TPU), SPC Schaber (AC), WO1 Tugaoen (TPU), and CPT Brow (TPU).

**Photo 5**  
Two paralegals from separate components united under one common mission, Operation INHERENT RESOLVE. SPC Sandoval (left) from 4th ID and SGT Myers (right) from 28th ID are working together to provide timely and efficient legal support to commanders and Soldiers.



**Photo 6**

SSG Marquis Jones, NCOIC, Area Support Group-Qatar legal office, Camp As Sayliyah, Qatar, recently received a coin from the Sergeant Major of the Army. SSG Jones was recognized by the SMA for asking an insightful question about the COVID-19 vaccine and for facilitating an ASG-QA NCOPD discussion on the Report of the Fort Hood Independent Review Committee. Patton's Own! First Team!

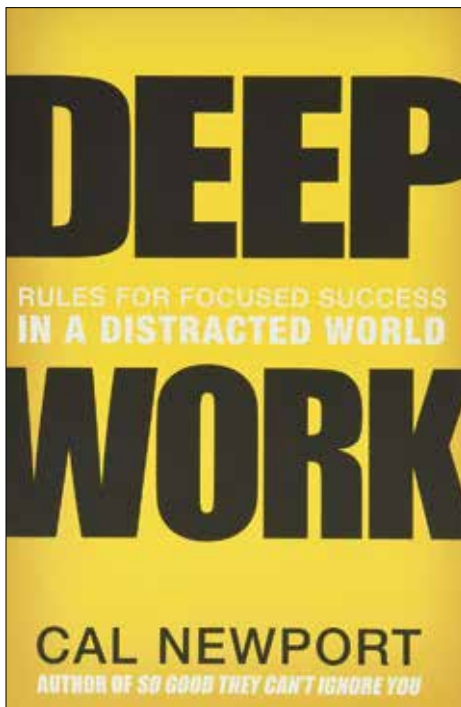
**Photo 7**

On 18 December 2020, SPC(P) Jinelis Solis, 2IBCT, 25th ID, reenlisted for three more years, including 12 months of stabilization in beautiful Hawaii. Members of the Warrior Brigade legal section and the HHC, 65th BEB commander came together at Waimea Bay for the occasion. Pictured from left to right: CPT John Ruhl, CPT LeBuria Johnson, SGT David Willey, MAJ Chris Chatelain, SPC(P) Jinelis Solis, SPC Lelia Contee, SGT Ashley Kiley, CPT Vick Jaswal, and SFC Thomas Coyne. Congratulations!

**Photo 8**

On 17 December 2020, members of the Client Services Division at USAREUR-AF participated in the Virtual 5k Jingle Bell Jog. Pictured from right to left: MAJ(P) Craig Ford, SGT Dawon David, Ms. Christine Hauser, and CPT Katherine Evangelista. Not pictured: CPT Avery Ory, who completed her 5k while on leave in Texas.





# Book Review

## Legal “Deep Work” in a World of Distraction

Reviewed by Major C. Cal Walters

*Like fingers pointing to the moon . . . diverse disciplines from anthropology to education, behavioral economics to family counseling, similarly suggest that the skillful management of attention is the sine qua non of the good life and the key to improving virtually every aspect of your experience, from mood to productivity to your relationships.<sup>1</sup>*

### Distractions

You are an administrative law attorney at Fort Hood, Texas. You are just settling in at your desk for the day, and you are hoping today will be more productive than yesterday. You glance at the Post-It note on your desk that displays your to-do list. As you begin the process of doing a legal review for an investigation, a colleague asks you a question. Fifteen minutes later, after helping them research their issue, you sit back down to work on the legal review. You get a few pages into the investigation, and

productive—but studies seem to indicate the opposite.<sup>2</sup> This article offers internal rules for individuals to be more productive and external rules to build an organizational culture that allows for focused, deep work in a distracted world.

### The Problem

You can probably feel it. As a society, we are attempting to cram more and more into each workday, leaving little room for focused work and solitude.<sup>3</sup> In his book, *Deep Work*, Cal Newport argues that, in a

**As a society, we are attempting to cram more and more into each workday, leaving little room for focused work and solitude.**

you glance at your computer and notice that an email just came in. After reading that email, you notice you have several other emails you have not read, so you decide to read those. At this point, forty-five minutes of your day have passed, and you feel that you don't have much to show for it.

You get back on task and finish reading the findings and recommendations memo. However, your work is interrupted again by having to attend a promotion ceremony. Fast forward to the end of the day, and you still have not finished your first legal review. Between meetings, lunch, email, phone calls, walk-ins, taking a few minutes here and there to browse your Twitter and Facebook accounts, and visiting with colleagues at the coffee area, you leave the office later than expected and frustrated. Why was it so hard to finish the legal reviews you set out to finish that morning? You desperately want to be more productive during the day, but it seems like a never-ending battle to do focused work.

Many of us can relate to this administrative law attorney desperately trying to eliminate distractions to do what he is paid to do. This article explores some of the underlying causes of low productivity and frustration in our current working world. One might think with smarter technology, faster communication, stand-up desks, and open office plans, we would be more

world that is increasingly distracted, those who can cultivate an ability to do what he calls “deep work” will have a distinct market advantage.<sup>4</sup> He defines deep work as “[p]rofessional activities performed in a state of distraction-free concentration that push your cognitive capabilities to their limit.”<sup>5</sup> Deep work allows one to innovate, create, and learn new skills.<sup>6</sup> In contrast, “shallow work” is “non-cognitively demanding, logistical-style tasks, often performed while distracted.”<sup>7</sup>

In the Judge Advocate General's (JAG) Corps, we are not immune to these trends toward distraction and shallow work. The practice of law and the value we bring to our clients often requires deep work and sifting through complexity to find clarity. Whether it is reviewing an investigation, mastering the evidence in preparation for a court-martial, or conducting a thorough review of legal authorities to answer a question, all judge advocates (JAs) must create time and find space to do deep work. Moreover, leaders ought to create an organizational culture where this is not only possible but encouraged. Without proactive steps individually and organizationally, we will be less effective for our client, and JAs will experience continued frustration and live unbalanced lives to offset distraction at work.



Before diving deeper into the need for this change and offering practical solutions to the problem, let me offer a few disclaimers. First, there is value and necessity in “shallow work,” when done at the right time. Collaboration and teamwork are essential elements to the success of any Office of the Staff Judge Advocate (OSJA). This article does not focus on eliminating shallow work, but, rather, on creating space for deep work. As Newport argues, and studies support, there is greater inertia against doing deep work than shallow work, so this article hopes to equip you and your team to push through that inertia and find greater productivity. Second, it is worth noting that the Army does not give us complete autonomy over our time—far from it. However, we still have significant choice in how we spend our time, within certain constraints.<sup>8</sup> Implementing many of these rules and principles goes against the grain, but they can lead to improved productivity, more fulfillment at work, and greater retention of talent.

## The Need for Deep Work

### Promote Productivity

The very best students often study less than students with lower grade point averages.<sup>9</sup> According to Newport, this can be explained by the law of productivity:

$$\text{High Quality Work Produced} = (\text{Time Spent}) \times (\text{Intensity of Focus})^{10}$$

This law of productivity explains why some students can spend less time studying than others and yet produce better results—they cultivate an ability to concentrate. In the working world, we often confuse busyness with productivity. Newport argues that in an age of cognitive work, employees tend to wear busyness as a badge of honor.<sup>11</sup> He says, “In the absence of clear indicators of what it means to be productive and valuable in their jobs, many knowledge workers turn back toward an industrial indicator of productivity: doing lots of stuff in a visible manner.”<sup>12</sup> When we create periods with no distractions, we create an environment that facilitates productivity.

We often think we can multitask and accomplish more, but studies show that

is not the case.<sup>13</sup> Massachusetts Institute of Technology neuroscientist Earl Miller says, “Trying to concentrate on two tasks causes an overload of the brain’s processing capacity . . . Particularly when people try to perform similar tasks at the same time, such as writing an email and talking on the phone, they compete to use the same part of the brain. Trying to carry too much, the brain simply slows down.”<sup>14</sup> In addition to studies outlining the limitations of multitasking, Sophie Leroy, a business professor at the University of Minnesota, has studied the effects of people working on multiple projects sequentially. In her paper, *Why Is It So Hard to Do My Work?*, she introduces the idea of “attention residue.”<sup>15</sup> After performing a series of experiments, Leroy found those that experienced attention residue had a drop in performance on the next task.<sup>16</sup> For example, participating in a meeting (Task A) can create attention residue when you go back to your office to read an investigation (Task B). Similarly, Leroy’s work suggests that even a quick glance at your email or phone can create a new target

Csikszentmihalyi and Reed Larson found that being in a mental state of “flow”<sup>19</sup> results in greater enjoyment than free time, cutting against the conventional assumption that relaxation is what makes people happy. According to their findings, “The best moments usually occur when a person’s body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile.”<sup>20</sup> These findings explain from a neurological and psychological perspective why the administrative law attorney above felt frustrated at the end of a day filled with distractions and shallow work. Cultivating an ability to carve out focused time, even in the midst of a busy work day with innumerable distraction, can make one better at their job and more fulfilled at the end of the day.

If deep work is both more productive and more fulfilling, why is it so rare? According to Newport, “the urge to turn your attention toward something more superficial” is the main obstacle.<sup>21</sup> Studies demonstrate we are “bombarded with the desire to do anything *but* work deeply

## We may think we can do it all by multitasking and moving from task to task, but our brains do not function at an optimal level in a state of “semi-distraction.”

for your attention, making it more difficult to refocus on your primary task. We may think we can do it all by multitasking and moving from task to task, but our brains do not function at an optimal level in a state of “semi-distraction.”<sup>17</sup> We are busy but unproductive, which can have negative effects on one’s mental health over time.

### Deep Work Makes Us Happy

In addition to being able to produce better results in a shorter period of time, studies show deep work can simply make people happier. Neurological studies synthesized by science writer Winifred Gallagher reveal that a workday filled with shallow work is likely to leave you feeling more drained and upset, even if these shallow tasks involve activities that were harmless and fun.<sup>18</sup> By contrast, research by psychologists Mihaly

throughout the day.<sup>22</sup> Work led by psychologists Wilhelm Hofmann and Roy Baumeister reveal two important realities about willpower: (1) each of us has a limited supply of willpower that shrinks as we use it; and (2) we pull from the same stock of willpower for every task, no matter the nature of the task.<sup>23</sup> In a world of open office plans and social media, this limited willpower can only fight off so many distractions. If JAs and other professionals want to benefit from higher productivity and increased satisfaction at work, we need rules internal to the individual and external to the organization that cultivate an ability to conduct deep work.

### Internal Rules for Deep Work

As you create time and space to do deep work, deciding on a philosophy for

integrating depth into your work life can be a helpful first step.<sup>24</sup> For most JAs, a monastic approach of eliminating all shallow work is likely an unrealistic philosophy to keep your job. As mentioned above, many forms of shallow work are critical to the

structured. This might be a ban on internet use, putting your phone on do-not-disturb, making a commitment not to check email, or deciding beforehand how many pages of a brief you plan to write or how many pages of an investigation you plan to read. The

you should instead schedule the occasional break *from focus* to give in to distraction.”<sup>31</sup>

As a JA, it is easy to get in the habit of repeatedly checking your email for new updates. Many of us are prone to have Microsoft Outlook open on our computer the entire workday. This practice may seem efficient, but it can be detrimental when you need to do deep work like read an investigation, research the law, or review an evidence packet. To avoid the urge to multitask, try scheduling in advance windows throughout the day for you to check email. You can do the same thing with checking your phone. Newport suggests keeping a notepad by your workspace.<sup>32</sup> On this pad, you can write down the next time you are allowed to check your email or your phone. Until you reach that time, do not allow yourself to look, no matter how tempting it may be. Each time you resist the allure of email and Internet distraction, you build up your ability to concentrate. Newport calls this “concentration calisthenics.”<sup>33</sup>

In order to build your concentration fitness, Newport recommends scheduling Internet use at home as well. If you are disciplined at work but find yourself glued to your screen outside of work, this can undo the progress you are making at work to rewire your brain.<sup>34</sup> The key is building up your ability to embrace boredom. When you find yourself waiting in line, fight the urge to fill that space with technology. Instead, allow yourself to experience solitude and resist switching to distractions. At home, this does not mean you have to eliminate Netflix. It simply means that you should build in blocks of time to intentionally resist technological distraction. Otherwise, the only time you will be resisting distraction is at work, and your brain will not be trained to resist the temptation.

### ***Creating Space in a Busy Workplace***

Referring back to our administrative law attorney, one of the biggest distractions at work can be your co-workers. Again, collaboration, being a team player, and socializing are all critical components of an effective working environment. However, without boundaries, individual attorneys and paralegals struggle to focus; and, ultimately, our client suffers due to delayed work or shallow legal analysis. One simple

## **without boundaries, individual attorneys and paralegals struggle to focus; and, ultimately, our client suffers due to delayed work or shallow legal analysis.**

success of the organization. Therefore, a philosophy adopted by most JAs will likely involve specific ways, both individually and collectively, to eliminate distractions and manage one’s attention for specific periods throughout the workday.

### ***Questions to Ask***

As you decide on your deep work routine, Newport recommends a few questions to help establish an effective routine. First, consider where you will work and for how long.<sup>25</sup> This question forces you to visualize a specific location for your deep work efforts. This may be your office with the door shut and a “do not disturb” sign on the door during periods of intense focus.<sup>26</sup> This question also forces you to be realistic about the specific timeframe for each session, which is better than open-ended periods. Unless you are already in the habit of doing distraction-free work, a word to the wise as you begin: start small. It may sound silly, but most of us are so accustomed to working in a state of semi-distraction it can be difficult to stay purely focused on a task for extended time periods without practice. The urge to check your email, your phone, or jump to another task can be great, so the best practice is to set a short, realistic time period (e.g., thirty minutes) for your first deliberate sessions of deep work. Remember: time x intensity = level of production. Therefore, even thirty minutes of intensely focused work can produce incredible results.

Next, ask how you will work once you start to work.<sup>27</sup> This question forces you to decide and visualize beforehand rules and processes to keep your work time

goal is to eliminate the need to use mental energy during periods of deep work to decide rules. With the rules established up front, you avoid tapping into your willpower reserves.<sup>28</sup>

Finally, consider how you will support your work.<sup>29</sup> The goal is to set the right conditions for your brain to focus during work. This could mean getting a cup of coffee, clearing everything off your desk except the project you need to focus on, going for a quick walk outside or around the building, or finding a snack to have as you work. Since you know yourself best, consider the conditions that have allowed you to work best in the past and create those conditions to support periods of deep work.

### ***Rules for Digital Distraction***

It is no surprise that technology can be a significant distraction. One could write an entire article or book on that topic alone (and many have).<sup>30</sup> Therefore, it is essential to establish personal rules for how you will manage technological distractions during periods of deep work. These distractions can come in the form of phone calls, emails, text messages, or notifications on your phone, just to name a few. During periods of focus, the best practice is elimination of these distractions. Depending on the strength of your urge to check these items, you may need to completely turn off your phone and close out your email. Whatever the best answer is for you, be deliberate and decide up front how you will eliminate these distractions. As Newport says in his book, “Instead of scheduling the occasional break *from distractions* so you can focus,

rule you can adopt to create space to do deep work is shutting your office door and leaving a note on the outside that you are doing focused work for a certain period of time. This sends a clear signal to others in your office that you have deliberately set aside time to do focused work on a task. Those in the organization should respect the boundary you are creating. With this in mind, let us examine external rules to create a culture where deep work is encouraged and less rare.

### **External Rules for Deep Work**

As a JAG Corps, the more productive we can be, the better we can serve our clients. An increase in productivity means we are accomplishing the same amount of work in less time. This is what happens when individuals eliminate distractions and can operate at a higher level of intensity. Remember, intensity multiplied by time equals productivity. When distractions are present, and we are trying to do deep work, it takes more time to accomplish the task. Having internal rules is a positive first step toward greater productivity, but external rules throughout the organization will result in widespread increase in productivity. In this section, we briefly explore practical, external rules that facilitate greater productivity by individual attorneys and paralegals. To maximize effectiveness, all members of an organization can adopt these external rules and create a culture where deep work and collaboration are not only possible, but valued.

### ***The Case Against the Open Office Plan***

Technology companies in Silicon Valley were among the first organizations to move to open office plans. By 2014, about seventy percent of companies had moved to this model.<sup>35</sup> These open office plans were designed to spark creativity, innovation, and collaboration; but, mounting research demonstrates they may have the opposite effect.<sup>36</sup> While the Army is not yet a workplace with fancy, open office plans, cold brew on tap, and unlimited snacks like you will find in Silicon Valley, there are lessons the JAG Corps can learn from those that have studied productivity in these open office environments.

In 2018, Ethan Bernstein and Stephen Turban of Harvard Business School and

Harvard University examined how transitioning from a traditional office design to an open office layout affected team collaboration.<sup>37</sup> Perhaps surprisingly, Bernstein and Turban found decreased collaboration. After switching to open office plans, participants spent seventy-three percent less time in face-to-face interactions, sixty-seven percent more time on email, and seventy-five percent more time on instant messenger.<sup>38</sup> The open layout seemed to make individuals want to withdraw. Bernstein explains, “If you’re sitting in a sea of people, for instance, you might not only work hard to avoid distraction (by, for example, putting on big headphones) but—because you have an audience at all times—also feel pressure to look really busy.”<sup>39</sup>

Other studies have shown similarly negative results. After reviewing over 100 studies of office environments, orga-

## **In the JAG Corps, each office needs space for intentional collaboration and space to perform isolated deep work or integrated depth with only a few people.**

nizational psychologist Matthew Davis concluded that free-flow office spaces had a negative effect on attention spans, creative thinking, productivity, and job satisfaction.<sup>40</sup> Researchers at Queensland University of Technology found that ninety percent of workers in open office plans had increased stress, conflict, blood pressure, and turnover.<sup>41</sup> Additionally, a Danish study found that employees working in open office environments used sixty-two percent more sick days.<sup>42</sup> A few of the top complaints from those who work in open office plans is noise distraction and a loss of privacy.<sup>43</sup> However, there is a way to combat this.

### ***The Hub-and-Spoke Model***

As you might imagine, Newport is not a fan of the open office plan concept.<sup>44</sup> Instead, Newport advocates for a “hub-and-spoke” model that allows for group collaboration and isolated deep thinking.<sup>45</sup> As Newport explains:

It’s a setup that straddles a spectrum where on one extreme we find the solo thinker, isolated from inspiration but free from distraction, and on the other extreme, we find the fully collaborative thinker in an open office, flush with inspiration but struggling to support the deep thinking needed to build on it.<sup>46</sup>

In the JAG Corps, each office needs space for intentional collaboration and space to perform isolated deep work or integrated depth with only a few people. Ideally, the office layout will cultivate both. For a criminal law office, for example, the chief of justice could create an area for collaboration with a large white board and a conference table and have individual offices for trial counsel to do concentrated work and case preparation. The chief of justice

could also create individual office signs to help trial counsel communicate when they are attempting to do deep work and when they are open to collaboration.

### ***Focusing Only on the Essential***

One challenge all people and organizations face is determining what is truly essential to the success of the organization. According to the Pareto Principle, eighty percent of the outcomes stem from only twenty percent of the inputs.<sup>47</sup> Therefore, much of what we spend time on may not actually move the needle of the organization. As we establish organizational rules to increase productivity, we have to consider what we are doing, not just how we are doing it—in other words, focusing only on what is “wildly important.”<sup>48</sup>

The more goals a team sets, the less likely they are to achieve any goals. This is because humans are hardwired to do only one thing at a time with excellence.<sup>49</sup> According to Professor Clifford Nass of Stanford University, “The neural circuits

devoted to scanning, skimming, and multitasking are expanding and strengthening, while those used for reading and thinking deeply, with sustained concentration, are weakening or eroding.”<sup>50</sup> Just as air traffic controllers have to focus on the plane landing at the moment, our legal offices must distinguish between the important and the “wildly important” to maximize focus and ultimately achieve better results.<sup>51</sup> For JAs and leaders, this may mean saying no to good ideas and even some great ideas to instead maintain focus on those items that are truly the most important.

For example, leaders may eliminate certain meetings in your organization that seem important but ultimately detract from the wildly important. It could mean eliminating paperwork, processes, or systems that do not serve the organization but are generally expected because “it’s the way we’ve always done it.” This might also require seeking clarity from your supervisor about what is truly the priority. This process is analogous to what is required to eliminate digital distractions, and it stems from the same reality that we cannot do it all and do it well. Decide what is truly essential as an office and create a culture where individuals and teams exercise deliberate focus only on those essential tasks. Leaders can also take initiative to shield their people from low-priority tasks, where the subordinates do not have the power or authority to set those boundaries for themselves.

## Conclusion

As a JAG Corps, we face many of the same problems that led Cal Newport to write the book *Deep Work*. In a world filled with distractions, those who successfully cultivate an ability to do focused work have a competitive advantage. Similarly, those organizations that face the problem head on and encourage individuals and teams to make deep work a regular part of their work rhythms will greatly benefit from an increase in productivity and job satisfaction by their employees. Like the administrative law attorney who desperately wanted to get his work done, you, too, may feel frustrated. Incorporating the rules outlined in this article can serve as stepping stones toward greater productivity, and, over time, your

brain will build up stamina to shield distractions and perform focused work. **TAL**

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## Notes

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2. See CAL NEWPORT, DEEP WORK: RULES FOR FOCUSED SUCCESS IN A DISTRACTED WORLD 49-61 (2016) (describing the negative effects of our current work culture on productivity).
3. CHRIS MCCHESENEY ET AL., THE 4 DISCIPLINES OF EXECUTION 24 (2012).
4. NEWPORT, *supra* note 2, at 14.
5. *Id.* at 3.
6. *Id.*
7. *Id.* at 6.
8. GREG MCKEOWN, ESSENTIALISM: THE DISCIPLINED PURSUIT OF LESS 36 (2014) (emphasizing that we have the power to choose, but that we can develop “learned helplessness” over time and forget that we have a choice).
9. See generally CAL NEWPORT, HOW TO BECOME A STRAIGHT-A STUDENT: THE UNCONVENTIONAL STRATEGIES REAL COLLEGE STUDENTS USE TO SCORE HIGH WHILE STUDYING LESS (2006).
10. NEWPORT, *supra* note 2, at 40.
11. *Id.* at 64.
12. *Id.*
13. VICTOR M. GONZÁLEZ & GLORIA MARK, “CONSTANT, CONSTANT, MULTI-TASKING CRAZINESS”: MANAGING MULTIPLE WORKING SPHERES 119 (2004).
14. MCCHESENEY ET AL., *supra* note 3, at 24.
15. NEWPORT, *supra* note 2, at 41.
16. *Id.* at 41-42.
17. *Id.* at 43.
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19. MIHALY CSIKSZENTMIHALYI, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE 3 (1990). Csikszentmihalyi used this term “flow” to describe an optimal mental state. He said, “The best moments usually occur when a person’s body or mind is stretched to its limits in a voluntary effort to accomplish something difficult and worthwhile.” *Id.*
20. *Id.*
21. NEWPORT, *supra* note 2, at 98.
22. ROY F. BAUMEISTER & JOHN TIERNEY, WILLPOWER: REDISCOVERING THE GREATEST HUMAN STRENGTH 35 (2011).
23. *Id.*
24. NEWPORT, *supra* note 2, at 101-19 (discussing different philosophies for deep work).
25. *Id.* at 119.
26. *Id.* at 120.

27. *Id.*
28. *Id.*
29. *Id.*
30. See, e.g., *id.*
31. NEWPORT, *supra* note 2, at 161.
32. *Id.*
33. *Id.* at 162.
34. *Id.* at 164.
35. Maria Konnikova, *The Open-Office Trap*, NEW YORKER (Jan. 7, 2014), <https://www.newyorker.com/business/currency/the-open-office-trap>.
36. Aytakin Tank, *Why It’s Time to Ditch Open Office Plans*, ENTREPRENEUR (Feb. 7, 2019), <https://www.entrepreneur.com/article/327142>.
37. Ethan S. Bernstein & Stephen Turban, *The Impact of the ‘Open’ Workspace on Human Collaboration*, ROYAL SOC’Y PUBL’G (May 3, 2018) <https://royalsocietypublishing.org/doi/pdf/10.1098/rstb.2017.0239>.
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39. Christian Camerota, *The Unintended Effects of Open Office Space*, HARV. BUS. SCH. (July 9, 2018), <https://www.hbs.edu/news/articles/Pages/bernstein-open-offices.aspx>.
40. Matthew C. Davis et al., *The Physical Environment of the Office: Contemporary and Emerging Issues*, 26 INT’L REV. INDUS. & ORGANIZATIONAL PSYCH. 193, 199 (2011).
41. Shane Borer, *Are Open Office Plans Bad for Work?*, CFO DAILY NEWS (June 3, 2009), <https://www.cfodailynews.com/articles/are-open-plan-offices-bad-for-work/>.
42. Jan H. Pejtersen et al., *Sickness Absence Associated with Shared and Open-Plan Offices—A National Cross Sectional Questionnaire Survey*, 37 SCANDINAVIAN J. WORK, ENVIRONMENT & HEALTH 376 (2011).
43. *Workers Dissatisfied with Open Plan Offices*, UNIV. OF SYDNEY (Sept. 17, 2013), <https://sydney.edu.au/news-opinion/news/2013/09/17/workers-dissatisfied-with-open-plan-offices.html>.
44. NEWPORT, *supra* note 2, at 126.
45. *Id.* at 131.
46. *Id.*
47. MCKEOWN, *supra* note 8, at 44.
48. MCCHESENEY ET AL., *supra* note 3, at 24.
49. *Id.* at 25.
50. *Id.* at 26.
51. *Id.* at 27.



# Azimuth Check

## Sharing Expertise

### JAGC Senior Civilians Continue to Develop Themselves and Others

By William J. Koon

Mr. William Koon (center), Mr. Eric Hammerschmidt (right), and Ms. Jennifer Talley (left) celebrate Mr. Hammerschmidt and Ms. Talley's graduation from the 69th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Ms. Talley and Mr. Hammerschmidt are DA Civilians who were selected to attend the graduate course. (Credit: Jason Wilkerson, TJAGLCS)

**The Judge Advocate General's (TJAG)** directive for attorneys to become masters in one or two areas of the law as their careers progress<sup>1</sup> fulfills the "expert" part of his description of judge advocate legal service (JALS) personnel—expert and versatile. For military attorneys, versatility is a must as they cycle through necessary and varying assignments in almost all areas of military law. It is the Civilian attorney

who is best situated to spend the most time in one field of practice; thus, mastery—which is certainly enhanced by experience and time spent on the job—is more easily attainable for those dedicated to their craft and able to practice in one legal discipline for several years.

In recognition of the Civilian attorney's key role in an Office of the Staff Judge Advocate (OSJA), TJAG created the "Senior Civilian" role in 2007,<sup>2</sup> making the leadership team for each OSJA a "Foundation of Five." Because Senior Civilians across the Army already serve as mentors and leaders in their fields and on their teams, it made sense for TJAG to support a course through The Judge Advocate General's Legal Center and School so that Senior Civilians can better understand their leadership roles and increase awareness of the strategic vision and goals of our organization.

To that end, the inaugural iteration of the Senior Civilian Law and Leadership Course (SCLLC) took place virtually 19 to 22 January 2021, after over a year of planning this important event. Over seventy of the Judge Advocate General's Corps's (JAGC's) civilian leaders met to receive updates on key areas of the law and legal policy, and to hone their leadership knowledge and skills. Represented in these students was more than 3,000 years of legal experience, all masters in their own right: experts in labor law, federal litigation, health care law, contract and fiscal law, and administrative and civil law, among other JAGC practice areas. Giants in their fields, Senior Civilians are leading their teams and the Corps each day, like, for example . . .

1. Mr. Gary Chura, the Senior Civilian and Chief of Client Services at Fort Leonard Wood, Missouri. Mr. Chura was an inaugural winner of the Corps's Regimental Award in 2019, has deployed three times as a judge advocate in the Reserve Component, and recently appeared as a panel member for an American Bar Association continuing legal education on domestic violence and military families.

2. Mr. Gary Baumann, the 101st Airborne Division (Air Assault) & Fort Campbell, Kentucky OSJA Senior Civilian and Chief of Administrative/Civil law. Mr. Baumann's team was named Fort

Campbell's Civilians of the Year for 2020 (team category).

And. . .

3. Mr. John Jakubowski, the Defense Language Institute Foreign Language Center and Presidio of Monterey, California, OSJA Senior Civilian, who is currently deployed under the Defense Security Cooperation Agency's Ministry of Defense Advisors Program in Afghanistan.

Although Department of the Army (DA) Civilians have been in service with the military since 1775,<sup>3</sup> they became more involved with legal services around 1865, when the War Department created the Freedman's Bureau (which closed in 1872). "Several hundred Army civilians helped former slaves find employment and locate family members dislocated during the chaos of the war. Other bureau employees established schools to instruct reading and writing and acted as legal advocates for freed slaves in court cases and litigation."<sup>4</sup> Today's DA Civilian Legal Assistance practitioners can take pride in the important roles they have been filling for over 100 years.

It is clear that Senior Civilians fill a vital role in an OSJA for continuity and helping to shape new team members. Though military personnel cycle through OSJAs frequently, the Senior Civilian remains on the team<sup>5</sup> and is continually charged with infusing the newly-formed team—with all the new chemistry of recently-joined personalities—with the positive aspects of the former team. Senior Civilians, as masters in their fields, train and guide newly-accessed attorneys, and their leadership is oftentimes crucial as they mentor judge advocates, warrant officers, paralegals, paraprofessionals, and fellow Civilian attorneys. Mastery and leadership go hand in hand for the Senior Civilian—each lends credibility to the other and, arguably, cannot exist without the other. This new course brings Senior Civilians together in a collaborative way, to share leadership experiences, receive updates in the law, and sharpen their skills in both of those areas. The next iteration of the course is in January 2022, and we are already working on further developing leadership and legal topics to feature. While our Senior Civilians are certainly expert in their practice, we all continually strive to ensure we are

fully prepared to lead in every OSJA's Foundation of Five. **TAL**

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## Notes

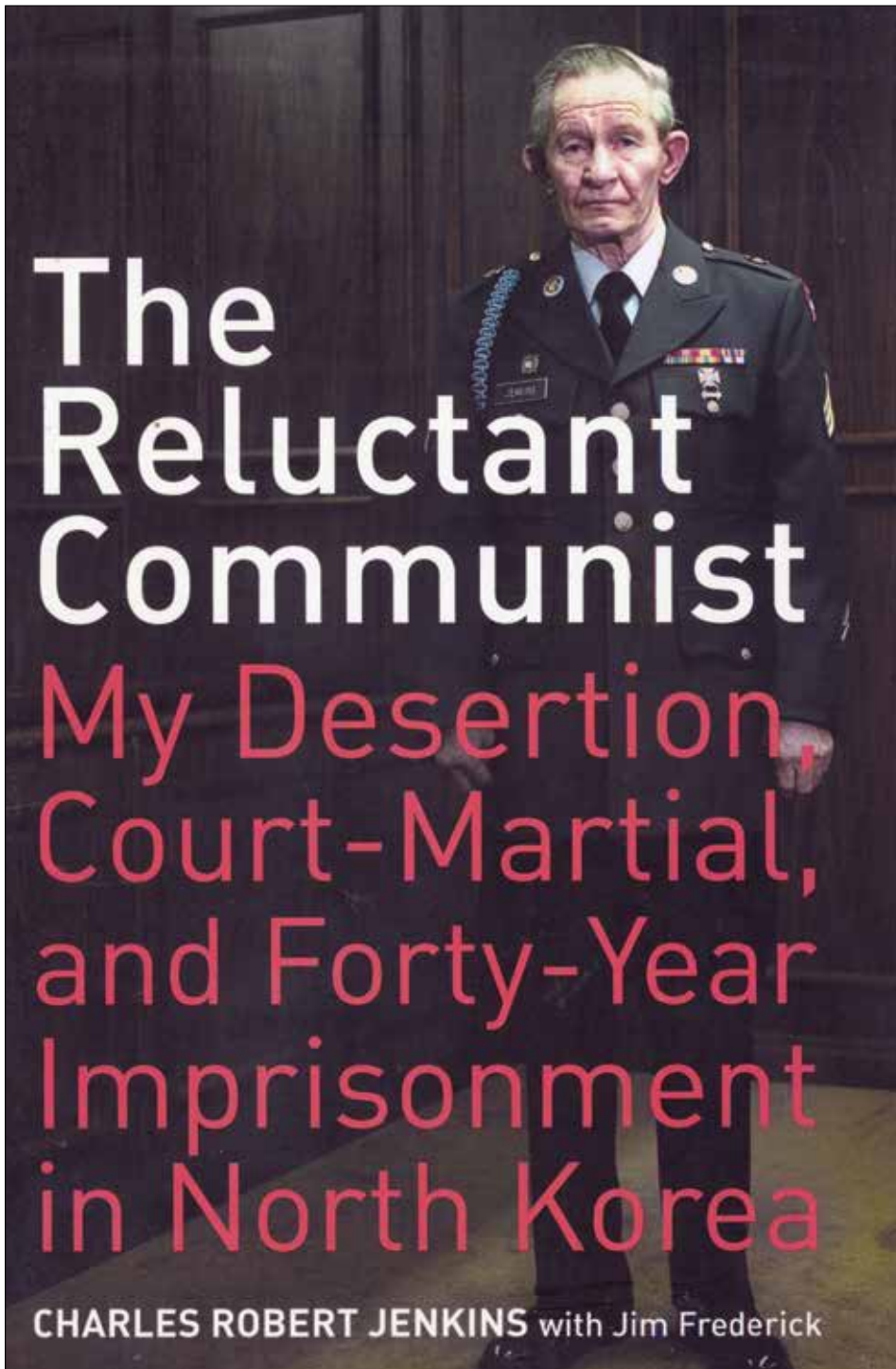
1. Lieutenant General Charles N. Pede, *JAGC Constant #2: Mastery of the Law*, TJAGLCS, <https://tjaglcspublic.army.mil/jagc-constant-2-mastery-of-the-law?inheritRedirect=true> (last visited Apr. 28, 2021) (highlighting the second of the four Judge Advocate General's Corps (JAGC) constants: (1) Principled Counsel, (2) Mastery of the Law, (3) Stewardship, and (4) Servant Leadership).

2. The Judge Advocate General Special Announcement 37-12 (13 June 2007) (Lieutenant General Scott Black, The Judge Advocate General, announcement concerning the creation of the "Senior Civilian" in the JAGC).

3. See THE HIGHEST LEVEL OF SKILL AND KNOWLEDGE: A BRIEF HISTORY OF U.S. ARMY CIVILIANS, 1775-2015 (Stephen J. Lofgren ed., 2016), [https://history.army.mil/html/books/070/70-124/cmhPub\\_70-124.pdf](https://history.army.mil/html/books/070/70-124/cmhPub_70-124.pdf) (noting "these quiet professionals have always been a vital part of the Army profession").

4. *Id.* at 20.

5. *Id.* at 5 (Brigadier General (later-Lieutenant General) James H. Pillsbury noted in 2003: "A real strength of our civilians is that they are stable, remaining in their jobs for much longer periods of time than the military. They thus learn their jobs and are able to hone the skills necessary to be at the highest level of skill and knowledge in their fields.")



# Lore of the Corps

## Stranger than Fiction

The GI Who Fled to North  
Korea for Forty Years

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*By Fred L. Borch III*

**In January 1965, Sergeant Charles Robert Jenkins** abandoned his post and, without authority, walked across the Demilitarized Zone (DMZ) into North Korea. After surrendering to enemy soldiers guarding the border, Jenkins spent the next four decades in North Korea—as a captive of the Pyongyang regime. In 2004, Jenkins—now married and with two daughters—returned to U.S. military control in Japan, where he was court-martialed for desertion and aiding the enemy. The story that follows is proof of the old adage that truth is stranger than fiction.

Born in a small town in North Carolina in February 1940, Charles Robert Jenkins enlisted in the Army in 1958. He had only eight years of education and a General Technical score of 65,<sup>1</sup> but this was apparently sufficient for him to complete training as a light weapons infantryman. Jenkins first served at Fort Hood, Texas, before volunteering for duty with the 7th Infantry Division in South Korea in 1960. After briefly returning to American soil, Jenkins joined the 3d Armored Division in Germany, where he served until 1964. When he left Germany, Sergeant Jenkins



COL Denise Vowell was serving as the Army's Chief Trial Judge when she decided *United States v. Jenkins*. (Photo courtesy of Fred Borch III)

requested to be reassigned to South Korea, since he had enjoyed his first tour of duty there. His request was approved and, after arriving in country, Jenkins joined the 1st Cavalry Division and was stationed along the 38th parallel at the DMZ.<sup>2</sup> According to *The Reluctant Communist*—a memoir Jenkins published in 2008—within months of his return to South Korea, Jenkins became increasingly fearful that he would be killed while on patrol along the dangerous and highly-fortified DMZ. He also feared that he might lose his life in combat in Vietnam, where he was notified that the 1st Cavalry Division would soon be sent.<sup>3</sup>

As Jenkins became more anxious and depressed about his future in the weeks and months that followed, he convinced himself that if he were to walk across the two-and-a-half-mile-wide DMZ and into North Korea, he could obtain political asylum in the Soviet Union. Ultimately, Jenkins believed that Moscow would return him to the United States under some sort of prisoner exchange. In any event, while on patrol on the DMZ after midnight on 4 January 1965, Jenkins told his fellow Soldiers that he had to “take a leak” and then disappeared from their view as he walked into North Korea. However, after his surrender

to North Korean soldiers guarding the frontier, subsequent events did not turn out as Jenkins had thought they would. “I did not understand,” he wrote more than forty years later, “that the country I was seeking temporary refuge in was literally a giant, demented prison; once someone goes in there, they almost never, ever get out.”<sup>4</sup>

After a few days of interrogation, the North Koreans confined Jenkins in a one-room house with three other American deserters: Larry Abshier, Jerry Parrish, and James Dresnok.<sup>5</sup> It was a horrific existence—with frequent periods of “cold, hunger, and despair.”<sup>6</sup> When the Americans got food, it was often of poor quality. The house had only cold running water, but it rarely worked, which meant hauling water from a well—not an easy task in sub-zero temperatures. Jenkins endured constant supervision and regular beatings by North Korean guards. And, on the orders of the North Koreans, he was also beaten by his fellow Americans.<sup>7</sup>

Over time, conditions improved for Jenkins and his fellow American deserters. Since the men were “Cold War trophies,” the North Koreans decided that it was best if their captives “were kept mostly healthy.”<sup>8</sup> But Jenkins “suffered from enough cold, hunger, beatings, and mental torture to frequently wish that he were dead.”<sup>9</sup>

Jenkins and his fellow Soldiers spent most of their days studying North Korean dictator Kim Il-sung’s “Juche Idea,” which was Kim’s “homegrown theory of communism.”<sup>10</sup> As Jenkins explained, the idea was for him and his fellow captives to study Kim Il-sung’s teachings and then “confess” on a regular basis how they had failed to live up to these teachings. It was hours of forced study, memorization, and “self-criticism.”<sup>11</sup>

In 1973, Jenkins and the other Americans were assigned to teach English at a military school on the eastern outskirts of Pyongyang. They would teach in rotation—ten to fifteen days at a time—to classes of officer cadets. There were thirty students in each class and all were the sons of prominent members of the North Korean government.<sup>12</sup> Jenkins taught until the school closed in 1976. He then spent his days translating English language broadcasts from *Voice of America*, Armed Forces



Network (Japan), and the *Nippon Hoso Kyokai* English radio service language into Korean for use by government cadre.<sup>13</sup>

In 1980, Robert Jenkins's life changed dramatically when the North Koreans brought a twenty-one-year-old Japanese nurse named Hitomi Soga to his home and told him to teach her to speak English. Soga had been kidnapped by North Korean agents from her hometown in Japan in 1978 and taken to North Korea to teach the Japanese language and culture to North Koreans, who would then infiltrate Japan as spies.

Now, after two years, the North Koreans decided to put Soga in the house where Jenkins lived. They probably hoped that Jenkins and Soga would get married, which they did—thirty-eight days after first seeing each other. As Jenkins tells it, they were both lonely and they both hated North Korea. That was a “common bond” and marrying each other made it less likely that the North Koreans would separate them.<sup>14</sup> Soga subsequently gave birth to a daughter in 1983. She and Jenkins had a second daughter in 1985.<sup>15</sup>

In 1981, Jenkins began teaching English to North Koreans at the Military Foreign Language University in Pyongyang. The students were already in the North Korean military, and most would be commissioned as officers. Some, however, were being taught enough English to be able to pass as South Koreans—and work as spies outside North Korea.<sup>16</sup>

The North Koreans also used Jenkins for propaganda. In an early installment of a multipart film called *Nameless Heroes*,<sup>17</sup> he played the evil Dr. Kelton—an American warmonger and capitalist who lived in South Korea and who wanted to keep the conflict between the two Koreas going in order to make profits for U.S. arms manufacturers. Jenkins also later played an American Navy captain in a movie about the North Korean capture of the USS *Pueblo*, which had occurred in 1968 and of which the North Koreans were immensely proud.<sup>18</sup>

While the American government knew for many years that Jenkins was living in North Korea, this knowledge was not revealed to the public. Not until 2002 did Americans—and the world—learn about

Jenkins. In a speech, Korean dictator Kim Jong-il admitted that North Korea had kidnapped a number of Japanese citizens “to use in its spy programs” and that some of them were still living in North Korea.<sup>19</sup> In identifying those Japanese citizens still living in North Korea, the North Koreans also disclosed that one of the kidnap victims—Hitoma Soga—had married Jenkins.

As a humanitarian gesture, the North Koreans allowed these Japanese nationals to travel to Japan. As a result, Jenkins's wife traveled to Japan in late 2002. Jenkins and his daughters, however, were kept in North Korea until July 2004, when they were finally reunited with their wife and mother, respectively, in Japan.

Recognizing that Jenkins had deserted from the Army, and that his presence in Japan arguably required that the Japanese government make an effort to return Jenkins to U.S. military authorities, the Japanese government formally requested a pardon for him. Having brought Hitomi Soga back from captivity, and now united her with her husband and their daughters, Japanese leaders in Tokyo mostly likely felt sorry for Jenkins having spent forty years confined in North Korea. They almost certainly believed that it would be best for all concerned if Jenkins and his family could get on with their lives.<sup>20</sup>

The U.S. Army, however, advised the Japanese government that Jenkins's only course of action was to surrender to the military authorities at Camp Zama. Criminal charges had been preferred against him when he deserted in March 1965—and these were still pending against him. The charge sheet in SGT Jenkins's official military records alleged that he had committed the following crimes: soliciting 1st Cavalry Division Soldiers to desert, in violation of Article 82, Uniform Code of Military Justice (UCMJ)<sup>21</sup>; desertion from 5 January 1965 to \_\_\_\_\_ (date to be determined), in violation of Article 85, UCMJ<sup>22</sup>; aiding the enemy, in violation of Article 104, UCMJ<sup>23</sup>; and adversely influencing the loyalty, morale, and discipline of 1st Cavalry Division Soldiers by advising these men to be disloyal, in violation of Article 134, UCMJ.<sup>24</sup>

In late July 2014—while Jenkins was still recovering from various ailments in a Japanese hospital, and had not yet returned

to military control—the U.S. Army Trial Defense Service (TDS) sent Jenkins a letter offering him the services of a defense counsel. Jenkins accepted the offer, and TDS assigned Captain (CPT) James “Jim” Culp to consult with him. Culp met with Jenkins for an extended period and talked at length with him about the charges against him.

Ultimately, Jenkins decided that he could plead guilty to desertion and to aiding the enemy (by teaching English to North Korean military students). But Jenkins denied soliciting American Soldiers to desert to North Korea and he also denied encouraging disloyalty among 1st Cavalry Division Soldiers. These two charges—which had been preferred almost forty years ago—were based on the belief that Jenkins had made radio propaganda broadcasts across the DMZ. Jenkins insisted that he had never made any such broadcasts—and that he could not plead guilty to crimes he had not committed.<sup>25</sup>

Shuttling back and forth between the hospital and Camp Zama, Culp first attempted to obtain a Discharge in Lieu of Trial by Court-Martial for Jenkins under Army Regulation 635-200, *Active Duty Enlisted Administrative Separations*.<sup>26</sup> The request was made in August, but the command refused to act upon it. As Major General Elbert N. Perkins, the General Court-Martial Convening Authority explained in writing to CPT Culp, it was “inappropriate” for him to act on a Chapter 10 when Jenkins had not yet returned to military control. Consequently, Perkins insisted that Culp tell Jenkins that his best course of action was to “expeditiously return” to the Army and “fulfill” his “duties, obligations, and responsibilities as a soldier.”<sup>27</sup>

Recognizing that it was unlikely that Jenkins would be permitted to avoid a trial, CPT Culp began informally negotiating a pre-trial agreement—even though Jenkins had not yet turned himself into the military authorities at Camp Zama. On 3 September 2004, Jenkins offered to plead guilty in return for a sentence that included no confinement. Major General Perkins refused this offer. Ultimately, with Culp's assistance, Jenkins informally obtained a pre-trial agreement that capped his confinement at thirty days—with the

understanding that nothing was assured until Jenkins turned himself in.

On 11 September 2004, now 64-year-old Jenkins finally surrendered to the military police at Camp Zama. The following day, he formally submitted his offer to plead guilty, which Major General Perkins approved on 22 October. The quantum portion of the agreement provided that, in return for entering pleas of guilty to desertion and aiding the enemy, Perkins agreed that he would not approve more than thirty days confinement, but that all other lawful punishments might be approved.<sup>28</sup>

On 3 November 2004, at a general court-martial convened by U.S. Army Japan and 9th Theater Support Command, SGT Jenkins pleaded guilty as agreed. Colonel (COL) Denise K. Vowell, the Army's Chief Trial Judge, was the military judge in a bench trial.<sup>29</sup> Captains Seth Cohen and Troy Wallace were detailed as trial counsel and assistant trial counsel, respectively.

After determining that his pleas were provident, COL Vowell sentenced Jenkins to six months' confinement, total forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge. When he took action in the case, Major General Perkins reduced the six months in jail to thirty days; he approved the remainder of the sentence as adjudged. As a result of his good behavior while confined, Jenkins was released from prison six days early, on 27 November 2004. While imprisoned, Jenkins decided to waive his post-trial and appellate rights, and so his dishonorable discharge was executed fairly quickly—on 18 July 2005.

Jenkins, his wife, and two daughters moved to Sado Island, Japan, which was his wife's home. He "was a popular worker at a local souvenir shop and could often be seen posing in photos with visiting tourists."<sup>30</sup> On 11 December 2017, Jenkins collapsed outside his home. He was rushed to a hospital, but did not survive. Japanese news sources later reported that he died of "heart failure."<sup>31</sup> Jenkins was seventy-seven years old.

So ends the strange, but true, story of SGT Charles Robert Jenkins. He remains the longest missing deserter in Army history to return to duty—under truly remarkable circumstances. **TAL**

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## Notes

1. The "General Technical" (GT) score represents a person's reading, language, and basic math skills. An average GT score is between 100 and 110. See *Learn How to Join*, U.S. ARMY, <https://www.goarmy.com/learn/understanding-the-asvab.html> (last visited Jan. 21, 2021).
2. CHARLES ROBERT JENKINS, THE RELUCTANT COMMUNIST: MY DESERTION, COURT-MARTIAL, AND FORTY-YEAR IMPRISONMENT IN NORTH KOREA 16 (2008).
3. *Id.* at 19.
4. *Id.* at 44.
5. U.S. Army Private Larry Allen Abshier, Private First Class James Joseph Dresnok, and Specialist Jerry Wayne Parrish all died while living in North Korea. Mark Russell, *An American in North Korea: Pledging Allegiance to the Great Leader*, N.Y. TIMES (Oct. 19, 2006), <https://www.nytimes.com/2006/10/19/movies/an-american-in-north-korea-pledging-allegiance-to-the-great-leader.html>; Cleve R. Wootson Jr., *A U.S. Soldier Who Defected to North Korea in 1962 Has Died, His Pyongyang-Born Sons Say*, WASH. POST (Aug. 21, 2017, 12:35 PM), <https://www.washingtonpost.com/news/worldviews/wp/2017/08/21/a-u-s-soldier-who-defected-to-north-korea-in-1962-has-died-his-pyongyang-born-sons-say/>. *Crossing the Line*, a 2004 documentary about Dresnok, is now streaming on Amazon. See *CROSSING THE LINE* (British Broadcasting Corporation et al. 2006).
6. JENKINS, *supra* note 2, at 33.
7. *Id.* at 40.
8. *Id.*
9. *Id.*
10. *Id.* at 43-44. Kim Il-sung was the first ruler of North Korea. Selected by the Soviets to take charge of North Korea, he ruled as an absolute dictator and created a cult of personality. After his death in 1994, his son Kim Jong-il succeeded him as "Dear Leader." *Id.*
11. *Id.* at 37.
12. *Id.* at 67.
13. *Id.* at 72. *Nippon Hoso Kyokai*, or Japan Radio Broadcasting, is also known as NHK. It is roughly equivalent to the United Kingdom's British Broadcasting Corporation. *Id.*
14. JENKINS, *supra* note 2, at 89.
15. *Id.* at 107.
16. United States v. Jenkins, No. 20041131, at 42 (U.S. Army Japan, Camp Zama, Japan, 14 Sept. 2004).
17. *Nameless Heroes*, also known as *Unknown Heroes*, is popularly referred to as *Unsung Heroes*. See UNSUNG HEROES (Chosun Art 1978).
18. JENKINS, *supra* note 2, at 95.
19. *Id.* at 137.

20. *Id.* at 175.
21. UCMJ art. 82 (1950).
22. UCMJ art. 85 (1950).
23. UCMJ art. 104 (1950).
24. United States v. Jenkins, No. 20041131, at 8 (U.S. Army Japan, Camp Zama, Japan, 14 Sept. 2004) (DD Form 458, Charge Sheet, 15 Mar 1965) [hereinafter Record of Trial]. See also UCMJ art. 134 (1950).
25. JENKINS, *supra* note 2, at 174-75.
26. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ch. 10 (15 July 2004).
27. Record of Trial, *supra* note 24, Allied Papers (Memorandum from CPT Culp to SGT Jenkins, subject: Offer to Plead Guilty, SGT Charles Robert Jenkins, 4 Sept. 2004). Ultimately, on the recommendation of Colonel Karen L. Judkins, Staff Judge Advocate, U.S. Army Japan and 9th Theater Support Command, the Chapter 10 request was disapproved by Major General Perkins on 12 September 2004. *Id.* Allied Papers (Memorandum from CG, subject: Request for Discharge in Lieu of Trial by Court-Martial, SGT Charles Robert Jenkins, 12 Sept. 2004).
28. Record of Trial, *supra* note 24, Appellate Exhibit III (Memorandum from Captain James Culp to Sergeant Jenkins, subject: Offer to Plead Guilty, 12 Sept. 2004).
29. See Fred L. Borch, *Women in the Corps: A Short History of Female Judge Advocates*, ARMY LAW., 2020 Iss. No. 1, at 13, 21. Denise K. Vowell had a distinguished career as an Army lawyer. She was the first female Staff Judge Advocate at 1st Infantry Division and the first female Chief Trial Judge in history. Colonel Vowell retired from active duty in January 2006 and was then appointed by the Court of Federal Claims as a Special Master in the National Vaccine Injury Compensation Program by the judges. A year later, Vowell was assigned as one of three special masters in the Omnibus Autism Program, handling one third of the court's more than 5,000 cases alleging vaccine causation of autism spectrum disorder. *Id.*
30. Austin Ramzy, *Charles Jenkins, 77, U.S. Soldier Who Regretted Fleeing to North Korea, Dies*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/obituaries/charles-jenkins-north-korea-defector.html>.
31. *Id.*

# In Memoriam

## Remembering Recently Departed Members of the Regiment in 2020

By Fred L. Borch III

The following members of our Regiment, in alphabetical order, passed away in 2020.

### George Bahamonde (1934-2020)

George Bahamonde served our Corps as a civilian attorney-advisor for almost fifty years, retiring as the Special Assistant to the Judge Advocate, Headquarters, U.S. Army Europe (USAREUR). He remained in Heidelberg, Germany, after retiring and died there on 31 March 2020, at the age of 86.

A native of New Jersey, Mr. Bahamonde graduated from Columbia Law School and, after being drafted into the Vietnam War, served as a Soldier with U.S. troops stationed in Europe. After being honorably discharged, he remained overseas and took a job as a civilian attorney with U.S. Forces in Fontainebleau, France. Starting in the 1960s, after U.S. Army European operations moved to Heidelberg, Mr. Bahamonde worked at that location, in the Office of the Judge Advocate, USAREUR, until he retired in 2002.

*Army Lawyer* 2020 Issue No. 4 has a feature article on Mr. Bahamonde and his importance in the history of our Corps.<sup>1</sup>

### Richard J. Bednar (1931-2020)

Brigadier General Richard John “Dick” Bednar, a procurement law expert who had a distinguished career in the Corps, died in Alexandria, Virginia, of Coronavirus Disease-2019 (COVID-19)-related pneumonia on 20 December 2020. He was eighty-nine years old.

Born in Omaha, Nebraska, on 31 October 1931, Dick Bednar attended

Creighton University. He earned both his undergraduate and law degrees in a unique five-year program. Additionally, while at Creighton, Dick obtained a commission through the Army Reserve Officer Training Corps (ROTC) program and began his Army career in the Infantry at Fort Benning, Georgia. He soon transferred to the Judge Advocate General’s (JAG) Corps, and served in a variety of locations and assignments, including: Aberdeen Proving Ground, Maryland; Washington, D.C.; and Charlottesville, Virginia. Dick also had overseas duty in France, Korea, and Vietnam.

After his promotion to brigadier general, Bednar served as the Judge Advocate, USAREUR. This was a turbulent time for Americans stationed in Europe, as U.S. military personnel were attacked by radical elements in various locations, including the attempted assassination of General Frederick Kroessen, the USAREUR commander, in 1982.<sup>2</sup>

Dick was one of the Army’s experts in contract law and he continued to work in this practice area after he retired from active duty in 1984. He headed the Government Contracts program at George Washington University. After two years of teaching, he accepted a position at the law firm of Crowell and Mooring. He practiced law there for more than 30 years and retired a second time in 2008.

In 2009, Dick joined with his friend and colleague Mike Eberhardt to form a company called Contractor Integrity Solutions. Contractor Integrity Solutions provided ethics and compliance monitoring



BG Richard “Dick” Bednar (circa 1982). (Photo courtesy of author)

and risk assessments for government contractors.

Brigadier General Bednar tested positive for COVID-19 on 12 December and was admitted to INOVA Alexandria Hospital with COVID-19-related pneumonia and other issues. He died on the morning of 20 December. Two weeks later, on 2 January 2021, his wife Judy also died from COVID-19-related complications. Dick and Judy had been married more than fifty years at the time of their deaths.

Dick Bednar is survived by a daughter, two sons, four grandchildren, and one great grandchild. His daughter-in-law, Lieutenant Colonel Yolanda Schillinger, currently serves as the Deputy Staff Judge Advocate (SJA), 2d Infantry Division, in Korea.<sup>3</sup>

### Stanley J. Cieslewicz (1956-2020)

Stan, as he was known to family and friends, died on 11 November 2020. He was sixty-three years old.

Born in Milwaukee, Wisconsin, on 8 December 1956, Stan Cieslewicz graduated from Georgetown University, Washington, D.C., and the University of Idaho’s law school. After completing the Judge Advocate Officer Basic Course in 1983, he served in a variety of jobs at Rock Island, Illinois, and Fort Lewis, Washington. Stan also served a tour of duty in Korea.

Mr. Cieslewicz left active duty in 1988. He first worked as a civilian attorney for the Army Corps of Engineers, Seattle District, before moving to Germany for the first time in 1990, when the Army Contracting Command-Europe hired him as Regional Counsel in Fuerth, Germany. In 1993, Stan left Germany to take a job at the Defense Commissary Agency, Northwest/Pacific Division, Fort Lewis, Washington. Three years later, Stan returned to Germany as the Regional Counsel, Army Contract Command-Europe, Grafenwoehr, Germany. In 1998, Mr. Cieslewicz became the Attorney-Advisor, Contract and Fiscal Law Division (KFLD), USAREUR. He remained with KFLD until his retirement in June 2019.

While pursuing his career as an Army civilian attorney, Stan also served as a judge advocate (JA) in the Army and Air Force Reserve. He retired as an Air Force Reserve lieutenant colonel in 2010.

Mr. Cieslewicz died less than a month before his sixty-fourth birthday, at his home in Vancouver, Washington. He was preceded in death by his parents and his brother, Paul. He is survived by brothers Mark, Bill, and Greg.<sup>4</sup>

### John J. Cleary (1936-2020)

John Cleary, who died in San Diego, California, on 31 January 2020, was the first JA in history to complete Ranger school while a JA and be awarded the distinctive black-and-yellow tab. After leaving active duty, Cleary had a successful legal practice as a federal public defender and civilian defense counsel in San Diego, California.

Born in Illinois in 1936, Cleary lied about his age and joined the Illinois National Guard when he was fifteen years old. At the time he enlisted, the Korean War was in full swing, and the Guard was not particularly vigilant when it came to verifying Cleary's age. He subsequently qualified as an assistant gunner on the .50 caliber machine gun.

After completing high school, Cleary obtained his undergraduate and law degrees from Loyola University in Chicago, Illinois. He joined the JAG Corps in 1960 and then served as an Army lawyer with the 101st Airborne Division at Fort Campbell, Kentucky. While serving with the 101st,



Cadet John Cleary. (Photo courtesy of author)

then-First Lieutenant Cleary wrote to a letter to The Judge Advocate General, Major General Charles E. "Ted" Decker, requesting that MG Decker permit him to attend the Army's Ranger School. A short time later, Cleary got a notification that he had a slot for the school. He successfully completed the grueling training and completed Ranger Class No. 7 on 24 May 1962.

Later, while stationed at Fort Bragg, North Carolina, Cleary made history again as the first Army lawyer to graduate from the John F. Kennedy Special Warfare School's High Altitude, Low Opening (HALO) course of instruction.

After leaving active duty, "Ranger" Cleary had a successful law career in San Diego, California. He was a federal public defender (1971-1983) and was the first public defender to serve on the Board of Directors of the National Association of Criminal Defense Attorneys (1979-1985). Cleary had a thirst for knowledge: he learned Russian and then taught at Moscow State University as a Fulbright Scholar (2004-2005). He subsequently lived in China for three years, where he studied at Xiamen University and learned to speak Mandarin.<sup>5</sup>

A feature article on John Cleary's military experiences appeared in the June 2017 *Army Lawyer*.<sup>6</sup>



SGM Walt Cybart, 10 November 2011. (Photo courtesy of author)

### Walter T. Cybart (1940-2020)

Walt Cybart, who died on 28 January at the age of 79, was the JAG Corps Sergeant Major (SGM) from May 1983 to September 1985. He was the second noncommissioned officer (NCO) to hold the position in our history.

Born in Michigan on 13 June 1940, Walt enlisted in the Army in 1957 as a small arms repairer. While he had an Ordnance Corps MOS, when he was assigned to Korea, the Army put him in an infantry unit and reclassified him as an infantryman

MOS 11B. Cybart left active duty for civilian life in 1960 but missed the Army and reenlisted that same year—this time in the Air Defense Artillery. He was assigned to Nike Hercules Missile sites in Gary, Indiana, and Wilmington, Ohio, before he reclassified as an MOS 71D Legal Clerk.

Sergeant Major Cybart served in a variety of locations during his career as a legal clerk, including: Fort Polk, Louisiana; Aberdeen Proving Ground, Maryland; Fort Bliss, Texas; Fort Lewis, Washington; Fort Bragg, North Carolina; Fort Sill, Oklahoma; and Redstone Arsenal, Alabama. He also had overseas assignments in Germany, Hawaii, Korea, and two tours in Vietnam.

In the fall of 1982, SGM Cybart was selected to follow SGM John Nolan as the second JAG Corps SGM and, in June 1983, he became the primary advisor to The Judge Advocate General in all matters concerning MOS 71D Legal Clerks. It was during Cybart's tenure that legal clerks were re-designated as "legal specialists," as this better described what enlisted Soldiers were doing in the Corps.

After retiring in 1985, SGM Cybart and his wife, Judith, settled in Grovetown, Georgia. She survives him along with his daughters, Laurie Underwood, of Grovetown, Georgia, and Valerie Still, of Augusta, Georgia, grandchildren, and great-grandchildren.<sup>7</sup>

### **Anthony P. De Giulio (1939–2020)**

Anthony Paul De Giulio died on 24 August 2020 in Pingree, Idaho. He was eighty years old and died from a combination of heart and respiratory failure.

Born on Christmas Day, 1939, "Tony attended grade school in Pingree and Snake River Junior High, before graduating from Snake River High School. He then attended Idaho State University where he joined ROTC.<sup>8</sup> After his undergraduate studies at Idaho State, Tony received his legal degree from Willamette University. He then entered the JAG Corps and subsequently served in a variety of locations and assignments, including duty overseas in Germany and Vietnam.

After retiring as a colonel in September 1993, Tony lived in Virginia for several years before returning to Idaho. He opened up the De Giulio Law Office in Blackfoot,

Idaho, in March 1996, and practiced law until retiring again in 2005.

Tony was first married to Barbara Marie Whiting and together they had four children. After they divorced, Tony married Nadine Eileen Semler in February 1983. He is survived by Nadine, one son, three daughters, eight grandchildren, and eleven great-grandchildren.<sup>9</sup>

### **Michael P. Finn (1954–2020)**

Michael "Mike" Patrick Finn died on 5 July 2020 after a short battle with a rare and aggressive cancer. He was sixty-six years old.

Born in Heidelberg, Germany, on 12 April 1954 (his father was a Command Sergeant Major (CSM) serving in Europe), Mike earned his law degree from the University of Texas at Austin. He then joined the JAG Corps, serving initially at Fort Hood, Texas. Mike would subsequently deploy overseas three times in his military career: to Hungary in 1995–1996 as part of Operation JOINT GUARD; to Iraq in 2002–2003 for Operation IRAQI FREEDOM; and to Afghanistan in 2005–2006 as part of Operation ENDURING FREEDOM.

Mike retired as a JA colonel in the Army Reserve. In addition to his military service, Mike worked as the civilian contract attorney for the Office of the Staff Judge Advocate (OSJA), III Corps and Fort Hood, Texas. He is survived by Amy Finn, his wife of thirty-nine years, two daughters, and one son.<sup>10</sup>

### **James C. Gleason (1944–2020)**

James Creighton "Jim" Gleason, a 1966 West Point graduate who entered the Corps in 1973 and retired as a colonel in 1991, died at his home in Marietta, Georgia, on 3 January 2020. He was seventy-five years old.

Born in Madison, Wisconsin, on 4 March 1944, Jim graduated from Marmion Military Academy in Illinois and then entered the U.S. Military Academy in July 1962. Commissioned in the Signal Corps, he completed airborne and Ranger training before deploying to Vietnam. After a 19-month tour of duty in the 1st Cavalry and 101st Airborne Divisions, then-Captain Gleason attended law school at the University of Maryland on the excess leave program. After passing the bar and entering

the Corps in 1973, he served in a variety of assignments and locations, including the Litigation Division and Administrative Law Division in the Pentagon. He also worked as an assignments officer in the Personnel, Plans, and Training Office and was the SJA, XVIII Airborne Corps and Fort Bragg. Colonel Gleason ended his career as the Chief, Army Procurement Fraud Division at the Office of The Judge Advocate General (OTJAG).

After retiring from active duty, Jim Gleason accepted a position as the First Assistant, Milwaukee Trial Division, Wisconsin State Public Defenders Office. He led an office with a staff of 100 attorneys and support personnel. In 1999, Jim and his wife Candace moved to Gainesville, Florida, where he accepted a job with Cooper-Atkins Corporation. He retired a second time in 2009.

In 2016, Jim was diagnosed with Parkinson's disease and was suffering from this neurodegenerative illness at the time of his death. Jim is survived by Candy, his wife of fifty years, four children, and twelve grandchildren. He was interred in the West Point Post Cemetery.<sup>11</sup>

### **William P. Heaston (1943–2020)**

"Bill" Heaston, who retired as a JA lieutenant colonel, died of cancer in Omaha, Nebraska, on 24 February 2020. He was seventy-six years old.

Born in Omaha on 2 May 1943, Bill earned his undergraduate and law degrees from Creighton University and was commissioned as a JA in 1968. He subsequently served with the 101st Airborne Division (Airmobile), at Camp Eagle, Vietnam, where he met his wife of almost fifty years, Dorris Hecht, who was employed by the American Red Cross.

Bill Heaston also had assignments in Alaska, California, Kansas, and Germany. After retiring from active duty as a lieutenant colonel, he worked for the U.S. West Legal Department before taking a position as a General Counsel for a regional communications company in South Dakota. Heaston retired permanently to Omaha in 2016.

He was very active in the Retired Association of Judge Advocates (RAJA) and was a longtime member of the RAJA Board of Directors. Bill is survived by

his wife, Dorris, four children, and ten grandchildren.<sup>12</sup>

### **Gustave F. Jacob (1935-2020)**

Gustave Francis “Gus” Jacob, who soldiered for more than twenty-nine years, most of which were as an Army lawyer, died on 18 August 2020 in Rapid City, South Dakota. He was eighty-five years old.

Born in DeSmet, South Dakota, on 27 March 1935, Gus earned his undergraduate degree from the South Dakota State University before obtaining a law degree from the University of South Dakota. He also had an LLM from New York University.

Gus began his Army career with a two-year stint on a Nike Missile site near Chicago. After law school and two years of private practice in Groton, South Carolina, he joined the Corps. The highlights of his years as a JA “were teaching law to cadets at the Military Academy, West Point, New York, a year spent in [Vietnam], and the last half of his career as a military judge. Colonel Jacob presided over all levels of courts-martial involving all types of criminal offenses, including capital murder. He traveled over much of the United States and Europe hearing some of these cases.”<sup>13</sup>

“After retiring from [active duty as a colonel], Gus spent three years as a staff attorney with the South Dakota Public Utilities Commission. Later in Rapid City he taught several courses, including Law for Engineers, at [South Dakota School of Mines and Technology].”<sup>14</sup>

Colonel Jacob is survived by his wife, Maryann, five children, ten grandchildren, and two great-grandchildren. He will be interred in Black Hills National Cemetery.<sup>15</sup>

### **R. Kevin Kelly (1953-2020)**

Kevin Kelly, who served in the Marine Corps before joining the JAG Corps as a legal specialist, died at his home in Galveston, Texas, on 17 April 2020. He was sixty-six years old.

Born in Cumberland, Maryland, on 17 May 1953, Kelly enlisted in the Marine Corps after graduating from high school in 1971. After leaving active duty, he attended college and then joined the Army as an MOS 19D Reconnaissance Scout. He completed a tour of duty in Europe on the East

German border and then again left active duty for civilian life.

Mr. Kelly missed soldiering, however, and enlisted once again in the Army in 1979 as an MOS 71D Legal Clerk. Ten years later, then-Sergeant First Class Kelly—who was on the promotion list to master sergeant—accepted an appointment as a warrant officer one legal administrator.

Kevin then served as a legal administrator in the 1st Cavalry Division and at the U.S. Medical Command. He subsequently was a senior legal administrator at OTJAG and at III Corps. He deployed to Iraq as part of Operation IRAQI FREEDOM from 2004 to 2005. He retired as a chief warrant officer four.

Chief Kelly is survived by a son and two daughters. His two sisters and two brothers also survive him. Kevin Kelly is interred in Arlington National Cemetery.<sup>16</sup>

### **Thomas M. Kullman (1941-2020)**

Thomas Maxson “Tom” Kullman, a West Point graduate who served as an Artillery officer and JA, died on 16 April 2020. He was seventy-eight years old.

Born in Alabama on 11 May 1941, Tom Kullman completed his education at the U.S. Military Academy and was commissioned in the Artillery in 1964. He subsequently served on the staff and faculty of the Infantry School and had a tour of duty in Vietnam from 1967 to 1968. Then-Captain Kullman resigned his commission in 1970 to enter law school at the University of Alabama, from which he graduated in 1973. Kullman then rejoined the Army as a JA.

He subsequently served in a variety of locations and assignments, including Fort Knox, the Pentagon, and Germany (8th Infantry Division). Then-Lieutenant Colonel Kullman was the Staff Judge Advocate (SJA), 3d Infantry Division (Germany) from 1983 to 1985 and the Chief, Administrative Law Division, The Judge Advocate General’s School, from 1985 to 1988. He finished his distinguished career as an advisor in the Office of the Chairman, Joint Chiefs of Staff, and as the SJA, Army Materiel Command. He retired as a colonel.<sup>17</sup>

Tom was living in Springfield, Virginia, at the time of his death. He is survived by his wife, Linda.

### **Roger Lane (1955-2020)**

Roger “Ray” Lane, who served both as a military and civilian paralegal in the Corps, died in Fountain, Colorado, on 21 October 2020. He was sixty-five years old.

Born on 3 June 1955, Ray graduated from high school in 1973 and enlisted in the Army in 1976. He subsequently served for twenty years as a legal clerk and paralegal specialist. After retiring from active duty in 1996, he obtained an Associate of Arts degree in paralegal studies from Washburn University. Mr. Lane then worked as an Army civilian paralegal at Fort Riley, Kansas, and Fort Carson, Colorado.

Ray Lane is survived by his wife, Pat, one son, one daughter, four grandchildren, and one great-grandchild. He will be interred in the Pikes Peak National Cemetery.<sup>18</sup>

### **Dwight L. Lanford (1946-2020)**

Dwight Lanford was the fourth SGM of the Corps. He was also the first Regimental SGM, as the JAG Corps was placed under the Army Regimental System in July 1986. Dwight died on 20 January 2020. He was seventy-three years old.

Born in Mobile, Alabama, on 6 July 1946, Lanford enlisted in the Army as infantryman and subsequently served in Vietnam with the 101st Airborne Division as a platoon sergeant. After reclassifying as an MOS 71D Legal Clerk, Dwight served in various positions of increased responsibility during his twenty-three years of distinguished service. Some of his assignments included: Chief Legal NCO, 3d Infantry Division, Germany; Chief Legal NCO, 1st Infantry Division, Fort Riley, Kansas; Chief Legal NCO, 8th Infantry Division, Germany; and Staff Sergeant Major, Sixth U.S. Army, Presidio of San Francisco, California. His awards included the Legion of Merit and Combat Infantryman Badge.

Sergeant Major Lanford is survived by his wife of thirty-two years, Susan; their children, Connie, Jay, and Chris; his two sons by a prior marriage, John and Jacob; his fourteen grandchildren; and one great-granddaughter.<sup>19</sup>

### **Edward Lassiter (1933-2020)**

Edward Allen “Ed” Lassiter, who served 30 years in our Corps and retired as a colonel,



COL Edward Lassiter. (Photo courtesy of author)

died on 13 August 2020. He was eighty-seven years old and had dementia.

Born in North Carolina on 7 April 1933, Ed graduated “from Wake Forest College at Wake Forest, [North Carolina,] in 1955 and Wake Forest School of Law at Winston-Salem, [North Carolina,] in 1957.”<sup>20</sup> He then joined the Army as a JA. His “[m]ilitary assignments included Rocky Mountain Arsenal, Denver, CO; US Army Europe, Heidelberg, Germany; The Judge Advocate General’s School, Charlottesville, VA; Fort Eustis, VA; US Army, Vietnam; 1st Armored Division, Ft. Hood, TX; Office of the Judge Advocate General, Department of the Army, Washington, DC; 193rd Infantry Brigade, Panama, Canal Zone; Fort Sill, OK; Fort Stewart, GA; and Fort Riley, KS.”<sup>21</sup>

After retiring from active duty in 1987, Ed Lassiter and his spouse, Dorene Elaine, moved to Charlotte, North Carolina, where they served “as volunteers with Wycliffe Bible Translators. In 2003, the they retired again and relocated to Asheville, NC.”<sup>22</sup>

Colonel Lassiter was interred in the Post Cemetery, Fort Still, Oklahoma, where he served as the SJA from 1977 to 1982. His spouse and two daughters survive him.<sup>23</sup>

### **Ralph L. Lurker (1939-2020)**

Lieutenant Colonel Ralph Lee Lurker had a distinguished career as a JA, culminating in his assignment as the Circuit Judge,



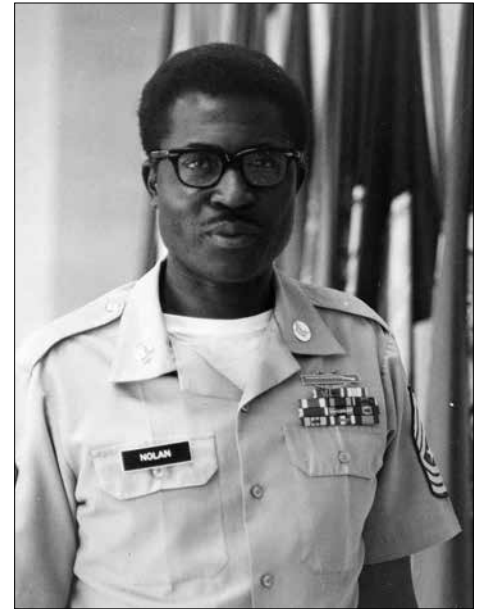
LTC Ralph Lurker. (Photo courtesy of author)

Fort Benning, from 1981 to 1984. He died at his home in Columbus, Georgia, on 4 April 2020.

Born in Kansas on 6 July 1939, Ralph Lurker enlisted in the Army in 1957 and, after one year of soldiering at Fort Carson, Colorado, obtained an appointment to the U.S. Military Academy. After graduating in 1962, he was commissioned in the Infantry and served as a platoon leader and company commander with the 8th Cavalry Regiment, Korea, from 1963 to 1964. After three years as an instructor at the Infantry School at Fort Benning, Ralph attended law school at the University of Kansas, from which he obtained his law degree in 1970. He subsequently served in various assignments as an Army lawyer, including SJA, Military Assistance Advisory Group, Thailand, and SJA, Fort Sam Houston, Texas.

After retiring from active duty on 31 December 1984, Lurker worked as a court administrator in Erie, Pennsylvania; Birmingham, Alabama; and Jonesboro, Georgia. He retired again in 2005 and settled in Columbus, Georgia.

Lieutenant Colonel Lurker is survived by his wife, Jean, whom he met while he was a cadet at West Point, four sons (Ralph Roger, Jeffrey, Michael, and Gregory), and numerous grandchildren and great-grandchildren.<sup>24</sup>



SGM John Nolan. (Photo courtesy of author)

### **George J. Miller (1931-2020)**

George Miller, who served three years as a JA in the late 1950s, died of COVID-19 in a retirement home in Bryn Mawr, Pennsylvania. He was eighty-nine years old.

Born in Bradford, Pennsylvania, on 28 February 1931, George graduated from Princeton University in 1953 and earned his law degree three years later from the University of Pennsylvania. He then served three years in the Army as a JA. When he left active duty as a captain in 1959, Miller joined the Philadelphia law firm of Dechert, Price & Rhoades.

George Miller specialized in environmental law and was appointed by Governor Tom Ridge to be the Chairman of the Pennsylvania Environmental Hearing Board in 1995. Arguably, his most successful contribution was insisting that the Board create a website and establish an electronic docketing system. Miller served on the Board until 2009.

Miller was predeceased by his wife and one son. He is survived by his former wife, two daughters, and five grandchildren.<sup>25</sup>

### **John M. Nolan (1935-2020)**

John M. Nolan was the first JAG Corps SGM (as the position was then known). He died of COVID-19 in Seaside, California, on 13 November 2020. Nolan was eighty-five years old.

Born in Evergreen, Alabama, on 6 July 1935, John Nolan was the youngest of eight children. John's father died when he was only one year old, so his mother and grandparents raised John and his seven brothers and sisters. After graduating from high school, John Nolan enlisted in the Army and completed training in motor maintenance. He then served in a variety of locations and assignments, including: Fort Sill, Oklahoma; Fort Ord, California; Germany; and Alaska.

In 1966, then-Sergeant First Class (SFC) Nolan was serving as a Drill Sergeant at Fort Leonard Wood, Missouri. Based on his exceptional performance as a Drill Sergeant, SFC Nolan was asked to volunteer for Officer Candidate School (OCS). After some resistance—he liked being an NCO—SFC Nolan reported to Fort Benning, where he excelled in OCS—earning the honor of top leadership graduate. After OCS, then-Second Lieutenant Nolan remained at Fort Benning where he served as a tactical officer for one year before attending jungle training in Panama in preparation for service in Vietnam.

Upon deploying to Vietnam, Lieutenant Nolan served as a platoon leader and company commander in the 8th Cavalry Regiment, 1st Air Cavalry Division. He was wounded in action and, after his recovery, was assigned to Germany as the Commander, Headquarters and Headquarters Company, 1st Battalion, 13th Infantry Regiment, 8th Infantry Division.

In 1973, then-Captain Nolan was serving at Fort Ord, California, as a budget officer. During the Army's downsizing efforts after the Vietnam War, which specifically included a reduction in infantry officers, Captain Nolan was given the option of retiring or reverting back to his enlisted rank. Nolan had twenty years of service—seven years as an officer and thirteen years as an enlisted Soldier—but under the regulations in force at the time, he needed at least ten years of commissioned service. Consequently, Nolan decided to return to the enlisted ranks. He was given the rank of master sergeant but maintained a commission in the Army Reserve as a captain.

Nolan's combat wound from Vietnam precluded his return to MOS 11B Infantry

and so he chose the only MOS with an opening for an E-8—MOS 71D Legal Clerk. After this shift to MOS 71D, then-Master Sergeant Nolan did on-the-job training as the noncommissioned officer-in-charge of the Fort Ord OSJA.

After his promotion to SGM, John Nolan was assigned to serve as the Chief Legal NCO, Taegu, Korea. After a short time in Taegu, SGM Nolan was transferred to Seoul, Korea, with duty at the Office of the Staff Judge Advocate, Eighth Army Headquarters. On 29 February 1980, John Nolan was selected as "Senior Staff NCO, Office of The Judge Advocate General." This was a competitive selection process and Nolan was well qualified in both experience and education. While he had only seven years in MOS 71D, significantly fewer years than other NCOs competing against him, Nolan had earned a law degree from the Blackstone School of Law—which may have been given considerable weight in his selection.

In the congratulatory letter SGM Nolan received on 29 February 1980, he was informed that the "specific goal" of his new role was to improve "the status and effectiveness of the enlisted members who support The Judge Advocate General's Corps."<sup>26</sup>

John Nolan retired from active duty and the Army Reserve in 1983. Since he kept his Army Reserve commission, Nolan's retired pay was based on his rank of captain. With his soldiering at an end, John Nolan worked as a Proceeding Clerk at the Commodity Futures Trading Commission until 1994. After retiring a second time, John and his wife, Arlene, moved to Seaside, California. Arlene predeceased him.

### **Brian B. O'Neill Jr. (1947-2020)**

Born in Michigan on 7 June 1947, Brian Boru O'Neill was the oldest of six children. His father was an Army engineer and this military background resulted in Brian attending the U.S. Military Academy, from which he graduated in 1969. Commissioned in the Field Artillery, O'Neill served in Italy and Greece for two years.

In 1971, then-Lieutenant O'Neill left active duty to attend law school at the University of Michigan on the excess leave program. Brian was managing editor of the

law review and graduated *magna cum laude* (he was in the top five of his class) in 1974. O'Neill then transferred from Field Artillery to the JAG Corps, and served in the Office of the Army General Counsel until resigning his commission in 1977.

O'Neil then enjoyed a successful career in private practice at the Minneapolis law firm of Faegre & Benson for thirty-four years. He was passionate about using the law to protect the environment and one of the highlights of his legal career occurred in 1994 when, after a nearly two-decade fight with Exxon, he obtained a five billion dollar jury verdict for damages arising out of the 1989 *Exxon Valdez* tanker oil spill in Alaska.<sup>27</sup> O'Neill died of Amyotrophic Lateral Sclerosis (ALS or Lou Gehrig's disease) on 6 May 2020 the age of 72. He is survived by his wife, two sons, three daughters, and three grandchildren.<sup>28</sup>

### **Robert S. Poydasheff Sr. (1930-2020)**

Colonel Robert Stephen "Bob" Poydasheff Sr., an Army lawyer who had a successful career as a politician and attorney after retiring from active duty, died on 24 September 2020 in Phenix City, Alabama. He was ninety years old.

Born in the Bronx, New York, Bob Poydasheff graduated from the Citadel in 1954 and received his law degree from Tulane University in 1957. He began his career as a Soldier as an Infantry officer before transferring to the JAG Corps. He served in a variety of locations, including Vietnam, and was a graduate of the Army War College. His last assignment was as the SJA, U.S. Army Infantry Center and Fort Benning.

After retiring from active duty as a colonel in 1979, Poydasheff remained in Columbus, Georgia, where he soon made a name for himself in local government. Bob was Mayor of Columbus and served on the City Council. He was active in many organizations and served on the boards of the Springer Opera House, Columbus Symphony, and National Infantry Museum.

Poydasheff was known for his sense of humor and outgoing personality. He was affectionately known as "Uncle Bob" to his colleagues and friends. Colonel Poydasheff is survived by his wife, Stacy, son Robert Stephen Poydasheff Jr., five grandchildren,



and two great-grandchildren. Bob was especially proud that his son, Bob Jr., also served a tour of duty as an Army lawyer.<sup>29</sup>

### **William F. Sherman (1937-2020)**

Brigadier General (ARNG) William Farrar "Bill" Sherman died on 11 March 2020 in Nashville, Tennessee, at the Barton House Memory Center. He was eighty-two years old.

Born in Arkansas on 12 September 1937, Bill had a rich and varied career as an attorney and Soldier. He served as an Assistant U.S. Attorney and an Arkansas Securities Commissioner and State Representative. Bill also had a thirty-two-year career in the Army Reserve and National Guard. He served as the Special Assistant to the Judge Advocate General from 1987 to 1990.

Brigadier General Sherman is survived by his wife, Carole Lynn, one son, two daughters, and four grandchildren.<sup>30</sup>

### **Brian K. Tolliver (1974–2020)**

Brian Keith Tolliver, who most recently served as Command Paralegal, U.S. Army Reserve Medical Command, died of COVID-19 on 17 August 2020. He was forty-six years old.

Born in Memphis, Tennessee, on 4 July 1974, Master Sergeant Tolliver enlisted in the Army as a combat engineer in June 1992. He served with the 82d Combat Engineer Battalion, Bamberg, Germany, and, after leaving active duty, reclassified as a Chemical Specialist. Tolliver served with both the 302d Military Intelligence Company and 398th Chemical Company, Memphis, Tennessee, before reclassifying as a paralegal specialist MOS 27D. He subsequently served with the 139th Legal Operations Detachment before accessing into the Active Guard Reserve. Master Sergeant Tolliver then served with the 3d Legal Operations Detachment, Boston, Massachusetts, before joining the Human Resources Command and 83d Army Reserve Readiness Training Center, both located at Fort Knox, Kentucky. While in this last assignment, Tolliver was responsible for the development of more than 350 senior Soldiers as the Chief of Training, Master Leaders Course.



MSG Brian Tolliver. (Photo courtesy of author)

Master Sergeant Tolliver is survived by his four children. He was interred in Memphis, Tennessee.<sup>31</sup>

### **Arthur C. White (1926-2020)**

Born on 20 May 1926, Arthur Campbell White served as a machine gunner in the Marine Corps in World War II and as an Armor officer during the Korean Conflict before joining the JAG Corps. He died in Williamsburg, Virginia, at his daughter's home on 4 June 2020. Arthur was ninety-four years old.

Born in Townley, Alabama, Arthur White was the seventh of twelve children. In 1943, at the age of seventeen, he joined the U.S. Marines as a machine gunner and saw combat with an anti-aircraft battalion on Okinawa. After being honorably discharged, White earned his undergraduate degree at the University of Alabama and, having participated in the Army ROTC, was commissioned as an Armor officer in 1949.

After seeing combat in Korea, he left active duty to attend law school at the University of Louisville and, after earning his degree, returned to the Army as a JA. Arthur White served in a variety of assignments and locations, including duty with the 82d Airborne Division, where he was one of the first Army lawyers to complete the Jumpmaster Course.

After retiring as a lieutenant colonel in July 1970, White moved to Washington, D.C., where he worked as a senior attorney for the Board of Veterans Appeals; he ultimately became a member of the Board. In 1979, White was appointed as an administrative law judge for the U.S. Department of Labor. In 1986, Judge White left the Labor Department to care for his adult son, Stephen, who was terminally ill. He cared for Stephen until his death in 1989. Lieutenant Colonel White also was the principal care giver for his wife, Wanda, until her death.<sup>32</sup>

### **Of Note**

#### ***June C. Fugh (1937-2020)***

June Chung Fugh died on 18 June 2020. She was eighty-three years old and was living in Alexandria, Virginia, at the time of her death. Her husband, Major General John L. Fugh, served as The Judge Advocate General from 1991 to 1993.

June was a remarkable person. Born in Suzhou, China, on 2 June 1937, she was the third of five surviving daughters born to her parents. Five of her siblings, including all of her brothers, died during the Japanese occupation of China. Her father, William Ling Chung, an intelligence officer in the Chinese Nationalist Government, was able to move his family from China to India, Iran, and the United States, eventually settling in the Washington, D.C., area. June quickly mastered English and displayed a particular aptitude for math, science, and softball. In her teenage years, she was invited by Clark Griffith, then the owner of the Washington Senators, to sit with his family in their booth or the dugout, thus cementing her lifelong love of baseball.

She started at American University, majoring in chemistry, eventually earning her degree with honors some years later. After marrying John Fugh in July 1960, she drove across country to then-Lieutenant Fugh's first posting at the Presidio of San Francisco. From that time forward, June Fugh was an integral part of the JAG Corps family, and even after her husband passed away, June continued to support our Corps with her generous support of the bi-annual Fugh Symposium.

June Chung Fugh is survived by her two children, Justina born in San Francisco,

California, and Jarrett born in Heidelberg, Germany. She is also survived by four grandchildren: two boys from Justina and two girls from Jarrett.

June Fugh was an indomitable and charming woman who instilled respect, awe, and a bit of fear, in others. She was always her own unfettered self, and you absolutely always knew where you stood with her on any given day.<sup>33</sup>

### **Elizabeth Hoyle (1926-2020)**

Elizabeth “Libby” Hoyle served for many years as a civilian personnel technician at The Judge Advocate General’s School.<sup>34</sup> Born in Halifax County, Virginia, on 26 May 1926, Libby graduated from Montreat College in North Carolina before she moved to Charlottesville. Libby Hoyle died on 1 August 2020. She is survived by two daughters, one son, and five grandchildren.<sup>35</sup>

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*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.*

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## Practice Notes

# Bridging the Voir Dire Gap

## A Practitioner's Guide to Winning Voir Dire

By Major Todd C. Gately, Major Jordan C. Stapley, Major Mitchell M. Suliman, & Colonel Timothy P. Hayes Jr.

### Part I—The Status Quo and the Basics

#### **Counsel Perspective**

You are, by your own estimation, a relatively-seasoned trial counsel. Your panel case is a week away. You double-check the military judge's pre-trial order and peer over one of the last items on the list: Provide the judge copies of proposed voir dire questions no later than three business days before trial. You spend all night coming up with twenty-five well thought-out questions and submit them to the judge just before the deadline. Two days later, you receive a response: "Government, you may ask questions 7, 14, and 21." There is no explanation. You feel defeated. You now consider all your voir dire training and effort to be a waste. Is it even worth asking these three questions? You wonder if the panel will think you are lazy, or that you mailed it in.

Now, imagine you are speaking to the panel for the first time. Your heart is in your throat as you prepare to make your first impression. You worry about generating credibility and building rapport. You stare at the members and then down at your list of three questions. The members stare back blankly. You complete your three questions, awkwardly acknowledging the members' affirmative or negative responses, and sit down. You feel you achieved nothing more than hearing yourself read aloud for a couple of minutes. You wonder what you accomplished and whether you even have enough information to justify speaking to each member individually. You blame the judge for limiting the scope of your questions. You blame yourself for not coming across more naturally. You curse all your advocacy training that encouraged creative and advanced advocacy techniques that your judge would never allow. You think, "I hate voir dire; this case is off to a bad start." And then you move on to opening statements.

### **Judicial Perspective**

*You are, by your own estimation, a relatively-seasoned judge. It is a week before trial and you have yet to see the government's requested voir dire questions, even though you repeatedly tell them in training it is one of the two most important parts of a contested case. You wait, not that you are expecting much. True to form, the questions come in right at the deadline. While it at least appears these questions are actually related to the current case, not the last case tried in this jurisdiction, none of them seem to be intended to elicit bias. Instead, they all seem bent on establishing the government's theory, and most are compound, complex, and confusing. You work to find three that are marginally acceptable and return them to the counsel, wishing they had provided them sooner in the hopes they might take another shot at it. A few days later, as they stumble through reading their three questions, you wish you would have struck them all. It is clear the panel does not understand the first question, but when one hand shoots up the other eleven timidly follow and the trial counsel mutters "affirmative response from all members." It only gets worse from there.*

### **Bridging the Gap**

The voir dire process does not need to feel like this for litigators or for judges. Counsel that proactively draft coherent and intelligible voir dire questions aimed at eliciting articulable bias are far more likely to have questions approved. More importantly, panel members are much more likely to comprehend well-crafted questions. It is only after members comprehend the questions that counsel can hope to gain useful information. When judges are confident that the design of the question will elicit an appropriate response, they are more likely to allow reasonable follow-up. Within that well-constructed framework, give-and-take between counsel and members can be both informative and productive. This inevitably leads to more intelligent challenges by counsel and more informed rulings by the judge. The worst thing that can come from more open-ended questioning of members, and the additional excusals that may follow, is that courts-martial may need more members detailed to appear for assembly to limit the inefficiency of "busted panels."<sup>1</sup> However, the benefits of achieving reliably

unbiased panels, and thus more just outcomes, far outweighs this cost to efficiency.

Despite this lofty hope, the practical truth is that voir dire and the art of panel selection is often a frustrating practice throughout the military justice system for both litigators and judges. It is frustrating because the practice varies widely among the different jurisdictions. In one jurisdiction, voir dire may be a strict, verbatim question-and-answer session approved by the military judge in which the judge limits the counsel to simple yes or no questions. In another jurisdiction, or in front of a different judge, it may be a more permissive and engaging conversation where counsel are able to ask more open-ended questions. This inconsistency can frustrate less-confident practitioners who are unwilling to push the advocacy envelope.

For many years, practitioners and a vocal minority within the judiciary have been urging for a more robust voir dire. There has been a concerted effort by some to promote wider latitude for counsel to engage in effective advocacy techniques.<sup>2</sup> Various training events, to include the course to train and certify all Department of Defense military judges, continue to recognize and emphasize advanced advocacy concepts related to panel selection. However, despite these efforts, a common complaint from litigators continues to be "that's nice and all, but my judge won't let me do that." Meanwhile, a common complaint from judges is "my counsel cannot even construct a grammatically correct and easily comprehensible question. Why would I let them start asking unscripted questions, especially when the Staff Judge Advocate is only sending me twelve members to start with?" These judicial concerns are not unfounded, but they should not overcome the advantages of allowing counsel to pursue more accurate information from the trier of fact. This is especially true in light of the judicial requirement to liberally grant defense challenges for cause or to disqualify themselves if appropriate.<sup>3</sup>

This article is intended to help litigators effectively use, and encourage judges to permit, advocacy tools that capitalize on all aspects of the voir dire process. This article was written in hopes that it can bridge the gap between the judiciary

and the litigators who are attempting to become more effective. In "Understanding the Basics of Voir Dire," this article explains the voir dire process.<sup>4</sup> The next part of the article presents legally permissible tools that, when approved and effectively used, can transform the litigator's case, panel, and practice.<sup>5</sup> Several of these suggestions can be implemented outside the courtroom. Last, this article suggests methods for the litigator to persuade the military judge to be open to the utilization of these tools in court, while also addressing the potential fears and criticisms of transforming our practice of panel selection.<sup>6</sup>

### **Understanding the Basics of Voir Dire**

To fully appreciate the value of robust voir dire, it is necessary to fully understand the basics of what voir dire is and what it looks like in the military justice system. Voir Dire is a French term that means "to speak the truth."<sup>7</sup> Truth-seeking is the hallmark of a legitimate justice system. It is uniquely important when deciding who should—and more importantly, who should not—sit in judgment of another person's conduct. The most important purpose of panel selection is discovering the truth with respect to the members. This truth is often hidden or unspoken due to the ineffective way voir dire is generally conducted in the military justice system. All parties to the trial want the panel members to speak truth in response to voir dire questions. These truths, obtained through questions and answers, reveal underlying biases. These biases may illegally affect or taint a member's judgment of the case. The ultimate objective is for the eventual voting members, those not excused after voir dire and challenges, to speak truth in their ultimate verdict.

This truth-seeking goal of voir dire is accomplished through the following general process. Understanding this process is crucial for appreciating how to implement the tools discussed below. First, the members are selected by the convening authority and asked to complete a questionnaire. These questionnaires are completed and provided to the Office of the Staff Judge Advocate. Counsel for the accused are given access to these questionnaires for use in developing voir dire questions. In accordance with the *Rules of Practice*, the military judge sets a

deadline for counsel to submit proposed questions in the judge's pre-trial order.<sup>8</sup> The judge determines which proposed questions may be asked and informs government and defense counsel. Next, on the day of trial, the judge assembles the members at the courthouse.<sup>9</sup> At this stage, all members detailed to the court-martial are present.<sup>10</sup> The number of members present for assembly varies by jurisdiction.

Regardless of how many members are present for assembly, all are subject to voir dire. The judge provides initial instructions to the members and then reads twenty-nine preliminary voir dire questions. These twenty-nine questions come from the script in the *Military Judge's Benchbook* and are common to all contested panel cases, although the judge has discretion to add or subtract questions.<sup>11</sup> Then, judges may, in their discretion, permit counsel to ask their previously-approved questions.<sup>12</sup> This is referred to as group voir dire. Following group voir dire, the judge may permit counsel to supplement the group voir dire questions by asking individual members follow-up questions outside the presence of the other members. This is referred to as individual voir dire. Counsel's ability to engage in individual voir dire is also within the judge's discretion.<sup>13</sup> Following all of these steps, the judge will have a discussion with counsel about which members, if any, each side believes should be removed for cause.

Following the decision of the judge regarding challenges for cause, each remaining member is assigned a random number and each side is then given the opportunity to exercise its single peremptory challenge.<sup>14</sup> Assuming there are still enough members present to assemble the court-martial under Article 16, Uniform Code of Military Justice, the judge dismisses any excess members, impanels the court-martial, and the trial begins.<sup>15</sup>

### **The Goals of Voir Dire**

In addition to knowing the procedural steps, counsel must appreciate the basic goals and objectives of voir dire. Three primary goals have been stated many ways, but they can be summarized as follows: 1) elicit information for the informed exercise of challenges, 2) establish a positive rapport with the members, and 3) educate the

members about the complex facts or legal issues in the case.<sup>16</sup> In contrast, the military judge is only concerned about one thing: the solicitation of information to inform the exercise of challenges. The counsel's goals of building rapport and educating the members are of little concern to the judge. Therefore, the savvy counsel must accomplish the last two goals with the shared objective of satisfying the first.

Knowing the goals is one thing. Understanding how to accomplish them is another. Determining how to convince the judge to let counsel try to accomplish them is yet another. This is where the tools outlined below become essential. Unfortunately, voir dire in the military has become defined by rote, inflexible, and verbatim questioning of the panel. Judges often limit the scope of questions counsel are permitted to ask. This limitation is often unexplained, especially when counsel submit questions on the eve of the deadline. These drastic limitations can often turn voir dire into an "empty ritual."<sup>17</sup> While the judge's goal may be to protect the record from reversible error, such restriction can also hamper counsel development, and, more importantly, it can limit the discovery of biased panel members. Effective advocacy during voir dire promotes counsel's ability to accomplish the above goals, while ineffectiveness hinders the accomplishment of those goals.

Selecting a fair and impartial panel is an art and not a science. Counsel are charged with getting into the minds and thought processes of prospective jurors. Counsel must discover both their open and hidden biases and, if possible, get them to adopt (or at least accept) a certain view of the facts. This must all be done while trying to develop credibility and rapport. The uniqueness of the military panel, often composed of the most senior and seasoned Soldiers, pressurizes these already monumental goals. To accomplish these hard-to-achieve goals, counsel would be wise to use all available tools. Moreover, it would be helpful for judges to permit counsel to use these tools. The tools discussed or referenced below are necessary and largely missing from our current practice.

In addition to achieving these goals within the panel selection process, counsel

must keep in mind that the information elicited and themes discussed in voir dire should echo throughout trial. Capitalize on voir dire questions and answers throughout the trial, especially in closing argument. Voir dire presents a unique and powerful time in a trial where counsel have the opportunity to connect with the members. It is the only time when counsel are permitted to have a direct conversation with members. If counsel receive powerful answers during voir dire, these answers should be reiterated during witness examinations and closing argument. For example, in a sexual assault case involving a delayed report by the victim, counsel may ask the panel members to articulate reasons why a crime victim may not report immediately. If a member suggests in response that "fear of retaliation" is a reason for delayed reporting, counsel should reiterate this answer during closing argument if relevant and helpful. Employing the tools discussed below can assist counsel in eliciting powerful answers, which in turn can be used throughout the rest of the trial to best advocate for their respective client.

## **Part II—The Tools**

### **Counsel Perspective**

*You just got back from the Intermediate Trial Advocacy Course. You learned a bunch of advocacy tools, including some about voir dire. But when faced with the reality of utilizing them, you can't help but think, "I barely have time to get my uniform ready for trial, how can you expect me to implement all these fancy advocacy tools?"*

### **Judicial Perspective**

*You were just recertified at the Military Judge Course and are beginning your second tour as a military judge. You're feeling much more comfortable in the role this time around and are excited to see if the field has improved in the world of advocacy. The Chief Judges all encouraged providing flexibility to deserving counsel to use more advocacy tools during voir dire. Your last experience as a judge doesn't give you much faith in the field's ability to pull them off. However, you acknowledge the value in the use of these tools and plan to encourage counsel to use them—if they can show competence in the area of panel selection.*

### ***Introducing the Tools***

Conducting voir dire with the use of the tools discussed below has the potential to transform counsel's trial practice and advocacy skills. These tools, largely missing from military justice practice, are instrumental to a better and more informed forum and panel selection. The tools are discussed in the sequence counsel have the opportunity to utilize them throughout trial. The section begins with voir dire of the military judge prior to forum selection. Next, it discusses the use of supplemental written questionnaires prior to assembly. Finally, it lays out the novel concept of the mini-opening statement before group voir dire and reiterates the value of individually questioning panel members during group voir dire.

### ***Voir Dire: The Military Judge***

The first, but least utilized tool, is voir dire of the military judge. A frequent frustration of new judges, and a continuing focus of judiciary-led training, is the dearth of case information available to judges prior to trial. Judges remind the panel members in their preliminary instructions that "counsel know much more about the case than we do."<sup>18</sup> Counsel often forget this. As previously stated, one of the goals of voir dire is to educate the fact-finder. If the accused elects to be tried by the military judge alone, it is imperative to also educate the military judge.

In addition to educating the military judge, there is an even more critical reason for voir dire of the military judge. Just like the panel members, the military judge may have potential biases that should be explored; and, just like the panel members, the judge can be challenged for cause. Simple math would suggest that it is up to eight times more important to voir dire the military judge in a general court-martial than to voir dire each individual panel member. This is true even in a contested panel case. The judge may still be the person imposing the sentence. Therefore, it is surprising that so few defense counsel fail to explore whether the judge possesses underlying biases before allowing their client to elect to waive their statutory right to a panel.

Imagine a defense counsel in a case involving an alleged assault upon a child. The client, the accused, is the father of four and the alleged victim is his seven-year-old

son. The case may hinge on the parental discipline instruction. If this were a panel case, the defense counsel would certainly know the marital status of the members, who had children, and how many. The defense counsel would also have likely submitted a request for a case-specific questionnaire and a litany of voir dire questions regarding their views on parental discipline. For example, counsel would want to know whether the members spank their children, whether they ever used a belt, and how they were disciplined as children. It is just as important to know this information about the military judge.

It should be safe to assume that judges will be better able to set aside personal biases and attitudes toward a particular behavior than panel members. However, as explained above, counsel should treat a judge-alone case no differently when it comes to voir dire. Counsel should not feel uncomfortable or reluctant to ask the judge voir dire questions. Judges understand they have a duty to answer questions designed to elicit bias.

Conducting voir dire of the judge at the first available opportunity is imperative. Doing so allows defense counsel to ensure their client is well-informed about forum selection and improves relations between counsel and the accused. The client will likely trust counsel's advice regarding forum selection even more after witnessing their counsel's voir dire of the military judge. Do not wait until the day of trial to voir dire the judge. Plan ahead and ask questions at arraignment when the judge discloses any grounds for challenge and provides counsel an opportunity to question or challenge him or her. It is far better to address these issues prior to forum selection and trial on the merits than during the trial or on appeal.

While voir dire of the judge is important, counsel should not approach voir dire of the military judge as an opportunity to put the judge on trial. Voir dire of the judge is not a fishing expedition into the judge's personal life.<sup>19</sup> If the counsel has reason to suspect the judge may have an impermissible bias, or simply does not know the judge's feelings on a certain relevant topic, they should prepare relevant questions. For example, whether the judge used appropriate corporal punishment to discipline their children may be an appropriate question in

a child abuse case. It would not be relevant or appropriate in a traditional assault and battery case between adults. Bottom line, counsel should use common sense and formulate questions in the same way they would for a panel.

In addition to educating the judge and identifying bias, a judge's views on punishment can also be explored. This is especially true considering the judge is now the default sentencing authority for all cases. When approaching a decision to voir dire the military judge, counsel should examine possible punishments available should the accused be convicted of any offense. Counsel rightly assume that a judge will keep an open mind when it comes to sentencing. However, it could be important for the accused to hear the judge articulate that understanding prior to making the forum election. If a judge had made an injudicious comment about the charged offense being incompatible with military service, even in another context or off the record, that comment is ripe for questioning. While sentences imposed in other cases are generally not relevant, whether the judge has a particular bias toward or against a particular crime or punishment is fair game for questioning. However, much like with any question, counsel must always be prepared to provide an articulable justification for their questions and inquire respectfully.

When articulating the justification for the questions, it is necessary for counsel to understand the standards related to judicial disqualification. While removal for cause is the end result of identifying actual or apparent bias in a panel member, judicial disqualification is the end result of uncovering bias when questioning the judge. The grounds for judicial disqualification and recusal are found in Rule for Courts-Martial (RCM) 902.<sup>20</sup> The grounds for disqualification listed in RCM 902 are nearly identical to the grounds for disqualification listed in 28 U.S.C. § 455, which controls disqualification for federal judges.<sup>21</sup> There are some minor differences. For example, disqualifying fiduciary interests rarely come into play in a court-martial and are not specifically contained in RCM 902.<sup>22</sup> However, given the historical framework of military jurisprudence, which harkens back to a time where the military judge was a member of the

convening authority's command, the fundamental requirement for impartiality is no less important in a military context.<sup>23</sup> According to RCM 902(a), a judge is required to disqualify himself or herself in any proceeding in which the judge's impartiality "might reasonably be questioned."<sup>24</sup> This is a broad obligation all military judges must follow.

In addition to this broad obligation, the rule also contains specific grounds requiring disqualification that counsel should be aware of when formulating questions.<sup>25</sup> Counsel must move to disqualify the judge if they uncover actual bias or something that reasonably calls into question the judge's impartiality.<sup>26</sup> Similarly, judges have a duty to disqualify themselves *sua sponte* for any of the specific grounds if no motion is made.<sup>27</sup> If disqualification is raised *sua sponte*, military judges must permit the parties to question them prior to making a decision.<sup>28</sup> If judges find that they are disqualified, judges are required to recuse themselves.<sup>29</sup> Counsel should be aware of certain recurring situations in which a judge's impartiality might reasonably be questioned. These situations include prior relationships between the judge and counsel or the judge and witnesses, whether positive or negative. Even if judges are confident they harbor no actual bias against a party based on prior relationships, some conduct by the parties may be so egregious as to require disqualification under the reasonable person standard of RCM 902(a).<sup>30</sup> Therefore, *voir dire* of the judge to determine if disqualification is necessary is an essential practice, one which both parties should more rigorously exercise.<sup>31</sup>

Counsel should not be concerned about the judge's reaction to well-formulated and relevant questions. Because of the infrequency of this practice, some judges may be surprised by what they perceive as personal questions; but, if handled appropriately by counsel, this should not be a significant fear. A suggested approach for counsel is to alert the judge in an RCM 802 session that they intend to *voir dire* the judge in a particular area, explaining their basis.<sup>32</sup> This gives the judge an opportunity to reflect on both the need to answer the question and to formulate a response. The goal should be to ensure the judge can, and will, be impartial—not to trip them up by putting

them on the spot in a confrontational or embarrassing manner. This technique can be employed when using the other recommended tools as well, as discussed below.

#### **Supplemental Written Questionnaires**

The first panel-related tool at counsel's disposal is to expand the panel questionnaire. Panel questionnaires are the first touch point with new members. They represent the first opportunity to learn valuable information to inform the exercise of challenges—the first goal of *voir dire*. Rule for Courts-Martial 912(a)(1) provides authority for the use of panel questionnaires. The rule highlights how this tool "may expedite *voir dire* and may permit more informed use of challenges."<sup>33</sup> Therefore, in cases where a trial with members is still possible, counsel should focus initial attention here, and treat the questionnaire as the first phase of *voir dire*.

While the rule points to how this tool can be helpful, the way it is most often utilized in our system is not. The rule says that "trial counsel may, and shall upon request of defense counsel, submit to each member written questions . . ."<sup>34</sup> This normally occurs following the members' selection by the convening authority. The problem is that members are too often only asked to provide broad or boilerplate information articulated in the rule.<sup>35</sup> This boilerplate information is not unique to any case, it is very general in nature, and adds little value to the group *voir dire* questions or to the justification for individual questioning of members. A much more effective tool is the case-specific panel questionnaire.

Case-specific panel questionnaires are simple to implement, but widely underutilized. To highlight counsel's ability to augment the standard questions, RCM 912 provides that "[a]dditional information may be requested with the approval of the military judge."<sup>36</sup> This additional information can and should be tailored to the facts and issues in each case. Case-specific panel questionnaires are especially effective tools in jurisdictions where judges significantly limit the questions counsel are permitted to ask during group *voir dire*.

The value of expanding the questionnaire and making it specific for each case is two-fold. First, it improves judicial efficiency and the quality of challenges. Second, it is the

best and most anonymous way to obtain sensitive information from members to justify requests for individual *voir dire*.

#### *Improving Judicial Efficiency and Challenges*

Regarding judicial efficiency, the discussion to RCM 912(a)(1) supports this claim by saying that "[the use of] questionnaires before trial may expedite *voir dire* and may permit more informed exercise of challenges."<sup>37</sup> This should be the opening line in any motion for expanding the standard questionnaire. This assertion also seems obvious. An expansive and honestly answered questionnaire tailored to the facts of the case could ostensibly eliminate the need for group questions as it relates to identifying bias. At a minimum, counsel are receiving more information that will educate the questions they ultimately decide to ask.

Well-thought-out augmentations to the standard questionnaire also make evident the need for individual *voir dire*. Note, the court will require counsel from either side to have some basis for questioning the panel member individually.<sup>38</sup> This justification may come from information elicited during group questioning. However, and more importantly at this point, it may also stem from responses to questions in the questionnaire. If counsel know that their judge will significantly limit the scope of in-person questions, then the questionnaire offers the best alternative way to justify speaking to the members one on one. The value to this strategy is that, given the impromptu nature of individual *voir dire*, judges do not traditionally limit individual questioning in the same manner they do group questions. Therefore, counsel are able to get into more detail with that panel member and often do not need explicit pre-approval of the questions asked during individual *voir dire*. This is because counsel have already articulated a basis for speaking to the member outside the presence of the other members, and it is therefore necessary to have conversational back and forth with the specific member to resolve whatever concern was raised.

#### *Obtaining Accurate Answers to Sensitive Questions*

The second benefit to expanding the questionnaire with case-specific questions is that it gives counsel a chance to probe topics

that members may be less inclined to address openly and candidly in person and in a group. The value of including sensitive questions in the questionnaire provides anonymity for the questioner and the respondent, minimizes embarrassment, and minimizes inaccurate but socially acceptable responses.

There are many questions that need to be asked, but many are hard to inquire about in public. For example, it is difficult to ask members their thoughts on certain types of sexual behaviors, especially ones that raise social stigmas. These social stigmas highlight the absolute necessity of obtaining truthful answers on the topic. However, it also presents a conundrum for the counsel inquiring. On one hand, it is necessary to know whether someone holds some biased preconceived notions about people who engage in those sexual behaviors. But, on the other hand, these questions have the potential to make the members uncomfortable at best, and (at worst) encourages them to provide what they believe to be a socially acceptable answer. Counter to the truth-seeking function of voir dire, these answers may not be in-line with the member's actual feelings. Social pressure is an actual phenomenon that impacts human responses to sensitive questions. Litigators and judges cannot ignore the real possibility that this will impact the veracity of information elicited during voir dire.

Compounding the problem of normal social pressure is the concept of military social pressure. An example of this stems from the general consensus surrounding the treatment of victims of sexual assault. Through various training programs, the military has indoctrinated its officers and enlisted Soldiers to believe individuals who make allegations of sexual assault. Another example is the inaccurate belief that a victim of sexual assault is legally incapable of consent if they have consumed even one drink of alcohol. These beliefs, if genuinely held and left unidentified, inevitably carry over into the panel's deliberations. Questions in a group setting about sensitive things, the answers to which are collectively consistent within military culture, is not the best way to seek the truth on these topics. A confidential questionnaire, however, is more likely to result in more honest and individualized responses.

### ***The Mini-Opening Statement***

#### *What Is It?*

The next tool is the mini-opening statement and is intended to be used at the beginning of either party's group voir dire. The mini-opening statement is a novel tool that is even less utilized or understood than the case-specific questionnaire. A mini-opening statement is a very brief non-argumentative statement made by each party to the panel before voir dire begins. It provides background information and describes the underlying facts and issues to the prospective panel members so that the follow-on voir dire questions are presented in context.<sup>39</sup> In other words, it is an introduction to voir dire aimed at making voir dire more effective. While brief, it can be an important tool in the pursuit of identifying bias and educating the members. It follows the basic premise that panel members should be introduced to the subject matter of the case before exploring their personal biases. The mini-opening statement is increasingly being used as an important trial advocacy tool across civilian jurisdictions, both criminal and civil, in the United States.<sup>40</sup> However, until recently, mini-opening statements have been absent in military courts-martial.<sup>41</sup>

#### *Compare to Opening Statements*

A mini-opening statement is an advocacy tool for voir dire; it is not a shorter version of an opening statement. It is an entirely different tool from the opening statement with the goals of aiding in the exposure of potential bias and educating the panel.<sup>42</sup> The objective of the mini-opening is to inform potential voting members of why they are there and why it is critical that they carefully consider—and honestly answer—the questions that will follow. The advocate should accomplish this objective in a matter of three-to-five minutes. Unlike the opening statement, this is not an opportunity to tell the most persuasive story and preview the best facts.<sup>43</sup>

Although the mini-opening statement is very different from the opening statement, there are critical similarities. First and foremost, both offer the earliest opportunity to build credibility, a trial attorney's most important asset in court.<sup>44</sup> Being

brutally honest and demonstrating care about one's client or the case helps build credibility in the eyes of the panel. This is also an opportunity for the litigator to make a good first impression and establish a human connection with the prospective panel members. Just like every single piece of the trial, the theme and theory should be woven in. However, argument is inappropriate. In fact, the very same prohibitions of an opening statement also apply to the mini-opening statement: no argument, no personal opinion, no vouching for witness credibility, and there must be a good-faith basis that the evidence will be presented.

#### *Best Practices: How to Do It*

The litigator should first strike the right tone and the right balance. The tenor of the mini-opening statement should be more calm and matter-of-fact. This tool should be informative to the panel and not argumentative, emotional, or intense.<sup>45</sup> The mini-opening statement should not be too minimal in substance and not too strong in advocacy. This balance must be struck to inform and introduce the case to the panel and not alienate them. In other words, this is a slightly livelier (but neutral) statement of the case. In that respect, it should include few adjectives and zero adverbs; they should also lose the legalese.<sup>46</sup> The mini-opening is a neutral introduction and preview to the significant issues in the case, so that the advocate can open up the dialogue with the panel and explore bias in context.

Not only should counsel limit persuasive adjectives, but it may be worthwhile to undersell the case in the mini-opening statement. This is not the time to introduce the best and most critical facts.<sup>47</sup> Again, the purpose of the mini-opening statement is to inform the panel and explore their biases up front. The advantage to underselling at this early juncture is that counsel are more likely to convince the judge to allow it and will eventually be able to present the strongest version of the case during trial to the panel members.

In that same vein, counsel should consider previewing the case weaknesses to the panel. It may seem counterintuitive to do so at the first opportunity, but it is important for counsel to invoke and then explore biases against their case. This is the



perfect opportunity to present the worst facts, discover what panel members think about those facts, and how much those facts could influence their decisions.<sup>48</sup> For example, after introducing the key facts of the case, counsel may introduce an alleged motive to fabricate that will likely be a key issue in the case. Including topics that are likely to invoke bias is a deliberate technique. As such, do not be afraid of panel member responses. These responses are ultimately what the advocate is seeking. The mini-opening is supposed to identify bias so the advocate can exercise more informed causal challenges.

It is important to keep it three-to-five minutes or less. Litigators should economize the words used. Get right to the point or the issue. What follows is an informed questioning and discussion with the panel. Like any piece of trial advocacy, this is not one done on the fly. Advocates should rehearse it, know it, and not be wedded to notes or a script. It should appear natural and genuine, allowing the panel to open up. Last, the trial attorney must be on their game! This is literally the first opportunity the panel will hear counsel advocate. Panel members will form opinions about the litigators based on how they present, how their uniform appears, and how articulate they are. When presenting the mini-opening statement, it is absolutely important that advocates are prepared, have appropriate body language, and address the panel articulately.

#### *Advantages and Disadvantages*

The mini-opening statement, when done correctly, presents several advantages. First, it can serve as an effective ice-breaker. All too often, in front of more restrictive judges, the litigator approaches the podium only to ask a pointed yes or no question to the panel. This is the first thing the panel hears. A pointed question that requires only a yes or no response is not the best introduction to the panel. Breaking the ice with a brief statement allows the panel to be acquainted with the counsel and the case. This opportunity allows counsel to make a good first impression and establish credibility at the outset. The panel will just have heard the military judge's standard questions, also requiring a yes or no answer.

The litigator's mini-opening statement, by contrast, is different and naturally interesting to the panel. It is the first taste of what they showed up to hear.

The mini-opening statement provides clarity on the issues before questioning begins. The mini-opening coupled with a seamless transition to questioning elicits better and more revealing answers from the panel members. Moreover, a mini-opening statement can eliminate the need for hypotheticals.<sup>49</sup> The use of hypotheticals in voir dire can be confusing and disjointed. Instead of building rapport with the panel, hypotheticals may alienate and confuse the panel. Presenting the actual issue up front can eliminate the need for these confusing questions. Most importantly, the mini-opening statement provides the advocates valuable insight into the panel to better exercise challenges.

While a mini-opening statement can be an effective tool for counsel, it can also be a trap.<sup>50</sup> Counsel may be tempted to become argumentative at the earliest opportunity. This trap is amplified in military justice practice, widely known for having fairly junior litigators in both rank and experience. Avoiding argument in the mini-opening is even more crucial than in traditional opening statements. An argumentative mini-opening statement is legally impermissible,<sup>51</sup> and can have a negative effect during voir dire. First, if the panel senses the counsel has a clear perspective on the issues or stake in the outcome, it can cause panel members to be guarded in their responses and not entirely open about their biases.<sup>52</sup> Second, it can alienate the panel members. Panel members will form opinions based on the mini-opening statement. An argumentative mini-opening may not coincide with a particular panel member's biases; therefore, it is less likely that the member will vocalize their differing opinions publicly. This could cause the panel member—who would otherwise be challenged for cause—to remain and be impeded. Worse, their undiscovered biases may contribute to a negative outcome for the client.<sup>53</sup> Finally, it could invoke a rebuke from the military judge, which is not the ideal way to be introduced to the panel or to encourage the judge to permit future flexibility during voir dire. It is imperative

that the litigator not fall into the argumentative trap. Understanding there are confines of mini-opening statements, the tool nevertheless has the benefit of exploring biases most relevant to the case. As such, the mini-opening statement is a tool that enables the parties to select a more fair and impartial panel.

A word of caution, however, from the judge's perspective. The easiest way to guarantee that a judge will not allow you to conduct a mini-opening is by not tying it to the purpose of identifying bias. The government counsel would do well to inform the judge that the mini-opening includes, for example, information about the delayed report by the victim. Counsel should explain how this uncontroverted fact is necessary to provide the context for the voir dire questions that will follow. Similarly, from the defense perspective, a brief introduction that discusses the mixed signals that can occur during a sexual encounter can make questions regarding the ability to accept a defense of mistake of fact much easier for the panel member to both comprehend and truthfully answer. Failing to tie the mini-opening to the biases counsel are attempting to uncover is likely to result in denial.

#### ***Individual Questioning During Group Voir Dire***

Another excellent but underutilized tool is to question members one-on-one—but in front of the group. Group voir dire is far more effective if counsel craft their questions to stimulate a conversation with the members, rather than simply asking yes or no questions. Unfortunately, far too often military justice practitioners and judges resort to the latter. The discussion for individual questioning during group voir dire is not a novel recommendation.<sup>54</sup> The following will highlight some effective group voir dire techniques with an application to a typical sexual assault scenario.

Imagine a sexual assault case involving an alleged victim who reported the crime seven days after the incident. The trial counsel wants to know the members' opinions on delayed reporting. However, instead of asking the members their thoughts, counsel typically ask something like the following: "Are you open to the proposition

that victims may delay before reporting a sexual assault?” This will guarantee everyone will agree with that statement, either because they truly believe it or because the members know it is the socially and professionally acceptable answer. Or, even worse, because everyone else seems to be agreeing. Nonetheless, there may be a few panel members who believe that if someone was truly assaulted, she would immediately report. As a result, the trial counsel wasted a question and did nothing to determine whether any members possess a bias toward delayed reporting.

A much more effective technique is to simply ask the members their thoughts on delayed reporting. Counsel can approach this in one of two ways: pose the question to the group or select an individual panel member. The benefit of asking the group for a volunteer is that counsel can determine who may be the stronger voices in the deliberation room while avoiding putting someone on the spot. A volunteer in this setting probably has little reservations about voicing their opinion when it matters most. On the other hand, there is a chance no one will volunteer to respond. In that event, revert to the second approach and select a member to answer the question. Whichever method counsel adopts, once one or two members begin to talk, others will typically feel more comfortable providing their own views thus creating a more robust and effective means of voir dire.<sup>55</sup> Also, counsel should ensure each response is correctly attributed for the record. This has the added benefit of helping counsel learn the panel members’ names and allows them to feel more comfortable talking to them.

Once counsel determines how to direct the question, the next step is to ask it in a meaningful way. Instead of asking a yes or no question, ask an open-ended question.<sup>56</sup> For example, “What is the first thing that comes to mind when you hear that a victim waited a week before reporting?” This is where things will get interesting. Counsel may receive answers showing an understanding of typical victim behavior, such as “She was scared,” or “She decided she did not want it to happen to someone else.” There is also a strong possibility counsel may receive answers that show a bias or at least skepticism,

such as “She was trying to protect a relationship after a boyfriend found out,” or “She was about to get in trouble.” Irrespective of the answers, counsel should resist the urge to challenge any member based on their responses.<sup>57</sup> Treat that member with respect and say thank you; they have done exactly what you asked them to do: be truthful. Counsel can then ask the group if anyone else feels that way, which will further the goal of uncovering bias.

If counsel initially receives answers exhibiting bias, they should ask other members, “Can anyone think of other reasons why someone might delay reporting a sexual assault?” The goal here is to draw out as many responses as possible and, hopefully, the one that will align with the victim’s explanation. After this line of questioning, counsel may consider asking the typical question, “Is everyone (now) open to the proposition that victims may delay before reporting a sexual assault?” This ultimate question will help ensure everyone is now in agreement, including those who initially exhibited hesitation or bias. Alternatively, if they intend to challenge some of the members based on initial answers and would prefer not to rehabilitate the specific members, counsel may desire not to ask the final question. Either way, counsel will have exposed bias and effectively provided members with other viewpoints to hopefully overcome that bias or ultimately challenge them for cause. Trial counsel should consider using this technique when dealing with other counterintuitive behavior, such as when victims do not physically resist, engage in consensual sexual acts subsequent to the assault, or have changes in their stories over time. Similarly, defense counsel should use this technique to explore the victim’s possible motives to fabricate, such as protecting a pre-existing relationship, fear of punishment, or simple regret.

### **Part III—How to Win Over the Judge**

#### ***Counsel Perspective***

*You mean I can ask the military judge questions? She is a full-bird Colonel, and I just graduated from the Officer Basic Course. I’ve never done voir dire, let alone know how to pronounce it correctly. I just submitted voir dire*

*questions at exactly 1659, one minute before the deadline. Fortunately, I found an old voir dire document on the share drive from a contested panel case years ago. I hope the judge will approve these questions. I put in there that I’d like to give a mini-opening statement—it won’t hurt if I am able to talk to the panel more about my theme and theory. Hopefully, the judge gives me the rope to have a discussion with individual members in front of the other members. I heard judges are strict when it comes to voir dire, so I doubt the judge will let me say anything. We’ll see.*

#### ***Judicial Perspective***

*I just received a list of questions from counsel right at the deadline. The questions are inartfully crafted and clearly cut and pasted from a prior trial. They don’t even have the right name of the accused in the questions. As it stands right now, I can only approve three questions. The rest of the questions will just confuse the panel. It’s no help that counsel misstates the law in several of the questions. Additionally, I don’t see how most of these questions are aimed at discovering bias. Instead, it appears that counsel is solely focused on arguing his theme and theory during panel selection. Counsel also requested to give a mini-opening statement, yet he provided no detail or summary of what he wishes to do in the mini-opening statement. Given the argumentative nature of his voir dire questions, I cannot trust that counsel will not argue during his mini-opening statement. Frankly, I can’t trust this counsel to speak to the panel more than it takes to deliver these three questions.*

#### ***Persuading the Military Judge***

Winning over the military judge requires preparation on behalf of counsel. Why would any military judge allow a more permissive voir dire if counsel continue to submit cut and pasted questions right at the deadline? In order for the military judge to grant more leeway, counsel must demonstrate their level of preparation and competence. Just as credibility is important before the panel, it is just as important before the judge. Accordingly, it is imperative that counsel demonstrate what they want to do with voir dire, why they want to do it, and why it should be permitted. This must be done well ahead of the deadline set in the judge’s pre-trial order. Providing it in advance will afford counsel adequate leeway

to engage with the military judge to permit the tools discussed above.

As previously mentioned, the military judge controls voir dire. Rule for Courts-Martial 912(d) provides the military judge massive discretion over the panel selection process.<sup>58</sup> Considering the judge faces significant appellate scrutiny when it comes to challenges for cause, it is not hard to imagine why a judge might take a safer, more structured approach to voir dire. Therefore, counsel must be able to persuade the military judge to allow them to use the aforementioned tools during panel selection. This section will guide counsel in their effort to assuage these concerns and win over the military judge to permit them to use these tools.

First, counsel must know their judge.<sup>59</sup> As previously discussed, military judges vary widely in how they exercise their discretion. There is a sliding scale as to what judges allow during panel selection. Where a judge falls on this scale often evolves over time based on their experiences and counsel competence. On the most conservative side of the scale, military judges, if they even allow voir dire at all,<sup>60</sup> will require a verbatim recitation of pre-approved questions to the panel without room for deviation. On the most liberal side of the scale, military judges will give advocates free reign over their voir dire, assuming it is conducted in accordance with the rules. Since military judges vary in what they allow during voir dire, it is imperative that counsel take every opportunity to understand the judge's boundaries. This starts with asking the judge's panel selection preferences in court-provided feedback sessions, such as gateway sessions or regular training sessions, or in RCM 802 sessions.<sup>61</sup> Simply ask the judge to articulate the left and right limits of voir dire in advance of trial. If still vague, ask local or previous practitioners what the military judge prefers.

The need to win over the judge arises primarily when the military judge falls on the conservative side of the scale. This is when counsel need to persuade the military judge to broaden their allowable voir dire practice. In an effort to encourage more permissive and liberal voir dire, it is critical to solicit precise feedback from the court. Oftentimes, the military judge's pre-trial

order requires a submission of proposed voir dire questions in advance of trial.<sup>62</sup> Counsel should use this opportunity to outline exactly what they wish to do during voir dire. Do not simply submit a list of questions. Instead, submit a motion for appropriate relief requesting permission to use the tools discussed above, whether it be supplemental written questionnaires, a mini-opening statement, or individual questioning of members following the use of open-ended questions. Counsel should articulate a defensible basis for objectionable questions and submit them early to allow time for requests for reconsideration.

Soliciting feedback from the court also encourages clarity amongst all parties. Oftentimes, the military judge will line out or edit questions based on the form of the question and not the subject-matter. Seek clarification from the court asking whether the judge takes issue with the form or the substance of the question. If it is a form issue, go back to the drawing board and modify the question or find a better way to ask it. For example, some judges are hesitant to allow counsel to ask "do you agree" questions rather than "are you open to the proposition that" questions. As a result, instead of asking, "Do you agree when an individual recounts events of a traumatic nature, there may be slight variations in the recounting over time," ask, "Are you open to the proposition that when an individual recounts events of a traumatic nature, there may be slight variations in the recounting over time?" And even better, if the judge permits open-ended questions, ask, "What are some reasons why someone's recollection of a traumatic event may change over time?"

The point is to not give up when first faced with opposition and seek these types of clarifications. Military judges, understandably, want to ensure advocates are not confusing the panel or wasting time by re-asking questions or asking confusing questions. Given their wide discretion over voir dire, military judges want to ensure that the questions work toward impaneling an impartial panel. To that end, counsel must prepare and demonstrate how their requested tools would help achieve that goal.

Last, counsel must use the law to their advantage. There is no better way to

persuade the judge to broaden voir dire than by using the law to support the position. Rule for Courts-Martial 912(f) provides several grounds for challenges and removal for cause.<sup>63</sup> Of particular note is the last listed factor which states that someone "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."<sup>64</sup> Counsel using broader tools to uncover panel members' biases and prejudices during voir dire would allow the court to impanel a more impartial jury. Further, these voir dire tools make the panel selection process more complete and efficient.<sup>65</sup> Supplemental questionnaires and mini-opening statements focus the panel on the relevant issues and provides necessary context. It streamlines the questioning, both in a group and in an individual setting, allowing for more informed and candid answers.<sup>66</sup> Counsel should use these arguments in the motion requesting permission to use the tools. Remind the judge that these practices help the counsel, and the court, uncover biases and prejudices more quickly; this leads to a more intelligent exercise of peremptory and causal challenges. As an additional selling point, using the tools increases judicial efficiency and contributes to the development of counsel. If the goal is to discover true bias and impanel a fair jury, there are more effective ways of doing so than our current practice.

### ***Addressing Potential Criticisms and Fears***

#### ***Busted Panel***

Adopting and utilizing advocacy tools to enhance the voir dire process is not without its risks. A common fear among trial counsel and judges conducting voir dire is "busting the panel." As is well-known, panel cases are a huge logistical endeavor and no one wants to be responsible for a delay. However, do not let this fear override the purpose and process of voir dire. Voir dire is too important to be curtailed or rendered ineffective due to a fear of busting a panel. To combat the chances of busting a panel, convening authorities should detail as many panel members as will fit in the courtroom. Do this by asking the Staff Judge Advocate to advise the convening authority to amend the convening order in subsequent versions to expand the number of members required

to be present for assembly. For example, instead of convening a court-martial with fourteen primary members, increase that number to twenty. Explain that, in the long run, this promotes efficiency and will likely encourage the trial judge to be less restrictive. In addition, have more substitute members on a one-hour recall to quickly backfill members if removed for cause. Ensuring there is an abundant pool of potential members will enable judges to confidently address each challenge without regard to concerns about trial delays. Counsel should then inform the judge in their motion that a primary benefit of expanding the number of detailed members was to encourage more robust voir dire.

In addition to bringing more members to the courthouse, consider exercising temporary or permanent excusals after one trial and before a subsequent panel selection. There will be times when panel members share personal feelings or experiences that counsel know will preclude them from being on the panel for certain types of cases. Perhaps they have an inelastic view on sentencing when it comes to certain crimes or they have a close family member who was a victim of sexual assault. Rather than have that panel member continuously take up a seat only to have them inevitably removed for cause, consider recommending to the convening authority that the member be excused from all future courts-martial—or at least all future courts-martial—relevant to why they were challenged before. Generally, the defense counsel is even more willing to excuse these members than the government and will likely join in any recommendation, thus avoiding any appellate concerns.

During panel selection, judges should address challenges one by one without knowing how many challenges exist. If the judge asks counsel to list *all* of their challenges at the outset, counsel should respectfully argue that they would prefer to take each challenge individually to protect the record. Since listing them all alerts the judge to how many potential challenges exist, it could subconsciously alter the judge's ruling on a particular challenge as the judge is trying to ensure there are enough to impanel—or, at the very least, give that appearance. Judges should

consider each challenge individually, and they should not alter their rulings based on number crunching just to avoid a busted panel. Doing so could create appellate issues down the road. Moreover, counsel should exercise their challenges to have the most fair and unbiased panel. The exercise of challenges, and the rulings on these challenges, should be the primary goal. Any inconvenience that might result from “busting the panel” should not be the prevailing consideration.<sup>67</sup> In other words, not satisfying quorum or “busting the panel” is always better than seating a biased panel.

#### *Appellate Issues*

Another common fear for judges during voir dire and panel selection is the risk of creating issues on appeal. Over time, this appellate fear has led to more constrained exercise of voir dire in military courts. The military appellate courts have made clear that an accused has a “constitutional right, as well as a regulatory right, to a fair and impartial panel.”<sup>68</sup> Since the primary concern is to have a fair and impartial panel, a more permissive voir dire is the best way to discover biases and issues that may taint the fairness of the proceeding.<sup>69</sup> Accordingly, the fear should not be that allowing a more permissive voir dire may create issues on appeal. Rather, it should be the fear that not discovering bias through voir dire will impede the constitutional rights of the accused. It is this latter issue that is more likely to create issues on appeal. Worse yet, allowing a robust questioning of the panel, discovering bias, and not exercising and/or not granting founded casual challenges will certainly create issues on appeal.

And, while not the focus of this article, it is important to discuss the two types of bias (actual and implied bias) and how appellate courts have treated both. Allowing a more permissive voir dire only enables counsel to better exercise causal challenges based on actual and/or implied bias. As previously discussed, RCM 912 directs excusal for cause whenever it appears that the member should not sit “in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.”<sup>70</sup> This rule contemplates both actual and implied bias.<sup>71</sup> While both actual

and implied bias provide cause to be excused from the court-martial, depending on when the challenge was raised, the appellate courts provided different tests in evaluating actual and implied bias.<sup>72</sup>

Actual bias is “bias in fact” and “the existence of a state of mind that leads to an inference that the person will not act with entire impartiality.”<sup>73</sup> Actual bias is a question of fact to be decided by the military judge based on the evidence presented at the court-martial.<sup>74</sup> Implied bias is conclusively presumed as a “matter of law.”<sup>75</sup> The implied bias test considers “the public's perception of fairness in having a particular member as part of the court-martial panel.”<sup>76</sup> Most common causal challenges in military courts are based on implied bias grounds.

The degree of deference afforded to a military judge's decision varies. An actual bias decision is entitled to great deference while an implied bias ruling is afforded less deference.<sup>77</sup> The varying degree of deference that appellate courts have afforded to military judges regarding implied bias rulings have caused confusion for practitioners.<sup>78</sup> However, it is clear that courts will grant more deference the more thorough the military judge's analysis is on the record.<sup>79</sup> Additionally, the liberal grant mandate makes clear that military judges should grant the defense's challenge in close cases.<sup>80</sup> Last, military appellate courts have articulated that “[r]eversal will ‘indeed be rare’ when a military judge ‘considers a challenge based on implied bias, recognizes his duty to liberally grant defense challenges and places his reasoning on the record.’”<sup>81</sup>

The fear of creating appellate issues by granting more permissive voir dire should be dispelled. Quite the contrary, more robust questioning of panel members allows for a more intelligent exercise of challenges. Appellate issues arise if the liberal grant mandate is not followed. In close cases, the challenge should be liberally granted in the defense's favor. Appellate issues also arise if the parties discover actual bias and that member is not excused. Last, in implied bias cases, appellate issues follow if the military judge does not comprehensively articulate the ruling and analysis on the record. Therefore, counsel should not be shy about requesting such articulation.

A more permissive voir dire only enables greater discovery of bias, leading to a more fair and impartial panel. As such, practitioners should not fear a more permissive nature of voir dire. Rather, parties should fear the failure to exercise and grant causal challenges based on the evidence gathered from permissive voir dire.

## Conclusion

Counsel should confidently pursue utilization of the voir dire advocacy tools discussed in this article and others.<sup>82</sup> In approaching this pursuit, the focus needs to be on three things: 1) counsel improving at voir dire so that its ultimate purpose may be achieved; 2) counsel convincing the judge of their competence in this area of advocacy for the same reason; and 3) judges rewarding that effort by providing more latitude to identify and challenge biases. A more permissive voir dire can be accomplished through well-thought-out articulation of the reasons behind the use of these tools and advance warning to the judge that will allow a reasonable time for a back and forth about the form and substance of what counsel propose. This level of preparation will allow the judge to trust counsel and to potentially permit greater latitude during voir dire.

Accomplishing the goal of robust voir dire requires more than judges simply giving more latitude to counsel who have yet to prove themselves capable of handling it. This approach fails to yield dividends and perpetuates the currently ineffective stalemate where judges use their discretion to greatly limit what counsel say and do. Instead, it is imperative that counsel demonstrate their level of preparation and competence to use the aforementioned tools. Utilizing these tools has the potential to transform counsel's advocacy, thus facilitating a more robust panel selection and improving military justice. However, this transformation is only possible if counsel and military judges finally bridge the gap between what counsel want to do and what the judge determines they are capable of doing. Nothing less than a fair trial is at stake. **TAL**

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## Notes

1. A "busted panel" is a colloquial term that refers to the scenario when judicially-granted challenges for cause and/or preemptory challenges made by counsel results in the number of panel members dropping below what is required under Articles 16 and 29 of the UCMJ. See *infra* Busted Panel. See UCMJ art. 16 (2017); UCMJ art. 29 (2016).
2. This article focuses on encouraging the use of under-utilized techniques in order to transform the current practice of voir dire. See generally Colonel Mark A. Bridges, *A View from the Bench: The Overlooked Art of Conducting Voir Dire*, ARMY LAW., Mar. 2011, at 35 (highlighting a critical framework for voir dire and providing essential advocacy tips that remain useful to our practice today); Lieutenant Colonel Eric R. Carpenter, *Rethinking Voir Dire*, ARMY LAW., Feb. 2012, at 5 (also highlighting a critical framework for voir dire and providing essential advocacy tips that remain useful to our practice today). The authors highly recommend these articles to all military justice practitioners desiring to improve their advocacy with respect to panel selection.
3. See *United States v. Peters*, 74 M.J. 31, 35 (C.A.A.F. 2015); *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007); *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998).
4. See *infra* Part I—The Status Quo and the Basics.
5. See *infra* Part II—The Tools.
6. See *infra* Part III—How to Win Over the Judge.
7. *Voir dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).
8. U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL r. 3.2, 15.1 (1 Dec. 2020) [hereinafter RULES OF PRACTICE].
9. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 911 (2019) [hereinafter MCM].
10. *Id.* R.C.M. 805.
11. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-1 (29 Feb. 2020) [hereinafter MILITARY JUDGES' BENCHBOOK].
12. RULES OF PRACTICE, *supra* note 8, r. 15.1.
13. MCM, *supra* note 9, R.C.M. 912(d).

14. *Id.* R.C.M. 912(f)(5), R.C.M. 912A. The court-martial procedural rules changed following the implementation of the Military Justice Act of 2016, so this is only applicable to charges referred on or after 1 January 2019. See also RULES OF PRACTICE, *supra* note 8, r. 15.5.

15. Article 16, Uniform Code of Military Justice (UCMJ), requires twelve members for capital cases, eight for non-capital general courts-martial, and four for special courts-martial. UCMJ art. 16 (2017). Article 29 requires impanelment of alternatives if the convening authority has authorized them. UCMJ art. 29 (2016).

16. See PETER K. ODOM ET AL., OFF. OF THE JUDGE ADVOCATE GEN., THE 2019 ADVOCACY TRAINER: A MANUAL FOR MILITARY JUSTICE PRACTITIONERS IN THE US ARMY JUDGE ADVOCATE GENERAL'S CORPS ch. 2, at 4. See also *United States v. Jefferson*, 44 M.J. 312, 318 (C.A.A.F. 1996) (voir dire can be used "as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise preemptory challenges and challenges for cause").

17. Telephone Interview with Colonel Timothy Hayes, Chief Judge, U.S. Army Trial Judiciary (Sept. 25, 2020).

18. MILITARY JUDGES' BENCHBOOK, *supra* note 11, para. 2-5.

19. For a cautionary tale on the dangers of independent investigation into the judge's personal life, see *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

20. See MCM, *supra* note 9, R.C.M. 902.

21. *Id.* See also 28 U.S.C. § 455.

22. See MCM, *supra* note 9, R.C.M. 902.

23. For a fuller treatment of judicial disqualification in federal courts, see CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW (3d ed. 2020).

24. MCM, *supra* note 9, R.C.M. 902(a).

25. Per RCM 902(b), a judge must also be disqualified if they possess "a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts"; previously acted on the case in some other capacity; are required to serve as a witness in the case or previously expressed an opinion on the case concerning the accused's guilt or innocence. *Id.* R.C.M. 902(1)-(3). If a judge is not qualified or detailed to the case, they are ineligible to preside. *Id.* R.C.M. 902(4). Disqualification is also necessary if the judge or their spouse, or a third degree relative of either, is a party or known to have an interest in the proceeding, or is known to be a material witness. *Id.* R.C.M. 902(b)(5).

26. While the actual grounds for disqualification in RCM 902(b) are easy to identify and articulate (and cannot be waived), apparent grounds under RCM 902(a) are more nuanced and require the application of the reasonable person standard. Remember, this standard is that "a judge is required to disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned." *Id.* R.C.M. 902(a). Waivers are not permitted for the specific grounds delineated in RCM 902(b). However, the parties may waive disqualification under RCM 902(a), provided that a full disclosure of the basis for disqualification is placed on the record. *Id.* R.C.M. 902(e). See also *United States v. Springer*, 79 M.J. 756, 759-60 (A. Ct. Crim. App. 2020) (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)) (appellate courts review the appearance of impartiality

objectively under the standard of “any conduct that would leave a reasonable man knowing all the circumstances to the conclusion that the judge’s impartiality might reasonably be questioned”).

27. MCM, *supra* note 9, R.C.M. 902(d)(1).

28. *Id.* R.C.M. 902(d)(2).

29. *Id.* R.C.M. 902(d)(3).

30. See *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013).

31. For a fuller treatment and outsider’s perspective on the necessity for voir dire of a military judge, see Michel Paradis, *Judicial Disclosure and the Judicial Mystique*, 49 HOFSTRA L. REV. 125 (2020). Mr. Paradis was the counsel for the petitioner in a case in which a military judge appointed to the military commissions was disqualified by the U.S. Court of Appeals for the D.C. Circuit for a failure to disclose employment negotiations. See *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019).

32. See MCM, *supra* note 9, R.C.M. 802.

33. See MCM, *supra* note 9, R.C.M. 912 discussion.

34. *Id.* R.C.M. 912(a)(1).

35. The standard questions include:

- (A) Date of birth; (B) Sex; (C) Race; (D) Marital status and sex, age, and number of dependents; (E) Home of record; (F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received; (G) Current unit to which assigned; (H) Past duty assignments; (I) Awards and decorations received; (J) Date of rank; and (K) Whether the member has acted as accuser, counsel, preliminary hearing officer, investigating officer, convening authority, or judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

*Id.* R.C.M. 912(a)(1)(A)-(K).

36. *Id.*

37. *Id.* R.C.M. 912(a)(1) discussion.

38. RULES OF PRACTICE, *supra* note 8, r. 15.2.

39. Julie Brook, *Mini Opening for Voir Dire*, CEBBLOG (Apr. 11, 2014), <https://cebca.wordpress.com/2014/04/11/mini-opening-for-voir-dire/>.

40. California law was recently amended as of 1 January 2018: “Upon the request of a party, the trial judge shall allow a brief opening statement for counsel by each party prior to the commencement of the oral questioning phase of the voir dire process.” CAL. CIV. PRO. CODE § 222.5(d) (2017) (effective January 1, 2018).

41. As a military judge, COL Robert Shuck has recently introduced and encouraged the practice of mini-opening statements by litigators in his courtroom. Colonel Shuck’s introduction of this “new” tool of mini-opening statements generated the idea for this article and formed its foundation. The authors thank Judge Shuck for continuing to push the envelope of advocacy and for encouraging counsel to be creative trial advocates.

42. Rich Matthews, *The Mini-Opening Before Oral Questioning: Upgrade Your Voir Dire*, JURYLOGY (Aug. 21, 2013), <https://juryology.com/2013/08/21/mini-opening-before-oral-questioning-upgrade-voir-dire/>.

43. See generally Boone Callaway, *Using Your Mini Opening to Out Unfavorable Jurors*, TRIAL LAW., Winter 2020, at 32.

44. See Kenneth J. Melilli, *Personal Credibility and Trial Advocacy*, 40 AM. J. TRIAL ADVOC. 227 (2016).

45. Matthews, *supra* note 42.

46. *Id.*

47. Callaway, *supra* note 43.

48. *Id.*

49. Brook, *supra* note 39.

50. Stephen M. Duffy, *Tips for Avoiding the Mini-Opening Trap: Why Putting on a “Good” Mini-Opening is the Last Thing You Should Do*, AM. BAR ASS’N (July 31, 2018), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2018/summer2018-tips-for-avoiding-the-mini-opening-trap/>.

51. See FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-53.00, at 15-34 (4th ed. 2015) (“Using voir dire for purposes such as arguing one’s case or exposing the members to inadmissible evidence is unethical and improper, and likely to elicit a mistrial motion.”). See also MCM, *supra* note 9, R.C.M. 912(d) (discussing how “counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case”).

52. Callaway, *supra* note 43.

53. Stephen Duffy, *Mini-Opening—It’s a Trap!*, TRIAL BEHAV. CONSULTING (June 27, 2018), <https://trialbehavior.com/mini-opening-trap/>.

54. See Bridges, *supra* note 2; Carpenter, *supra* note 2. Note that the accused does not have a right to individually question members during voir dire. See *United States v. Dewrell*, 55 M.J. 131 (C.A.A.F. 2001).

55. Bridges, *supra* note 2, at 37.

56. *Id.*

57. Carpenter, *supra* note 2, at 10.

58. MCM, *supra* note 9, R.C.M. 912(d). Rule for Courts-Martial 912(d) states that “[t]he military judge may permit the parties to conduct examination of members or may personally conduct examination.” *Id.* Further, the discussion of the rule provides that “[t]he nature and scope of the examination of members is within the discretion of the military judge.” *Id.* R.C.M. 912(d) discussion.

59. Bridges, *supra* note 2, at 36.

60. *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001) (parties do not have right to individually voir dire the members). See also *United States v. Jefferson*, 44 M.J. 312, 322 (C.A.A.F. 1996).

61. In the U.S. Army, these are referred to as “gateway” and “bridging the gap” sessions.

62. RULES OF PRACTICE, *supra* note 8, r. 3.2, 15.1.

63. MCM, *supra* note 9, R.C.M. 912(f)(1).

64. *Id.* R.C.M. 912(f)(1)(N).

65. Carpenter, *supra* note 2, at 7.

66. *The Importance of Mini-Opening Statements for the Trial Lawyer*, LORONA MEAD (May 31, 2017), <https://loronamead.com/importance-mini-opening-statements-trial-lawyer>.

67. See *United States v. Leathorn*, No. 20180037, 2020 CCA LEXIS 450, n.11 (A. Ct. Crim. App. Dec. 11, 2020) (“We remind military judges and practitioners that concern about inconvenience resulting from the need to halt court-martial proceedings in order to add additional panel members to satisfy quorum

requirements ‘is not an adequate ground to deny a challenge for cause.’” (quoting *United States v. Smart*, 21 M.J. 15, 20-21 (C.M.A. 1985)).

68. *Id.* at \*16 (citing *United States v. Comisso*, 76 M.J. 315, 321 (C.A.A.F. 2017)). See also *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (“Indeed, ‘impartial court-members are a *sine qua non* for a fair court-martial.” (quoting *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995))).

69. An obligation exists to question sufficiently to expose the grounds for challenge. See Bridges, *supra* note 2, at 36 (quoting *United States v. Smith*, 27 M.J. 25, 27 (C.M.A. 1988); *United States v. Parker*, 19 C.M.R. 400, 405 (1955)) (“The accused should be allowed considerable latitude in examining members so as to be in a position to intelligently and wisely exercise a challenge for cause or a preemptory challenge.”).

70. MCM, *supra* note 9, R.C.M. 912(f)(1)(N).

71. See *United States v. Miles*, 58 M.J. 192, 194 (C.A.A.F. 2003).

72. *Leathorn*, 2020 CCA LEXIS 450, at \*18 (The appellate courts have prescribed specific standards of review based on the timing of the raised challenge. If there is a new ground for challenge not previously raised at trial, the appellate court will review the post-trial challenge for “plain or obvious error”). See also *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011) (“Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.” However, if a causal challenge is raised during trial, appellate courts will review the military judge’s ruling for an abuse of discretion.). *Leathorn*, 2020 CCA LEXIS 450, at \*21 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

73. *United States v. Hennis*, 79 M.J. 370, 384 (C.A.A.F. 2020).

74. *United States v. Velez*, 48 M.J. 220, 224 (C.A.A.F. 1998).

75. *Hennis*, 79 M.J. at 385.

76. *Leathorn*, 2020 CCA LEXIS 450, at \*18 (quoting *United States v. Rogers*, 75 M.J. 270, 271 (C.A.A.F. 2016)).

77. Specifically, implied bias rulings are afforded less deference than abuse of discretion but greater than de novo. *Id.* at \*20.

78. See Major Philip Staten, *Clarifying the Implied Bias Doctrine: Bringing Greater Certainty to the Voir Dire Process in the Military Justice System*, ARMY LAW., Mar. 2011, at 17.

79. *Leathorn*, 2020 CCA LEXIS 450, at \*20-22 (“Regarding the deference afforded a military judge’s ruling on implied bias challenge, it exists on a sliding scale dependent on whether, and to what extent, the military judge places his analysis on the record. Thorough, well-reasoned analysis places the ruling on the end closest to abuse of discretion review. The absence of any analysis places the judge’s ruling at the end closest to de novo review.”).

80. See *United States v. Peters*, 74 M.J. 31, 35 (C.A.A.F. 2015).

81. *Leathorn*, 220 CCA LEXIS 450, at \*21 (quoting *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007)).

82. See Bridges, *supra* note 2; Carpenter, *supra* note 2.



(Credit: Victor Moussa – stock.adobe.com)

## Practice Notes

# Support and Defend

## Why the Military Must Train Service Members in the Constitution

*By Lieutenant Colonel Alexander G. Douvas*

The violent assault on the U.S. Capitol in January 2021 was a shocking and disgraceful spectacle. This horrendous act resulted in the first breach of the Capitol since the War of 1812,<sup>1</sup> and, in addition to a tragic loss of life, it involved something far more insidious: a direct assault on the U.S. Constitution. Those who participated in the assault aimed to stop the counting of electoral votes by the Vice President in a joint session of Congress—as required by the 12th Amendment.<sup>2</sup> Perhaps unsurprisingly, those who participated in this assault included an assortment of extremists and conspiracy theorists.<sup>3</sup> More astounding, however, is the revelation that one in five of those arrested and charged for their involvement were active or former Service members.<sup>4</sup>

The Constitution has been both the foundation and purpose of military service since 1789.<sup>5</sup> Every American Service member swears an oath that begins with a pledge to “support and defend

the Constitution of the United States against all enemies, foreign and domestic” and “bear true faith and allegiance to the same [Constitution].”<sup>6</sup> This solemn pledge demands a willingness by Service members to sacrifice their own lives if necessary—not for a leader or a flag, but for the ideals contained in this sacred document. While Service members receive regular training in everything from basic military skills to safeguarding personally identifiable information, they receive no formal training in understanding the very document that the military exists to protect.<sup>7</sup>

This lack of knowledge about the Constitution’s design and structure, coupled with the zeal instilled and training provided by military service, is a potentially dangerous combination. This is evidenced by growing concerns about the rise of extremist and anti-government ideology within the armed forces.<sup>8</sup> Such ideology is often couched in patriotic terms, making Service members a

# OATH OF ENLISTMENT

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.

prime target for recruitment and indoctrination by extremist organizations. In an unprecedented move, the members of the Joint Chiefs of Staff released a message to the joint force calling the attack on the U.S. Capitol a “direct assault on the U.S. Constitution . . . and our Constitutional process” and reiterated that “any act to disrupt the Constitutional process is not only against our traditions, values, and oath; it is against the rule of law.”<sup>9</sup> That top military leadership felt compelled to publicly reemphasize the military’s commitment to the Constitution, and remind Service members of their oaths to it, underscores the importance of educating the military in the Constitution’s contents.

This was driven home for me in an encounter I had with a young Marine last year. The Marine casually tossed around words like “treason” and “tyranny” to describe various restrictions enacted by state governors in response to the Coronavirus Disease 2019 pandemic. In support of his position that the Founding Fathers would have already gone to war in response to similar restrictions on liberty, the Marine selectively quoted lines from the Declaration of Independence<sup>10</sup> and liberally invoked “We The People” from the Preamble to the Constitution.

I pulled him aside and, not-so-gently, counseled him that advocating war over domestic political disagreements is not something Americans do, let alone Marines who swear an oath to the Constitution. I walked him through the structure of the Constitution and the separation of powers; explained federalism and the 10th Amendment; and listed the numerous checks and balances that the Framers specifically built into our system of government to safeguard it against tyranny. I concluded by explaining to him that the Constitution provides remedies for Americans to respond to poor governance or unpopular laws, including the voting booth and *peaceful* protests—not the battlefield. The Marine apologized profusely and said it was the first time he was told that. His patriotism was sincere, but his zeal was totally misguided.

Sadly, this is not the first Service member I have encountered in my career whose well-meaning—but uninformed—beliefs about the Constitution and government tyranny could have metastasized into the same sort of extremist, anti-government beliefs that motivated some of the veterans who participated in the breach of the U.S. Capitol. One of those veterans—a retired Air Force lieutenant colonel, photographed with flex cuffs—posted on social media

about his preparations for a “Second Civil War” against a “hostile governing force,” and concluded a similar post by reciting a portion of his former oath: “Against all enemies foreign and domestic.”<sup>11</sup> Other anti-government organizations, such as the Oath Keepers—whose members were present inside the Capitol, actively recruit current and former Service members with care packages<sup>12</sup> containing conspiratorial warnings about the Federal Government’s plans to use the military to deprive Americans of their constitutional rights.<sup>13</sup>

How does a Service member so badly misunderstand the Constitution (and their oath to it) that they use it as justification for a violent raid on a constitutionally-required joint session of Congress or a war against the very government the Constitution establishes? Many factors are possible, but surely one of them is the military’s failure to properly educate Service members on the basics of what the Constitution does and does not say. Such training need not be onerous or detailed, but should at least provide an overview of the three co-equal branches of government, separation of powers, federalism and states’ rights, the Bill of Rights, and the amendment process. The training need not be conducted annually; however, it



should be required at regular intervals that coincide with a Service member taking the oath of office or enlistment—such as at enlistment or commissioning and subsequent re-enlistments or promotions. Finally, such training need not transform riflemen into constitutional law experts, but it should be enough to inoculate them against the efforts of those who would deceive them about what the Constitution actually says and requires of the few who have sworn an oath to defend it.

In his first annual address to Congress, President George Washington emphasized the importance of educating the American public in the newly-ratified U.S. Constitution in order to promote their confidence in their new government and enable them to distinguish between unconstitutional “oppression and the necessary exercise of lawful authority.”<sup>14</sup> Service members are not only members of the American public, but sworn guardians of the Constitution, trained in violence to defend it “against all enemies, foreign and domestic.” Failing to train Service members in the Constitution itself risks allowing it to serve as little more than a totem for the preexisting beliefs and values of individual Service members, regardless of the accuracy of those beliefs. Worse yet, it risks the resulting vacuum of knowledge being filled with misinformation and exploited by any number of malign actors or groups.

Ignorance of the Constitution is hardly unique to Service members. A recent survey of American adults showed that 33 percent of respondents could not name a single branch of the U.S. Government, and 37 percent were unable to name a single right protected by the First Amendment.<sup>15</sup> However, where the risks of constitutional illiteracy concern those who have been trained and entrusted with the security of our nation, an ounce of prevention is worth a pound of cure.<sup>16</sup> **TAL**

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## Notes

1. See AOC Curator, *A Most Magnificent Ruin: The Burning of the Capitol During the War of 1812*, ARCHITECT OF THE CAPITOL: EXPLORE THE CAPITOL CAMPUS (Aug. 22, 2012), <https://www.aoc.gov/explore-capitol-campus/blog/most-magnificent-ruin-burning-capitol-during-war-1812>.
2. *Election of President and Vice President*, NAT'L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/amendment/amendment-xii> (last visited Mar. 2, 2021).
3. Logan Jaffe et al., *Capitol Rioters Planned for Weeks in Plain Sight. The Police Weren't Ready*, PROPUBLICA (Jan 7, 2021, 12:24 AM), <https://www.propublica.org/article/capitol-rioters-planned-for-weeks-in-plain-sight-the-police-werent-ready>.
4. Tom Dreisbach & Meg Anderson, *Nearly 1 in 5 Defendants in Capitol Riot Cases Served in the Military*, NPR (Jan. 21, 2021, 3:01 PM), <https://www.npr.org/2021/01/21/958915267/nearly-one-in-five-defendants-in-capitol-riot-cases-served-in-the-military> (“Of more than 140 charged so far, a review of military records, social media accounts, court documents and news reports indicate at least [twenty-seven] of those charged, or nearly 20%, have served or are currently serving in the U.S. military. To put that number in perspective, only about 7% of all American adults are military veterans, according to the U.S. Census Bureau.”).
5. *Oaths of Enlistment and Oaths of Office*, U.S. ARMY CTR. OF MIL. HIST., <https://history.army.mil/html/faq/oaths.html> (last visited Mar. 2, 2021).
6. 5 U.S.C. § 3331.
7. U.S. DEP'T OF DEF. U.S. CONSTITUTION DAY, <https://constitutionday.cpm.osd.mil/> (last visited Mar. 2, 2021). Notably, federal law “requires Federal agencies to provide new employees with educational and training materials on the U.S. Constitution as part of the new employee orientation materials; and provide all Federal agency employees educational and training materials on the Constitution on September 17th.” *Id.* That said, this author has never received any such training or materials in over fifteen years of active duty service. See also Ken Harbaugh, *The U.S. Military Is Not Ready for a Constitutional Crisis*, ATLANTIC (Feb. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/us-military-not-ready-constitutional-crisis/606367/>.
8. See Tom Vanden Brook, *Congress Demands Investigation into White Supremacists in the Military After Capitol Riots*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/01/14/pentagon-review-extremism-after-veterans-arrested-capitol-riots/4159099001/> (Jan. 14, 2021, 7:52 PM).
9. Memorandum from Joint Chiefs of Staff to Joint Force, subject: Message to the Joint Force (12 Jan. 2021).
10. “But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
11. Jake Bleiberg, *Air Force Veteran Aimed “To Take Hostages” During US Capitol Riot, Prosecutor Says*, A.F. TIMES (Jan. 14, 2021), <https://www.airforce-times.com/news/pentagon-congress/2021/01/15/>

[air-force-veteran-aimed-to-take-hostages-during-us-capitol-riot-prosecutor-says/](https://www.airforce-times.com/news/pentagon-congress/2021/01/15/air-force-veteran-aimed-to-take-hostages-during-us-capitol-riot-prosecutor-says/).

12. ANTI-DEFAMATION LEAGUE, THE OATH KEEPERS: ANTI-GOVERNMENT EXTREMISTS RECRUITING MILITARY AND POLICE (2015), <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/The-Oath-Keepers-ADL-Report.pdf>.
13. *Oath Keepers*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/oath-keepers> (last visited Mar. 2, 2021) (explaining the Oath Keepers' organization, mission, and goals).
14. George Washington, U.S. President, First Annual Message to Congress (Jan. 8, 1790), <https://miller-center.org/the-presidency/presidential-speeches/january-8-1790-first-annual-message-congress>.

By convincing those who are entrusted with the public administration, that every valuable end of Government is best answered by the enlightened confidence of the people: and by teaching the people themselves to know and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burdens proceeding from a disregard to their convenience and those resulting from the inevitable exigencies of Society; to discriminate the spirit of Liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy, but temperate vigilance against encroachments, with an inviolable respect to the Laws.

*Id.*

15. *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR. (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/>.
16. The saying “an ounce of prevention is worth a pound of cure” is widely attributed to Benjamin Franklin, who wrote an article on the importance of improving firefighting techniques with a particular focus on prevention. Benjamin Franklin, *On Protection of Towns from Fire*, 4 February 1735, PA. GAZETTE, Feb. 4, 1734, at 5, <https://founders.archives.gov/documents/Franklin/01-02-02-0002>.



PFC Shania Woodhurst, paralegal specialist, 30th Medical Brigade, receives grid coordinates during the land navigation event on day two of the USAREUR Best Warrior Competition at U.S. Army Garrison Hohenfels Training Area, Germany, in July 2020. (Credit: SPC Kaden D. Pitt)

## Practice Notes

# Tactically and Technically Proficient Balancing Lethality with Technical Competence in a Comprehensive Field

*By Command Sergeant Major Michael J. Bostic*

The title of this article remains a constant aspiration for many military paralegals within our Corps. We must find ways to remain ready in our field craft as Soldiers and noncommissioned officers (NCOs) just as much as we need to remain relevant in our technical trade as paralegal specialists.<sup>1</sup> This article explores a Judge Advocate General's (JAG) Corps paralegal's participation in both technical and tactical assignments; how those two proficiencies relate to each other; and why paralegal leaders must be, know, and

do both kinds of work in order to achieve legal mastery and career success. I use examples from my own career to illustrate my belief that technical competence and tactical proficiency go hand-in-hand in every paralegal assignment, no matter what level of tactical, operational, or strategic job is involved. Building on all types of experiences at each of these levels results in a true dual professional—the Soldier-paralegal—who enhances any type of mission with both technical and tactical skills.

From junior enlisted to senior NCO, we have creeds, mottos, reference doctrine, and organizational experiences that we leverage to aid us in our journey of service in the U.S. Army. However, in a highly technical field, most do not get opportunities to experience broadening assignments that test our leadership and competency in Soldier skills. As dual professionals, we need to leverage our experiences, training, and technical expertise—as well as our education—to support *lethality*. Simply being familiar in one discipline will not suffice in a new generation of talent management.

We follow organizational leaders toward one common goal—mission success. We recite: “I will always maintain my arms, my equipment, and myself”<sup>2</sup> or “I will strive to remain technically and tactically proficient.”<sup>3</sup> These two stanzas provide expectations—starting a career as a junior Soldier or NCO with an enlisted culture that runs deep with expectations. Regardless of our technical Military Occupational Specialty (MOS), our field craft is our foundation for service. We serve to fight and win our Nation’s wars. Whether or not that opportunity presents itself, our day-to-day constant is our technical trade, which is our vehicle to service.

The Army sets out tactical and technical knowledge in its doctrine, Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession*.<sup>4</sup> The section discussing expertise is worth reading in its entirety for a better understanding of how the two work together toward our professional goals as experts in our dual-professional field of Soldier and paralegal:

Army leaders must know the fundamentals of their duty position related to warfighting, tactics, techniques, and procedures. Their tactical knowledge allows them to employ individuals, teams, and organizations properly to accomplish missions at least cost in lives and materiel.<sup>5</sup>

In contrast to tactical knowledge, the same doctrine discusses technical knowledge:

Technical knowledge relates to equipment, weapons, systems, and functional areas. Leaders need to know how the equipment for which they are responsible works and how to use it. Subordinates generally expect their organizational leaders to be technically competent, and their direct leaders to be technically expert.<sup>6</sup>

I firmly believe that you must understand technical knowledge in order to apply and develop tactical knowledge in every job the Army assigns you. Take me, for instance: One morning, in April 2017 at Fort Bragg, my phone rings as I sit in my office; it is Sergeant Major (SGM)/Command Management branch on the line. I am told that I am to assume duty as a battalion command sergeant major (BN CSM) at Fort Drum with a June 2017 report date. About a week prior, the published CSM slate revealed my initial assignment would be October 2017—so you can imagine my surprise. That day, I had a long phone call with my wife, spoke with my rater, and later called my mentor.

The next day, we contacted a realtor, and I started preparations to achieve better technical proficiency that I knew I would need in this new challenge. I began studying Army programs, refreshing my Military Decision Making Process (MDMP) awareness, and reviewing my knowledge of Soldier Warrior Tasks and Battle Drills (WTBD). I would not be the first 27D SGM to be a unit CSM, just the first to serve in the specific type of unit I was designated for. This was daunting and exciting at the same time. This was also not the first time I had to serve outside of the normal 27D key and developmental assignments; but this time, it mattered more—at the organizational leadership level, more peoples’ lives would be my responsibility. I would have an important role in a garrison environment and an even more impactful role if we ever needed to operate in a tactical environment. Beginning this assignment with as much technical knowledge as I could gather in the little time I had to prepare to move was pivotal, I felt, to mission success.

My first 100 days as a BN CSM were very stressful, and I realized how

much I would rely on the technical skills I attempted to refresh prior to taking on this job. Since we supported brigade and division elements throughout the world, I averaged about four hours of sleep most nights—keeping a turbulent organizational operational tempo. We found ourselves with a potential U.S. Central Command deployment on the horizon and countless field exercises (company, battalion, brigade, and division level) every other month. I had to leverage my tactical field craft often. Officially, I was the senior trainer and enlisted leader in the battalion. I was trusted to know what right looked like in terms of setting up unit assembly areas, operator level maintenance of equipment and vehicles, professional development of NCOs, company sergeants’ time training, WTBD, unit mission essential task list training, and mentoring first sergeants (1SGs) to run life support operations in a field environment. I was supposed to know exactly where to place everyone on the battlefield in support of Reception, Staging, Onward-Movement, and Integration (RSOI). I recount all this in an effort to explain the technical knowledge I had to have (and build from scratch) as a foundation to ensure my unit and I could be tactically successful at our mission.

Because of the type of unit that I was assigned to, I was required to be an advisor to a battalion and brigade staff—I was expected to know MDMP and ensure courses of action met the commander’s intent or end state long before he could make a decision. We had many junior officers with between two and three years of service, and our battalion had over sixty different MOSs assigned. I found myself creating binders with MOS charts and information that I would study prior to any office calls or open door sessions with leaders and Soldiers. I used a miniscule amount of my 1SGs’ time in meetings and required them to be out with their platoons and squads rather than in an office. I had information everywhere to enable me as a leader to ensure my organization could achieve success. I empowered the staff NCOs to support their officers in charge and quickly reach shared understanding of the mission. I made it my purpose not to miss an opportunity to learn about everyone and offer advice or influence a decision.



27D Advanced Individual Training students put their new knowledge into practice under the supervision of NCO paralegals at the JAGEX in June 2021 at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

These technical-type practices helped me to improve upon my role as an organizational leader and fulfill most of my responsibilities to my commander and my organization. At my level, I shared counsel and best practices with my 1SGs, platoon sergeants, and staff section NCOs in charge. It is no secret that most units are manned below seventy-five percent—thus, many times, I was called to serve at the operational level as the brigade CSM. And, due to our operational tempo and requirements, one of my 1SGs or platoon sergeants would follow suit and serve in a higher capacity. We had a “next man up” mentality, a practice of “train your replacement,” which allowed us to eliminate most of the single points of failure within the organization. There was typically

a primary and alternate for every additional duty and responsibility on the books.

I practiced many of these functions long before I ventured into a broadening position as a BN CSM. Technical versus tactical has always been part of our dual professional. In some assignments, you might begin to wonder, “Which side am I on?” Service in the Army in a technical leader capacity can include some tactical leader roles. A senior paralegal NCO serving at a brigade combat team (BCT) legal office or a senior or chief paralegal NCO serving at an office of the staff judge advocate (OSJA) still has to get to know their Soldiers. They still have to ensure training happens; they have to assist the unit commander and 1SG with personnel readiness of everyone in the BCT

legal office or OSJA. Many times, I have heard of legal office personnel not attending unit training events because there is so much work to be done; yet, most times, unit leaders try to micromanage legal personnel because of this exact assumption. They want ownership because they are not sure of the availability and readiness of the legal team.

Senior paralegal NCOs are primarily enablers to the unit leadership. They provide progressive reports of the readiness of their small team and they must fulfill training requirements. They share the responsibility with the OSJA leadership on a technical level since they are usually the liaison to the operational unit. However, these technical roles sometimes go ignored. I served and liaised with many units in my

career. Most unit leaders appreciate our technical (advisory) role. Yet we add more value when we can share more in common with our unit (client). When assigned to the 82d Airborne Division, jump and run often; at the 101st Airborne Division, complete air assault school; at the 10th Calvary Division, complete your spur ride . . . the list goes on and on. We have to embrace organizational culture, regardless of the type of unit or role we serve in. So the answer to where you belong—technical versus tactical in our dual profession—is, of course, both. You may combine those roles at times, you might exclusively do technical work for a period of time, but then switch to a more tactical role. The ability to combine these approaches is the embodiment of our role as paralegal and Soldier/NCO.

The Judge Advocate General recently spoke about principled counsel<sup>7</sup> and being able to advise on the law and still provide genuine counsel. Like many of you, I had to learn this technique early in my career. You have likely experienced how unit leaders do not always want to hear the “legal guy” recite black-and-white rules. Sometimes they know you, as the person sharing the law, are not supportive of their risky plans. Most times, they just want to affirm that their gut decision to do (or not do) something that may be supported by another leader—not just negated by law or policy. A prime example of this is unit fundraisers. Units always need more money to support unit activities. When confronted with these questions of what they could or could not do to raise funds, I was the good idea fairy. I sought out my legal team to affirm what I already knew: that the rules were quite restrictive. Yet, through their principled counsel, the legal team understood my dilemma as a unit leader, and we all learned. We pushed the envelope a lot but, because I was technically proficient, I knew where to draw the line.

I recently told a company commander that he could not have Soldiers pay \$10.00 to wear civilian clothes to work on Fridays as a fundraiser. My simple response was, “Sir, you are the commander, you can make the uniform of the day whatever you want it. It’s not safe [to your career] to have your Soldiers pay you to make that decision. Go see legal.” Here, I leveraged my technical

knowledge to support my organizational leader role. The commander had to listen to me because we shared the same boss—and he wanted to keep his job. A few days later, a member of the legal team told me that they squared the young company commander away.

Throughout our Army, there are highly desired positions that require poise, confidence, tact, knowledge, skills, and a certain level of trust and competence. Whether tactical or technical knowledge, experience incorporates those two types of skills. Our professional development model suggests we should pursue operational assignments, generating force, or broadening assignments. I do not believe there is a balance. I prefer to believe it is exposure.

In our field, we must expose ourselves to all three types of assignments to be better leaders—people who provide tasks, purpose, direction, and motivation to others to accomplish something that they otherwise would not do. A senior paralegal NCO does this as well as a unit platoon sergeant or drill sergeant. Exposure to these different levels and types of leadership allows us, as technical professionals, a better understanding of our organizational leaders as our clients. To that end, master sergeants should have the desire to be 1SGs. Most 1SGs share the responsibility with a company commander to directly lead units and have to know everything about their sixty-five-plus-person company. Most chief paralegal NCOs have to know everything about their forty-five-person office (the OSJA). They are both leaders, yet most times, the 1SG has more opportunities to leverage tactical knowledge and responsibility that is inherent at the organizational level. Exposure at these levels allows one to step out of each role as needed and allows talent managers to assess Soldiers’ potential for future assignments.

Field craft or tradecraft—tactical or technical proficiency. All NCOs need to know both. We need to inculcate in our junior Soldiers the obligation and desire to maintain themselves, their arms, and their equipment. The more that we expose our junior Soldiers to, the more prepared they will be when they fall into roles that influence decisions. When the opportunity arises for them to put on a leader hat versus

a legal hat, they will be ready to wear both simultaneously because, through lifelong learning, they get exposure to various opportunities that will build them as multi-dimensional leaders.

Ask yourself—when was the last time you, your junior Soldiers, or your judge advocate actually found a packing list, loaded a tactical vehicle, strapped on a forty-five-pound ruck, drove or walked to a field site, spent at least seventy-two hours without the comforts of garrison to set up a tent, and executed WTBD field craft?<sup>8</sup> We owe it to ourselves to practice these perishable skills to maintain military readiness. We dual professionals need our minds to enable us to leverage our knowledge, skills, and experiences to enhance lethality within the Army. Our leadership and technical counsel allow our clients to focus on their mission while we address the administrative legal distractions that detract from readiness. We should avoid the potential identity crisis: “balancing tactical or technical leadership.” Instead, we should be certain of who we are and create a paradigm of exposure to leadership in organizational and technical roles that yield lethality with an appreciation of competence from such a unique and storied career field. **TAL**

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## Notes

1. “Fieldcraft is an essential element of tactical knowledge that leaders must understand, teach, and enforce during both training and operations. Fieldcraft encompasses all of the techniques associated with operating and surviving in austere, hostile field conditions.” U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 4-19. (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].
2. *Soldier’s Creed*, U.S. ARMY, <https://www.army.mil/values/soldiers.html> (last visited Dec. 4, 2020).
3. *NCO Creed*, U.S. ARMY, <https://www.army.mil/values/nco.html> (last visited Dec. 4, 2020).
4. ADP 6-22, *supra* note 1.
5. *Id.* para. 4-18 (describing tactical knowledge).
6. *Id.* para. 4-20 (describing technical knowledge).
7. Lieutenant General Charles N. Pede, The Judge Advocate Gen., U.S. Army, Address at the Worldwide Continuing Legal Education Course: Principled Counsel (Sept. 28, 2019).
8. ADP 6-22, *supra* note 1, para. 4-19.



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## Practice Notes

# Are Mercenaries the Future of Warfare?

By Colonel Jeffrey S. Thurnher

*Mercenaries . . . are useless and dangerous. And if a prince holds on to his state by means of mercenary armies, he will never be stable or secure.<sup>1</sup>*

*Frankly, . . . we need to accept the fact that mercenaries are here to stay, and they will change warfare as we know it.<sup>2</sup>*

Mercenaries have been used since the dawn of war.<sup>3</sup> For much of history, it was preferable to rent an existing, trained force rather than going through the expense of creating one from within.<sup>4</sup> From the mid-nineteenth century through the end of the twentieth century, as nation-states developed professional militaries, mercenaries fell out of favor. In recent years, however, there has been a tremendous resurgence in the use of mercenary forces on the battlefield.<sup>5</sup> While Machiavelli may have discouraged their use over five-hundred years ago, many nations appear to have adopted the modern-day sentiment of Professor Sean McFate from the National Defense University: mercenaries are an accepted and growing element of warfare.

One of the most prolific users of mercenaries is Russia, which has used such groups to expand its presence and influence in various hotspots around the world. Rather than deploying large numbers of military forces into conflict zones, Russia has increasingly sent mercenaries to accomplish the mission.<sup>6</sup> The use of these opaque forces is intended to provide plausible deniability for any involvement and to shield the Russian government from responsibility.<sup>7</sup> These Russian efforts represent a dangerous geopolitical trend. They also present unique legal challenges in terms of state responsibility and accountability under the law of armed conflict.

In the era of great power competition, judge advocates (JAs) need to be aware of these battlefield developments. They must be

prepared to provide the right context legal advice to commanders about how best to deal with these emerging forces. This article will assist in that preparation by detailing the contemporary uses of Russian mercenaries, the laws applicable to them, and recommendations for advising commanders about these groups.

## Contemporary Uses of Russian Mercenaries

Ranging from the Tsarist days through the Soviet era, Russia has a long history of employing mercenaries to fight battles.<sup>8</sup> Under Vladimir Putin's leadership, the practice has evolved and increased.<sup>9</sup> With Putin's consolidation of the various security apparatuses, and an abundance of skilled military veterans following the collapse of the Soviet Union, the conditions were ripe for an expanded reliance on these quasi-state forces.<sup>10</sup> With Russia seeking to re-emerge as a global power, mercenary groups provide low-cost options to rapidly send forces to support favored authoritarian regimes or friendly military leaders.<sup>11</sup> Russia views these groups as particularly attractive because they operate under legal ambiguity and allow for plausible deniability. These dynamics led to the formation of numerous Russian private mercenary groups.

The most prolific of these Russian mercenary organizations is the Wagner Group.<sup>12</sup> It is headed by Yevgeny Prigozhin, a Russian oligarch and close Putin ally.<sup>13</sup> Wagner, like most other Russian mercenary groups, operates worldwide—despite being officially outlawed under Russian law, which prohibits mercenaries and all private military security contractors.<sup>14</sup> Instead, Wagner is registered using a series of shell corporations located outside of Russia.<sup>15</sup> Through its close ties to Russian Special Forces and other security service elements, Wagner has access to sophisticated weapons and intelligence.<sup>16</sup> Its worldwide actions are coordinated with Putin's regime to advance Russia's national interests and expand Russian influence.<sup>17</sup>

The Wagner Group supported Russia's efforts in Syria several years before the official entry of Russian military forces into the conflict. Wagner, operating at the time as a predecessor firm known as the Slavonic Corps, was contracted to protect

Syrian military depots and various oil fields in eastern Syria. The mercenaries, however, were not simply guarding static sites. As the Islamic State of Iraq and Levant and other groups began having success against the Syrian regime, Wagner increasingly began participating alongside regime forces in offensive combat operations to retake territory.<sup>18</sup> Even through present day, Wagner Group elements have remained engaged in these types of combat operations in Syria—thus, playing a variety of roles that complement the mission of Russian uniformed forces.<sup>19</sup>

Wagner was also instrumental in helping Russia accomplish its goals in the Ukraine. Elements of Wagner are suspected to have been associated with the "little green men" and Russian forces, both regular and irregular, who helped annex Crimea in early 2014.<sup>20</sup> In eastern Ukraine, they engaged in some of the heaviest direct fighting against Ukrainian forces. Equipped with new Russian armored trucks and other key military items, Wagner Group elements have fought alongside separatist forces across the Donbass region.<sup>21</sup> Russia employed these mercenaries, rather than its military, to avoid domestic scrutiny for casualties and to falsely claim all the fighters were indigenous separatists.<sup>22</sup>

Russia is further employing this mercenary model in Venezuela and across Africa as it seeks expanded influence and access to natural resources and basing rights.<sup>23</sup> The Wagner Group is having one of its biggest impacts in Libya where it is helping a Russian ally in an ongoing civil war. The Wagner Group deployed several hundred snipers and others to Libya in 2019 to support the militia fighting against the United Nations-recognized government in Tripoli.<sup>24</sup> The experienced mercenaries provided an immediate military advantage on the battlefield, tipping the balance in favor of the militia.<sup>25</sup> Wagner elements even destroyed an American unmanned vehicle flying over Libya using advanced Russian-made air defense artillery.<sup>26</sup> These actions led the commander of U.S. Africa Command to condemn Wagner as being a "destabilizing" element helping Russia expand its footprint in Africa.<sup>27</sup>

The contemporary use of mercenaries is far reaching and formidable. Russia is not

alone in the use of these shadowy forces. Mercenaries have become more prevalent in various corners of the globe, including helping the government in Nigeria fight against Boko Haram, and assisting the Saudi-led coalition in Yemen.<sup>28</sup> Given the limited pushback and relative success Russia and others have had using mercenaries, one should expect to see them employed more often in the future.

## Applicable Law

With this trend of relying on mercenaries likely to continue, JAs must understand how these groups are classified under international law. Legal advisors need to provide commanders with timely advice about the complicated legal framework surrounding mercenary groups.

Under the 1907 Hague Conventions, there was no prohibition on mercenaries working for a warring nation.<sup>29</sup> They were treated as comparable members of the nation's official military force. The parties to the 1949 Geneva Conventions (GC) did not directly address the role of mercenaries. They did, however, potentially afford them prisoner of war status protections under the Third Geneva Convention (GC III), Article 4(a), but only if the person qualified as accompanying the armed forces of a party to the conflict.<sup>30</sup>

The first major treaty to detail the legal obligations of mercenaries is the 1977 First Additional Protocol to the Geneva Conventions [AP I].<sup>31</sup> Article 47 of AP I prohibits a mercenary from qualifying as a lawful combatant or obtaining prisoner of war status.<sup>32</sup> It provides a six-part definition of who qualifies as a mercenary, to include a requirement that the person must be motivated by a "desire for private gain."<sup>33</sup> These rules apply only in international armed conflicts. A study conducted by the International Committee for the Red Cross (ICRC) claims that Article 47 is reflective of customary international law, but the United States disagrees with that assessment.<sup>34</sup> The Department of Defense Law of War Manual details the U.S. position that being a mercenary is not considered a crime under international law.<sup>35</sup> The manual further explains how the United States determines whether mercenaries are disqualified from being combatants or



(Credit: kaninstudio – stock.adobe.com)

prisoners of war simply for being paid for their services.<sup>36</sup> The United States does, however, believe mercenaries must follow the law of armed conflict and can be tried and punished for any violations.<sup>37</sup>

While the United States does not adopt the AP I position as being customary, it is important to remember that many U.S. allies are AP I treaty members and do consider it binding law. Additionally, some U.S. partners have also signed onto a 2001 International Convention against the Recruitment, Use, Financing, and Training of Mercenaries which extended prohibitions against mercenary groups in both international and non-international armed conflicts.<sup>38</sup> Judge advocates working in international coalitions need to be mindful of the potential for varied legal interpretations amongst the coalition partners.

The Wagner Group and other similar Russian organizations dispute being labeled as mercenaries. These groups regularly refer to themselves as private military security contractors (PMSCs) or similar descriptions.<sup>39</sup> They claim they do not fall under the AP I six-part definition of mercenaries.<sup>40</sup> The distinction between mercenaries and PMSCs is not always clear, but the rules for mercenaries have done little to regulate groups like Wagner. Moreover, Russia intentionally blurs these

lines and takes advantage of these perceived definitional gaps.<sup>41</sup>

Given the definitional uncertainty, JAs must also focus on the rules applicable to PMSCs. Security contractors do not have a separate legal classification under international law, nor are they specifically regulated under customary international law.<sup>42</sup> While some commentators have called this situation a “vacuum,” the members of PMSCs do, nevertheless, fall under the longstanding law of armed conflict dichotomy of being either a combatant or a civilian. Depending on their role and affiliation with a state party to the conflict, members of PMSCs could be classified under GC III, Article 4, in a few different ways.<sup>43</sup> Legal advisors must carefully examine these factors as each of the different statuses would affect various legal aspects, such as whether the contractor would be entitled to prisoner of war status and under what situations the contractor could be targeted or detained.

In a major 2008 international effort known as the Montreux Document, states sought to address some of the perceived PMSCs legal gaps by adopting a set of best practices for PMSCs.<sup>44</sup> Russia refused to sign onto the agreement or force its PMSCs to adhere to the practices.<sup>45</sup> Similarly, the PMSCs’ industry created an International

Code of Conduct for Private Security Service Providers for which individual firms pledge to follow international law; but, the Wagner Group has not yet committed to the code.<sup>46</sup>

Instead, Russia has purposely sought to take advantage of these legal gaps and use groups like Wagner to help it avoid state responsibility.<sup>47</sup> Russian leadership has used extensive disinformation campaigns to consistently deny any ties to Wagner and other mercenary groups and to disavow any role in directing their activities.<sup>48</sup> Additionally, in 2018, President Putin decreed that all information related to firms cooperating with Russian intelligence would be classified.<sup>49</sup> This action ensured communications between Wagner and Russian officials would remain secret.<sup>50</sup>

There are many benefits for Russia if it succeeds in maintaining the illusion of separation between itself and Wagner. When Russia exclusively uses mercenary groups in an armed conflict, it can claim to not be involved in the conflict. Thereby, it might avoid scrutiny under *jus ad bellum* or the United Nations Charter’s non-interference principles.<sup>51</sup> Russia’s obfuscation may also affect the character and applicable law of some non-international armed conflicts as their official entry into the conflict might otherwise transform it into an international



armed conflict.<sup>52</sup> Furthermore, under international law, the conduct of a group is attributed to the state—if the state directs or controls the group.<sup>53</sup> Russia’s deliberate disinformation is intended to help it avoid accountability for any mercenary misconduct. Until the law potentially evolves, one should expect nations like Russia to continue to rely on groups like Wagner.<sup>54</sup>

### Providing Legal Advice About Mercenary Groups

Judge advocates must be prepared for battlefield encounters with mercenary groups. Legal advisors will be expected to provide advice on the thorny legal issues about whether mercenaries can be targeted or detained. This is not a hypothetical risk. In early 2018, U.S. forces located in eastern Syria came under an armored assault from several hundred Wagner Group members operating in support of pro-Syrian regime forces.<sup>55</sup> A four-hour firefight ensued, and estimates indicate more than one-hundred Russian mercenaries were killed in the exchange.<sup>56</sup> With Russia expanding its mercenary presence around the world, the potential for similar interactions with U.S. forces will only increase in the future.

Given the likely interactions with mercenaries on the battlefield, JAs need to anticipate the issues related to detention and treatment of these personnel. The United States does not view the mere act of being a mercenary as a crime under international law.<sup>57</sup> Thus, mercenaries may be afforded Prisoner of War (POW) status, but only if they meet the requirements thereof—such as being considered a member of the militia or the armed forces of the nation. Depending on the circumstances, however, there may be doubt with respect to the status of these detained mercenaries. In cases of doubt, the United States would determine through a competent tribunal (commonly referred to as an “Article 5 tribunal”) whether the personnel are entitled to POW status or should instead be treated as unprivileged belligerents.<sup>58</sup> Article 5 tribunals provide a forum during a conflict for a detained individual to address a panel of three commissioned officers and assert whether they are entitled to POW status.<sup>59</sup> Normally, JAs serve as non-voting recorders for these tribunals; and, as part of

the operational planning effort, they play a key role in the planning and developing of them. Furthermore, mercenaries—whether deemed unprivileged belligerents, POWs, or (regardless of status) having committed violations of the law of armed conflict—can potentially be prosecuted for war crimes. Judge advocates would undoubtedly serve in critical roles if such prosecutions took place using courts-martial, military tribunals, or military commissions.

Judge advocates also have a role to play in helping America’s great power competition against Russia. America needs to highlight Russia’s illicit use of mercenaries and detail how it violates international law and facilitates corruption around the world.<sup>60</sup> Legal advisors must be vigilant for law of armed conflict violations involving mercenary groups. Russian mercenaries have been implicated in several atrocities. For example, Wagner has been accused of torture, human rights abuses, and the killing of three reporters who were investigating their operations in the Central African Republic.<sup>61</sup> Judge advocates can help work with commands to detail and expose the abuses of Russian mercenaries. Using that information, America can attempt to implicate Russian state responsibility and pressure Russia to reform its conduct.

### Conclusion

Some might contend Russia’s use of mercenaries is the functional equivalent of the United States relying heavily on contractor groups, such as Blackwater, during the height of the wars in Iraq and Afghanistan. Such a comparison, however, is tremendously flawed. While the United States consistently hires legally-registered contractor firms, Wagner is a “covert creation” of the Putin regime.<sup>62</sup> Russia intentionally obscures its connections to Wagner, but the United States publicly announces the deployment of its contractor personnel.<sup>63</sup> Moreover, as opposed to Russia, the United States demands all armed contractors receive individual training on the law of armed conflict and the use of force.<sup>64</sup> Although the United States has faced criticism for deploying armed contractors to the battlefield, U.S. practices differ fundamentally from those of Russia.

To prepare for the fluid combat situations of Battlefield Next, national security law professionals need to stay attuned to these emerging participants of war. It is almost assured that mercenaries will play a role in future conflicts. These contracted forces provide the ambiguity and flexibility that America’s great power competition adversaries seek, and JAs must be at the vanguard in helping identify the legal implications of these mercenary groups for their commanders and units. **TAL**

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### Notes

1. NICCOLO MACHIAVELLI, *THE PRINCE* 42 (Oxford University Press 2008) (1513).
2. SEAN MCFATE, *THE NEW RULES OF WAR: VICTORY IN THE AGE OF DURABLE DISORDER* 125 (2019).
3. *Id.*
4. *Id.*
5. *Id.* at 128.
6. CANDACE RONDEAUX, *DECODING THE WAGNER GROUP: ANALYZING THE ROLE OF PRIVATE MILITARY SECURITY CONTRACTORS IN RUSSIAN PROXY WARFARE* 1, 6-7 (2019), <https://www.newamerica.org/international-security/reports/decoding-wagner-group-analyzing-role-private-military-security-contractors-russian-proxy-warfare/>.
7. Anna Borshchevskaya, *Russian Private Military Companies: Continuity and Evolution of the Model*, FOREIGN POL’Y RSCH. INST. 1 (Dec. 2019), <https://www.fpri.org/wp-content/uploads/2019/12/rfp4-borshchevskaya-final.pdf>.
8. Kimberly Marten, *Russia’s Use of Semi-State Security Forces: The Case of the Wagner Group*, 35 POST-SOVIET AFFS. 181, 181 (2019).
9. Borshchevskaya, *supra* note 7, at 2.
10. RONDEAUX, *supra* note 6, at 7.
11. Borshchevskaya, *supra* note 7, at 6.
12. Marten, *supra* note 8, at 184.
13. Dionne Searcey, *Gems, Warlords and Mercenaries: Russia’s Playbook in Central African Republic*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/30/world/russia-diamonds-africa-prigozhin.html>. See also *Ep. 62: Wagner and Russian Private Military Contractors*, DEF. ONE (Jan. 15, 2020), <https://www.defenseone.com/ideas/2020/01/ep-62-wagner-and-russian-private-military-contractors/162447/>.
14. However, Russian law does provide some legal options for Russian oil and gas businesses, and others, to employ private security contractors to protect their overseas interests. These rules are intended to offer security protection, which is fundamentally different from what is offered by mercenary groups like Wagner. Russian firms, however, have consistently

exploited gaps in these rules. Borshchevskaya, *supra* note 7, at 6.

15. Marten, *supra* note 8, at 192.

16. *Hearing to Receive Testimony on United States Africa Command and United States Southern Command in Review of the Defense Authorization Request for Fiscal Year 2021 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 4 (2020) (statement of Gen. Stephen J. Townsend, U.S. Army, Commander, U.S. Africa Command) [hereinafter Statement of Gen. Townsend].

17. *Hearing to Receive Testimony on United States Africa Command and United States Southern Command in Review of the Defense Authorization Request for Fiscal Year 2020 and the Future Years Defense Program: Hearing Before the S. Comm. on Armed Servs.*, 116th Cong. 32-33 (2019) (statement of Gen. Thomas D. Waldhauser, U.S. Marine Corps, Commander, U.S. Africa Command).

18. RONDEAUX, *supra* note 6, at 45.

19. NATHANIEL REYNOLDS, PUTIN'S NOT-SO-SECRET MERCENARIES: PATRONAGE, GEOPOLITICS, AND THE WAGNER GROUP (2019), [https://carnegieendowment.org/files/GlobalRussia\\_NateReynolds\\_Vagner.pdf](https://carnegieendowment.org/files/GlobalRussia_NateReynolds_Vagner.pdf).

20. Borshchevskaya, *supra* note 7, at 9.

21. Marten, *supra* note 8, at 193.

22. *Id.*

23. Benoit Faucon & James Marson, *Russia Leans on Mercenary Forces to Regain Global Clout*, WALL ST. J. (Feb. 23, 2020), <https://www.wsj.com/articles/russia-leans-on-mercenary-forces-to-regain-global-clout-11582482577>. Russian mercenaries have appeared in the African nations of Zimbabwe, Central African Republic, Guinea, Sudan, the Democratic Republic of Congo, and several others. See ANDREW S. WEISS & EUGENE RUMER, CARNEGIE ENDOWMENT FOR INT'L PEACE, NUCLEAR ENRICHMENT: RUSSIA'S ILL-FATED INFLUENCE CAMPAIGN IN SOUTH AFRICA (2019). These private groups train and fight alongside local military forces and help Russia gain tremendous influence. Searcey, *supra* note 13. For example, according to the U.S. Africa Command commander, the Wagner Group's extensive influence in Central African Republic has extended to the highest levels of the government—including their president. PAUL STRONSKI, CARNEGIE ENDOWMENT FOR INT'L PEACE, LATE TO THE PARTY: RUSSIA'S RETURN TO AFRICA 5-27 (2019).

24. David D. Kirkpatrick, *Russian Snipers, Missiles and Warplanes Try to Tilt Libyan War*, N.Y. TIMES, <https://www.nytimes.com/2019/11/05/world/middleeast/russia-libya-mercenaries.html> (June 18, 2020).

25. *Id.*; Michael Weiss & Pierre Vaux, *Russia's Wagner Mercenaries Have Moved into Libya*, DAILY BEAST, <https://www.thedailybeast.com/russias-wagner-mercenaries-have-moved-into-libya-good-luck-with-that> (Sept. 28, 2019, 1:32 AM).

26. Statement of Gen. Townsend, *supra* note 16, at 4.

27. *Id.*

28. McFATE, *supra* note 2, at 134-35. Some groups have even advocated that the United States should look to mercenaries to handle their long-standing counterinsurgency efforts in Afghanistan. Erik D. Prince, *The MacArthur Model for Afghanistan*, WALL ST. J., (May 31, 2017), <https://www.wsj.com/articles/the-macarthur-model-for-afghanistan-1496269058>.

29. Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War

on Land, Oct. 18, 1907, 36 Stat. 2310; Peter W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 526 (2004).

30. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(a), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Singer, *supra* note 29, at 526.

31. Katherine Fallah, *Corporate Actors: The Legal Status of Mercenaries in Armed Conflict*, 88 INT'L REV. RED CROSS 599, 603 (2006).

32. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47, 8 June 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

33. *Id.* art. 47. A mercenary is a person who: "(a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces." *Id.*

34. INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW r. 108 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL para. 4.21 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL].

35. LAW OF WAR MANUAL, *supra* note 34, para. 4.21.

36. *Id.*

37. *Id.*

38. International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, Oct. 20, 2001, 2163 U.N.T.S. 75. Neither the United States nor Russia have signed onto this convention. CTR. FOR HUMAN RTS. & RULE OF L. INITIATIVE, AM. BAR ASS'N, THE LEGAL FRAMEWORK REGULATING PROXY WARFARE 17 (2019).

39. These types of entities are also commonly referred to as private military contractors, private security contractors, or private military firms.

40. For example, they contend they perform their missions for more than merely private gain, relying on broader justifications—such as performing the missions in part for their reputation or their connection to a state. Marten, *supra* note 8, at 183; Borshchevskaya, *supra* note 7, at 4.

41. Singer, *supra* note 29, at 534. RONDEAUX, *supra* note 6, at 6.

42. Louis Doswald-Beck, *Private Military Companies Under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATIONS OF PRIVATE MILITARY COMPANIES 115 (Simon Chesterman & Chia Lehnardt eds. 2007).

43. For example, PMSC employees could conceivably be deemed to be part of the armed forces of a party to the conflict, part of a militia, as a person who accompanies the armed forces, or as a civilian taking a direct part in hostilities. *Id.* at 116-27.

44. The Montreux Document was a Swiss and ICRC-led initiative. It has been adopted by more than fifty states, including the United States and several of its key allies. INT'L COMM. OF THE RED CROSS, THE MONTEUX DOCUMENT (2009); INT'L COMM. OF THE RED CROSS, PRIVATE MILITARY AND SECURITY COMPANIES: IMPLEMENTATION OF MONTEUX DOCUMENT (2004), <https://www.icrc.org/en/document/private-military-and-security-companies-implementation-montreux-document>.

45. See RONDEAUX, *supra* note 6, at 17.

46. INT'L CODE OF CONDUCT ASS'N, INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (2010), [https://www.icoca.ch/en/the\\_icoc](https://www.icoca.ch/en/the_icoc).

47. WEISS & RUMER, *supra* note 23.

48. REYNOLDS, *supra* note 19; Maria Tsvetkova, *Russian Clinic Treated Mercenaries Injured in Secret Wars*, REUTERS (Jan. 7, 2020, 6:44 AM), <https://www.reuters.com/article/us-russia-putin-mercenaries-exclusive/exclusive-russian-clinic-treated-mercenaries-injured-in-secret-wars-idUSKBN1Z61A7>.

49. Marten, *supra* note 8, at 184-85.

50. *Id.*

51. Colonel Shane R. Reeves & Major Ronald T. P. Alcala, *Five Legal Takeaways from the Syrian War*, HARV. L. NAT'L SEC. J. ONLINE 1, 4 (2019), [https://harvardnsj.org/wp-content/uploads/sites/13/2020/03/Reeves-Alcala\\_Five-Legal-Takeaways-from-the-Syrian-War.pdf](https://harvardnsj.org/wp-content/uploads/sites/13/2020/03/Reeves-Alcala_Five-Legal-Takeaways-from-the-Syrian-War.pdf).

52. *Id.*

53. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrong Acts art. 8 (Dec. 12, 2001); CTR. FOR HUMAN RTS. & RULE OF L. INITIATIVE, *supra* note 38, at 14-17; Reeves & Alcala, *supra* note 51, at 4.

54. Reeves & Alcala, *supra* note 51, at 4.

55. McFATE, *supra* note 2, at 132.

56. Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html>.

57. LAW OF WAR MANUAL, *supra* note 34, para. 4.21.

58. U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE para. 1-64 (Aug. 2019).

59. U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (Oct. 1, 1997).

60. STRONSKI, *supra* note 23, at 5-27.

61. Searcey, *supra* note 13.

62. REYNOLDS, *supra* note 19.

63. Heidi Peters, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020*, CONGR. RSCH. SERV. 1-2 (Feb. 22, 2021); OFF. OF THE ASS'T SEC. OF DEF. FOR SUSTAINMENT, *Contractor Support of U.S. Operations in the USCENCOM Area of Responsibility* (Jan. 2021), [https://www.acq.osd.mil/log/ps/CENTCOM\\_reports.html/FY21\\_1Q\\_5A\\_Jan2021.pdf](https://www.acq.osd.mil/log/ps/CENTCOM_reports.html/FY21_1Q_5A_Jan2021.pdf).

64. U.S. DEP'T OF DEF., INSTR. 3020.50, PRIVATE SECURITY CONTRACTORS (PSCs) OPERATING IN CONTINGENCY OPERATIONS, HUMANITARIAN OR PEACE OPERATIONS, OR OTHER MILITARY OPERATIONS OR EXERCISES encl. 3 para. 1.a.(3)(d) (22 July 2009) (C1, 1 Aug. 2011).



A Soldier holds an American flag prior to the start of an oath of citizenship ceremony at Fort Knox, Kentucky. (Credit: Eric Pilgrim)

## Practice Notes

# Defending Your MAVNI Client Security Clearance Revocations and Separations

*By Captain Vy T. Nguyen*

Your client tells you their commander is involuntarily initiating separation proceedings against them and they are worried this can lead to them being removed from the United States. They entered the Service through the Military Accessions Vital to the National Interest (MAVNI) program, have served for almost one year on active duty, and have not yet naturalized. Your client hands you a small, four-page packet from the Office of the Deputy Chief of Staff (DCS) G-1, notifying them that the Department of Defense (DoD) Consolidated Adjudication Facility (CAF) has rendered

an adverse Military Service Suitability Recommendation (MSSR) against them. Attached to the memorandum is an Acknowledgment of Notice and Election sheet and an unclassified summary of the Counterintelligence (CI)-Screening Interview and screening assessment. The screening assessment is one paragraph, finding your client has foreign ties to their family members, which poses a concern that cannot be mitigated. Nothing else follows. What do you do?

## MAVNI Program Background

Between 2008 and 2016, 10,400 individuals enlisted in the U.S. military through the MAVNI program.<sup>1</sup> At its inception in 2008, the MAVNI program aimed to recruit certain legally-present aliens whose skills are vital to the national interest.<sup>2</sup> Those skills include high-demand, low-density skills

## Given the tension between the program's strategic goals and its security concerns, MAVNI recruits now face volatile consequences.

such as medical specialties and expertise in certain languages.<sup>3</sup> In return, MAVNI applicants are offered an expedited path to U.S. citizenship.

Eventually, "MAVNIs" encapsulated a group of recruits with diverse backgrounds and unique circumstances. At the time of enlistment, applicants were either asylees, refugees, holders of Temporary Protected Status, beneficiaries of the Deferred Action for Childhood Arrivals policy, or in another nonimmigrant category.<sup>4</sup> The program also allowed administrative waivers for certain applicants who lost their legal status but who were otherwise eligible for enlistment under the MAVNI program.<sup>5</sup> For these applicants, it also imposed a complementary requirement for the Service to ensure they obtained Deferred Action from the Department of Homeland Security.

As concerns grew over whether these foreign-born recruits posed an increased security concern, the program became more restrictive.<sup>6</sup> In 2016, the DoD established new security screening requirements.<sup>7</sup> It imposed a yearly cap on the number of enlistments per military department and an annual reporting requirement to Congress.<sup>8</sup> Although the program was suspended in 2017, and resumed in 2018, the DoD is reportedly not accepting new applicants to the MAVNI program.<sup>9</sup> Notably, parts of these restrictions have been successfully challenged in civilian courts.<sup>10</sup>

Given the tension between the program's strategic goals and its security concerns, MAVNI recruits now face volatile consequences. Legal practitioners struggle

to choose between pursuing recourse through the civilian judicial system and recourse through regular security clearance channels.<sup>11</sup>

Ultimately, representing a MAVNI client requires familiarity with CI processes, administrative separation procedures, and immigration law. When I was a newly

commissioned judge advocate (JA) starting my first duty position as a legal assistance attorney, I didn't even know what I didn't yet know. Now, after tumultuous experiences with my own MAVNI clients, I at least know what I wish I had known when I met my first MAVNI client. So, whether you are a first-term JA or first-time MAVNI counsel, this article seeks to assist you in the early stages of responding to security concerns.

### What Makes a MAVNI Client Different

Any Service member can face security clearance denial, suspension, or revocation, but a separate process exists for MAVNIs. Ordinarily, Service members facing security revocation will receive a notice of intent to revoke their security clearance from the DoD CAF containing a statement of reasons for the action. The MAVNI Service members receive an MSSR from DoD CAF where the immediate reasons for their separation are contained in a summarized CI statement. It may seem like a mere difference of nomenclature; but, in practice, the MAVNI process is complicated by frequent ad hoc policy changes, a lack of transparency, and varying standards based on the individual who applied it and the time at which it was applied.

Moreover, the length of time for MAVNIs to respond before they are removed from Service will depend on their duty status. For example, if your client is in the Reserve or National Guard, they will have the opportunity to respond directly to the DCS G-1 before the DCS G-1 issues a

Military Service Suitability Determination (MSSD). Their chain of command will only be directed to initiate separation proceedings in accordance with Army Regulation (AR) 135-18 after your client receives an adverse MSSD.<sup>12</sup> In contrast, if your client is on active duty, the DCS G-1 memorandum will direct their chain of command to initiate separation within thirty days of your client's signed acknowledgment and election sheet. Your client's only opportunity to respond to the MSSR will be through that separation process. And then—if your client is afforded the opportunity to respond—hopefully, they have not already declined that opportunity before coming to see you.

To top it off, there are high-stake immigration consequences. For instance, your MAVNI client has either not yet naturalized and is foremost concerned about their continued eligibility for naturalization; or, they were already naturalized and are concerned about their continued employment and/or denaturalization. Either type of MAVNI client can fall out of legal status. Therefore, both can face removal from the United States.

### Your Ten-Point Checklist

#### 1. Apply a Critical Eye to the Underlying Information

When you first read the DCS G-1 packet, do not take the information at face value. After all, a lot has happened in your client's clearance adjudications process up to this point.<sup>13</sup> Prior to shipping to basic training or serving any time on active duty, each MAVNI applicant completed security screening requirements, including 1) the National Intelligence Agency Check (NIAC), 2) the CI-Screening Interview, and 3) Tier 3 or Tier 5 background investigations and/or polygraphs, as applicable. Your client will have also submitted a Standard Form (SF) 86, *Questionnaire for National Security Positions*. The CI-Security Interview will be based on the findings of the NIAC, review of the SF-86, and standard questions from the Service and DoD CAF. These findings will be forwarded to the DoD CAF to support the National Security Determination (NSD). The DoD CAF will also have rendered the NSD based on thirteen National Adjudicative Guidelines.<sup>14</sup>

The NSD/MSSR/MSSD process has changed over the years, in part due to judicial challenges. This includes the right for your MAVNI client to 1) receive notice of a negative determination, which was only required by policy beginning in 2018<sup>15</sup> and 2) to not undergo continuous monitoring, a requirement that otherwise was compulsory only from those who possessed the highest clearance levels.<sup>16</sup> As a result, expect the amount and quality of information you receive for each client to vary.

Furthermore, the MAVNI program is an interdepartmental, interagency effort, so it is essential for you to know the “how” and “to whom” when submitting a Freedom of Information Act (FOIA) request.<sup>17</sup> To that end, your first task should be to draft and submit three FOIA requests: one for the CI-Screening from the U.S. Army Intelligence and Security Command; another for any final reports, recommendations, or adjudicative decisions made by DoD CAF; and a third for your client’s SF-86 from the Defense Counterintelligence and Security Agency.<sup>18</sup> If your client kept a copy of their SF-86, it could save you a lot of time. Otherwise, prepare for a potentially lengthy wait for FOIA request results.<sup>19</sup> Though you can submit a request for expedited review in certain circumstances, at the outset of a separation proceeding, request an additional thirty to forty-five days to allow for the expected receipt of FOIA request results.

## **2. Get to Know Your Client’s Circumstances**

Your legal strategy must account for the potential impact on your client’s retention and immigration status. Some questions to consider include: Does your client want to stay in the Service and are they inside their reenlistment window? Your client would have a vested interest in expeditious processing through the command channel. What is your client’s current legal status? If it looks like they will lose their permanent residency, advise them to consult an immigration attorney sooner rather than later. Did they commit a past immigration violation, intentionally or unwittingly? This could increase their chances of removal from the United States and, as their attorney, you should make them aware. Could their responses to the security clearance concerns reveal that past violation and

subject them to immigration proceedings? Regardless of the answers to these questions, you should review their responses for incriminating statements. Keep in mind that these are just some of the things for you to issue-spot as you work with your MAVNI client.

Talk to your client and draw out their narrative summary. Ask questions such as: What does your client remember about the interview? What was their English language skill level at the time of the interview versus now? That four-page packet your MAVNI client initially hands you likely only contained a single-paragraph summary of a CI agent’s impression of them at a time when they might not have spoken English well.

## **3. Help Your Client Respond**

Once the FOIA results return, advise your client to write a pointed response addressing why each concern in the CI-Summary is either wrong or can be mitigated. All Service members are evaluated against thirteen National Adjudicative Guidelines which assess their reliability, loyalty, and trustworthiness to include: Allegiance to the United States, Foreign Influence, and Foreign Preference.<sup>20</sup>

Each Guideline lists example conditions that could mitigate the security concern. For example, “Guideline B: Foreign Influence” is concerned with foreign contacts and interests which could result in divided allegiance.<sup>21</sup> So, contact with foreign family members can create a concern if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.<sup>22</sup> This concern may be mitigated in the following circumstance: if the nature of the relationship, the country in which these persons are located, or positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign entity and the interests of the United States.<sup>23</sup>

The CI-Screening will include a narrative question and answer and the screener’s conclusions. After reading the CI-Summary, what does the client think could have triggered a security concern? Compare the narrative Q&A with the

CI-Summary to determine the heart of the security concern(s). Advise your client to round out the facts about the circumstances underlying the security concern(s). Show them the guidelines and talk through evidence they could provide to explain, refute, mitigate, and/or correct the security concern(s). Focus their efforts on building a solid narrative statement and gathering letters of support. Edit for grammar and clarity, but try to preserve their voice.

## **4. Research**

Based on your initial consultation and while you wait for FOIA results, compare how your client’s security concerns have been adjudicated in other cases. Look in JA community repositories, including JAGCNet and milSuite, to see if other JAs have dealt with a client in similar circumstances.<sup>24</sup> For more nuanced issues, take advantage of public databases which track the latest immigration policy changes.<sup>25</sup> Next, refer to the handbook for security clearance adjudicators to understand the criteria adjudicators must apply.<sup>26</sup> Most importantly, scrub the DoD CAF and Defense Office of Hearings and Appeals (DOHA) websites. The DOHA is an administrative office with quasi-judicial powers to review security clearance appeals. While DOHA decisions have no precedential value, reading through analogous cases—such as those involving contractors—provide insight into the minds of administrative law judges.<sup>27</sup>

Consider also how your local standard operating procedures could impact your client’s circumstances. For example, installation policy may require Soldiers to begin transition assistance programs in anticipation of initiating separation proceedings. Your MAVNI client should anticipate being removed from a meaningful position and ordered to attend classes about life after the military before they will have the opportunity to respond to the MSSR.

And then, if you have time—whether in an in-processing brief or through information papers—practice preventive law. By doing this, other MAVNIs who go through this revocation process can at least know they have somewhere to turn and then seek legal help before they potentially waive their right to respond.

### **5. Gather Support from Your Client's Command Team**

With your client's permission, reach out to their chain of command. If their command wants to retain them, ask them to provide detailed letters of support that address their impression of your client's reliability, loyalty, trustworthiness, and—if they know—the enumerated security concern(s). They should also emphasize your client's value to the unit. Because CI interviews likely only lasted a few hours, and the summary is based on the impressions of a single screening officer, letters from the command

forwards it through your client's G-1 to the MAVNI Operations Team, the packet undergoes a multi-step review process that includes routing through the office of the Assistant Secretary of the Army—Manpower and Reserve Affairs. Clients and JAs can send requests for status updates to the MAVNI Operations Team general inquiries mailbox.<sup>29</sup> The MSSR memorandum should provide a point of contact, which may be either a specific person in the Enlisted Accessions Branch at HQDA or the MAVNI Operations Team general inquiries mailbox. If they are not aware of the steps to take,

representation for your MAVNI client, it is professional to convey a seamless transition between attorneys; and, it is critical that efforts are complementary.

You can view this Legal Assistance Office-TDS handoff and early coordination as analogous to the military justice advisor preparing a case in anticipation of court-martial and in close consultation with the litigators. Consider creating a joint, local standard operating procedure between the two sections, as this could alleviate some of the stress caused by an opaque security clearance process and also yield better results than ad hoc efforts whose success or failure rests on the motivation of the individual JA.

## **So, your task will be to provide an explicit explanation of why your client does not pose a security concern by contrasting their enumerated security concern(s) and mitigating evidence against the DOHA decisions and adjudicator handbook.**

team can carry significant weight. This is because the unit has spent far more time with them and is better positioned to know the Soldier.

When considering who to ask, consider those in a position of authority who could provide specific, objective assessments of their Soldier—whether it is their commander or a senior noncommissioned officer. If the individual providing a character reference is also an immigrant, see if their situation is analogous to your client's experience and turned out favorably.<sup>28</sup>

### **6. Steward the Process**

Commanders, staff sections, and JAs alike tend to shy away from anything involving immigration. That, coupled with a process with which few have any experience, creates bottlenecks and a general unwillingness of responsible parties to take actions needed to process your client's paperwork efficiently. Consequently, it is critical you—as an advocate for your MAVNI—be a good steward of the process.

One way to do this is to know where and through whom paperwork should be transmitted. Once the separation authority signs your client's separation packet and

refer your client's security manager(s) questions regarding interim security clearance eligibility to the DCS G-2, Personnel Security Branch. Follow up with the HQDA point(s) of contact, the commander, and/or the security manager(s).

Your job will be to ensure your client has received the complete separation packet and the paperwork is being transmitted in a timely manner. At the same time, be sure to manage your client's expectations and prepare them for lengthy periods of time where they likely will not receive further answers.

### **7. Coordinate Early**

Ideally, your legal strategy incorporates all stakeholders as early in the process as possible. You must know whether the Client Services office handles the whole process on your installation or whether Trial Defense Service (TDS) would be willing to be involved before the unit initiates separation proceedings. Once separation proceedings are initiated, does TDS handle the case exclusively? There are fewer worse experiences for a client than believing their chances slipped away due to a careless handoff or disjointed legal strategy. So, while it is impractical to provide joint

### **8. Build the Due Process Argument**

As counsel, draft a memorandum that highlights the procedural difficulties your client faced. Advocate for them based on how their experience contravenes AR 635-200's due process requirements.<sup>30</sup> As previously mentioned, MAVNIs were not always entitled to receive notice of a negative determination, nor were they required to undergo continuous monitoring—even though their non-MAVNI counterparts did not receive notice of negative determination and were required to undergo continuous monitoring.

It may initially seem reasonable to require initiation of administrative separation in your client's case, just as command teams would be required in other serious cases (e.g., drug abuse). But then you find the basis for your MAVNI client's derogatory information—usually that they have foreign ties to their family members—cannot be mitigated. And you realize that a program which aimed to hire foreign-born recruits will, as a matter of course, find that recruit has foreign ties. The consequence of the program's strategic goals and its post-facto security concerns are apparent. So, your task will be to provide an explicit explanation of why your client does not pose a security concern by contrasting their enumerated security concern(s) and mitigating evidence against the DOHA decisions and adjudicator handbook.

### 9. Manage Your Client's Retention Expectations

Ensure your client is aware that, regardless of the outcome, a copy of the MSSR memorandum will be placed in their Army Military Human Resource Record. While this process is pending, a code will appear on their record brief that can prevent them from reenlisting. Although this can have the practical effect of a bar to reenlistment, the DD Form 214, *Certificate of Release or Discharge from Active Duty*, will not contain the same separation code.<sup>31</sup>

Clearly explain to your client that losing their military employment is a possibility. Reassure them that you will help them through this process to the best of your ability, but also encourage them to develop a secondary course of action. Discuss their preferences for civilian employment, including public service positions that will require similar security checks.

### 10. Do Not Avoid Immigration Law

No one expects you to be an immigration expert simply because you are representing a MAVNI client. But immigration consequences will be at the forefront of their concerns. Just as you would research other areas of law for your client, limited by your State rules of professional responsibility, you should put forth the effort to understand the basic framework of U.S. immigration laws and procedures.

Remember also that active duty Soldiers are afforded greater due process than Reserve and National Guard Soldiers. After serving longer than 180 days, they cannot be separated with uncharacterized discharges. For Reserve Soldiers, the U.S. Citizenship and Immigration Service does not treat an uncharacterized discharge as an honorable discharge, which could affect the client's eligibility for naturalization. Even those who were naturalized may not be completely shielded; through a series of subsequent events, denaturalization may be a possibility. For example, if during their background investigation they were found to have naturalized by illegally procuring citizenship or by concealment of a material fact or by willful misrepresentation, naturalization may be revoked.<sup>32</sup> Naturalization through wartime military service may also be revoked if they are discharged under

other than honorable conditions within a period or periods aggregating five years.<sup>33</sup> For those without valid status, the Service is only obliged to ensure deferred action while the applicant is enrolled in the MAVNI

adverse factors—such as family ties within the United States, residence of long duration in the country, evidence of hardship to the respondent and their family if removal occurs, honorable service in the U.S. armed

## The best thing you can do is empower your MAVNI client to help themselves; prepare them to prove the merits of their own case.

program; therefore, out-of-status clients may face removal upon separation. In most circumstances, the U.S. immigration system is only easy for those with limitless time, money, and stability.

Nevertheless, recall that MAVNI recruits are a diverse population. Its members could have a conditional, rather than a permanent, residency status; they could be waiting to naturalize through their military service; or, they could have naturalized prior to service. Depending on their immigration status at the time their security clearance is revoked, MAVNI recruits can face various immigration concerns. Moreover, the outcome of a case can vary widely between federal circuits throughout the country, even between immigration officers in the same office or judges within a single immigration court. Caution your client against catastrophizing and encourage them to seek an immigration attorney early and often. Refer them to pro bono immigration legal services approved by the U.S. Department of Justice to avoid *notario fraud*.<sup>34</sup>

In the meantime, advise them that proving they qualify for any immigration benefits and/or protection from removal will be their burden. If they express fear of returning to their country of origin, ask them the basis for those fears and if they have any supporting documentation. Consult U.S. Department of State country reports to corroborate their concerns.<sup>35</sup> Certain protections may apply to those who fear persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion.<sup>36</sup> Some discretionary applications turn on a balancing test of positive equities and

forces, and evidence of value and service to the community.<sup>37</sup> The best thing you can do is empower your MAVNI client to help themselves; prepare them to prove the merits of their own case.

### Conclusion

Representing a MAVNI client is an uphill battle, especially if you are unfamiliar with CI processes, administrative separation procedures, and immigration law. Unlike other Service members, this security clearance revocation and mandatory separation may not be just a matter of losing their job. With the long delays and confusing processes, their patriotic journeys in pursuit of the American dream are held in unceremonious suspense. But, if you apply a critical eye to their case, pay attention to the responsible proponents, strive to understand the basics of immigration law, and care enough to steward the process, your attorney-client relationship should provide your client with much-needed reassurance and understanding. **TAL**

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*CPT Nguyen is the Resolute Support Train, Advise, Assist Command-South and Kandahar Airfield Command Judge Advocate.*

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### Notes

1. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-416, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER HANDLE, IDENTIFY, AND TRACK CASES INVOLVING VETERANS 1, 7 (2019) [hereinafter GAO REPORT].
2. 10 U.S.C. § 504 (b)(2). 10 U.S.C. § 504(b)(2) provides a statutory basis for the Military Accessions Vital to the National Interest (MAVNI) program. The Office of the Secretary of Defense implemented the MAVNI pilot program in 2009 and it was subsequently authorized through 30 September 2017. *Id.*

3. By January 2018, MAVNI Soldiers represented more than 30 percent of the Army's strategic language speakers. GAO REPORT, *supra* note 1.
4. Memorandum from the Under Sec'y of Def. to the Sec'y of Army et al., subject: Military Accessions Vital to the National Interest Pilot Program Extension (30 Sept. 2016) (including nonimmigrant categories E, F, H, I, J, K, L, M, O, P, Q, R, S, T, TC, TD, TN, U, and V) [hereinafter *Military Accessions Memorandum*]; BRYCE H. P. MENDEZ ET AL., CONG. RSCH. SERV., R45343, FY2019 NATIONAL DEFENSE AUTHORIZATION ACT: SELECTED MILITARY PERSONNEL ISSUES 1, 13 (2018). See also *Nonimmigrant Classes of Admission*, HOMELAND SEC. (Dec. 28, 2017), <https://www.dhs.gov/immigration-statistics/nonimmigrant/NonimmigrantCOA> (listing nonimmigrant categories such as temporary workers and their families as well as students and exchange visitors and their dependents); *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/temporary-nonimmigrant-workers> (Sept. 7, 2011).
5. MARGARET D. STOCK, *IMMIGRATION LAW & THE MILITARY 20-21* (2d ed. 2015); U.S. CITIZENSHIP & IMMIGR. SERVS., *Military Service During Hostilities (INA 329)*, in 12 POLICY MANUAL, <https://www.uscis.gov/policy-manual/volume-12-part-i-chapter-3> (Mar. 10, 2021).
6. One of the security concerns was that clients had "foreign born parents"; however, that was known at the time of application, given the nature of the program.
7. *Military Accessions Memorandum*, *supra* note 4.
8. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 521, 132 Stat. 1636, 1755 (2018).
9. See MENDEZ ET AL., *supra* note 4; GAO REPORT, *supra* note 1. See also Memorandum from Dep't of Army to Deputy Chief of Staff, G-1, subject: Temporary Suspension of Separation Actions Pertaining to Members of the Delayed Entry Program (DEP) and Delayed Training Program (DTP) Recruited Through the Military Accessions Vital to National Interest (MAVNI) Pilot Program (20 July 2018) [hereinafter *Memorandum of Temporary Suspension*].
10. See *Tiwari v. Shanahan*, No. 17-cv-242 (W.D. Wash. 2019) (enjoining the DoD from requiring a biennial series of National Intelligence Agency checks for continuous monitoring or security clearance eligibility purposes in the absence of individualized suspicion). See also *Calixto v. U.S. Dep't of the Army*, Civil Action No. 18-1551 (D.D.C. May 16, 2019) (awaiting certification as a class action on behalf of all persons subject to final discharge or separation since 30 September 2016, whose discharge or separation has not been characterized by the Army and whose final discharge or separation decision was made without being afforded due process—including adequate notice of the discharge grounds, an opportunity to respond, and due consideration of the Soldier's response by the Army); *Nio v. U.S. Dep't of Homeland Sec.*, Civil Action No. 17-0998 (D.D.C. Mar. 4, 2019) (alleging unlawful delay of Service member naturalization by imposing additional citizenship qualification and criteria not required by law); *Kirwa v. U.S. Dep't of Def.*, 315 F. Supp. 3d 266 (D.D.C. 2017) (filing a class action suit on behalf of those who have not received Form N-426 certifications of honorable service from the DoD).
11. See, e.g., Sean Bigley, *What's New in the World of MAVNI*, CLEARANCEJOBS (Jan. 31, 2021) <https://news.clearancejobs.com/2021/01/31/whats-new-in-the-world-of-mavni/> (noting a substantial number of MAVNI recruits receiving favorable adjudication after a period of no movement on their appeals until summer 2020); Lorelei Laird, *When Things Go Wrong, Immigrants Serving in the Military Look to Margaret Stock*, ABA J. (Jan. 1, 2019, 1:05 AM), [http://www.abajournal.com/magazine/article/immigrants\\_military\\_margaret\\_stock\\_mavni](http://www.abajournal.com/magazine/article/immigrants_military_margaret_stock_mavni).
12. U.S. DEP'T OF ARMY, REG. 135-178, ARMY NATIONAL GUARD AND RESERVE ENLISTED ADMINISTRATIVE SEPARATIONS (7 NOV. 2017).
13. See *Military Accessions Memorandum*, *supra* note 4, attach. 1, 2, as modified by Memorandum from the Under Sec'y of Def. to Sec'y of the Military Dep't. et al., subject: Military Accessions Vital to the National Interest Pilot Program (13 Oct. 2017) (detailing screening requirements); OFF. OF THE DIR. OF NAT'L INTEL., SECURITY EXECUTIVE AGENT DIRECTIVE 4, NATIONAL SECURITY ADJUDICATIVE GUIDELINES (8 June 2017) [hereinafter *DIRECTIVE 4*] (establishing the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position).
14. *DIRECTIVE 4*, *supra* note 13 (providing the adjudicative guidelines as (i) Allegiance to the United States, (ii) Foreign Influence, (iii) Foreign Preference, (iv) Sexual Behavior, (v) Personal Conduct, (vi) Financial Considerations, (vii) Alcohol Consumption, (viii) Drug Involvement and Substance Misuse, (ix) Psychological Conditions, (x) Criminal Conduct, (xi) Handling Protected Information, (xii) Outside Activities, and (xiii) Use of Information Technology Systems).
15. *Memorandum of Temporary Suspension*, *supra* note 9.
16. *Tiwari v. Shanahan*, No. 17-cv-242 (W.D. Wash. 2019).
17. See U.S. DEP'T OF DEF., MANUAL 5200.02, PROCEDURES FOR THE DoD PERSONNEL SECURITY PROGRAM (PSP) (3 Apr. 2017) (CI, 29 Oct. 2020) (designating proponent responsibilities, investigative requirements, and determination authorities).
18. OFF. OF MGMT. & BUDGET, INV 100, FREEDOM OF INFORMATION/PRIVACY ACT RECORDS REQUEST FOR BACKGROUND INVESTIGATIONS (Mar. 2020). You should submit a copy of two forms of government-issued identification and the form OMB No. 3206-0259 to the Defense Counterintelligence and Security Agency (DCSA). *Id.* See also Exec. Order No. 13,869, 84 Fed. Reg. 18125, § 925 (Apr. 24, 2019). Note that, effective 27 September 2019, DCSA's predecessor—the National Background Investigation Bureau—officially transferred from the Office of Personnel Management to the Department of Defense. *Id.*
19. 5 U.S.C. § 552(a)(6)(A), (B) (prescribing twenty working days to respond and a ten-day extension for unusual circumstances such as voluminous records or need for consultation with another agency). For more information on FOIA, see 32 C.F.R. pt. 286, DoD Freedom of Information Act Program (2020); U.S. DEP'T OF DEF., DIR. 5400.07, DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (5 Apr. 2019); U.S. DEP'T OF DEF., MANUAL 5400.07, DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (25 Jan. 2017); U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (19 Oct. 2020).
20. *DIRECTIVE 4*, *supra* note 13.
21. *Id.* at 9.
22. *Id.*
23. *Id.* at 10.
24. See, e.g., *JAGConnect-Legal Assistance*, MILBOOK, <https://www.milsuite.mil/book/groups/army-legal-assistance> (last visited Mar. 29, 2021) (note that access to the website's content requires membership in the group).
25. See, e.g., *1064 Policies*, IMMIGR. POL'Y TRACKING PROJECT, <https://immpolicytracking.org/policies/> (last visited Mar. 15, 2021) (tracking changes from 2017 through 2021); MAVNI FED. CLASS ACTION LITIG., <https://dcfederalcourtmavninclasslitigation.org/> (last visited Mar. 15, 2021).
26. U.S. DEP'T OF DEF., ADJUDICATIVE DESK REFERENCE (Mar. 2014).
27. DEF. OFF. OF HEARINGS & APPEALS, <https://search.usa.gov/search?affiliate=doha> (type in relevant adjudicative guideline into the search bar; then select relevant result) (last visited Jan. 25, 2020).
28. Digital signatures and/or notarized handwritten signatures can contribute to the credibility of their authors.
29. The MAVNI Operations Team is nested in Headquarters, Department of the Army (HQDA) DCS, G-1 (DAPE-MPA). The email address for the MAVNI Operations Team's general inquiries is [usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil](mailto:usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil). See the appendix for more addresses and contact information of agencies involved in the security clearance revocation and separation process, current as of 19 March 2021.
30. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 Dec. 2016).
31. U.S. DEP'T OF ARMY, REG. 601-210, REGULAR ARMY AND RESERVE COMPONENTS ENLISTMENT PROGRAM (31 Aug. 2016).
32. See 8 U.S.C. § 1451(a).
33. 8 U.S.C. § 1440(c).
34. *Notario fraud* is a form of fraud involving individuals holding themselves out to be qualified to offer legal advice or services without possessing such qualifications. See *About Notario Fraud*, AM. BAR ASS'N (Nov. 11, 2020), [https://www.americanbar.org/groups/public\\_interest/immigration/projects\\_initiatives/fightnotariofraud/about\\_notario\\_fraud/](https://www.americanbar.org/groups/public_interest/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud/).
35. See *Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE, <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/> (last visited Mar. 29, 2020). See also *Country Conditions Research*, U.S. DEP'T OF JUST., <https://www.justice.gov/eoir/country-conditions-research> (Oct. 9, 2020) (click on the letter for the country that you wish to view; select the country that you wish to view; and click on the relevant file).
36. 8 U.S.C. § 1101(a)(42)(A).
37. *Id.* §§ 1229a(c)(4)(A)(ii), 1229b.



## Appendix: Agency Contact Information

The most difficult part of defending a MAVNI client is the lack of agency transparency. Therefore, here are the proponents and contact information available at the time of publication discussed throughout this article:

Proponent	Contact Information
Under Secretary of Defense (USD)	Under Secretary of Defense Attn: Personnel and Readiness 4000 Defense Pentagon Washington, DC 20301-4000
Assistant Secretary of the Army, Manpower and Reserve Affairs (ASA M/RA)	Assistant Secretary of the Army Attn: Manpower and Reserve Affairs 111 Army Pentagon, Room 2E460 Washington, DC 20310-0111 (703) 697-9253
DoD Consolidated Adjudications Facility (DoD CAF)	DoD Consolidated Adjudications Facility Attn: Privacy Act Office 600 10th Street Ft. George G. Meade, MD 20755-5615 <a href="https://www.dcsa.mil/mc/pv/dod_caf/resources/">https://www.dcsa.mil/mc/pv/dod_caf/resources/</a>
Office of the Deputy Chief of Staff (DCS), G-1	Office of the Deputy Chief of Staff, G-1 Attn: Accessions Division and/or MAVNI Operations Team 300 Army Pentagon Washington, DC 20310-0300 <a href="mailto:usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil">usarmy.pentagon.hqda-dcs-g-1.mbx.dmpm-mavni-ops@mail.mil</a>
Office of the Deputy Chief of Staff (DCS), G-2	Office of the Deputy Chief of Staff, G-2 Attn: Personnel Security Branch 1000 Army Pentagon Washington, DC 20310-1000 <a href="mailto:uarmy.pentagon.hqda-dcs-g-2.mbx.g-2-personnel-security@mail.mil">uarmy.pentagon.hqda-dcs-g-2.mbx.g-2-personnel-security@mail.mil</a> (703) 695-3060
U.S. Army Intelligence and Security Command (INSCOM)	U.S. Army Intelligence and Security Command Attn: IAMG-C-FOI 2600 Ernie Pyle Street, Room 32502-B Ft. George G. Meade, MD 20755
Defense Office of Hearings and Appeals (DOHA)	Defense Office of Hearings and Appeals Claims Division – Reconsideration P.O. Box 3656 Arlington, Virginia 22203-1995 <a href="mailto:dohastatus@osdgc.osd.mil">dohastatus@osdgc.osd.mil</a> <a href="https://ogc.osd.mil/Defense-Office-of-Hearings-and-Appeals/">https://ogc.osd.mil/Defense-Office-of-Hearings-and-Appeals/</a> 1-866-231-3153
Defense Counterintelligence and Security Agency (DCSA)	Defense Counterintelligence and Security Agency Attn: FOI/PA office OPM-FIPC PO Box 618 Boyers, PA 16018
Freedom of Information Act/Privacy Act (FOIA/PA)	<a href="mailto:FOIPARRequests@nib.gov">FOIPARRequests@nib.gov</a>
U.S. Citizenship and Immigration Service (USCIS)	Military Help Line (877) 247-4645 TTY (800) 877-8339 <a href="mailto:militaryinfo@uscis.dhs.gov">militaryinfo@uscis.dhs.gov</a>
U.S. Department of Justice, Executive Office for Immigration Review (EOIR)	<a href="https://www.justice.gov/eoir/eoir-immigration-court-listing">https://www.justice.gov/eoir/eoir-immigration-court-listing</a> <a href="https://www.justice.gov/eoir/list-pro-bono-legal-service-providers">https://www.justice.gov/eoir/list-pro-bono-legal-service-providers</a> <a href="https://www.justice.gov/eoir/country-conditions-research">https://www.justice.gov/eoir/country-conditions-research</a>



(Credit: Olivier Le Moal – stock.adobe.com)

## Practice Notes

# A PR Scenario

### Responsibilities of Supervisory and Subordinate Lawyers

*By Colonel Mark Sydenham & William Martin*

The Judge Advocate General (TJAG) expects the daily actions of every member of the Judge Advocate Legal Services (JALS) to reflect an unwavering commitment to the highest standards of ethical conduct, founded on the premise that service to our nation is not only an honor, but a responsibility. This commitment requires steadfast integrity and absolute compliance with established professional conduct standards. An area of periodic discussion within the practice of law in the Judge Advocate General's (JAG) Corps is the relationship between supervisory and subordinate lawyers. This

professional responsibility relationship normally, but not always, works in tandem with either the military rank or civilian personnel structure. This relationship is governed by Army Regulation (AR) 27-26, *Rules of Professional Conduct for Lawyers*, rule 5.2.<sup>1</sup>

#### **Scenario**

Captain (CPT) Jane Army is currently serving as a trial counsel. She has been assigned a case that involves multiple charges to include a charge of sexual assault. She sees from the outset that it will

be difficult to obtain a conviction on the sexual assault charge. The facts of the case afford a plausible defense for the accused. She has reviewed the evidence and has had multiple discussions with the special victim prosecutor and chief of justice. Both recognize her concerns and, after reviewing the evidence—to include the victim’s initial statement and subsequent interview—each has a differing opinion as to the strength of the evidence, including the evidence responsive to the accused’s possible defense. Though she and the special victim prosecutor disagree, the chief of justice believes there is probable cause to prefer charges and proceed to an Article 32 preliminary hearing.

The Article 32 preliminary hearing officer recommends dismissing the charges. The chief of justice believes the Article 32 officer did not fully appreciate the evidence and recommends referral anyway. Captain Army still has reservations and requests an opportunity to discuss the case with the staff judge advocate (SJA). She meets with the SJA and presents her concerns about the case and, in particular, the defense raised by the accused during the pre-trial process. In accordance with her state bar rules, she does believe and acknowledge that there is probable cause at this time to proceed with the charges.<sup>2</sup> Captain Army’s SJA acknowledges her concerns, but professionally disagrees and advises the convening authority to refer the case to court-martial. She is disappointed that she was unpersuasive with the recommendation to withdraw the sexual assault charge. Although she recognizes the merits of the SJA’s position, she still has some reservations as to whether she can serve as trial counsel in this case as she continues to prepare for the court-martial.

Under the professional conduct rules can Captain Army continue to serve as a trial counsel with these reservations? How does the differing professional opinion of more experienced, supervisory attorneys shape her analysis? Which professional responsibility rules provide guidance to assist in resolving this dilemma?

#### **Scenario Resolution**

Captain Army dusts off her copy of AR 27-26 and lands on rule 5.2(b) (Responsibilities of a Subordinate Lawyer)

which states: “A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.”<sup>3</sup> Further, comment 2 to Rule 5.2 provides: “if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly.”<sup>4</sup>

In this case, CPT Army should continue with her trial counsel duties and prosecute this case on behalf of the Army. The accused’s potential defense, and the weight it is afforded during both the pre-trial and referral process, is a common issue that creates an “arguable question” in the military justice system.

As provided in rule 5.2, when these issues arise someone must decide on a course of action; in an Office of the Staff Judge Advocate that responsibility falls upon the SJA. Captain Army has brought her concerns to her supervisory attorneys and the case has been fully discussed. The SJA, with the input from the military justice team, has determined that probable cause has been satisfied and has provided that advice to the convening authority. With that advice, the convening authority has referred the case to court-martial. It is now the responsibility of CPT Army, as the assigned trial counsel, to zealously represent the interest of her client—the U.S. Army—at court-martial, with competence and diligence regardless of her personal reservations.

#### **Additional Fact to the Scenario**

What if two weeks before trial Captain Army receives new information that necessitates a reanalysis of one of the non-sexual assault charges? Based on her review, she determines that the information is so significant that she no longer thinks there is enough evidence to support a probable cause determination. She recalls her earlier discussion with the special victim prosecutor, chief of justice, and SJA on the sexual assault charge. She determines that with this new information there is no longer an “arguable question” regarding the sufficiency of this charge.

Under the professional responsibility rules should she continue to court-martial

in two weeks with this charge? Which additional professional responsibility rules provide guidance to assist in resolving this issue? What actions should she take?

#### **Additional Fact Resolution**

Captain Army, now very familiar with AR 27-26, knows that she must further discuss the case with her supervisors. Ever the professional, CPT Army wants to be fully prepared to brief her supervisors. She recalls that when she assumed her responsibilities her successor mentioned that as a trial counsel she may have additional responsibilities under the Rules of Professional Conduct. Reviewing the rules, she finds rule 3.8, Special Responsibilities of a Trial Counsel and Other Army Counsel. It provides in part: “A trial counsel in a criminal case shall recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn.”<sup>5</sup>

After reviewing the Rules of Professional Conduct, CPT Army is confident that she must inform her supervisory judge advocates and recommend that the SJA advise the convening authority to withdraw the charge. Captain Army informs her chief of justice of the new development, that she has already notified the defense counsel of this new information, and will continue to prepare for court-martial while waiting for the convening authority’s decision on the charge now in question.

#### **Additional Fact Bonus Scenario**

The SJA disagrees with CPT Army’s recommendation to have the convening authority withdraw this charge and directs CPT Army to continue to prosecute this charge. Any change to CPT Army’s obligation under the Rules of Professional Conduct based on the SJA’s guidance?

#### **Additional Fact Bonus Scenario Resolution**

Captain Army always has an obligation under the Rules of Professional Conduct for her own actions as a lawyer. Rule 5.2(a) provides that “[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.”<sup>6</sup> Under these circumstances and as previously discussed, “arguable questions” are decided by the



(Credit: MohamadFaizal – stock.adobe.com)

supervisory attorney and the subordinate attorney can act pursuant to the direction of the supervisory attorney. In the additional scenario, CPT Army, however, is now confident there is no “arguable question” based on the new information regarding this charge. After a final discussion with her chief of justice, CPT Army must now request that the SJA relieve her from the requirement to prosecute this particular charge. Upon further reflection, the SJA recognizes CPT Army’s ethical obligation to decline the prosecution of the offense and that they must seek a withdrawal of the charge. Captain Army can continue to prosecute the other remaining charges.

### Conclusion

These scenarios highlight the complexities of our daily practice. During their career, judge advocates will encounter numerous situations where there is an “arguable

question” that must be resolved in order for the Army to accomplish its mission. Rule 5.2 grants the authority to resolve “arguable questions” with the supervisory attorney and at the same time provides the subordinate attorney the ability to act in accordance with the supervisor’s guidance and direction. Every member of the JALS has a responsibility to know and understand rule 5.2 as it applies to both the subordinate and supervisory attorney in order to deliver premier legal support to our clients. Additionally, if you have the privilege to serve as a trial counsel you should spend some time reviewing rule 3.8 as you begin your tour in this position. **TAL**

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*COL Sydenham is the Chief of the Professional Responsibility Branch at the Office of the Judge Advocate General in the Pentagon, Washington, D.C.*

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*Mr. Martin is an Attorney-Advisor in the Professional Responsibility Branch at the Office of the Judge Advocate General, in the Pentagon, Washington, D.C.*

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### Notes

1. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 5.2 (28 June 2018) [hereinafter AR 27-26] (providing the responsibilities of a subordinate lawyer).
2. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS’N 2020) (requiring prosecutors to refrain from prosecuting a case when the prosecutor knows there is not probable cause).
3. AR 27-26, *supra* note 1, r. 5.2.
4. *Id.* cmt. (2).
5. *Id.* r. 3.8(a).
6. *Id.* r. 5.2(a).

MAJ Kyle Dietrich and SGT Jessica Fleming, 310th ESC, mobilized at Camp Arifjan, Kuwait, completed the Norwegian Ruck March in March 2021 in Kuwait. The event consisted of carrying a 25-pound assault pack or ruck sack and completing an 18.6 mile course in OCPs and combat boots. (Photo courtesy of SGT Fleming)





Mount Etna, an active volcano on the island of Sicily, is in full view behind Naval Air Station Sigonella. (Credit: Mass Communication Specialist 3d Class Jacques-Laurent Jean-Gilles)

## No. 1

# The 1985 Sigonella Episode and the Limits of the United States-Italian Relationship

By Peter Brownfeld & Ginevra Baino

Picture this: It is the night of 10 October 1985. Four Islamic terrorists with American blood on their hands are huddled in a grounded airplane in Sicily, Italy. They are surrounded by Italian and U.S. forces, but the two allied militaries are pointing their guns at one another, not at the terrorists. With the plane in the middle, the first ring is composed of Italian airmen with weapons pointed at U.S. Special Forces, who are surrounded by armed Italian *Carabinieri*. This is not science fiction. This chaotic scene took place at Naval Air Station Sigonella during the height of the Cold War; it demonstrated both the limits of the United States-Italian relationship and the constraints of international agreements, most importantly the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA).

Italy is a key platform to project power in Europe, the Middle East, and Africa. Once known for its automatic vote in favor of the United States and NATO, the friction in Sigonella showed that Washington could push Rome too hard. In an environment in which the bilateral relationship is no longer bounded by the Cold War, the incident leaves us with a question: What risks does Washington run if it bends international agreements or does not take the political context into account?

### History of U.S. Presence in Sigonella

In 1985, Italy maintained critical installations for the U.S. Army, Air Force, and Navy, and—thereby—met an indispensable need for the United States in its mission to face down the Soviets. The most important of these were the Army's sites in Vicenza and Pisa, the Air Force's in Aviano, and the Navy's in Naples and Sigonella. After World War II, U.S. forces left Italy, but returned in the 1950s for a number of reasons: to resupply U.S. forces in Germany; to establish Cold War outposts; and to project force in the Mediterranean and Middle East.

Naval Air Facility Sigonella (now Naval Air Station (NAS) Sigonella) was established in 1959 because the British facilities in Malta were unable to handle all of the U.S. military air traffic. Naval Air Station Sigonella is located near Catania on the eastern coast of Sicily. The U.S. Navy obtained NATO backing for the site, and its importance has steadily grown, with the Navy nicknaming it "Hub of the Med." Naval Air Station Sigonella now hosts thirty-six tenant commands representing the U.S. Navy, Army, Marine Corps, Air Force, and NATO.<sup>1</sup>

Naval Air Station Sigonella is an Italian Air Force installation that hosts U.S. forces under the NATO SOFA and other bilateral United States-Italian agreements. All installations in Italy that host

U.S. forces are Italian installations that have Italian commanders, with specific rights, privileges, and obligations delineated to U.S. forces.

### Geopolitical Situation in 1985

Additionally, 1985 was the year that President Ronald Reagan began his second term; his administration could see progress in its more aggressive prosecution of the Cold War. Reagan believed the way to end the Cold War was through a tough foreign policy, not obsequiousness to Moscow, and he and members of his administration became frustrated with European allies that took a softer approach. After four decades in power, the centrist Christian Democrats in Rome—longtime American allies—no longer held the Prime Minister's office. The Socialist Party (PSI) now led Italy's coalition government, with Prime Minister Bettino Craxi taking office in 1983. At the same time, international terrorism was on the rise, primarily originating from the conflict between Israel and the Palestinians.

Craxi's PSI was a minority party, but it was a dynamic one compared to the much bigger sclerotic Communist Party and Christian Democratic Party. The PSI became a kingmaker. Craxi reportedly said, "I'll show you what can be done with only 10 percent of the votes."<sup>2</sup> Craxi's foreign policy was firmly pro-NATO and anti-Communist. The clearest demonstration was his willingness to accept American cruise missiles, also known as "Euromissiles," on Italian soil in 1984 as a western response to the Soviet Union's SS-20 missiles in Eastern Europe.<sup>3</sup> At the time, it was a controversial decision for one of the leaders of the European Left. But for Craxi, the relationship with America was fundamental. When he addressed the U.S. Congress on 6 March 1985, Craxi said, "Italians and Americans have the same faith, honor the same values, defend together the same principles: peace and liberty. We understand each other. Our relationship is precious."<sup>4</sup>

However, Craxi also led the most independent foreign policy of any postwar Italian government, principally demonstrated by Rome's interest in playing a bigger role in the Mediterranean. "We cannot accept the fact that things are done and

undone in the Mediterranean without our opinion being heard or our interests being respected," Craxi said.<sup>5</sup>

Craxi was in favor of a Palestinian state and regarded Yasser Arafat's Palestinian Liberation Organization (PLO) as a legitimate partner to move toward the establishment of that state. After Craxi met with Arafat in Tunisia in 1984, he said that both the rights of the Palestinians and the legitimacy of an Israel state must be recognized.<sup>6</sup>

### Hijacking in the Mediterranean

In October 1985, the Italian cruise ship *Achille Lauro* toured the Mediterranean with 800 passengers and crew, including 16 Americans. On 7 October, most of the passengers disembarked to visit Cairo, leaving 200 people on board. A waiter surprised four of the remaining passengers who were cleaning Kalashnikov rifles in their cabin. These passengers reacted by taking first the waiter, and then the entire ship, hostage.

The Palestinian terrorists later told authorities that their intent was not to hijack the *Achille Lauro*, but to launch an attack in Israel—a later stop of the cruise.<sup>7</sup> Once the unplanned hijacking began, the terrorists demanded the release of fifty Palestinians detained by Israel.<sup>8</sup> Arafat denied any PLO involvement in the hijacking and offered the PLO's diplomatic assistance.<sup>9</sup>

At midnight on 7 October, Italy readied its special forces to liberate the ship, prepositioning them in Cyprus.<sup>10</sup> On 8 October, Craxi rejected Reagan's offer to use U.S. forces because the *Achille Lauro* was an Italian-flagged vessel. However, Rome favored negotiation, fearing a rescue operation would result in casualties. Although Washington deeply distrusted Arafat, Craxi believed the Palestinian leader was critical to a negotiated solution.<sup>11</sup>

On the second day of the hijacking, 8 October, the terrorists took a fateful action that would shape the international perception of the incident and have a significant impact on United States-Italian relations. Magid Youssef al-Molqi, one of the four terrorists, murdered an American passenger. The twenty-three-year-old native of Jordan selected Leon Klinghoffer—a sixty-nine-year-old Jewish New Yorker confined to a wheelchair—shot him twice, and

threw his body overboard.<sup>12</sup> In his court testimony, and later comments, al-Molqi indicated the murder was not part of a clear plan, but rather an increasingly desperate improvisation.<sup>13</sup>

Rome, Cairo, and the PLO were seeking a negotiated solution, and later claimed that on 8 October, they were unaware of Klinghoffer's murder.<sup>14</sup> In a deal brokered by the PLO, al-Molqi and three of his fellow terrorists were joined by Egyptian government officials and two PLO representatives. They flew on an Egypt Air flight toward PLO headquarters in Tunisia. Arafat said that he would take responsibility for the prosecution of the terrorists.

By the next day, 9 October, the Italian and American authorities were clearly aware of Klinghoffer's murder, and Washington found the PLO's negotiated solution unacceptable. Four U.S. fighter jets intercepted the Egypt Air flight and compelled it to change course towards NAS Sigonella.<sup>15</sup>

The legality of the U.S. approach was questionable. Even assuming that the United States enjoyed jurisdiction over the terrorists, there is the question of whether unilateral use of force was permissible under international law, namely under the Charter of the United Nations (the U.N. Charter)<sup>16</sup> and customary international law. The interpretation of the prohibition of the use of force and the exception of self-defense under the U.N. Charter has arguably broadened over the decades in the framework of the war on terror. In the 1980s, the exceptions to the prohibition of the use of force under Article 2 of the U.N. Charter were defined narrowly.<sup>17</sup> As provided under Article 51 of the U.N. Charter and customary international law, this assessment holds particularly true with regard to unilateral use of force as self-defense.<sup>18</sup>

The traditional approach is spelled out in the *Nicaragua* case from the International Court of Justice, which set a threefold limitation to the permissibility of unilateral use of force against terrorists.<sup>19</sup> First, self-defense against armed attacks by non-state actors was admitted in principle, but only under rather stringent rules on attribution—i.e., that the state against which self-defense was directed had to exercise "effective control [over] the military



or paramilitary operations” in question.<sup>20</sup> Second, self-defense should be available only in response to grave infractions of the prohibition against the use of force.<sup>21</sup> Finally, under the traditional approach, Article 51 and customary international law entitled states to “resort to force only defensively, in the presence of an armed attack and to the extent necessary to repel it.”<sup>22</sup>

United States forces’ interception of the Egypt Air flight was an act directed against a third state, to which the terrorists’ acts were not attributable. It would not be regarded as “necessary to repel” the “armed attack,” as the interception took place after the terrorists surrendered to the Egyptian authorities. In sum, it is hard to make the argument that the interception of the plane was permissible under international law.<sup>23</sup>

At the time, an internal Italian Ministry of Foreign Affairs legal analysis cited the NATO SOFA and the 1954 Bilateral Infrastructure Agreement and concluded two things: 1) the United States’ use of NAS Sigonella as a landing ground for forcing down the Egypt Air plane was “inappropriate” and 2) there were legal grounds to complain to NATO or U.S. authorities.<sup>24</sup>

As the planes approached Sicily, Reagan called Craxi and asked for permission to land at NAS Sigonella. Craxi granted permission; but, because he knew that the United States wanted to capture the terrorists, he had an armed force surround and protect the plane.

Immediately after the plane landed, a U.S. military plane landed and fifty Special Forces Soldiers disembarked. These Soldiers formed a ring around the Italian airmen. Wanting to further reinforce its position, the Italian government then sent in Italy’s militarized police, the *Carabinieri*, to form an outer ring. Now, there were two NATO allies facing off on an Italian Air Force installation that hosted the U.S. Navy. Italian Admiral Fulvio Martini recalled: “There were three concentric circles around the airplane. Ours were in Italian territory defending national law and would not move without precise orders. At all costs, the Americans intended to bring the four terrorists to the United States.”<sup>25</sup>

At the time, the *New York Times* offered this account:

When the Egyptian 737 pulled to a stop on the runway, several dozen Americans from the Army Delta Force clambered out of a C-141 transport plane that had just arrived and surrounded the civilian plane. Italian paramilitary *Carabinieri* also quickly converged on the plane. “Our intentions were to take the Palestinians off the 737, hustle them onto the C-141 and take off for the United States,” an Administration official said. “The Italian commander objected. We surrounded the plane, and then the Italians surrounded us.” Outside the closed airplane, the commanding general of the Delta Force unit and an Italian colonel argued over custody of the hijackers while more and more Italian troops from the joint United States-Italian air base converged on the scene . . . . An Administration official said the Americans had placed trucks in front of and behind the Egyptian plane to keep it from moving. The Italians did the same with the American plane. “There were some heated exchanges,” an official said.<sup>26</sup>

These servicemen, used to serving alongside one another, had to answer to their political masters—a cold warrior in Washington who gave no quarter to terrorists, and a prime minister in Italy who wanted to be loyal to NATO, but also wanted his nation to be a bridge between Europe and the Arab world.

### Whose Jurisdiction?

The United States forced the Egypt Air flight to land at NAS Sigonella because it was the closest military facility with a U.S. presence. However, the use of Sigonella in this manner raises questions about America’s adherence to the NATO SOFA. Article VII of the NATO SOFA prescribes that the sending State enjoys “exclusive jurisdiction over persons subject to the military law of that State with respect to offences . . . punishable by the law of the sending State, but not by the law of the receiving State.”<sup>27</sup> The sending State enjoys concurrent jurisdiction with the receiving State with regard to offences punishable by the law of both States.<sup>28</sup> The NATO SOFA

did not entrust the sending State with jurisdiction over nationals of a third party with regard to offenses committed on a vessel cruising under the flag of the receiving State.

Craxi rejected Reagan’s request to immediately fly the terrorists to the United States, saying that would not be legal without Italy’s judiciary reviewing the extradition request.<sup>29</sup> Craxi insisted that Italy had the right to try the terrorists because the criminal acts took place on an Italian ship in international waters.<sup>30</sup> The stance of the Italian government was, at this stage, supported by international law. Article 92 of the Law of the Seas Convention of 1982 states, “ships shall sail under the flag of one State only and . . . shall be subject to the exclusive jurisdiction on the high seas.”<sup>31</sup>

The U.S. claims of jurisdiction were weaker. United States officers labeled the acts of the terrorists as piracy and, in 1992, so did the U.S. District Court for the Southern District of New York.<sup>32</sup> Effectively, the terrorists met the definition of “pirates” under U.S. law and practice, but the same is not as clear under international law.<sup>33</sup> The law of nations considers pirates *hostis humani generis*—enemy of the mankind—“whom any nation in the interest of all capture and punish.”<sup>34</sup> It is the so-called universal jurisdiction, entitling all states to prosecute the authors of certain crimes. The 1982 Law of the Sea Convention states that pirates must be onboard a different ship from that seized. Therefore, the framing of the seizure of the *Achille Lauro* as piracy is doubtful, especially in that it fails to meet the so-called two ship requirement. And, it is worth noting that—in this case—the terrorists were passengers of the *Achille Lauro*.<sup>35</sup>

Alternatively, the United States could rely on the passive personality doctrine, according to which states enjoy extraterritorial jurisdiction if one of their nationals is the victim of the offense. However, the doctrine’s legitimacy was questioned in the *Lotus* case from the Permanent Court of International Justice;<sup>36</sup> and, most importantly, one of the doctrine’s major opponents has traditionally been the United States itself.<sup>37</sup> Finally, the United States could claim jurisdiction under the United States-Italy Bilateral Extradition Treaty

of 1983, also known as the “Extradition Treaty.”<sup>38</sup> The terrorists were accused of piracy, murder, kidnapping, and hijacking. Each of these acts qualify under Article II of the Extradition Treaty, which makes any offense which is punishable by deprivation of liberty for more than one year an extraditable offense. According to Article VII of the Extradition Treaty, however, extradition may be refused if “the person caught is being proceeded against by the requested Party for the same acts for which extradition is required.”<sup>39</sup> Because the acts committed by the terrorists aboard the *Achille Lauro* were punishable under Italian criminal law, in so far as Italy had intended to exercise and effectively exercised jurisdiction against the terrorists, it could legitimately refuse extradition.

The U.S. State Department’s Italy Desk Officer, Thomas Longo, who was called in to interpret between Reagan and Craxi, recalled,

Citing constitutional and legal reasons—since the ship was Italian and at Sigonella the culprits were now within Italian territorial jurisdiction—Craxi refused, begging Reagan’s understanding. I can still hear Craxi’s voice quavering at the prospect of Americans and Italians shooting at each other on the runway. Reagan and Craxi agreed the Italians would assume custody pending a legal extradition request from Washington through diplomatic channels.<sup>40</sup>

### Stepping Away from the Edge

United States and Italian forces were in a standoff starting at 0016 on 11 October when the Egypt Air plane landed at Sigonella. When Craxi did not back down, the U.S. forces withdrew at 0530. Escorted by two Italian fighters, the plane then flew to Ciampino airport in Rome. It was also followed by a U.S. fighter, which requested permission to execute an emergency landing immediately after the Egypt Air plane landed. The pilot claimed mechanical problems. The U.S. plane landed and then taxied in front of the Egypt Air plane to block its departure. The U.S. plane withdrew only after the airport commander threatened to bulldoze the plane off the runway.<sup>41</sup>

At this point, Craxi made a fateful decision. Because the Egypt Air plane had an extraterritorial status, he asked Cairo for permission to arrest the four terrorists, which Cairo granted.<sup>42</sup> The Egypt Air plane qualified as a “state aircraft” under Article 3(b) of the International Convention on Civil Aviation of 1944, according to which: “aircraft used in military, customs, and police services shall be deemed to be state aircraft.”<sup>43</sup> Under customary international law, state aircraft enjoy immunity from foreign jurisdiction in respect to search and inspection and, of course, arrest.<sup>44</sup> The waiver of immunity is ordinarily negotiated at the time when authorization to land is requested. In this case, the Egypt Air plane was forced to land at Sigonella by U.S. fighters; permission to arrest had to be requested afterwards.

However, instead of acceding to the United States’ request to also arrest alleged mastermind Mohammed Abbas and the PLO official with whom he traveled, Italy arranged for them to leave Italy on 12 October via a chartered flight to Yugoslavia.<sup>45</sup>

Rome justified this move, arguing that the extraterritorial status of the airplane prevented it from arresting the PLO representatives without Egypt’s permission and that it was not possible to immediately verify their culpability in the attack.<sup>46</sup> The United States filed a formal request of immediate arrest of Abbas and his PLO colleague under Article XII of the Extradition Convention to the prosecutors of Syracuse and Genoa, as they asserted jurisdiction on the case. However, the request was rejected on the grounds that the United States had not presented sufficient evidence of the involvement of Abbas and his colleague in the crimes charged.<sup>47</sup> The Reagan administration, however, firmly held Abbas responsible, and his release without an investigation or trial created friction between Washington and Rome.<sup>48</sup> It is still unclear whether the operation was authorized by the PLO or was taken independently by a faction.<sup>49</sup>

Ultimately, both PLO representatives would be convicted *in absentia*<sup>50</sup> and sentenced to life in prison.<sup>51</sup> In 2003, Abbas was captured by U.S. forces in Iraq. He died the following year in U.S. custody. The four

hijackers were all convicted and sentenced to long prison sentences in Italy. Al-Molqi pleaded guilty to the murder of American passenger Leon Klinghoffer and was sentenced to thirty years’ confinement.<sup>52</sup>

### Repairing the Relationship

Rome was frustrated and felt that Washington was trying to bully it. In Washington, there was anger and a feeling that Rome was shielding terrorists who killed an American citizen. However, in October 1985, there was no space for such emotions. At the peak of the Cold War, America needed Italy. After all, Italy was a key host to U.S. forces, a founding member of NATO, and a nation with a dangerously large Communist Party. The Craxi government also could not stray too far from its American partners or risk a government collapse and leave Italy adrift from its traditional Euro-Atlantic foreign policy orientation.<sup>53</sup>

There was a mixed reaction in Rome, with Craxi’s defenders noting that the loss of life could have been much higher. Former President Sandro Pertini hailed Craxi’s approach as defending “the independence of Italy.”<sup>54</sup> In the preface of a recent book *The Night of Sigonella* published by the Craxi Foundation, the authors make the following assessment: “Craxi, with his courageous rejection, demonstrated the boundaries of the Atlantic alliance, and the strong ties of friendship with the United States of America could and must coexist with the principles of international justice.”<sup>55</sup> Those authors concluded that a conflict between Craxi and Reagan was inevitable given the black and white “intransigence” of the Reagan administration in contrast with Craxi’s desire for negotiated solutions.<sup>56</sup>

However, Craxi’s coalition creaked under the pressure of a confrontation with Washington. Defense Minister Giovanni Spadolini resigned, and his small Italian Republican Party (PRI) withdrew its support from the government. Without PRI’s support, Craxi was compelled to resign on 17 October; but he quickly reformed his government, and remained in power until 1987.<sup>57</sup> Craxi’s foreign policy also did not bend to Washington’s will. In 1986, Washington blamed Tripoli for a series of

terrorist attacks and asked European allies to use bases on their territory to launch this attack. Craxi rejected Reagan's request. At the time, Craxi complained that military action would only further destabilize the international environment and lead to more terrorism.<sup>58</sup>

For Washington, there was no time to punish Italy or freeze it out of international relations.<sup>59</sup> Seeking to move past the incident, on 18 October, Reagan wrote to Craxi: "Italian-American relations have been and will remain broad, deep, and strong; and I am sure our personal ties will continue to be solidly grounded in that tradition."<sup>60</sup> However, a 17 October 1985 *Washington Post* editorial illustrates the emotional environment:

Egypt and Italy are caught in the turbulent wake of the *Achille Lauro* affair. This is, in any long-range scheme of things, a matter for keen regret. As Americans move beyond their anger at seeing the two countries do less than they could have to apprehend the killers, a concern for their political health cannot fail to come to the fore.<sup>61</sup>

Reagan had invited the major Western powers to meet on 24-25 October 1985 in advance of a summit with Mikhail Gorbachev, former President of the Soviet Union. Washington needed to show that the West was united. On 25 October, Reagan told Craxi: "The incident is closed. We are friends like before."<sup>62</sup> On 4 November 1985, Craxi told Parliament that friendship with the United States was a cornerstone of his foreign policy, and commented on Sigonella saying that it was the result of "a defect in information and comprehension."<sup>63</sup>

However, even as Craxi stepped back from the edge, he reminded Washington that the bilateral relationship and American use of installations was bounded by NATO agreements. "NATO bases in Italy can be used by our allies only for specific purposes of the alliance," Craxi told Parliament. What happened at Sigonella "must, in the interest of both countries and NATO, never be repeated."<sup>64</sup>

### Implications for Today

Sigonella is a distant memory for most, although one U.S. Ambassador to Italy did refer to it as "the only exception" to the normally solid relationship.<sup>65</sup> However, there are lessons to be learned from this episode, both in foreign relations and the law.

A study of the relevant laws and precedent leaves doubts as to whether the United

**"Italian-American relations have been and will remain broad, deep, and strong; and I am sure our personal ties will continue to be solidly grounded in that tradition."**

States conducted itself in accordance with its rights and obligations. As a result, Italy had the space to oppose America's requests with an unprecedented firmness. However, the United States' fundamental allegiance to the rule of law ultimately prevailed, which—in addition to the pressing political considerations—helped close the incident.

In the longer run, the episode of Sigonella arguably paved the way to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988 and related IMO Protocol of 2005.<sup>66</sup> Moreover, some legal scholars claim that the Sigonella episode contributed to the current shift towards a less restrictive approach to unilateral use of force in the war on terror under international law.<sup>67</sup> In fact, state practice has a decisive weight in shaping international law, including when it comes to the construction of the most fundamental treaty rules, such as the prohibition of use of force under Article 2 of the U.N. Charter. However, state practice that is not backed by *opinio iuris* (the belief of acting in accordance to the law) is insignificant under international law. When it decided to force the Egypt Air plane to land, the United States did not claim to act in accordance to the law, nor did it when it ordered the fighter to "escort" the Egypt Air plane from Sigonella to Ciampino. Washington's acceptance of Rome's decisions proved the strength of the international rule of law and of international legal obligations.<sup>68</sup>

The United States and Italy are no longer bound together through the Cold War. Although they share many of the same interests, there is no existential threat. As a result, there is some drift in the relationship. They remain bound together through the NATO alliance, a shared commitment to the war on terror, as well as a trade relationship and strong cultural ties. Although

Rome values the alliance with Washington, it makes no apologies about its desire for strong relationships with Moscow and Beijing. For example, Italy is at the front of the line to sign up for China's Belt and Road Initiative.<sup>69</sup> Without the boundaries of the Cold War, should another incident like the one in Sigonella occur, there are greater risks that could endanger the long-term health of the United States-Italy relationship. Washington should weigh any immediate advantage against the potential erosion of the relationship. **TAL**

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16. U.N. Charter Article 2(4) forbids states from using force in their international relations. Exceptions to this prohibition are acts taken in self-defense under U.N. Charter Article 51 or under the auspices of a U.N. Security Council authorization to use force under Article 42. See U.N. Charter arts. 2(4), 51.
17. Christian J. Tams, *The Use of Force Against Terrorists*, 20 EUROPEAN J. INT'L L. 359, 367-73 (2009).
18. See U.N. Charter art. 51.
- Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
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38. Extradition Treaty Between the Government of The United States of America and the Government of the Republic of Italy, It.-U.S., Oct. 13, 1983, 35 U.S.T. 3023.
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42. MUSELLA, *supra* note 8, at 278.
43. Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295.
44. United Nations Convention on Jurisdictional Immunities of States and Their Property, A/RES/59/38, art. 3(3) (Dec. 2, 2004) [hereinafter U.N. General Assembly on Jurisdictional Immunities] (the rule of customary international law has been acknowledged in the U.N. General Assembly).
45. PINI, *supra* note 4, at 308.
46. MUSELLA, *supra* note 8, at 280; MONTANELLI & CERVI, *supra* note 7, at 192.
47. Details and sources for this case were reported in CASSESE, *supra* note 33, at 44-48, 224-28.
48. MONTANELLI & CERVI, *supra* note 7, at 189.
49. PINI, *supra* note 4, at 304.
50. *In absentia*, MERRIAM-WEBSTER, [www.merriam-webster.com/dictionary/in%20absentia](http://www.merriam-webster.com/dictionary/in%20absentia) (last visited Mar. 26, 2021) (*in absentia* is a Latin term that means "in absence").
51. See N.Y. Times, *Ship Hijackers Sentenced Klinghoffer Daughters Are Outraged*, S. FLA. SUN-SENTINEL (July 11, 1986), <https://www.sun-sentinel.com/news/fl-xpm-1986-07-11-8602100860-story.html> (originally published by the *New York Times*). See also Roberto Suro, *Italian Jury Gives Cruise-Ship Killer 30-Year Sentence*, N.Y. TIMES, July 11, 1986, at A1.
52. N.Y. Times, *supra* note 51; Suro, *supra* note 51.
53. BETTINO CRAXI, *LA NOTTE DI SIGONELLA* 130-40 (2015).
54. PINI, *supra* note 4, at 309.
55. CRAXI, *supra* note 53, at X (translation by author).
56. *Id.* at XI.
57. *Id.* at 130-40.
58. MUSELLA, *supra* note 8, at 291.
59. Rudy Abramson & James Gerstenzang, *U.S. Planned to Keep Hijackers: Bid to Sidestep Italy Led to Confrontation*, L.A. TIMES (Oct. 19, 1985, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1985-10-19-mn-14994-story.html>.
60. CRAXI, *supra* note 53, at 162.
61. *In the Wake of the Achille Lauro*, WASH. POST, <https://www.washingtonpost.com/archive/politics/1985/10/17/in-the-wake-of-the-achille-lauro/f7ad014d-2d57-4d04-8e6d-3fceb2ac4591/> (last visited Jan. 8, 2021).
62. PINI, *supra* note 4, at 310.
63. *Id.* at 312.
64. *Craxi Criticizes U.S. On Use of Base in Crisis*, N.Y. TIMES, Nov. 5, 1985, at A9.
65. PINI, *supra* note 4, at 310.
66. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; International Maritime Organization, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Oct. 14, 2005, IMO Doc. LEG/CONF. 15/21.
67. Gooding, *supra* note 23, at 175.
68. Liput, *supra* note 15.
69. China's Belt Road Initiative is a massive infrastructure project that aims to link Europe and Asia.



## AROUND THE CORPS

The U.S. Army JAG Corps's newest court reporters graduate from the 64th Basic Court Reporter Course in February 2021 in a ceremony at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)



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## No. 2

# Legal Risks of Explosives in Urban Areas

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*By Lieutenant Colonel Matthew A. Krause & Captain Jennifer L. Bryer*

In the past several years, the use of explosive ordnance in urban areas has gained a high level of notoriety. This largely stems from the current wars in Syria and Yemen, and has often resulted in allegations of war crimes. Since the war in Syria began, the Syrian government's use of "barrel bombs"—makeshift containers filled with debris and high explosives that are dropped from helicopters or cargo planes—is estimated to have caused thousands of civilian casualties.<sup>1</sup> Both state and non-state actors are criticized for their use of explosive munitions in urban environments. Saudi Arabia and the Houthis, an Islamist movement fighting against the government of Yemen, are locked in a fight against each other in Yemen. Both parties have been criticized for their use of explosive ordnance.<sup>2</sup> Due to the increased criticism and scrutiny, it is important for commanders to consider the legal risk associated with using explosives in urban environments.

The wars in Syria and Yemen easily fit the legal definition of "armed conflict," and the decisions to employ aerial-delivered explosives have raised cries of war crimes, which must be analyzed under the law of armed conflict (LOAC).<sup>3</sup> An action that triggers outrage and emotion does not automatically imply a violation of the LOAC. No matter what the immediate public and media reaction may be, it is important to undertake a deliberate and thoughtful legal analysis to prevent misinterpretations and inaccurate articulations of the law. Civilian casualties are tragic, and are

often accompanied by difficult conversations, criminal accusations, and demands for accountability. With so much scrutiny resulting from these incidents, it is often challenging to take an objective look at whether a tragic event during armed conflict constitutes a crime. The destructive power of explosive munitions in cities can often create unintended casualties, and it is important to understand the legal framework that applies to a particular operation or strike. Only then can commanders assess legal risk.

This article takes a close look at a specific use of explosive ordnance in the limited tactical situation called "counterbattery fire."<sup>4</sup> One useful case study of counterbattery fire that caused civilian casualties with a high degree of public criticism was the Israeli artillery strike on the United Nations (U.N.) School.<sup>5</sup> In July 2014, during Operation Protective Edge,<sup>6</sup> the U.N. School, located within the Jabalia Palestinian refugee camp in Gaza, was hit.<sup>7</sup> Incidents between Israel and Hamas offer good case studies under the LOAC because the public's criticisms of Israel's kinetic tactics of the occupied territories offer no legal analysis, and they do little to hide their political biases.

### **The Case Study**

The security problem associated with Gaza is complex. Israel faces daily threats that it considers existential.<sup>8</sup> In fact, it is reasonable to say that the conflict is existential considering the expressed aim



(Credit: Roman – stock.adobe.com)

of Hamas, which is to liberate Palestinian territory—including modern day Israel.<sup>9</sup>

The 2014 armed conflict between Israel and Hamas in Gaza did not immediately start out with a ground operation. Rather, violent incidents escalated into an armed conflict—which the Israeli government later named Operation Protective Edge.<sup>10</sup> On 12 June 2014, in the Alon Shvut area of the West Bank, small arms fire ended the lives of three teenaged Israeli boys.<sup>11</sup> These murders rekindled simmering tensions into an armed conflict.<sup>12</sup> In the aftermath of the murders, the Israeli Defense Force (IDF) launched a search operation in the West Bank.<sup>13</sup>

The operation preceding Protective Edge was called Mivtza Shuvu Ahim, or Operation Brother's Keeper. Its objective was to search for and recover the bodies of the three boys—Yifrach, Shaar, and Fraenkel—and arrest the murderers and conspirators.<sup>14</sup> Israeli intelligence services identified two Hamas suspects: Marwan Kawasma and Amer Abu Aysha.<sup>15</sup> Israeli Defense Force Units, some of which were already stationed in the West Bank and some that were deployed to supplement the force, arrested almost 400 Palestinians—most with ties to Hamas.<sup>16</sup>

On 16 June 2014, a Palestinian named Ahmad Savarin was shot and killed by

members of the IDF at the Jalazone refugee camp after he threw a brick at them, according to the Israeli Army.<sup>17</sup> These operations resulted in clashes between the IDF and Hamas<sup>18</sup> in the West Bank.<sup>19</sup> By 21 June, the IDF and Hamas escalated their responses, and fighters from Gaza were firing rockets and mortars into Israel.<sup>20</sup> On 7 July 2014, Israel launched Operation Protective Edge<sup>21</sup> with the objective to stop indirect fire originating from Gaza.<sup>22</sup> After ten days of airstrikes, Israel deployed ground troops to Gaza.<sup>23</sup>

Over the course of approximately fifty days, many individual battles and small actions took place in the population-dense



Gaza Strip; but, one event in particular triggered scrutiny. On 30 July 2014, the IDF detected enemy indirect fire coming from the vicinity of the U.N. school in Jabalia (also referred to as Jabaliya or Jabalya).<sup>24</sup> The school was serving as a humanitarian shelter for displaced refugees.<sup>25</sup> Citing self-defense, the IDF returned fire with artillery at the point of origin of enemy attack,<sup>26</sup> a common tactic when returning artillery fire.<sup>27</sup> The Israeli fire resulted in the death of at least nineteen Palestinian civilians, including children sleeping near their parents, who were sheltering at the U.N. school.<sup>28</sup>

After the incident, there was a great degree of public outcry everywhere from the news media to the floor of the U.N.<sup>29</sup> Israel's position was that it was lawfully defending itself,<sup>30</sup> while others claimed that Israel intentionally targeted civilians, or at least recklessly returned fire.<sup>31</sup> What has been lost among the tragic pictures of dead children and broken infrastructure is an analytical review of this incident within the appropriate legal regime.

This article applies the framework under the LOAC to analyze the July 2014 Israeli counterfire. We use this incident to analyze the risk and decisions commanders had to make under the LOAC. The purpose of this article is not to accuse IDF commanders of war crimes, but to provide a methodical expression of the legal risk associated with counterbattery fire in urban areas for commanders of ground forces in future operations.<sup>32</sup>

### **The Legal Regime of Operation Protective Edge**

The applicability of LOAC to violent events depends on one critical factual condition: the existence of an armed conflict, as opposed to responses to some lesser-form crisis.<sup>33</sup> In *Tadić*, the International Criminal Tribunal for the Former Yugoslavia defined an armed conflict as existing whenever there is a "resort to armed force between States or protracted armed violence between governmental authorities and organized groups."<sup>34</sup> This is a factual determination based on the protraction and intensity of the violence, rather than a legal conclusion.<sup>35</sup> Whether a particular situation is considered an armed conflict

is not black and white, but rather shades of grey; violence in one situation might be more protracted than others, and some situations might be more violently intense than others.<sup>36</sup> Because there is no precise calculus commanding the factual existence of an armed conflict, a well-reasoned legal opinion is usually required prior to using tactics that would be permissible under the LOAC but otherwise prohibited under criminal law.<sup>37</sup>

To determine the lawfulness of military action, the first question to ask is not always whether the parties are in an armed conflict, but whether they are in an armed

## **To determine the lawfulness of military action, the first question to ask is not always whether the parties are in an armed conflict, but whether they are in an armed conflict at the particular moment of the incident in question.**

conflict at the particular moment of the incident in question.<sup>38</sup> Using the intensity of violence guidance from the *Tadić* case means that a crisis area could rise above, or fall below, armed conflict thresholds at various times during the crisis.<sup>39</sup> This distinction is important because it directs the legal regime of the incident. If there was no armed conflict at the time of a particular incident, then the domestic law of the country, rather than the LOAC, would apply to the analysis of the legality of the use of force.

In the particular moment when Israeli artillery struck Jabalia, the conflict had risen to that of an armed conflict.<sup>40</sup> According to an IDF spokesperson, Israeli artillery was responding to Hamas artillery.<sup>41</sup> An artillery attack coming from foreign territory will likely exceed the law enforcement capabilities of any state, thus requiring military tactics. Likewise, the indigenous Gaza law enforcement agencies could not have reasonably expected to have responded to Hamas artillery either because 1) Hamas was effectively in control of Gaza by this point, or 2) the Palestinian Authority was complicit or otherwise unable to affect Hamas militias. Accordingly, Israel

exercised an operational option usually only seen during an armed conflict and responded to Hamas rocket artillery with its own cannon artillery.<sup>42</sup>

### **The LOAC**

Using the LOAC framework as opposed to a framework under the law of occupation or international human rights law gives Israel more legal maneuver space, although it does not eliminate legal risk entirely. The LOAC is a "permissive" legal regime.<sup>43</sup> Parties to an armed conflict are allowed to lethally target each other based on their belligerent acts.<sup>44</sup> This is not without

limitation. The four Geneva Conventions of 1949 sought to regulate specific matters that may arise during an international armed conflict—that is, a war among nations.<sup>45</sup> However, the Geneva Conventions recognized that non-international armed conflicts (NIACs), those where at least one party to the conflict is a non-state actor, also existed, and provided a baseline of minimum protections of both belligerents and non-belligerents during NIACs.<sup>46</sup>

As the nature of conflicts continued to evolve during the twentieth century, so did the international community's desire to attempt to fill what some perceived as gaps in the LOAC.<sup>47</sup> The next major revision occurred in 1977, with the drafting of two protocols to the Geneva Conventions.<sup>48</sup> Specifically, the international community began to recognize gaps in the LOAC during conflicts that do not involve the lawful armed forces of a sovereign nation.<sup>49</sup> Like international armed conflict, there is generally no obligation to consider alternative non-lethal effects during a NIAC.<sup>50</sup> However, as we will see below, this does not mean the effects can be unrestricted, even when responding in self-defense *in bello*.

## As the nature of conflicts continued to evolve during the twentieth century, so did the international community's desire to attempt to fill what some perceived as gaps in the LOAC.

### Counterbattery Fire Under LOAC

#### *Necessity*

United States Army doctrine describes the principle of necessity as all measures, not otherwise forbidden by international law, which are necessary to defeat the enemy as quickly and efficiently as possible.<sup>51</sup> As described in the case study, counterbattery fire typically refers to defensive fires where a ground force commander is returning fire in response to an attack. An attack on enemy belligerents or their capabilities and equipment will generally satisfy the requirement of military necessity.<sup>52</sup>

#### *Self-Defense*

Attacks in self-defense are not unlimited<sup>53</sup> and are bound by the *jus in bello* rules of necessity and proportionality. Self-defense is authorized against hostile acts or demonstrations of imminent hostile intent, and the force allowed is that reasonably necessary to counter the attack or threat.<sup>54</sup> Once the hostile act is countered, or there is no longer an imminent threat of attack, the rules of self-defense would not apply.

Conflicts that are asymmetric, such as the one between Israel and Hamas, offer additional challenges due to the differences in tactics used by the parties' artillery formations. In asymmetric warfare,<sup>55</sup> the state party will often have an ability to detect the point of origin of an indirect fire attack, usually through a counterbattery radar system, and the non-state party will be aware of this.<sup>56</sup> Because of the tactical overmatch of Israeli artillery, the mobility of Hamas artillery systems, and the experience of both parties in this conflict, it is unlikely that a Hamas artillery crew remained in the vicinity after firing on Israel.<sup>57</sup>

The amount of legal risk in counterbattery fire also depends on whether the return fire is observed or unobserved.<sup>58</sup> With an observed fire, the ground commander is

able to view the object of attack throughout the strike. Such a fire would carry less legal risk because the ground force commander is able to view whether belligerents have remained in the anticipated impact area of the counterbattery fire.<sup>59</sup> Additionally, a commander would be able to see potential civilians or other collateral objects that might be impacted by an attack.

Unobserved fires carry more risk because the ground force commander is unable to observe the object of attack.<sup>60</sup> Likewise, the commander is unable to observe potential collateral objects and civilians who may be in the vicinity of the target. In an unobserved fires situation, a ground force commander is taking on an increased legal risk of violating the LOAC by firing when the hostile actor—a valid military objective under the LOAC and also a valid target in self-defense—is no longer present, and only civilians remain.

In order for the counterbattery to have an effect on a Hamas artillery crew, it would likely have to respond rapidly. This is under the assumption that there was no reconnaissance capability where the more sophisticated party can see the belligerents or possess precise intelligence on a particular location.

#### *Military Objective*

Both offensive and defensive fires must satisfy the customary international law requirements of the LOAC.<sup>61</sup> Under the LOAC, armed forces may strike a target so long as certain conditions are met.<sup>62</sup> First, the target must be a military objective. “[M]ilitary objectives are limited to those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>63</sup>

#### *Military Object and Counterbattery*<sup>64</sup>

Determining the exact nature of a target that has threatened a commander's forces during asymmetric warfare in urban areas can be challenging.<sup>65</sup> Information about a particular target is often based on classified intelligence not readily apparent to third party observers, such as the media.<sup>66</sup> In traditional wars, heavy artillery formations were fixed positions and cumbersome.<sup>67</sup> Unlimbering an artillery piece could often be awkward and take time, exposing the crews to great danger.<sup>68</sup> Modern artillery is towed, self-propelled,<sup>69</sup> or carried in the case of mortars.<sup>70</sup> Hamas primarily uses highly portable rocket artillery and mortars, because it has to smuggle equipment into the region.<sup>71</sup>

While potentially difficult to identify in a modern environment where the artillery is mobile and not necessarily carried by uniformed troops, an artillery unit remains a valid military objective. An artillery unit is an object which, by its nature and use, makes an effective contribution to military action, and the destruction of the unit would offer a ground force commander a military advantage.<sup>72</sup> However, given the mobile nature of Hamas artillery, it is unlikely the Hamas artillery unit was still in position when Israeli troops struck with counterbattery fire. Additional information would be required to determine whether some other valid target, such as a weapons cache, was in the same area.

#### *Military Objective and Terrain Denial*

A piece of ground from which enemy artillery fired, particularly if the enemy uses that piece of ground frequently due to its favorable geography, could itself be a lawful target, if the purpose is to deny the enemy that particular piece of terrain.<sup>73</sup> Israel's spokeswoman stated that Israel fired at a point of origin of suspected enemy mortar fire.<sup>74</sup> Accordingly, we can suspect that the purposes behind counterfire were either to suppress or destroy Hamas artillery, or to deny Hamas the terrain.<sup>75</sup>

#### *Proportionality in Artillery Strikes*

Civilian casualties and the destruction of civilian property, although tragic, are still legally acceptable under certain circumstances—so long as they themselves were

not the object of the attack.<sup>76</sup> However, this does not permit the striking of a lone military objective without regard to the effect on collateral civilians and objects.

The LOAC allows parties to treat civilians and civilian objects as “collateral concerns,” weighed in the balance of proportionality.<sup>77</sup> States are required to refrain from attacking an otherwise lawful military objective if the attack is expected to result in the incidental loss of civilian life or damage to civilian objects that would be excessive in relation to the direct military advantage anticipated.<sup>78</sup> This means that under the law of proportionality, the military gain represented by an artillery attack on a piece of ground must be expected to exceed civilian loss of life and damage to civilian objects if it is to be lawful.

Article 57 of Additional Protocol I of the Geneva Conventions, which requires forces to take precautionary measures during the planning phases of a military operation to protect civilians,<sup>79</sup> reinforces Article 51 of the same Protocol. Even if forces have lawfully decided to attack a target, once information about that target clarifies its true nature, then the “attack shall be canceled” under three circumstances.<sup>80</sup> First, if a previously suspected military target is shown to be a civilian object, then the attack must be canceled.<sup>81</sup> Second, if it becomes apparent that the suspected military target has special protection<sup>82</sup>—for example, a suspected command and control center is actually a hospital—then the attack must be canceled.<sup>83</sup> Finally, if the “attack may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage, then the attack shall be canceled.”<sup>84</sup> It should be noted that under the LOAC, a civilian object used for a military purpose, even one with special protections, can lose that protected status and be lawfully targeted.<sup>85</sup>

#### *Choose the Least Dangerous Objective in Any Type of Operation*

Article 57(3) of Additional Protocol I requires forces, whenever possible, to choose the military objective that will have the least danger to civilian lives.<sup>86</sup> “When a choice is possible between several military objectives for obtaining a similar military

advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”<sup>87</sup> Despite its awkwardness, the paragraph removes some of the traditional autonomy of the ground commander in choosing his own tactics.

It is possible, however, that there is no feasible choice between several military objectives, and, therefore the requirements of Article 57(3) may not apply.<sup>88</sup> Israel knows that rockets and mortars have been smuggled into Gaza for decades through tunnels.<sup>89</sup> An independent outside observer may conclude that absent good observation, returning artillery fire will typically have the effect of only destroying a piece of earth, and not the highly mobile Hamas crew that fired it. Without other intelligence or insight into the targeting decision, it is difficult for an outside observer to conclude any other effect was intended by the ground force commander who called for the counterbattery fire.

#### *. . . and Take All Reasonable Precautions*

Article 57(4) of Additional Protocol I requires parties to an armed conflict to “take all reasonable precautions to avoid losses to civilian lives and damage to civilian objects.”<sup>90</sup> Gaza is home to over 1.9 million people packed into 360 square kilometers,<sup>91</sup> roughly twice the geographic size of Washington, D.C., which had a population of around 705,000 in 2019.<sup>92</sup> If Gaza were a country, it would be the 207th largest country in the world.<sup>93</sup> Imagine Washington, D.C., with a population of 800,000. Next consider a 155 millimeter (mm) high explosive artillery shell landing in a population this dense. This population density necessarily increases the expectation of incidental loss of civilian life.

Military weapon capabilities are often kept secret. However, unclassified and public reports place the effects radius of the 155mm high explosive round up to 300 meters—someone standing 300 meters away from a 155mm high explosive could experience some type of effect.<sup>94</sup> This article is not analyzing technical effects radius calculus, but merely giving an example of the explosive’s reach. The closer to the impact point of the round, the greater the likelihood of danger.<sup>95</sup>

There are few places in the vicinity of Jabalia where a 155mm artillery round could land without causing incidental damage to civilians or civilian objects. Given the population density, it would be difficult to strike anywhere in the Gaza Strip without endangering civilians. This would not necessarily violate the LOAC, but it may do so if it fails the proportionality test as discussed earlier.

#### *Objective and Proportionality Revisited*

Proportionality is a weighing of the advantage gained by destroying the military objective against the likelihood of civilian casualties.<sup>96</sup> As shown above, the target could have been the terrain itself, as opposed to Hamas militants.<sup>97</sup> If so, a commander’s military advantage by striking and denying the enemy terrain would need to outweigh the impact the strike had on civilians and civilian objects in the area.

Although warfare may sometimes be asymmetrical, the law certainly is not. Hamas also has an obligation under the LOAC to refrain from endangering civilians. Likewise, Hamas has an obligation to refrain from firing artillery from nearby protected persons and places if it knows that such firing may cause return fire that could endanger civilians. Some scholars have argued that Hamas has militarized protected buildings and locations and deliberately endangered civilians by placing fighters and equipment nearby.<sup>98</sup> The U.N. Relief and Works Agency has criticized Hamas in the past for the intentional placement of weapons caches in U.N. schools,<sup>99</sup> a tactic familiar to Israeli commanders.

This is all to say that when conducting a proportionality test, the precise military objective matters. If the target is an empty piece of ground, then the value of the military objective could be low. If the target is—and there is a reasonable expectation of effects on—a Hamas artillery crew, then the military advantage in a proportionality analysis could be higher. Finally, considering that the overall objective of Operation Protective Edge is to stop artillery attacks coming from the Gaza Strip, if the target is a cache of rockets and artillery, then the value of the target could be much higher as determined by the ground commander. Depending on the target, such possibilities

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create a spectrum of military advantage that could either outweigh, or be outweighed by, the risk of civilian casualties, thus creating a spectrum of legal exposure for ground commanders.

**Conclusion**

This article has sought to provide a deliberate legal analysis to a particular case study during an armed conflict. Such an analysis can cut through public outrage, incomplete reports, and less-than-accurate—or even biased—scrutiny of incidents that cause civilian casualties during armed conflict. By identifying the appropriate legal regime, carefully assembling facts, and applying legal elements to those facts, a clearer perspective of chaotic events during armed conflict can be revealed.

Using the Jabalia case study, we have identified that—at the time of the strike—Israel and Hamas were engaged in an armed conflict, and the LOAC applied as opposed to human rights law. The facts resulting in this determination are important. Israel reported it had been attacked by Hamas artillery, had deployed combat troops in Gaza, and was returning artillery fire into Gaza. As previously discussed, the appropriate legal regime is important because it drives the duties of the parties during an armed event.

The security problem associated with Gaza is extremely complex. Israel faces an existential threat,<sup>100</sup> as Hamas's goal is to liberate Palestinian territory, including modern day Israel.<sup>101</sup> To say that Israel has devoted its most brilliant minds to seeking a sustainable solution to its own security would be a gross understatement. The intent of this article is to not to criticize Israel for defending itself by conducting strikes in Gaza; rather, the intent of the article is to

critically examine the legal risk associated with the particular strike on Jabalia in light of the LOAC.

Using the framework of LOAC, Israel's artillery strike on Jabalia prompted a careful look at several elements of the LOAC in particular—namely military necessity and proportionality. First, commanders must determine whether a target is a lawful military objective of which the destruction will provide a military advantage. In order to accurately answer this question, commanders must be able to clearly articulate what the target is. In the case of Jabalia, it is unclear to an outside observer whether the target was Hamas personnel, Hamas equipment, or a piece of terrain that was providing Hamas with an advantage. Without the ability to identify the target, commanders cannot appropriately balance the military advantage sought versus expected civilian casualties during a proportionality test.

Finally, having a deep understanding of the effects and capabilities of particular weapon systems,<sup>102</sup> as well as the operational environment in which those weapons will be employed is essential in assessing the legal risk of a particular military operation.<sup>103</sup> As discussed in the article, the destructive power of artillery combined with Gaza's population density increases the legal risk to commanders.

Civilian casualties are tragic, and are often accompanied by difficult conversations, criminal accusations, and demands for accountability. With so many knee-jerk reactions of outrage resulting from these incidents, it is often challenging to take an objective look at whether a tragic event during armed conflict constitutes a crime. The destructive power of explosive ordnance in cities can often create unintended casualties, and it is important to understand

the legal framework that applies to a particular operation or strike. Only then can commanders assess legal risk. Using the Israeli case in Jabalia, we have attempted to show how counterbattery fire into population-dense areas that causes civilian casualties creates legal risk. The commander's ability to clearly articulate what the target is, and the clear military advantage of the target, is critical to counter-balance risk under the LOAC. As the situations in Israel, Syria, Yemen, and others teach, armed conflicts will continue to be fought in populated areas—and those areas will only continue to grow in size and density. **TAL**

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**Notes**

1. Since the beginning of the Syrian Civil War until 2014, Human Rights Watch documented thousands of civilian casualties caused by explosive ordnance dropped in cities. *See Syria: Barrage of Barrel Bombs*, HUM. RTS. WATCH (July 30, 2014, 12:04 AM), <https://www.hrw.org/news/2014/07/30/syria-barrage-barrel-bombs>. The use of indiscriminate attacks against civilians is so severe in Syria that the United Nations Security Council, in a rare example of solidarity, passed Security Council Resolution 2165 in 2014 “[e]xpressing grave alarm . . . at the continuing indiscriminate attacks in populated areas, including an intensified bombing campaign . . . and the use of barrel bombs . . . and reiterating that some of these violations may amount to war crimes and crimes against humanity.” *See* S.C. Res. 2165 (July 14, 2014).

2. Press Release, Security Council, U.N. Security Council Press Statement on Yemen, U.N. Press Release SC/13270 (Mar. 28, 2018). In a Security Council Presidential Statement, during the March 2018 meeting of the Security Council, Karel Jan Gustaff van Oosterom stated on behalf of the Council:

The Security Council expresses grave distress at the level of violence in Yemen, including indiscriminate attacks in densely populated areas, and the impact this has had upon civilians, including large numbers of civilian casualties and damage to civilian objects. The Security Council calls on all parties to comply with their obligations under international humanitarian law, including to respect the principle of proportionality and at all times to distinguish between the civilian population and combatants, and between civilian objects and military objectives, and by taking all feasible precautions to avoid, and in any event minimize, harm to civilians and civilian objects and

- infrastructure, and to end the recruitment and use of children and other violations committed against them in violation of applicable international law, in order to prevent further suffering of civilians.
- S.C. Pres. Statement 2018/5 (Mar. 15, 2018).
3. See Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
  4. Counterbattery in military doctrine refers to the act of returning enemy artillery fire with friendly artillery fire for the purpose of suppressing or destroying the enemy's artillery capability. These are defensive fires *in bello*, that is once an armed conflict already exists. It is sometimes also referred to as counterfire. See generally U.S. DEP'T OF ARMY, TACTICS, TECHNIQUES, & PROCEDURES 3-06.11, COMBINED ARMS OPERATIONS IN URBAN TERRAIN para. 2-6 (10 June 2011).
  5. See Pierre Krähenbühl, U.N. Relief & Works Agency Commissioner-General, UNRWA Strongly Condemns Israeli Shelling of its School in Gaza as a Serious Violation of International Law, U.N. RELIEF & WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST (July 30, 2014), <https://www.unrwa.org/newsroom/official-statements/unrwa-strongly-condemns-israeli-shelling-of-school-gaza-serious>. See also Bill Hutchinson, *United Nations Secretary General Rips Israel for Attacking School that Sheltered Gaza Refugees, Killing 20*, N.Y. DAILY NEWS, (July 31, 2014, 3:46 AM), <http://www.nydailynews.com/news/world/israeli-tank-opens-fire-gaza-refugee-camp-article-1.1885121>.
  6. See *Israel Launches Operation Protective Edge in Gaza Strip*, NBC NEWS, <https://www.nbcnews.com/storyline/middle-east-unrest/israel-launches-operation-protective-edge-gaza-strip-n150281> (July 8, 2014, 1:08 PM) [hereinafter *Israel Launches Operation*].
  7. Ben Hubbard & Jodi Rudoren, *Israeli Shells Are Said to Hit a U.N. School*, N.Y. TIMES (July 30, 2014), [https://www.nytimes.com/2014/07/31/world/middleeast/israel-gaza.html?\\_r=0](https://www.nytimes.com/2014/07/31/world/middleeast/israel-gaza.html?_r=0).
  8. See generally STATE OF ISR., THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS 1-2 (2015), <https://mfa.gov.il/protectiveedge/documents/2014gazaconflict-fullreport.pdf> (discussing the ongoing threat Israel faces from Hamas).
  9. See The Covenant of the Islamic Resistance Movement art. 34, Aug. 18, 1988, [https://avalon.law.yale.edu/20th\\_century/hamas.asp](https://avalon.law.yale.edu/20th_century/hamas.asp).
  10. See RAPHAEL S. COHEN ET AL., FROM CAST LEAD TO PROTECTIVE EDGE: LESSONS FROM ISRAEL'S WARS IN GAZA 78-83 (2017).
  11. Karl Vick, *Bodies of Missing Israeli Teens Found in West Bank Field*, TIME (June 30, 2014, 3:12 PM), <https://time.com/2941362/bodies-of-missing-israeli-teens-found-in-west-bank-field/>. See also Umberto Bacchi, *Israeli Teens' Killers Celebrated 'We Got Three!' After Shots Heard on Police Emergency Recording*, INT'L BUS. TIME, <https://www.ibtimes.co.uk/israeli-teens-killers-celebrate-we-got-three-after-shots-heard-police-emergency-recording-1455083> (July 2, 2014, 5:48 PM).
  12. Shlomi Eldar, *Was Israeli Public Misled on Abductions?*, AL-MONITOR (July 3, 2014), <http://www.al-monitor.com/pulse/originals/2014/07/misleading-kidnapping-almoz-hamas-vengeance-hatred.html#>.
  13. See STATE OF ISR., *supra* note 8, at 25-26.
  14. Gantz: *Operation Brother's Keeper Has Come to an End*, JERUSALEM POST (Sept. 23, 2014, 9:38 AM), <https://www.jpost.com/breaking-news/gantz-operation-brothers-keeper-has-come-to-an-end-376127>.
  15. *Id.* Kawasma and Aysha were killed by the Israeli Defense Force (IDF) during a shootout. After their deaths, IDG Chief of Staff, Lieutenant General Benny Gantz declared an end to Operation Brother's Keeper. *Id.* However, Hussam Kawasme, the mastermind of the kidnappings, was arrested and convicted by a domestic criminal court in Israel. He is currently serving three life sentences. *Palestinian Sentenced over Settler Killings*, AL JAZEERA (Jan. 7, 2015), <https://www.aljazeera.com/news/2015/1/7/palestinian-sentenced-over-settler-killings>.
  16. CBS & Associated Press, *Israel IDs 2 Main Suspects in Teens' Disappearance*, CBS NEWS (June 26, 2014, 5:50 PM), <https://www.cbsnews.com/news/israel-ids-2-main-suspects-in-teens-disappearance>.
  17. Dalia Hatuqa, *Israeli Forces Kill Palestinian During Raids*, AL JAZEERA (June 17, 2014), <https://www.aljazeera.com/news/middleeast/2014/06/israeli-forces-kill-palestinian-during-raids-201461674729736569.html>.
  18. Harakat al-Muqawamah al-Islāmiyyah, or "Islamic Resistance Movement" is better known by its acronym, Hamas. Despite being listed as a terrorist organization, it has also served as the de facto government of Gaza.
  19. Yoav Zitun, *Infantry Battalion Deployed to Hebron, IDF Calls in Reservists*, YNETNEWS (June 15, 2014, 1:41 PM), <http://www.ynetnews.com/articles/0,7340,L-4530549,00.html>.
  20. Matan Tzuri & Ilana Curiel, *Three Gaza Rockets Hit Open Areas in Sha'ar HaNegev*, YNETNEWS (June 22, 2014, 1:05 AM), <https://www.ynetnews.com/articles/0,7340,L-4532884,00.html>.
  21. Nothing in this article should be interpreted to mean that sovereign nations do not have the right to self-defense *ad bellum* under Article 51 of the Charter of the United Nations, or *in bello* once the conflict has begun. See U.N. Charter art. 51. Whether the three murders constitute an armed attack authorizing Israel to respond with military force is outside the scope of this article.
  22. See STATE OF ISR., *supra* note 8, at 1-2, 32-34. There is some discussion on when Operation Protective Edge officially started. On the evening of 7 July 2014, the Prime Minister of Israel announced a broad operation, termed "Operation Protective Edge," claiming the action was necessary to protect Israel's civilian population from increasing rocket and mortar attacks. *Id.* However, other articles and publications hold 8 July 2014 as the official start of Operation Protective Edge. See COHEN ET AL., *supra* note 10, at 81-82.
  23. See STATE OF ISR., *supra* note 8, at 1-2. The Government of Israel's records reflect that it ordered the IDF to commence ground operations on 17 July 2014, which is ten days after the date the government recognizes as the initiation of concentrated aerial operations against Hamas—7 July 2014.
  24. *Israeli Fire Kills Nineteen in Gaza UN School*, AL JAZEERA (July 31, 2014), <https://www.aljazeera.com/news/2014/7/31/israeli-fire-kills-nineteen-in-gaza-un-school>.
  25. Tovah Lazaroff, *IDF Accuses Palestinians of Firing from Vicinity of UNRWA School, Says Probing Deaths*, JERUSALEM POST (July 30, 2014, 2:09 PM), <https://www.jpost.com/operation-protective-edge/rockets-found-at-unrwa-school-for-third-time-369358>.
  26. See *US Resupplying Israel with Ammunition Even After Condemning Shelling of Gaza School*, RT (July 30, 2014, 8:23 PM), <https://www.rt.com/us-a/176820-pentagon-idf-unrwa-ammunition/>. See also William Saletan, *The Horrific Results of Israel's Good Intentions: How a Civilized Nation Can Descend into War Crimes*, SLATE (Aug. 4, 2014, 5:00 PM), <https://slate.com/news-and-politics/2014/08/gaza-shelter-massacre-how-israel-could-have-killed-21-civilians-at-a-u-n-school.html>.
  27. See generally U.S. DEP'T OF ARMY, FIELD MANUAL 3-09, FIRE SUPPORT AND FIELD ARTILLERY OPERATIONS paras. 2-9, 2-38, 3-65 (30 Apr. 2020) (discussing the use of radar and counterbattery fires as part of artillery operations).
  28. See *Israeli Fire Kills Nineteen in Gaza UN School*, *supra* note 24 (discussing nineteen casualties). See also Ben Hubbard & Jodi Rudoren, *Questions of Weapons and Warnings in Past Barrage on a Gaza Shelter*, N.Y. TIMES (Aug. 3, 2014), <https://www.nytimes.com/2014/08/04/world/middleeast/international-scrutiny-after-israeli-barrage-strike-in-jabaliya-where-united-nations-school-shelters-palestinians-in-gaza.html> (discussing twenty-one casualties).
  29. See Hubbard & Rudoren, *supra* note 7 (discussing condemnation from multiple sources).
  30. See Saletan, *supra* note 26 (citing an IDF spokeswoman saying that the Israeli troops fired as a result of militants firing on Israeli Soldiers).
  31. See *id.* (discussing the risks inherent in firing artillery at Jabalia and references that some view the attack as a deliberate strike on civilian targets).
  32. A secondary purpose of this article is to walk the human rights community through a law of armed conflict (LOAC) analysis to provide a roadmap for analyzing such events under the appropriate legal regime. The human rights community has a great deal of expertise and resources that, if channeled appropriately with the right evidence and legal analysis, could greatly contribute to achieving accountability for crimes of atrocity. On 18 March 2015, the IDF Military Advocate General (MAG) announced that it ordered criminal investigations into the strike on the UNRWA School in Jabalia on 30 July 2014 after a Fact-Finding Assessment Mechanism presented evidence indicating existence of a reasonable suspicion that the strike was not carried out in accordance with the rules and procedures applicable to IDF forces. See Press Release, Israel Defense Forces Military Advocate General, Decisions of the IDF Military Advocate General Regarding Exceptional Incidents During Operation 'Protective Edge'—Update No. 3 (Mar. 18, 2015), <https://www.idf.il/media/40280/operation-protective-edge-mag-corps-press-release-update-3-march-2015.pdf>. The last press release by the MAG Corps was published on 15 August 2018 and did not mention results of the criminal investigation into the Jabalia strike. See Press Release, Israel Defense Forces Military Advocate General, Decisions of the IDF Military Advocate General regarding Exceptional Incidents That Allegedly Occurred During Operation 'Protective Edge'—Update No. 6 (Aug. 15, 2018), [https://www.idf.il/media/40288/examination\\_and\\_investigation\\_of\\_exceptional\\_incidents\\_from\\_operation\\_protective\\_edge.pdf](https://www.idf.il/media/40288/examination_and_investigation_of_exceptional_incidents_from_operation_protective_edge.pdf).

33. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

34. *Id.*

35. See *id.* ¶¶ 96-99. See also INT'L COMM. OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 3 (Mar. 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> (discussing factors which distinguish an armed conflict from other less serious forms of violence) See also *Prosecutor v. Tadić*, Case No. IT-94-1-I, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

36. *Id.*

37. The determination of whether a state has been attacked *ad bellum* is made by the state that has been attacked. Likewise, it is a basic tenet of law that only states and other sovereign bodies may authoritatively interpret the law. However, there is danger in determining that an internal armed crisis has risen to the level of armed conflict if the sole reason for that determination is that the crisis has exceeded the capability of police agencies and judicial infrastructure. Exceeding the capability of law enforcement and the judiciary does not necessarily make a crisis an armed conflict in fact, but it could present an indicator of such.

38. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Opinion and Judgment, ¶¶ 561-562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (in order for an internal crisis to have ended and an armed conflict to have begun, the level of violence must be protracted and must rise to a certain level of intensity). However, this description is highly ambiguous, and necessarily cannot provide objective criteria which would give guidance as to when precisely an armed conflict has begun. In that regard, this determination is more art than science.

39. GLORIA GAGGIOLI, THE USE OF FORCE IN ARMED CONFLICTS: THE INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND THE LAW ENFORCEMENT PARADIGMS 4 (2012), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf>.

40. See STATE OF ISR., *supra* note 8, at 28-29 (where Israel states that the military actions during the 2014 Gaza Conflict were part of an ongoing armed conflict).

41. See Hubbard & Rudoren, *supra* note 7.

42. A response under the more limited legal regime under domestic law would have meant leveraging law enforcement assets to arrest and criminally try the Hamas members responsible for the rocket attacks. See STATE OF ISR., *supra* note 8. Under LOAC principles, the Israeli government itself reviewed the IDF conduct during Operation Protective Edge. *Id.*

43. U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL SEC. 1.3.3.2 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter LAW OF WAR MANUAL].

44. Geneva Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulations Concerning the Laws and Customs of War on Land arts. 22-28, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations]. The Hague Regulations do not affirmatively authorize belligerent parties to permissively target one another based on their status, but rather their violent actions. This status-based concept is deduced from those means that are specifically prohibited by Hague Regulations during armed conflict.

It necessarily follows that those means that are not prohibited are authorized.

45. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Articles 2 and 3 are common to all four Geneva Conventions pertaining to humanitarian law of 1949. They are informally known as Common Articles 2 and 3. *Id.*

46. *Id.* art. 3.

47. See INT'L COMM. OF THE RED CROSS, *supra* note 35 (discussion of non-international armed conflicts and ways to define when hostilities have risen to a level of a non-international armed conflict). See also LAW OF WAR MANUAL, *supra* note 43, sec. 3.4.2.2. (discussing a range of views on what constitutes an "armed conflict not of an international character"). One of the aims of the LOAC is to protect civilians on battlefields, although the law does not provide a great deal of guidance. Some advocates have voiced support for using more of a law enforcement paradigm during armed conflict by looking to international human rights law for guidance on interpreting LOAC.

48. While the United States is a state signatory, it has never ratified the additional protocols; and, so, is not a state party to them. Pakistan and Iran are the only two other countries who have not ratified the protocols. Nevertheless, 174 other countries are parties. See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

49. See INT'L COMM. OF THE RED CROSS, *supra* note 35. See also LAW OF WAR MANUAL, *supra* note 43, sec. 3.4.2.2.

50. See LAW OF WAR MANUAL, *supra* note 43, secs. 17.1.2.1-17.2.2.2 (discussing similarity in principles of law of war between international and non-international armed conflicts).

51. See U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE para. 1-23 (7 Aug. 2019) [hereinafter FM 6-27].

52. *Id.* para. 1-27.

53. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 234-41 (5th ed. 2011). See generally NILS MELZER, INTERNATIONAL HUMANITARIAN LAW: A COMPREHENSIVE INTRODUCTION 289 (2019). See also Ian Henderson & Bryan Cavanagh, *Military Members Claiming Self-Defence During Armed Conflict: Often Misguided and Unhelpful*, in ACCOUNTABILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW: ESSAYS IN HONOUR OF TIM MCCORMACK (Jadranka Petrovic ed., 2017).

54. See generally FM 6-27, *supra* note 51 (discussion of *ius ad bellum* international law providing a legal basis for the use of force versus *ius in bello* international law that applies for the use of force during an armed conflict). *Id.* para. 2-3 (circumstances of unit self-defense). See also DINSTEIN, *supra* note 53, at 234-41 (discussion of necessity and proportionality as they apply to self-defense).

55. Asymmetric warfare is a common term used to describe an armed conflict where one party, such as Israel, possesses significant tactical overmatch of the other, such as Hamas. In order to achieve a level of tactical parity, the weaker party will often resort to non-traditional tactics such as suicide bombings, targeted assassinations, and—in Hamas's case—indiscriminate firing of rockets and mortars into Israel.

56. See generally *HAMAS Rockets*, GLOBAL SEC., <http://www.globalsecurity.org/military/world/para/hamas-qassam.htm> (last visited Jan. 21, 2021) (unclassified background information on Hamas's rocket capability).

57. See PADRAIG O'MALLEY, THE TWO-STATE DELUSION: ISRAEL AND PALESTINE—A TALE OF TWO NARRATIVES 143 (2016) (discussing how Hamas is highly mobile, adept at asymmetric warfare and difficult to pin down). See also Sreenivasan Jain, *NDTV Exclusive: How Hamas Assembles and Fires Rockets*, NDTV, <https://www.ndtv.com/world-news/ndtv-exclusive-how-hamas-assembles-and-fires-rockets-641680> (Aug. 14, 2014, 9:03 PM) (discussing how a rocket launcher was buried and left by Hamas and fired later the following day).

58. See generally YVES J. BELLANGER, U.S. ARMY ARMORED DIVISION 1943-1945, at 321-32 (2010). See also Kristina Wong, *US Commander: Lack of Intelligence Assets Slowing Down ISIS War*, HILL (June 7, 2016, 10:21 AM), <https://thehill.com/policy/defense/282457-isis-air-war-commander-short-on-intelligence-assets> (discussing the use of intelligence, surveillance, and reconnaissance to minimize the risk of civilian casualties and develop targets).

59. Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47 TEX. INT'L L.J. 337, 369 (2012) (discussing observed and unobserved indirect fires and legal risk).

60. *Id.*

61. See FM 6-27, *supra* note 51, para. 1-46.

62. *Id.* paras. 1-1, 1-4, 1-19. These sections generally discuss when force can be used and the restrictions on that force under LOAC.

63. Additional Protocol 1, *supra* note 48, art. 52(2). Although Israel is not a party to Additional Protocol I, the elements of a lawful target as articulated by the Protocol is one of the strongest statements of customary international law. See generally NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

64. Counterbattery in military doctrine refers to the act of returning enemy artillery fire with friendly artillery fire for the purpose of suppressing or destroying the enemy's artillery capability. It is sometimes also referred to as "counterfire." See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, JOINT FIRE SUPPORT (10 Apr. 2019) [hereinafter JP 3-09].

65. An insurgency exists when an organized group or movement uses subversion and violence to force political change to the lawful government where the group operates. DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 106 (Jan. 2021).

66. See STATE OF ISR., *supra* note 8, at 143-45 (discussing the use of intelligence in targeting and showing an example of an IDF "target card" containing redacted classified information). See also *id.* at 186 ¶ 333 (discussing how third parties are not privy to information a commander possessed when deciding to launch an attack because of the classification of the information).

67. BOYD L. DASTRUP, KING OF BATTLE: A BRANCH HISTORY OF THE U.S. ARMY'S FIELD ARTILLERY 3 (1992).

68. Karl Baron Smola, *The Austrian Cavalry Gun in Comparison to the Horse Artillery of Other States*, NAPOLEON SERIES (Digby G. Smith trans., June 2010), <https://www.napoleon-series.org/military-info/>

organization/Austria/Artillery/c\_Smola.html (discussing the dangers a crew faces during unlimbering).

69. See DASTRUP, *supra* note 67, at 188-90 (discussing self-propelled artillery and towed artillery).

70. *Id.* at 2-3 (discussing the historical use of mortars as a siege weapon in the 15th century).

71. Jodi Rudoren, *From Gaza, an Array of Makeshift Rockets Packs a Counterpunch*, N.Y. TIMES (July 17, 2014), <https://www.nytimes.com/2014/07/18/world/middleeast/from-gaza-an-array-of-makeshift-rockets-packs-a-counterpunch.html>.

72. See LAW OF WAR MANUAL, *supra* note 43, sec. 4.1.1.1; *Israel Launches Operation Protective Edge*, *supra* note 6. Both articles discuss how artillery is generally considered to fall under “combatant” as defined by the Hague Regulations. See also LAW OF WAR MANUAL, *supra* note 43, sec. 5.1.1 (discussing artillery as a means and method of warfare).

73. This is known by various doctrinal terms including terrain denial or harassment and interdiction fires. Interdiction is an action that is “conducted to divert, disrupt, delay, or destroy the enemy’s military surface capabilities before they can be brought to bear effectively against friendly forces or to otherwise achieve objectives” and can include the targeting of favorable ground. JP 3-09, *supra* note 64, at II-2.

74. See Lazaroff, *supra* note 25.

75. See Ben Hubbard & Jodi Rudoren, *Blasts Kill 16 Seeking Haven at Gaza School*, N.Y. TIMES (July 24, 2014), <https://www.nytimes.com/2014/07/25/world/middleeast/despite-talk-of-a-cess-fire-no-lull-in-gaza-fighting.html>.

76. See Jean-Marie Henckaerts & Louise Doswald-Beck, *Rule 1. The Principle of Distinction Between Civilians and Combatants*, INT’L COMM. OF THE RED CROSS, in I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005), [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter1\\_rule1](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1).

77. See Additional Protocol I, *supra* note 48, art. 51(5) (b).

78. See LAW OF WAR MANUAL, *supra* note 43, sec. 5.5.2 (“Combatants must refrain from attacks in which the expected loss of life or injury to civilians, and damage to civilian objects incidental to the attack, would be excessive in relation to the concrete and direct military advantage expected to be gained.”). See also *id.* para. 5.12 (discussing proportionality in conducting attacks).

79. See Additional Protocol I, *supra* note 48, art. 57.

80. *Id.* art. 57(2)(b).

81. *Id.*

82. *Id.*

83. See LAW OF WAR MANUAL, *supra* note 43, sec. 5.6.2 (discussing objects protected from attacks including hospitals and medical facilities).

84. See Additional Protocol I, *supra* note 48, art. 57(2) (b).

85. It is customary international law that civilian objects can lose protected status for such time as they are military objectives. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *Rule 10. Civilian Objects’ Loss of Protection from Attack*, INT’L COMM. OF THE RED CROSS, in I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005), [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_ru\\_rule10](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_ru_rule10).

86. See Additional Protocol I, *supra* note 48, art. 57(3). See also LAW OF WAR MANUAL, *supra* note 43, sec. 5.11.5 (discussing the U.S. position that this rule is not a requirement of customary international law).

87. See Additional Protocol I, *supra* note 48, art. 57(3).

88. IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING: MILITARY OBJECTIVE, PROPORTIONALITY AND PRECAUTIONS IN ATTACK UNDER ADDITIONAL PROTOCOL I 189-90 (2009) (discussing choosing between targets and the occasional applicability of Article 57(3)).

89. See STATE OF ISR., *supra* note 8, at xi, 40-49 (discussing Hamas smuggling rockets through tunnels).

90. This can be achieved strategically through long-term solutions, but ordinarily occurs tactically at the time of attack. Many armies have a standing doctrine that states what type of ordinance will be used for the suppression of enemy artillery, and a battery will often be designated as the counterfire battery. See Tzuri & Curiel, *supra* note 20. In the case of the Jabalia strike, reports indicate Israel fired 155mm artillery. See Peter Beaumont, *Israel Responsible for Gaza Strikes on UN Schools and Shelters, Inquiry Finds*, GUARDIAN (Apr. 27, 2015, 1:19 PM), <https://www.theguardian.com/world/2015/apr/27/israel-responsible-gaza-strikes-un-schools-ban-ki-moon>. See also Hum. Rts. Council, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1 115, ¶ 434, U.N. Doc A/HRC/29/CRP.4 (June 24, 2015).

91. *Middle East: Gaza Strip*, CIA, <https://www.cia.gov/the-world-factbook/countries/gaza-strip> (Feb. 8, 2021) [hereinafter *Gaza Strip*].

92. *Id.* (Comparing the size of the Gaza Strip with Washington, D.C., one can see that the Gaza Strip is slightly more than twice the size of Washington, D.C.). See also *QuickFacts District of Columbia, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/DC> (last visited Jan. 21, 2021).

93. See *Gaza Strip*, *supra* note 91 (Gaza is 207th in the world in terms of area, but 152d in terms of population.).

94. JANE’S AMMUNITION HANDBOOK 329 (Terry J. Gander & Ian V. Hogg eds., Jane’s Information Group 2d ed. 1994) (estimates place lethal effect around 150 meters which means that if an individual is within 150 meters of the impact, there is a high chance of death or serious bodily injury). See also Julian Borger, *Gaza Civilian Death Toll Raises Questions About Israeli Military Training*, GUARDIAN (July 31, 2014, 2:56 PM), <https://www.theguardian.com/world/2014/jul/31/gaza-civilian-death-toll-military-training-experts>.

95. According to reports, an Israeli 155mm round struck part of the school. See *Aftermath of a Shelling—Jabalia*, U.N. RELIEF & WORKS AGENCY FOR PALESTINIAN REFUGEES IN THE NEAR E. (Aug. 1, 2014), <https://www.unrwa.org/newsroom/photos/aftermath-shelling-%E2%80%93-jabalia>.

96. See LAW OF WAR MANUAL, *supra* note 43, sec. 5.12 (discussing proportionality in which the military advantaged is compared to the expected loss of life or injury to civilians). Attacks are disproportionate if the impact on civilians would be excessive in relations to the military advantaged gained. *Id.*

97. The mobility of an indirect fire crew is critical to survival for belligerents in the forces of the less sophisticated party during asymmetric warfare. With rocket artillery, a common tactic by insurgents in this author’s experience is to simply place the rocket on a rail, and

set it on a timer. By the time the rocket fires, insurgents have left and nothing remains in place except an empty rail. This assertion is based on the author’s professional experience as the Regimental Judge Advocate of the 2d Cavalry Regiment from 2011 to 2014.

98. See Kristin Hausler & Robert McCorquodale, *Guest Post: Attacks on Schools—What About International Law?*, OPINIOJURIS (Aug. 13, 2014), <http://opiniojuris.org/2014/08/13/guest-post-attacks-schools-international-law/>.

99. See UNRWA *Condemns Placement of Rockets, for a Second Time, in One of Its Schools*, U.N. RELIEF & WORKS AGENCY FOR PALESTINIAN REFUGEES IN THE NEAR EAST (July 22, 2014), <https://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools>.

100. See STATE OF ISR., *supra* note 8.

101. See *The Covenant of the Islamic Resistance Movement*, *supra* note 9.

102. See LAW OF WAR MANUAL, *supra* note 43, sec. 5.12.4 (discussing what would constitute an excessive use of force under the proportionality rule). See also *id.* sec. 6.7.2 (discussing whether a weapon is indiscriminate and violates the principles of distinction and proportionality by examining the use of the weapon); Fionnuala Ní Aoláin, *The Weapons Piece of the Proportionality Analysis in Gaza*, JUST SEC. (Aug. 15, 2014), <https://www.justsecurity.org/14045/weapons-piece-proportionality-analysis-gaza/>.

103. *Id.*



The 21st Theater Sustainment Command performs a ROC drill to prepare for a major exercise. (Credit: PFC Katelyn Myers)



## No. 3

# Litigate Like We Fight

## Using Joint Planning Doctrine to Succeed at Your Next Court-Martial

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*There are no secrets to success. It is the result of preparation, hard work, and learning from failure.<sup>1</sup>*

The execution of a court-martial is analogous to a complex military operation. Inexperienced counsel often lack an adequate planning system to visualize, organize, and execute all critical tasks for each court-martial, resulting in trial delays and frustrated stakeholders. Moreover, military justice leaders often struggle to communicate their knowledge and experience in a transferable way to new counsel. Key elements of joint planning doctrine—operational art,<sup>2</sup> operational design,<sup>3</sup> and Red Teaming<sup>4</sup>—used by commanders and their staffs for planning and executing complex operations can provide a common planning framework and uniform terminology for military justice leaders to use in training new counsel. If adopted more broadly, these elements can also create consistency between the institutional training elements in the Judge Advocate General's (JAG) Corps.<sup>5</sup>

Assume you are a military justice leader, and one of your counsel is Captain (CPT) John Smith. Captain Smith is three months into his time as a trial counsel (TC) and one month away from his first contested court-martial. He believes he can prove the case from an evidentiary standpoint; but he and his trial team have devoted so much time to gathering evidence and preparing the alleged victim that they are falling behind on other government responsibilities. Captain Smith realizes he forgot to send subpoenas

to several witnesses<sup>6</sup> and forgot to request criminal background checks on all government witnesses.<sup>7</sup> To make matters worse, CPT Smith also failed to subpoena documents he agreed to produce in discovery.<sup>8</sup> Like many new TCs, CPT Smith wants to succeed, but disorganization and inadequate planning have left him overwhelmed and unprepared for trial.<sup>9</sup> In joint planning terminology, CPT Smith failed to manage all “lines of effort” (LOEs)<sup>10</sup> to achieve the government’s “desired end state.”<sup>11</sup> Unable to resolve these issues with only a few weeks before trial, the military judge grants defense’s motion for a continuance.<sup>12</sup>

As a military justice leader, it is often difficult to help CPT Smith see everything he does not know. This article demonstrates how the use of joint planning doctrine can help military justice leaders quickly fill the gap between what inexperienced TCs know and what they need to know to serve their client. Unlike the many checklists and products that already exist in the JAG Corps, this article offers a framework that can help leaders train their counsel on all aspects of the court-martial process at once. In the end, counsel will be able to see how all aspects of court-martial planning fit together to produce success at trial.

## Court-Martial Application of Joint Planning Doctrine

### *Assemble the Planning Team*

The first step in the court-martial planning process is to assemble the planning team. It is recommended that this happen before referral. Since face-to-face communication is most effective, the best practice is to do all significant planning sessions and in-progress reviews (IPRs) in person.<sup>13</sup> At

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a minimum, the TC, assistant TC, paralegal specialist supporting the court-martial, and key Civilian support staff should be present.<sup>14</sup> The TC can set the conditions for collaborative and efficient planning by reserving a conference room free of distractions, providing resources to facilitate collaborative planning (e.g., a white board with markers), and providing all members of the team with a roadmap for each planning session and IPR.

### *Determine Current State and Desired End State*

Once all members of the trial team are in the same room and ready to conduct planning, the next step is to identify the case's current state.<sup>15</sup> This is really a question of where the case is procedurally (and substantively, though this is less important). Have charges already been preferred? Is the case still in the investigation stage? Determining the case's current state is not the time to dig into the weeds about the many items the trial team needs to accomplish. That will come soon enough. For example, the case's current state may be "we are pending referral and we see this as a case we should take to a court-martial" or "we are post-Article 32 preliminary hearing and we think this case should be referred to a general court-martial as long as the victim continues to participate." It is that simple.

The next step in the planning process is to identify the government's desired end state.<sup>16</sup> Visualizing the desired end state early in the planning process and remaining end-state oriented<sup>17</sup> create a foundation for meaningful backward planning.<sup>18</sup> For a contested court-martial, the government's desired end state is likely to be prompt,<sup>19</sup> prepared,<sup>20</sup> persuasive,<sup>21</sup> and "exclude every fair and reasonable hypothesis except that of guilt."<sup>22</sup> Some may say the government's

desired end state is to obtain a conviction, but the end state should be something the government can fully control and complies with the pursuit of justice. The government's desired end state will likely differ for a contested court-martial and a guilty plea.<sup>23</sup> The TC and other trial team members should constantly compare the desired end state to the current state of the case to maintain a clear picture of the work required to achieve this end state.<sup>24</sup>

### *Define Objectives*

The next step in the planning process is to identify objectives that will lead to the government's desired end state.<sup>25</sup> To arrive at the end state outlined above, this article argues there are six critical, consistent objectives the government must achieve. First, the government must prove each element of each offense.<sup>26</sup> Second, the government should optimize communication throughout the court-martial process with all key stakeholders, such as commanders and victims. Third, the government must successfully manage all trial logistics.<sup>27</sup> Fourth, the government must meet all discovery obligations.<sup>28</sup> Fifth, the government must fully utilize pre-trial motions to resolve all pre-trial issues.<sup>29</sup> Finally, the government must educate and persuade the fact finder.<sup>30</sup> To a new TC, these objectives may seem a bit overwhelming, but each of these areas is

critical to the government's success at trial. With thorough planning and developing a shared understanding among the trial team, even an inexperienced TC can achieve success using this planning framework.

### *Identify Lines of Effort and Tasks*

Once the government has established objectives to achieve its desired end state, the next planning step is to visualize LOEs and tasks that will help the government achieve these objectives.<sup>31</sup> A LOE "links multiple tasks . . . using the logic of purpose—cause and effect—to focus efforts" toward objectives and the desired end state.<sup>32</sup> Objectives are the goals, and LOEs are the separate systems that allow the government to achieve the goals. If our hypothetical CPT Smith had been able to visualize each LOE and each critical task required to achieve success at trial, he may have been able to avoid a trial delay. Like joint commanders and their staffs, TCs can utilize LOEs to organize and visualize the government's many areas of responsibility. One way to do this in practice is to make each objective its own LOE. To illustrate this point, the six objectives described above could have corresponding LOEs: (1) evidentiary proof, (2) stakeholder communication, (3) logistics, (4) discovery, (5) motions, and (6) persuasive presentation.<sup>33</sup>

Developing LOEs helps the trial team visualize and develop broad solutions for mission accomplishment and creates a shared understanding in a complex environment.<sup>34</sup> The purpose of operational art and design is to produce an "operational approach," allowing the commander to translate broad strategies into an executable plan.<sup>35</sup> For trial planning, the operational approach could be a list of specific tasks with clear deadlines under each LOE.<sup>36</sup> Using the six LOEs outlined above, the rest of this article illustrates how a trial team can develop an executable plan within each LOE to achieve the government's desired end state.

### *LOE 1: Evidentiary Proof*

The first LOE any TC must manage is evidentiary proof. If the government fails to admit evidence on any element of any offense, the military judge will find the accused not guilty of that offense under

Rule for Courts-Martial (RCM) 917.<sup>37</sup> However, surviving an RCM 917 motion is the *minimum* standard for the government. Ultimately, the government’s goal should be to prove each element of each offense beyond a reasonable doubt and negate any defenses properly raised by the defense.<sup>38</sup> Meeting this goal requires thorough preparation, detailed follow-through, and mastery of the facts and the law.

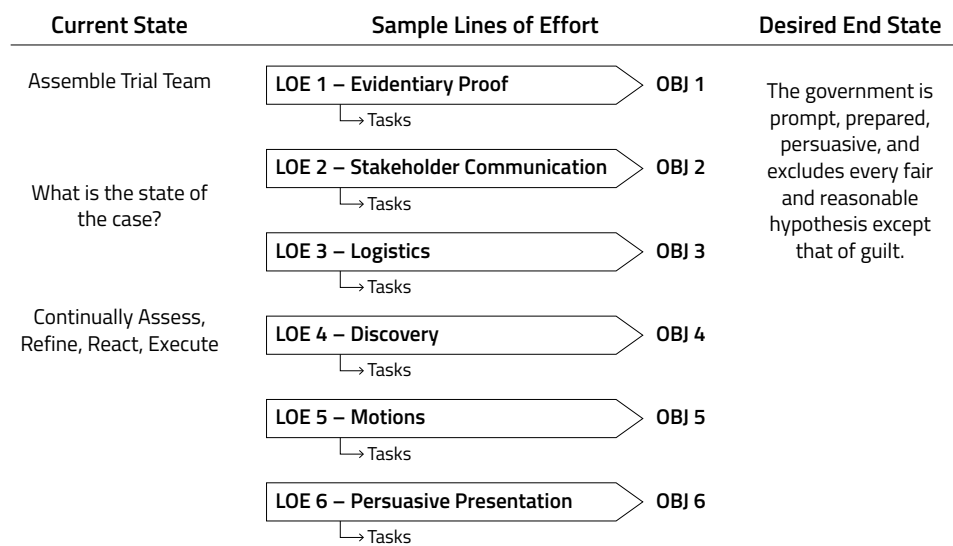
Many military justice leaders create safeguards—such as requiring a prosecution memorandum or elements proof matrix—to ensure TCs are thorough in their case preparation. These safeguards serve a useful purpose, especially at the pre-preferred stage, but much more is required of the TC to prove the case at trial. For example, consider the specific tasks required to prepare one offense of larceny in the hypothetical trial of *United States v. Private (PVT) Sam Snead*.

Assume the government charged PVT Snead with larceny for wrongfully taking Specialist (SPC) James Doe’s 2018 Toyota Camry (valued above \$1,000) on 1 January 2019 at or near Fort Bragg, North Carolina. Officer White, a civilian police officer in Raleigh, North Carolina, pulled PVT Snead over driving the 2018 Camry on 10 January 2019. Specialist Doe reported the vehicle stolen on 1 January after it went missing from the parking lot outside his barracks room. Specialist Doe purchased the vehicle from the Toyota dealership in Fayetteville, North Carolina, on 20 December 2018. After the arrest on 10 January, Special Agent (SA) Cleveland from Fort Bragg Criminal Investigation Command (CID) conducted a lawful search of PVT Snead’s cell phone that revealed text messages of PVT Snead attempting to sell the Toyota Camry to various used car dealerships in the Raleigh area.

To prove the offense of larceny, the government must admit evidence for each of the following elements:

- (1) On or about 1 January 2019;
- (2) at or near Fort Bragg, North Carolina;
- (3) PVT Snead wrongfully took a 2018 Toyota Camry from the possession of SPC Doe;
- (4) that the property belonged to SPC Doe;
- (5) that the property was of a value of

**Figure. Lines of Effort**



over \$1,000; and (6) that the taking by PVT Snead was with the intent to permanently deprive SPC Doe of the use and benefit of the property.<sup>39</sup>

With these facts and elements in mind, the next step requires the trial team to make an executable plan to prove each element by creating a thorough list of all tasks the trial team must complete. Then, for each task, the trial team should set a deadline for completion of the task, designate a member of the trial team to be responsible for the task, and ensure all trial team members understand the plan of execution.

To prove that the theft occurred on or about 1 January 2019, the government will likely rely on the in-court testimony of SPC Doe. Thus, task #1 for this LOE could be preparing SPC Doe to explain the dates associated with the theft. He can likely testify that he parked the vehicle near his barracks on 1 January and that he noticed it was missing later that day. He also went to the Fort Bragg Military Police station that same day to report it missing. To prove that the theft occurred at or near Fort Bragg, North Carolina, the government will likely again rely on the testimony of SPC Doe. Therefore, task #2 could be for a trial team member to prepare SPC Doe to discuss where he parked the vehicle when he discovered it was missing.

To prove that PVT Snead took the 2018 Camry from SPC Doe, the government will likely rely on the testimony of Officer White because he pulled PVT Snead over driving the stolen vehicle after SPC Doe reported it missing. Accordingly, task #3 could be for a trial team member to prepare Officer White to testify about pulling PVT Snead over on 10 January 2019. Since Officer White took photographs of PVT Snead with the stolen vehicle, and was wearing a body camera that evening, task #4 could be for a trial team member to obtain a photograph of the vehicle and PVT Snead from that evening. Task #5 might be to obtain a copy of the body camera footage.<sup>40</sup>

To prove that the 2018 Toyota Camry belonged to SPC Doe, the government will likely once again rely on testimony from SPC Doe, proof of purchase information from the Toyota dealership in Fayetteville, North Carolina, and title information from the State of North Carolina. Thus, task #6 could be to ensure SPC Doe is prepared to testify about his ownership of the 2018 Camry; task #7 may be obtaining a copy of the purchase information from the Toyota dealership in Fayetteville, North Carolina; and, task #8 could be retrieving a copy of the title information in SPC Doe’s name from the State of North Carolina.

Note that tasks #7 and #8 involve documents the TC intends to offer into



Members of the Alabama National Guard conduct a mock court-martial. (Credit: SSG Jeremy Dunkle)

evidence at trial. Thus, the government must be prepared to overcome potential hearsay<sup>41</sup> and authentication<sup>42</sup> objections to the admission of both documents. The vehicle purchase information from the Toyota dealership likely qualifies as a business record under Military Rule of Evidence (MRE) 803(6).<sup>43</sup> Therefore, the government may overcome a hearsay objection if it has a records custodian from the Toyota dealership testify at trial or produce a certification that complies with MRE 902(11).<sup>44</sup> Because getting the certification document is far more efficient than having a witness appear in person, obtaining the certification document that complies with MRE 803(6) and MRE 902(11) could become another task for the trial team—task #9. The vehicle title information may also qualify as a business record under MRE 803(6), as a public record under MRE 803(8),<sup>45</sup> or as a record or statement that affects an interest

in property under MRE 803(14)<sup>46</sup> and MRE 803(15).<sup>47</sup> Regardless of the avenue chosen, for planning purposes, task #10 could be for a trial team member to be prepared to authenticate the document.

Proving that the vehicle is of a value more than \$1,000 may be an item worthy of judicial notice, but judicial notice is something the trial team must request from the judge in advance of trial in accordance with the pretrial order.<sup>48</sup> Other options for proving this element could be calling an expert witness to testify to the value of a 2018 Toyota Camry, introducing a market report from a source such as Kelly Blue Book under MRE 803(11),<sup>49</sup> or relying on the purchase agreement from tasks #7 and #9. Proving this element could be task #11.

Finally, to prove that PVT Snead had the intent to permanently deprive SPC Doe of the vehicle, the TC will likely want to call SA Cleveland to testify about the text

messages found on PVT Snead's phone. Evidence to support this intent element could also come from Officer White's testimony about finding PVT Snead driving the vehicle in the Raleigh area. Therefore, proving this element could produce several tasks. Because the government intends to offer the text messages from PVT Snead's phone against him at trial, task #12 could be for a trial team member to include text messages as a category in the government's Section III disclosures.<sup>50</sup> Task #13 could be that a trial team member prepares SA Cleveland to testify about the text messages he found during a digital forensic examination. Because SA Cleveland will have to be qualified as an expert, task #14 might be obtaining his curriculum vitae (CV) and preparing him to draft his notice of expert testimony to provide to the court and defense counsel in accordance with the pretrial order. Finally, task #15 might be

for a trial team member to prepare Officer White to testify about his observations of PVT Snead when he pulled PVT Snead over in SPC Doe's vehicle.

Although more tasks may be necessary to prove each element beyond a reasonable doubt, one can see from this simple exercise how the trial team can utilize this systematic approach to ensure the government is prepared to admit evidence for each element of the offense. A prudent TC will also use this method to prepare to negate any relevant defenses. The next step is to ensure a trial team member is responsible for each task and set internal team deadlines.

When deciding which member of the team is responsible for each task, the best practice is to group tasks into a logical order of execution. For example, tasks #1, #2, and #6 all involve testimony by SPC Doe. Tasks #3, #4, #5, and #15 all involve testimony or evidence from Officer White. Tasks #7-11 involve obtaining documents from outside agencies and overcoming hearsay and authentication objections. Tasks #13 and #14 involve SA Cleveland, and task #12 involves Section III disclosures.<sup>51</sup> Thus, it might make sense to give the first set of tasks to the trial team member planning to conduct the direct examination of SPC Doe and the second set to the trial team member conducting the direct examination of Officer White. Ultimately, the goal should be that a member of the trial team is responsible for each task and that all trial team members have a shared understanding of the distribution of work and the deadline for each task.

After creating an executable plan for LOE 1, the trial team could bring in a Red Team<sup>52</sup> to look at the plan from a critical, objective point of view. A Red Team can help the trial team "think critically and creatively; see things from varying perspectives . . . [and] avoid false mind-sets, biases, or group thinking."<sup>53</sup> It is far better to have members of the government team question false assumptions, identify weaknesses, and look at the government plan objectively than to let the defense counsel be the first to do so at trial. Red Teaming does not need to be overly complicated. The trial team can simply invite members of the government not intimately involved in preparation of the case to hear their trial strategy and

provide constructive feedback. Under the Military Justice Redesign, members of the other litigation team could serve as the Red Team.<sup>54</sup> The most value will likely come from asking some of the most experienced litigators to be part of the Red Team. The best practice is to bring in a Red Team during each critical stage of court-martial

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preparation. For those who may think this type of detailed, systematic planning is overkill, consider that this is just one LOE for one offense. If the trial team does not plan to this level of detail, even seasoned attorneys can overlook critical details when the stress and pressure of trial preparation take over.<sup>55</sup>

#### *LOE 2: Stakeholder Communication*

Next, to meet all the government's objectives and ultimately achieve the government's desired end state, the government must maintain clear, consistent, and meaningful communication with all key stakeholders in the court-martial process. The most critical stakeholders in the military justice system are commanders charged with maintaining good order and discipline.<sup>56</sup> Despite proposals for reform, the commanders maintain the authority and responsibility for discipline.<sup>57</sup> Accordingly, TCs and Military Justice Advisors (MJAs) have a responsibility to ensure commanders have the information required to make LOE meaningful charging decisions,<sup>58</sup> give recommendations on disposition,<sup>59</sup> make decisions on referring a case to courts-martial,<sup>60</sup> and make decisions on plea negotiations.<sup>61</sup> Government counsel should also keep commanders informed on the procedural status of their pending cases.

In addition to maintaining effective communication with commanders, TCs must also maintain meaningful

communication with alleged crime victims and, when applicable, their Special Victim's Counsel. Maintaining an open line of communication with a crime victim makes tactical sense, but it might also be required by law<sup>62</sup> or regulation.<sup>63</sup> As with the other LOEs, the trial team should create tasks for each engagement with key stakeholders,

designate one trial team member to be responsible for each task, set deadlines for task completion, and schedule IPRs to monitor the progress of each task and continue to refine the plan.<sup>64</sup>

#### *LOE 3: Logistics*

In addition to evidentiary proof and stakeholder communication, one of the government's most critical—and often most overlooked—LOEs is trial logistics.<sup>65</sup> If something goes wrong with logistics, it often results in trial delays, frustrated stakeholders, and diminished good order and discipline. As one former military judge observed, "attention to detail should be the trial advocate's obsession. If counsel let down their guard, something will go wrong."<sup>66</sup> When it comes to trial logistics, government counsel would be wise to train their paralegals to support this LOE to the maximum extent possible. Once paralegals have received adequate training, trial counsel should empower them and create effective feedback loops to ensure adequate attention to detail. Managing logistics also requires over-communication and detailed coordination with civilian support staff (e.g., the victim witness liaison) and the accused's chain of command.

Once the government grants production of witnesses, it has the responsibility to ensure their presence at trial.<sup>67</sup> It is the TC's responsibility, with the assistance of the trial team, to subpoena all witnesses,<sup>68</sup>

schedule witness travel, book hotel accommodations, and organize reimbursements for witnesses. This means the government must obtain critical information from each witness—such as their mailing address, best contact information, social security number, and bank account information—at the first opportunity. Sometimes witnesses are hesitant to give over personal information until trust and credibility have been established. Nonetheless, the best government teams know exactly what information they need from all witnesses and are prepared to obtain it as early as possible. They also have an effective tracking system for organizing and sharing relevant information with key stakeholders, such as the victim witness liaison.<sup>69</sup>

The government should also have a detailed tracking system to ensure a team member mails each non-military witness a subpoena and that each witness affirmatively acknowledges the subpoena. The government must keep track of when each witness arrives, where they are staying, and when they are expected to arrive at the courtroom. The government is also responsible for arranging rental cars or ensuring witnesses have transportation from the airport to their hotel and from their hotel to trial. The government should have a clear timeline for preparing witnesses after they arrive and getting them familiar with the location and layout of the courtroom, and witnesses should be aware of proper courtroom attire.

The government must also manage the logistics of expert witnesses and consultants. In addition to processing defense expert requests to the convening authority, government counsel must also litigate motions to compel expert assistance and coordinate to ensure they are properly contracted when approved. This typically requires coordination with the legal administrator and the Division or Corps G8 office.

The government is also responsible for making sure all panel members are aware of the court-martial and present for trial.<sup>70</sup> The trial counsel must ensure all panel member information is correct, taking into account excusals and alternate members. This includes ensuring the court and defense have the correct court-martial

convening orders and vice orders. The government must provide the court and defense with all panel members' enlisted record briefs, officer record briefs, and questionnaires. Additionally, the government is responsible for drafting a findings and sentencing worksheet, a diagram of where panel members will sit in the courtroom, putting together panel binders, panel nameplates, courtroom security, and ensuring the technology works in the courtroom. Government counsel must also prepare a trial script that covers in detail all stages of the trial, including areas where the government must respond to questions from the judge such as whether the information on the charge sheet is correct. The government must also coordinate with the accused's unit to have proper escorts and bailiffs; confirm the accused's uniform is correct and ready for trial; and, in the event the sentence includes confinement, ensure that the accused's confinement packing list is completed.<sup>71</sup>

To achieve success for this LOE, create specific tasks for each government responsibility, identify one person on the team to be responsible for the execution of each task, and set clear deadlines. Finally, the trial team should schedule IPRs to monitor the progress of each task and ensure no gaps exist in execution.<sup>72</sup>

#### *LOE 4: Discovery*

For new TCs and experienced litigators, discovery can be stressful, cumbersome, and lead to consequential problems if mismanaged.<sup>73</sup> If the government gets discovery wrong, it can cause a delay or an overturned conviction, or it can lose ethical credibility.<sup>74</sup> Thus, discovery requires a systematic, thorough approach to achieve the government's desired end state. Rule for Courts-Martial 701 discusses discovery obligations,<sup>75</sup> and RCM 703 deals with production of evidence and witnesses.<sup>76</sup> These rules outline many of the critical discovery tasks for the trial team, but they are not all-inclusive.

As a trial team, developing a systematic method of tracking discovery early is essential for success. While many offices use Microsoft Excel to track items of discovery,<sup>77</sup> make sure the entire team agrees to use one tracking method and that each

member of the trial team agrees to capture all items of discovery and production using this method. Developing an agreed upon method of tracking discovery could be task #1. In addition to having a fail-safe method of tracking discovery, the trial team should utilize Bates numbering<sup>78</sup> (or something equally effective) to track each page the government turns over to defense. Although Bates numbering will be a continual obligation until trial, the trial team could make this task #2 to create accountability between all trial team members.

The government must promptly disclose all evidence that reasonably tends to negate guilt, reduce the degree of guilt, reduce punishment, or adversely affect the credibility of any prosecution witness or evidence.<sup>79</sup> The trial team could make this task #3 and ensure all members of the team understand the significance and ongoing nature of this obligation. While examining this task, the trial team may come up with other tasks or subtasks that flow out of this obligation.<sup>80</sup>

Additionally, the trial team can create tasks based on where they must search for unfavorable information. For example, task #4 could be to search all law enforcement files involved in the case for information favorable to defense, including the files of CID and civilian law enforcement agencies involved in the criminal investigation. The government has an affirmative due diligence requirement to search the entire investigation file for favorable information.<sup>81</sup> The trial team should also look for derogatory information on all government witnesses. Therefore, task #5 could be to review the military personnel files of all government witnesses for derogatory information. This task includes their official files and their local personnel files. Similarly, the trial team could make task #6 conducting criminal record checks on all government witnesses through the National Crime Information Center (NCIC).

The trial team will also need to make Section III disclosures to defense prior to arraignment, which could be task #7.<sup>82</sup> This includes grants of immunity,<sup>83</sup> statements by the accused,<sup>84</sup> evidence seized from the accused,<sup>85</sup> and identifications.<sup>86</sup> The trial team could also create tasks for all other mandatory disclosures by the government.

For example, at prefferal, the government is obligated to disclose the charges and any document accompanying the charges.<sup>87</sup> The government must also disclose any order directing an Article 32 preliminary hearing,<sup>88</sup> the report of the Article 32 preliminary hearing,<sup>89</sup> and (at referral) all allied papers.<sup>90</sup> Similarly, the government must disclose any prior convictions of the accused it may offer on the merits, including impeachment,<sup>91</sup> similar sex assault or child molestation crimes the government intends to offer,<sup>92</sup> notice of intent to employ an expert witness at government expense,<sup>93</sup> the names and contact information of government witnesses,<sup>94</sup> and testing that may consume the only available samples of evidence.<sup>95</sup>

If the government receives a defense discovery request, the trial team can create separate tasks based on its responses to the discovery request. Some common disclosures triggered by a defense request include documents and tangible objects,<sup>96</sup> reports,<sup>97</sup> sentencing information,<sup>98</sup> uncharged misconduct,<sup>99</sup> and witness statements.<sup>100</sup> The trial team can also create separate tasks for each production request granted by the government under RCM 703.<sup>101</sup> Because granting a request for production under RCM 703 often requires the issuance of a subpoena or warrant and coordination with an outside organization, the trial team should ensure it carefully accounts for these tasks and use backward planning to meet all required deadlines. As with the previous LOEs, the trial team should finalize the planning for this LOE by assigning a responsible individual to each task and setting clear deadlines based on the Rules and the pretrial order.

#### *LOE 5: Motions*

Effective pretrial motions are critical to the government's success at trial.<sup>102</sup> Well-drafted and well-researched pretrial motions can quickly establish credibility with the military judge.<sup>103</sup> As former trial and appellate judge Colonel James W. Herring, Jr. explains, "Credibility is the most important character attribute a trial attorney can have. Without it, a trial attorney cannot accomplish his two most important missions: educate and persuade the fact finder."<sup>104</sup> When TCs prepare in

advance and set aside sufficient time to identify key legal issues, research those issues, write, and rewrite, they are likely to make a great first impression with the military judge. However, if you fail to plan and "[s]ubmit and litigate a motion with

motions. The government can anticipate the motions defense will likely file, which means the trial team can begin researching and outlining possible responses in advance of the motions deadline. As with the other LOEs, the government should ensure some-

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only half-hearted effort" you will "reap the credibility and outcome consistent with the effort you put into that motion."<sup>105</sup>

As the trial team begins planning for this critical LOE, consider the steps required for successful execution of pretrial motions and pretrial litigation. First, the trial team should spend time brainstorming key legal issues ripe for affirmative government motions or issues that will likely lead to defense motions and require a government response. Common issues for pretrial litigation are motions to suppress evidence, motions to suppress an accused's confession, motions under MREs 412, 413, 414, and 513, motions to pre-admit evidence, and motions to compel production of witnesses and evidence.<sup>106</sup> As the trial team conducts this brainstorming session, they can make a list of each affirmative motion the government plans to file and each issue that might require a government response.<sup>107</sup>

After the trial team identifies all critical legal issues ripe for litigation, the next steps are research<sup>108</sup> and writing. Because great writing takes time,<sup>109</sup> the trial team should backward plan from the motions deadline to have time to research, write, edit, and receive feedback from co-counsel and supervisors. Waiting until the last minute to draft motions could result in a poor product, loss of credibility, or failure to win the day on a case dispositive issue.<sup>110</sup> The government should avoid the common mistake of relying too heavily on a "brief bank" to draft motions.<sup>111</sup> Instead, the trial team should create a task for the writing of each affirmative government motion and each government response to anticipated defense

one on the trial team is responsible for each task and, based on the Rules or the pretrial order, assign deadlines for when the task needs to be completed.<sup>112</sup>

#### *LOE 6: Persuasive Presentation*

In addition to presenting admissible evidence on each element of each offense, TCs must educate and persuade the fact finder to achieve the government's desired end state.<sup>113</sup> Good advocates identify a persuasive theme and theory early and then artfully weave their theme and theory into all key stages of the trial, from voir dire to closing arguments. Persuading the fact finder requires preparation, thoroughness, mastery of the facts and the law, and credibility as an advocate.<sup>114</sup> Accordingly, the government should devote significant time, effort, and attention to persuading the fact finder with the art and science of persuasion.<sup>115</sup>

To develop tasks for this LOE, the trial team should take an honest look at the good and bad facts of the case and examine what story the government needs to tell the factfinder in closing argument to be most persuasive. The government's theme should help the fact finder make sense of the facts of the case.<sup>116</sup> When used properly from the beginning of trial, the government uses the theme from its first interaction with the fact finder and builds until it confirms the theme in closing argument.<sup>117</sup> Finding a meaningful theme and creating truly persuasive presentations from start to finish takes significant time, commitment to rehearsals, and significant collaboration between all members of the trial team.

With task development, the trial team can translate these abstract concepts into

an executable plan. Task #1 could be to collaborate and put in writing the government's theory of the case, and task #2 might be to develop a compelling theme. Task #3 could be for a trial team member to outline the closing argument, while task #4 may be to write out questions for voir dire. Task #5 could then be to write out direct examina-

placed on each member of the trial team. To set the government up for success on each task, utilize backward planning<sup>121</sup> to set meaningful deadlines. Be mindful of the significant time investment required to create persuasive presentations,<sup>122</sup> and do not rely on having free time in the weeks preceding trial.<sup>123</sup>

**The danger of confirmation bias, in which law enforcement investigators and prosecutors reach conclusions based on first impressions and then seek evidence to prove their conclusion, exists in every case and risks missing important evidence. Using the Analysis of Competing Hypotheses mitigates this effect by preventing snap judgments.**

tion questions for each witness, and task #6 might be to write out cross-examination questions for each defense witness, including the accused.<sup>118</sup> Task #7 could be to write out the opening statement. Task #8 could be for a team member to create audio-visual aids to assist in the presentation of evidence. Tasks #9-12 could be to conduct rehearsals on critical tasks with the Red Team—such as the government's closing argument, voir dire, opening statement, and cross-examination of the accused.<sup>119</sup> Task #13 might be to prepare the alleged victim (if there is an alleged victim) for direct examination and have a member of the government conduct a mock cross-examination of them. This is not an exhaustive list of tasks under this LOE, but each task requires individual preparation and meaningful trial team collaboration to create a compelling, cohesive presentation.

As the trial team makes a list of tasks for this LOE, the team should ensure a trial team member has responsibility for each task. Some key factors to consider when assigning tasks for this LOE are the experience level of the counsel, unique talents of the counsel, and rapport between the counsel and certain witnesses.<sup>120</sup> Regardless of how the trial team decides to distribute tasks, this planning step is critical to moving from an abstract list of tasks to an executable plan with responsibilities

**Red Team Tools: Applied Critical Thinking**  
Red Teaming is a capability that allows commanders to fully explore alternatives and test plans.<sup>124</sup> Red Teamers use various tools designed to improve decision-making by assisting staffs with the identification of the shortcomings in their plans; they do this by avoiding group think and logical fallacies and through identifying and challenging cognitive biases and assumptions.<sup>125</sup> Trial teams can use Red Team tools to test their litigation plans and mitigate the potential for currently unknown events to derail their cases. Two Red Team tools that are particularly useful for trial preparation are the Analysis of Competing Hypotheses<sup>126</sup> and Premortem Analysis.<sup>127</sup>

An Analysis of Competing Hypotheses is useful in avoiding logical fallacies such as confirmation bias.<sup>128</sup> Confirmation bias is the tendency to seek or interpret information or evidence consistent with existing beliefs.<sup>129</sup> The danger of confirmation bias, in which law enforcement investigators and prosecutors reach conclusions based on first impressions and then seek evidence to prove their conclusion, exists in every case and risks missing important evidence. Using the Analysis of Competing Hypotheses mitigates this effect by preventing snap judgments.

Ideally, counsel would be involved in the early stages of an investigation and

use the Analysis of Competing Hypotheses to assist law enforcement's scope of the investigation. Trial counsel can also use the Analysis of Competing Hypotheses to assess the strength of evidence, determine charges, and forecast defenses or weaknesses in cases. This Red Team tool is easy to use and forces deliberate assessment of evidence.

At the start of evidence analysis, the team leader (ideally the Special Victim Prosecutor or the General Crimes Prosecutor) leads the litigation team in brainstorming to identify all reasonable hypotheses.<sup>130</sup> To encourage divergent thinking, include every member of the trial team—including paralegals. In generating alternate hypotheses, it is important that the team identifies all potential hypotheses of criminal liability in a particular matter as well as hypotheses of non-liability before assessing any individual hypothesis.<sup>131</sup> After identifying all of the hypotheses, the group then lists all the evidence relevant to all the hypotheses and "arrays the evidence against each hypothesis."<sup>132</sup> At this point, the goal is to negate hypotheses rather than to prove any hypothesis.<sup>133</sup> The simplest way to do this is to create a matrix with the hypotheses across the top, listing evidence related to each hypothesis in a column underneath.<sup>134</sup> Once the team identifies sufficient evidence to negate a hypothesis, the team leader removes that hypothesis from consideration.<sup>135</sup> Through deliberate evidence analysis and removal of disproved hypotheses the trial team will be able to identify gaps in evidence, weaknesses in their case, and the most appropriate charges to assert.

A second useful Red Team tool is Premortem Analysis.<sup>136</sup> Trial teams should use Premortem Analysis after they have developed their initial plan and drafted their initial LOEs. The premise of Premortem Analysis is to critically view a plan by imagining that the plan failed and then identifying all the reasons the plan could potentially fail.<sup>137</sup> Once the team identifies these potential failure points, the team places them along their LOEs and creates tasks designed to mitigate or eliminate the problem.<sup>138</sup>

Like Analysis of Competing Hypotheses, it is important to include the entire litigation team. Incorporating ideas



generated by paralegals supporting the case, victim witness liaisons, and the trial attorneys increases the likelihood of capturing all potential problems. For example, the paralegal supporting the case may have a better sense of logistical issues that could derail a court-martial. The victim witness liaison has probably maintained a relationship with an alleged crime victim, or has engaged in regular contact with other witnesses and can inform the trial counsel of witness issues that could cause the court-martial to fail. Each member of the team participates equally in the steps of Premortem Analysis.

There are five steps to Premortem Analysis.<sup>139</sup> The first step is to ensure each member of the team has at least a basic understanding of the plan.<sup>140</sup> In the second step, team members imagine catastrophic failure of the plan.<sup>141</sup> The cause of the failure could be anything: a discovery violation that causes an Article 10 issue; failure to properly contract a defense expert witness that leads to a delay in the trial and the resulting discontinuation of victim cooperation in the court-martial; or a lack of child care for a key non-local witness who cannot testify unless their child travels with them. The possibilities are almost unlimited. The second step requires each member of the team to write down, individually, as many ideas as possible of things that could cause the plan to fail.<sup>142</sup> Team members should include ideas that apply to any LOE. For example, the paralegal may raise a point that relates to the persuasive presentation LOE. The only rule at this point is that the more ideas generated, the better.<sup>143</sup> The fourth step requires consolidation of the ideas.<sup>144</sup> Once each team member generates ideas individually, the team leader consolidates by going around the room, having each team member give one idea at a time, and writing the ideas on a white board for everyone to see and contemplate.<sup>145</sup> It is important to go one idea at a time to allow opportunity for each team member to assess the idea and determine if that idea generates additional ideas that were not initially thought of. The fifth step is to revisit the plan and place failure points along the LOEs and assign tasks to mitigate the problems.<sup>146</sup> Last, it is important for teams to regularly review the LOEs to ensure tasks are being completed, ensure the plan remains good,

and to identify any other problems that may have occurred.

Premortem Analysis is useful to avoid overconfidence in a plan, and is particularly useful with inexperienced teams.<sup>147</sup> It provides a methodical framework that, when the ability to react to the problem is either limited or non-existent, allows trial teams to avoid surprises late in the litigation. Although it requires effort on the front end, use of deliberate processes like Premortem Analysis should, in the end, relieve stress and create unified, committed teams whose members are all informed and invested in both the process and the outcome of the case.

### Conclusion

Imagine if CPT Smith had utilized these elements of joint planning and Red Teaming for his upcoming trial. From the beginning of trial preparation, CPT Smith could have visualized all the LOEs to achieve success instead of narrowly focusing on just a few key tasks. For each LOE, CPT Smith could have created a detailed list of tasks, responsibilities, and deadlines to avoid failure and delay.

**Although it requires effort on the front end, use of deliberate processes like Premortem Analysis should, in the end, relieve stress and create unified, committed teams whose members are all informed and invested in both the process and the outcome of the case.**

He could have also utilized Red Teaming to identify weaknesses for any of the critical LOEs. Because of all that is required of government counsel in the military justice system, ad hoc approaches to planning and execution leave too many critical tasks to chance. The elements of joint planning illustrated in this article provide military justice leaders and practitioners a systematic framework for court-martial planning that will help new TCs find clarity in a complex military justice environment, just as they provide joint commanders and their staffs with clarity in complex operational environments around the world. **TAL**

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### Notes

1. HILL HARPER, LETTERS TO A YOUNGER BROTHER: MANIFEST YOUR DESTINY 44 (2006) (quoting General Colin Powell).
2. JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING I-3 (1 Dec. 2020) [hereinafter JP 5-0]. “Operational art is the cognitive approach by commanders and staffs—supported by their skill, knowledge, experience, creativity, and judgment—to develop strategies, campaigns, and operations to organize and employ military forces by integrating ends, ways, means, and evaluating risks.” *Id.* at I-3.
3. Operational design is the analytical “framework that underpins a campaign or operation and its subsequent execution.” *Id.* at IV-1.
4. A Red Team is “an independent group that challenges an organization to improve its effectiveness.” *Id.* at III-76. A Red Team can help commanders and their staffs “think critically and creatively; see things from varying perspectives . . . [and] avoid false mind-sets, biases, or group thinking.” *Id.*
5. The institutional elements are in reference to the Trial Counsel Assistance Program, Defense Counsel

Assistance Program, The Judge Advocate General’s Legal Center and School, and—now—the Advocacy Center at Fort Belvoir, Virginia.

6. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(d)(4) discussion (E) (2019) [hereinafter MCM] (describing the trial counsel’s (TC’s) responsibility to ensure all witnesses are present for trial).
7. See MCM, *supra* note 6, R.C.M. 701(a)(6) discussion (describing the TC’s obligation to exercise due diligence in discovering information favorable to defense); *United States v. Green*, 37 M.J. 88, 89 (C.M.A. 1993) (discussing the government’s obligation to disclose a witness’s Article 15 as impeachment evidence).
8. See MCM, *supra* note 6, R.C.M. 703(e) (outlining the production responsibilities of the government).
9. Colonel Jeffery R. Nance, *A View from the Bench: So, You Want to Be a Litigator?*, ARMY LAW., Nov. 2009, at 48, 48-52 (emphasizing the importance of preparation and thoroughness to achieve success at trial).

10. See JP 5-0, *supra* note 2, at GL-11 (defining line of effort (LOE) as “using the purpose (cause and effect) to focus efforts toward establishing operational and strategic conditions by linking multiple tasks and missions”).
11. See *id.* at IV-21 (defining military end state as “the set of required conditions that defines achievement of all military objectives”).
12. See MCM, *supra* note 6, R.C.M. 906(b)(1) discussion (“The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.”).
13. See Brigadier General Charles N. Pede, *Communication is the Key—Tips for the Judge Advocate, Staff Officer and Leader*, ARMY LAW., June 2016, at 4, 5 (emphasizing the importance of face-to-face communication); JP 5-0, *supra* note 2, at I-5.
14. The chief of military justice, general crimes prosecutor, or special victim prosecutor should be present at the initial planning meeting to ensure the case starts on the right track. The chief of justice should check on the status of each case on a regular basis.
15. One of the first questions a commander may ask under operational art and design is: what is the current state of the operational environment? See JP 5-0, *supra* note 2, at IV-6.
16. See *id.* at I-19 to -20 (“A military end state describes conditions that define mission success.”).
17. A fundamental principle of joint planning is to remain focused on the objective and desired end state. See *id.* at I-5.
18. Nance, *supra* note 9, at 48 (recommending backward planning for court-martial preparation).
19. See Colonel James W. Herring, Jr., *A View from the Bench: Make the Routine, Routine*, ARMY LAW., Aug. 2014, at 41, 42 (describing the importance of meeting every suspense as a TC).
20. Nance, *supra* note 9, at 48 (emphasizing the importance of preparation).
21. See Lieutenant Colonel Jacob D. Bashore, *A View from the Bench: Maximizing the Effect of Your Motions Practice*, ARMY LAW., Jan. 2018, at 3, 3 (stating the two most important missions of the trial attorney are to educate and persuade the fact finder).
22. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-5 (29 Feb. 2020) [hereinafter DA PAM. 27-9].
23. This article focuses on preparing for a contested court-martial. A TC who can navigate the complexities and demands of a contested court-martial will be well equipped to plan and execute a guilty plea, a much less complex undertaking in terms of planning and moving parts.
24. See JP 5-0, *supra* note 2, at III-8. One element of joint planning not covered in this paper is the creation of a problem statement. See *id.* at IV-14. Commanders and their staffs spend significant time defining the problem and creating a problem statement. Military justice practitioners could incorporate this practice into court-martial planning as Joint Publication 5-0 states, “[d]efining the problem is essential to addressing the problem.” *Id.* at IV-11.
25. See *id.* at IV-21 (describing the end state as the achievement of the commander’s objectives).
26. See Major Matthew McDonald, *A View from the Bench: “You Don’t Know What You Don’t Know”* Perspectives from a New Trial Judge, ARMY LAW., July 2010, at 38, 39.
27. Lieutenant Colonel Lawrence M. Cuculic, *Trial Advocacy—Success Defined by Diligence and Meticulous Preparation*, ARMY LAW., Oct. 1997, at 4, 9 (emphasizing the importance of attention to detail in every aspect of trial preparation).
28. *Id.* at 6-7 (emphasizing the importance of discovery).
29. See generally Bashore, *supra* note 21.
30. See Bashore, *supra* note 21 and accompanying text.
31. JP 5-0, *supra* note 2, at III-30.
32. *Id.*
33. For an example, see figure “Lines of Effort.”
34. JP 5-0, *supra* note 2, at IV-30 to -32.
35. *Id.*
36. Note that the approach recommended here incorporates aspects of the joint planning process (JPP) and operational design. The JPP and operational design are “complementary tools of the overall planning process.” JP 5-0, *supra* note 2, at III-4.
37. See MCM, *supra* note 6, R.C.M. 917 (explaining how the military judge, on a motion of the accused or *sua sponte* shall enter a finding of not guilty if the evidence is insufficient to sustain a conviction); Cuculic, *supra* note 27, at 9-10 (emphasizing how counsel should track each element of each offense).
38. DA PAM. 27-9, *supra* note 22, para. 2-5.
39. MCM, *supra* note 6, pt. IV, ¶ 64.b.(1).
40. This task illustrates how interconnected the LOEs can be. While obtaining a copy of the body camera footage is critical to proving the case, it might also become a task under the Logistics LOE to send a preservation request.
41. MCM, *supra* note 6, MIL. R. EVID. 802.
42. *Id.* MIL. R. EVID. 901.
43. *Id.* MIL. R. EVID. 803(6).
44. *Id.* MIL. R. EVID. 803(6)(D).
45. *Id.* MIL. R. EVID. 803(8).
46. *Id.* MIL. R. EVID. 803(14).
47. *Id.* MIL. R. EVID. 803(15).
48. *Id.* MIL. R. EVID. 201. The *Rules of Practice* allow the judge to use a pretrial order “to establish dates for compliance regarding discovery and notice, sessions, and conferences.” U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL ¶ 3.2 (1 Jan. 2019).
49. MCM, *supra* note 6, MIL. R. EVID. 803(11).
50. See *id.* MIL. R. EVID. 301(d)(2).
51. Note that task #15 could fall under LOE 3 Discovery, but the best practice is to account for a task the first time it comes up to avoid overlooking it later in the planning process in case, for example, LOEs fall off.
52. A Red Team is “an independent group that challenges an organization to improve its effectiveness.” JP 5-0, *supra* note 2, at III-76. See also RAY DALIO, PRINCIPLES: LIFE AND WORK 134-35 (2017) (“Truth—or, more precisely, an accurate understanding of reality—is the essential foundation for any good outcome.”).
53. JP 5-0, *supra* note 2, at III-76.
54. The chief of justice should supervise the Red Teaming, but they should keep comments to a minimum to avoid causing bias in the Red Team.
55. Nance, *supra* note 9, at 48-52 (highlighting how preparation and thoroughness are key characteristics of successful advocates).
56. See generally DAVID A. SCHLUETER, §1-8 The Commander’s Options: Prosecutorial Discretion, in MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 65 (LEXISNEXIS, 10th ed. 2019) (You can download specific sections of this document; but, if you download the entirety of this document, the page number is 65). See generally, Lindsay Nicole Alleman, *Who is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMPAR. & INT’L L. 169 (2006).
57. See generally, e.g., Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 134 (2014); Charles W. Schiesser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from Military Justice*, 7 TEX. TECH. L. REV. 559, 560 (1976).
58. MCM, *supra* note 6, R.C.M. 307(a).
59. *Id.* R.C.M. 401, R.C.M. 402.
60. Rule for Courts-Martial 601(a) states, “[r]eferral is the order of the convening authority that charges and specifications against an accused will be tried by a specified court-martial.” *Id.* R.C.M. 601(a).
61. *Id.* R.C.M. 705.
62. UCMJ art. 6b (2017).
63. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 17-14 (11 May 2016).
64. It may be helpful to create a checklist, much like those found in all military justice shops, to state the tasks, persons responsible, deadlines, and current statuses. This will assist the stakeholders in identifying tasks and tracking their progress.
65. See MCM, *supra* note 6, R.C.M. 502(d)(4).
66. See Cuculic, *supra* note 27, at 9.
67. See MCM, *supra* note 6, R.C.M. 502(d)(4) discussion (E) (describing the TC’s responsibility to ensure all witnesses are present for trial).
68. *Id.* R.C.M. 703(e)(2).
69. The victim witness liaison will often use an Invitational Traveler Worksheet to capture critical information needed for booking witness travel through the Defense Travel System.
70. See MCM, *supra* note 6, R.C.M. 502(d)(4) discussion (E) (describing the TC’s responsibility to ensure all witnesses are present for trial).
71. When appropriate, government counsel should consider utilizing an operations order to ensure communication takes place between command channels.
72. A checklist can also be very helpful in tracking task and status progress in this LOE.
73. See McDonald, *supra* note 26, at 40 (describing discovery issues).
74. See, e.g., United States v. Stellato, 74 M.J. 473, 489-91 (C.A.A.F. 2015) (finding dismissal with prejudice was appropriate because of the “nature, magnitude, and consistency of the discovery violations”).
75. MCM, *supra* note 6, R.C.M. 701.

76. *Id.* R.C.M. 703.
77. As a trial counsel and senior trial counsel, I utilized Microsoft Excel to track each item of discovery turned over to defense, the date it was turned over, the bates stamp of each item, and the method used for tracking the discovery—such as a DA Form 200 Transmittal Record or email.
78. *Bates Numbering 101: History, Usage and Tutorial*, INVESTINTECH, <https://www.investintech.com/resources/blog/archives/7829-bates-numbering-101-history-usage-and-tutorial.html> (last visited Feb. 9, 2021).
79. See *Brady v. Maryland*, 373 U.S. 83 (1963); MCM, *supra* note 6, R.C.M. 701(a)(6); U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para. 3.8(d) (28 June 2018).
80. For example, if the alleged victim in the case made inconsistent statements during a trial team member's interview, that may create a separate task under this LOE.
81. See *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The government should review all documented actions taken by Criminal Investigation Command and other agencies for information favorable to defense or disclose the entire case file to defense, including all hand-written notes by agents working on the case.
82. MCM, *supra* note 6, MIL. R. EVID. 301(d)(2).
83. *Id.*
84. *Id.* MIL. R. EVID. 304(d).
85. *Id.* MIL. R. EVID. 311(d)(1).
86. *Id.* MIL. R. EVID. 321(d)(1).
87. *Id.* R.C.M. 404A(a)(1).
88. *Id.* R.C.M. 404A(a)(2).
89. *Id.* R.C.M. 405(l)(4).
90. See *id.* R.C.M. 602, R.C.M. 701(a)(1).
91. See *id.* R.C.M. 701(a)(4).
92. *Id.* MIL. R. EVID. 413-414.
93. *Id.* R.C.M. 703(d).
94. *Id.* R.C.M. 701(a)(3).
95. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986). These disclosures are not conditioned upon a defense discovery request, so the best practice is to create a separate task for each mandatory disclosure that applies in a case.
96. MCM, *supra* note 6, R.C.M. 701(a)(2)(A).
97. *Id.* R.C.M. 701(a)(2)(B).
98. *Id.* R.C.M. 701(a)(5).
99. *Id.* MIL. R. EVID. 404(b).
100. Demands for Production of Statements and Reports of Witnesses, 18 U.S.C. § 3500(b) (1970) (allowing a defendant to demand from the prosecution "any statement . . . of the witness [who has testified] in the possession of the United States which relates to the subject matter as to which the witness has testified"); MCM, *supra* note 6, R.C.M. 914.
101. MCM, *supra* note 6, R.C.M. 703(a).
102. See *Bashore*, *supra* note 21, at 3.
103. *Id.*
104. *Herring, Jr.*, *supra* note 19, at 41 n.3.
105. See *Bashore*, *supra* note 21, at 3.
106. *Id.*
107. To better anticipate which motions may be appropriate to file in a particular case, a TC should consult with more experienced military justice practitioners and mentors.
108. Lieutenant Colonel Bashore provides a helpful list of resources to begin your research. See *Bashore*, *supra* note 21, at 3.
109. See generally ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* (Anchor Books 1995) (1994).
110. See *Bashore*, *supra* note 21, at 3.
111. See *id.* Although, a brief bank of current, proven, successful motions might be a good resource to consult, along with checking the cases and other laws cited in the motion.
112. Because the research for—and writing of—motions can be a major time commitment, the trial team should carefully monitor the distribution of work. It makes logical sense to assign the same person the task of researching, writing, and then arguing the same motion. For example, if the case has an MRE 412 issue, assign one member of the trial team to do the legal research into the issue, prepare the relevant witnesses, and write the motion. That same person would also be responsible for arguing the motion during the motions hearing.
113. See *Bashore*, *supra* note 21, at 3.
114. *Nance*, *supra* note 9, at 48-52; *Bashore*, *supra* note 21, at 3.
115. The Greek philosopher Aristotle discovered "three appeals" for persuasive speaking: *ethos*, *logos*, and *pathos*. He believed persuasion occurs when all three components are present. *Ethos* is an appeal to credibility. We tend to believe people we respect because of their experience, credentials, or even the amount of confidence they exude. *Logos* is persuasion with "logic, data, and statistics." See CARMINE GALLO, *TALK LIKE TED: THE 9 PUBLIC-SPEAKING SECRETS OF THE WORLD'S TOP MINDS* 47 (2014). *Pathos* is an appeal to emotions. A speaker can appeal to emotions through storytelling. Although all three components are important for persuading the fact finder, studies show *pathos* may be the most powerful element in persuasion. *Id.* at 47-48, 78-80; CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* 18 (2007). With functional magnetic resonance imaging technology and the study of brain waves, Uri Hasson, an assistant professor of psychology at Princeton, discovered that our brains are most active when we hear stories. See generally Greg J. Stephens et al., *Speaker-Listener Neural Coupling Underlies Successful Communication*, 107 PROC. NAT'L ACAD. SCI. U.S. 14,425 (2010).
116. *Nance*, *supra* note 9, at 52.
117. *Id.*
118. The trial team could make a task for each direct examination and cross-examination to ensure they do not overlook any critical task in the planning process.
119. See GALLO, *supra* note 115, at 76-81 (describing the importance of practice and rehearsals for persuasive presentations). Many offices conduct "murder boards," where the trial team practices key parts of a court-martial in front of other people and receive feedback. These murder boards are the same concept, just a different name.
120. Because the special victim prosecutor typically has more experience than the TC, the special victim prosecutor often takes on some of the most challenging tasks—such as the closing argument, direct examination of the alleged victim, or cross examination of the accused. However, lack of experience may also drive the trial team or military justice leaders to assign a task for developmental reasons. Similarly, a trial team member may be assigned a task because of their unique talents in that area. For example, a trial team member with PowerPoint skills could have the task of creating audio-visual aides for the closing argument. Finally, rapport may be a significant factor for assigning tasks, especially for key direct examination roles. If a trial team member has met with the alleged victim several times and seems to have great rapport with them, that trial team member may be in the best position to conduct the direct examination notwithstanding a lack of experience.
121. Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21, 21 (recommending backward planning in trial preparation).
122. See GALLO, *supra* note 115, at 76-81 (emphasizing how great presentations take significant time investment).
123. When a trial team conducts thorough planning and preparation for this LOE, the fact finder will feel the difference in the compelling and persuasive nature of the government's case from start to finish. This LOE brings to life LOE 1 (evidentiary proof) and helps the government achieve its desired end state.
124. U.S. DEP'T OF ARMY, *THE RED TEAM HANDBOOK* 3 (9th ed. 2020).
125. *Id.* at 1-3.
126. *Id.* at 78-80.
127. *Id.* at 170-72.
128. *Id.* at 78.
129. Bettina J. Casad, *Confirmation Bias*, BRITANNICA, <https://www.britannica.com/science/confirmation-bias> (last visited Mar. 29, 2021).
130. RED TEAM HANDBOOK, *supra* note 124, at 79.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 170-72.
137. *Id.*
138. *Id.*
139. *Id.* at 171.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 172.
147. *Id.* at 171.



A JA discusses strategy with the brigade staff at JRTC. (Photo credit: LTC Ryan Howard)

## No. 4

# Using Red Team Techniques to Improve Trial Advocacy

By Lieutenant Colonel Robert E. Murdough

The panel files back into the courtroom. You try to read the members' faces, but they are as inscrutable as ever. Your supervisor gives a reassuring nod from behind the bar. You are as confident as you can be. Your cross-examination of the other side's key witness was devastating, your closing argument was incisive, your expert witness was compelling, and your evidence was flawless. You spent months preparing this case, and it paid off—everything from voir dire to closing instructions went according to plan. You don't want to say you have this in the bag; but you know the case was yours to lose, and you worked too hard to lose it.

"Accused and defense counsel please rise." Your heart hammers in your chest. All the late nights, rushed meals, and unhealthy levels of caffeine come down to this. The panel president begins to speak . . .

You lost.

As you feel the tension release from the lawyers on the other side, you sink into your chair, stunned. In the next minutes, hours, and even days, you and your team will ask yourselves and each other: "What went wrong?"

Try enough cases, and you will eventually lose one. Moreover, in an adversarial justice system that tries to get as close to objective truth as humanly possible, there is always one side that is *supposed* to lose.<sup>1</sup> Still, while excellent trial advocacy may not be sufficient to win a losing case, poor trial advocacy can lose a winning case. And

since we can never be sure *why* judges or panels make the decisions they do, you're left wondering if you should have made a different argument or called a witness you did not call.

We learn from failure. If you have ever experienced a situation like that described above, you certainly learned from it. But can we learn from failure before it happens? Can we avoid the problems that arise when we rely on assumptions based on what is familiar? Can we make better decisions by combining intuition and experience with deliberate systems designed to avoid falling into bad habits? We can, through "a flexible cognitive approach to thinking and planning that is specifically tailored to each organization and each situation" known as Red Teaming.<sup>2</sup> As the *Red Team Handbook* explains:

[P]eople court failure in predictable ways, by degrees, almost imperceptibly . . . we routinely take shortcuts because of limitations on time, personnel, or other resources, and we accept that as a normal way of doing business. We assume we understand situations because we have been in similar ones before, and we turn a blind eye to ambiguity or don't fully appreciate asymmetries . . . We make many small decisions that are individually "close enough," but when joined together, become the seeds of failure.<sup>3</sup>

Does any of that sound familiar? If it does, you are far from alone—military justice practitioners are as susceptible as anyone to these tendencies. Luckily, Red Teaming techniques can help you overcome them.

Developed by the U.S. Army's University of Foreign Military and Cultural Studies, the purpose of Red Teaming is "to help us ask better questions, challenge explicit and implicit assumptions, expose information we might otherwise have missed, and develop alternatives we might otherwise have missed."<sup>4</sup> Red Teaming is built on four principles: self-awareness and reflection; fostering cultural empathy; groupthink mitigation and decision support; and applied critical thinking.<sup>5</sup> The Army develops and uses Red Teaming to aid in making decisions in a variety of settings. Military justice practitioners can apply many of the same Red Team principles and techniques to improve trial preparation and advocacy.

### Self-Awareness and Reflection

Military justice is not the place to reinvent yourself. If you are bellicose, be righteous. If you are soft-spoken, be compassionate. If you are stoic, be placid. Any personality can produce a winning advocacy style. But first you have to know yourself and understand why you are the way you are. When you are part of a team, you need to understand each other. And in the military, with our fast-paced work and relatively short assignment tours, we need to accelerate that understanding. Red Teaming can help us do that.

Try the technique "Who am I?" with the other attorneys and paralegals in your office.<sup>6</sup> Ideally, you should do it as a new team forms (or when a team replaces or adds new members), but you can use it any time. First, each member of the group reflects on the "watershed moments" in their life and either writes or draws them on a sheet of paper.<sup>7</sup> Then, they reflect on the meaning of these events and *why* they explain who they are today.<sup>8</sup> "It is not an oral biography or resume, but rather an individual's choice of life-changing events that [they perceive] changed the way they think—both negative and positive—to share."<sup>9</sup> Second, each participant takes a turn sharing with the group.<sup>10</sup> Third,

everyone else *listens*, without adding comments, suggestions, or reacting at all.<sup>11</sup>

Last, that same day, every participant reflects on their experience.<sup>12</sup> During that reflection, experienced leaders on the team can help participants examine how their ways of thinking will impact their practice of military justice: How do they respond to adversity? How do they handle the unexpected? How do they react to setbacks? The goal is not to change core beliefs and personality traits, but to gain self-awareness. Court-martial litigation is the product of thousands of decisions—which theories to pursue or discard, which witnesses to call, which objections to make—made over the course of months or minutes, any one of which can affect the outcome of a case. These decisions are best made "by self-aware individuals who understand the characteristics of the self that would influence the end result."<sup>13</sup>

Self-awareness includes the realization that "how we see ourselves (what we say and what we do) may be quite different from how others perceive us, and vice versa."<sup>14</sup> An inability to recognize this can account for significant failures in trial advocacy. A prosecutor believes that the alleged crime victim is sympathetic, but the panel sees them as opportunistic. A defense counsel believes their expert witness request is reasonable, yet the judge denies the motion to compel production.<sup>15</sup> An attorney thinks their cross-examination was brilliant, but—to the panel—they just looked like a condescending jerk.<sup>16</sup>

To address this issue, we can use a tool called "n-Ways of Seeing."<sup>17</sup> The activity proceeds as follows: Take a piece of paper and divide it into a 4x4 grid; be sure to leave room for labels at the top and along the left side. On the top, write "How does . . ." and then label the columns "trial counsel," "defense counsel," "military judge," and "the panel." Along the side, write "See" and then label the rows the same way, in the same order. Next, fill in each block: how do trial counsel see themselves; how do defense counsel see the military judge; and how does the panel see the trial counsel. Use the actual examples from your installation—the defense counsel opposing you in the local Trial Defense Service (TDS) field office, the military judge who typically presides

over your cases, the panel on your current convening order. You will—of course—have to rely on your own experience and observations, but try to assess the perspectives of each party as comprehensively as you can with the limited information you have available. For an example of how this could be filled out from the perspective of a hypothetical trial counsel, see Table 1.

After viewing Table 1, two things should be apparent. First, it is necessary to make a number of *assumptions*. Assumptions are a necessary part of making any decision. The danger of assumptions is treating them as fact; therefore, whenever possible, we should seek to confirm or disprove them rather than continuing to rely on them.<sup>18</sup>

The second thing you probably saw in Table 1 is that there are some controversial ideas on there. And, while the table is only a sample exercise drawn from a fictitious trial counsel, defense counsel, military judge, and panel taken to the extreme, that's intentional. A key function of Red Teaming is *making the implicit explicit*. This document is for you (or, if you do it as a group, your team); not for anyone else.<sup>19</sup> If you just write "defense counsel are zealous advocates for their clients" and "the military judge presides fairly and impartially," you miss the point of the exercise, which is to confront our own biases and preconceptions. If you are a prosecutor who really thinks the judge is a defense hack and the defense counsel are underhanded, you need to be honest and put it on paper. If you are a defense counsel who thinks the trial counsel only care about convictions and not justice, write it down. Your actual chart may not be as extreme as these examples, but if you don't feel uncomfortable at the end of this exercise, you probably did it wrong.

Now comes the hard part, where you confront your own thoughts and consider the reasons why you wrote what you wrote. To get at the root of some of these beliefs, we can use the "5 Whys" technique.<sup>20</sup> Familiar to any parent of small children, this exercise is as simple as its name: Ask the question "why" at least five times, to get at the root of a problem, symptom, or belief.<sup>21</sup> Apply this to all, or at least the most significant, of the beliefs you wrote. Start by asking "Why does \_\_\_ see \_\_\_ as \_\_\_?" and then ask successive questions based on your

**Table 1. Sample 16-Ways of Seeing Chart**

See . . .	How Does . . .			
	Trial Counsel	Defense Counsel	Military Judge	The Panel
Trial Counsel	<ul style="list-style-type: none"> <li>▪ White hats</li> <li>▪ Voice of command</li> <li>▪ Seeking to do justice</li> </ul>	<ul style="list-style-type: none"> <li>▪ Aggressive</li> <li>▪ Obstructionist</li> <li>▪ Unsympathetic</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unreasonably aggressive</li> <li>▪ Tiresome, especially with issues of evidence production</li> </ul>	<ul style="list-style-type: none"> <li>▪ The white hats</li> <li>▪ The same as the JAG guys who give them advice</li> </ul>
Defense Counsel	<ul style="list-style-type: none"> <li>▪ Underhanded</li> <li>▪ Uncompromising</li> </ul>	<ul style="list-style-type: none"> <li>▪ The heroes</li> <li>▪ The only ones standing up against injustice</li> </ul>	<ul style="list-style-type: none"> <li>▪ Sympathetic</li> </ul>	<ul style="list-style-type: none"> <li>▪ Defending wrongdoers</li> <li>▪ Obstacles to commanders' intent</li> <li>▪ Necessary part of the system</li> </ul>
Military Judge	<ul style="list-style-type: none"> <li>▪ Defense hack</li> <li>▪ Worried about being overturned on appeal</li> </ul>	<ul style="list-style-type: none"> <li>▪ Hard during sentencing</li> <li>▪ Likely to do what they want</li> </ul>	<ul style="list-style-type: none"> <li>▪ Fair-minded</li> <li>▪ Impartial</li> <li>▪ In control</li> </ul>	<ul style="list-style-type: none"> <li>▪ In charge</li> </ul>
The Panel	<ul style="list-style-type: none"> <li>▪ Unsophisticated</li> <li>▪ Unable to follow nuanced instructions</li> </ul>	<ul style="list-style-type: none"> <li>▪ Unable to follow nuanced instructions</li> <li>▪ Enlisted are best</li> <li>▪ Company men/women</li> </ul>	<ul style="list-style-type: none"> <li>▪ Need to be accommodated</li> <li>▪ Pro-government</li> </ul>	<ul style="list-style-type: none"> <li>▪ Fair-minded</li> <li>▪ Want to do the right thing</li> <li>▪ Efficient</li> </ul>

answers. If you cannot sustain reasonable answers for at least five questions, you may have uncovered a baseless assumption, or at least one you can't confirm. For example, if your only reason that defense counsel see "enlisted are best" is because their clients usually choose enlisted panels over officer panels, you can't get deep enough to confirm that assumption.<sup>22</sup>

If you find yourself circling back, use a "how" question to change perspective. Here is an example of how one of the more controversial postulations in Table 1 might play out:

1. Why do we see the judge as a defense hack? *Because he used to be in TDS.*
2. Why does service in TDS mean he's a defense hack? *Because he's sympathetic to them.*
3. Why is he sympathetic to them? *Because he lets them file motions after the deadline.*
4. Why does he let them file motions after the deadline? *Because he favors TDS.*
5. How else do out-of-time motions mean the judge is a defense hack? *Because he doesn't want to get overturned on appeal.*
6. Why doesn't he want the case to get overturned on appeal? *Because he doesn't want to try the case over again.*
7. Why do we want to try the case over again? *Umm . . . we don't.*

In this case, the "5 Whys" may have changed your perspective—maybe the judge seethes at every late filing from the defense, but begrudgingly allows it to protect the record from appellate reversal due to ineffective assistance of counsel, or maybe they're out to make sure the accused gets a fair trial despite their counsel's tardiness. Perhaps they're not in the defense's corner as much as you initially thought. Remember, this is *also* an assumption, but it at least expanded your perception to allow for alternate explanations instead of your first intuitive answer, and maybe you will modify your approach accordingly.<sup>23</sup>

This is an example of how *framing* affects our perceptions. When you look out the window of your house, you cannot see everything in your yard—the window limits what you see. Our minds work the same way. "Frames are mental structures that simplify and guide our understanding of a complex reality."<sup>24</sup> Mental frames are necessary to focus our attention and guide our decisions without becoming overloaded by information.<sup>25</sup> But frames also distort what we see. To us, they appear complete; they are themselves hard to recognize, and they can be hard to change.<sup>26</sup> Being self-aware includes being aware that our frames limit our thinking.

What about the panel members? They almost certainly start out seeing the case

differently than you do, but your entire case presentation is aimed at getting them to adopt your frame—your view of the case. In order to do that, you need to *shift their frame* to accommodate your view, either by stretching their existing frames or giving them a new one.<sup>27</sup> But, before you can do that, you need to identify the contours of their frame and help them do the same.

Voir dire is an excellent, and often under-utilized, opportunity to identify the panel's frame, help them to acknowledge it, and then start to stretch it. Using voir dire as a venue to ham-handedly inject your theory of the case misses the point and the opportunity.<sup>28</sup> Instead, use voir dire for its exact purpose—to identify bias.<sup>29</sup> You probably cannot get there with the twenty-eight generic questions the military judge asks; and leading, single-answer questions like "would you agree that cops sometimes lie?" are not much better.<sup>30</sup> The point is to *make the implicit explicit*, just like you did with yourself in the "16-Ways of Seeing" exercise—"make [the panel] aware of their underlying beliefs."<sup>31</sup>

You cannot undo a person's core beliefs crafted over a lifetime with just a few minutes of questioning, but you can at least get them to acknowledge them—to identify the contours of their frame.<sup>32</sup> Then, you can help the members confront their frame and stretch it. As then-Lieutenant Colonel

**Red Teaming focuses on fostering cultural empathy in support of operational decision-making, as “part of the larger intellectual process of warfighting and peacekeeping.” Red Team cultural training focuses primarily in the subject areas of social structure, politics, economics, and religion, in order to “understand the nature of the whole.”**

Eric Carpenter explained it: “describe those belief systems (describe the 800-pound gorilla), and then have the panel members find reasons why those belief systems are sometimes unreliable (have them find some swords) so they can kill the gorilla.”<sup>33</sup>

For the defense counsel, you can start with: “Who would like to hear [name of the accused] testify?” Even though the judge told them they can’t hold it against your client if he doesn’t testify, asking a question non-judgmentally is likely to get a more honest answer.<sup>34</sup> Get the members to acknowledge the natural inference of guilt that comes from silence—and then stretch the frame by asking, “What are some reasons someone might not want to testify even if they’re innocent,” drawing out examples like “they’re nervous” or “they’re worried their words might get twisted.”<sup>35</sup> Thus, instead of burning any panel member brave enough to honestly admit the natural inference that silence equals guilt, you’ve given the entire panel pause and helped them understand why the law instructs them contrary to their natural inferences.

For a prosecutor, you can do something similar with common counterintuitive victim behaviors:

If your victim placed [themselves] in a risky situation, particularly by [their] own voluntary drinking, then you need to address this assumption of risk. You might first ask, “If a [victim] does X, Y, and Z, do you think [they] assume[] some risk in what might happen to [them]?” Wait. You will probably get several people who agree. Ask why they think that way. Describe the 800-pound gorilla.

The next step is to see if they think that because [the victim] assumed some risk, the offender might be less culpable. Ask, “Well, if someone gets really drunk and stumbles out of a bar, they have placed themselves at risk of getting mugged. If someone does mug them, do we let the mugger go because the victim was drunk?”<sup>36</sup>

When you began, you were forced to make some assumptions about the panel’s frame—maybe you believe medical officers will give more weight to medical experts, female panel members will judge female victims more harshly, et cetera. Instead of stumbling through a timid *voir dire* that just skirts the facts of your case, use it to explore these assumptions and make the implicit explicit. Find the contours of the panel’s frame and help them see their frame as well. Then give them the tools they need to stretch it so that it can accommodate your frame, which you’re about to show them in your opening statement.

This all begins with knowing yourself and striving to understand how others may see themselves and you. If you think critically about your frame and others’ frames, you will be better-positioned to negotiate with opposing counsel and advocate to the court. You can aid yourself in that endeavor by increasing your cultural empathy.

**Fostering Cultural Empathy**

Red Teaming focuses on fostering cultural empathy in support of operational decision-making, as “part of the larger intellectual process of warfighting and peacekeeping.”<sup>37</sup> Red Team cultural training focuses primarily in the subject areas of

social structure, politics, economics, and religion, in order to “understand the nature of the whole.”<sup>38</sup> Examining the culture of other societies does not have a ready application to military justice except in unusual cases (e.g., a war crime trial). However, the military justice system reflects the interactions between thousands of decisions made by humans, all of whom are impacted by their respective cultures. Thus, as military justice practitioners, we would do well to turn our gaze inward and reflect on the cultures of our clients—the national culture, the Army culture, and their many overlapping subcultures.

Red Teaming teaches that culture 1) is learned, 2) is shared, 3) changes over time, and 4) is not always rational to outsiders.<sup>39</sup> Every panel member, every accused, most investigators, and many witnesses all come from the Army and have been assimilated into the Army culture to varying degrees. Yet, even within the Army, we have many different subcultures. The fourth point, “not always rational to outsiders,” can sometimes cause a frame mismatch between judge advocates and other Soldiers.

The Judge Advocate General’s (JAG) Corps, with its separate systems for accessions<sup>40</sup> and training, along with our unique statutory roles inside the military organization,<sup>41</sup> has different exposures to the broader Army culture and its subcultures (different frames) than other parts of the Army. As such, we sometimes fail to empathize with them. Think back to your “16 Ways of Seeing” chart, and consider how that fictitious trial counsel and defense counsel viewed the panel. Why might a trial or defense counsel characterize the panel as “unsophisticated” or “unable to follow nuanced instructions?”

A useful general framework for studying culture is the Hofstede’s Onion Model shown in Figure 1.<sup>42</sup> Fill out the chart with your understanding of Army culture. Symbols may be “uniforms, insignia, and salutes”; rituals may be “ceremonies [and] formations”; and values might be “order, discipline, loyalty, duty, respect, honor”; et cetera. It was probably not too difficult even if you have not been in the Army for long. Now do it again, but focus on the culture of your particular unit or installation. Do you see any additions or differences? Maybe you



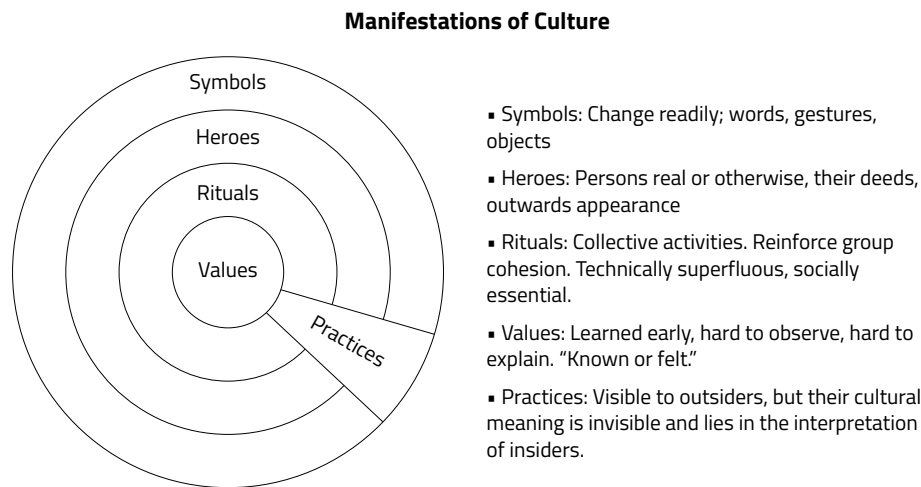
wrote “attention to detail” in values for an aviation unit, or “team players” as practices for an organization of logisticians. When you consider your panel’s frame, consider how these overlapping layers influence it.

Perhaps you are a prosecutor trying a case of prohibited activities with a trainee<sup>43</sup> before a panel with a background in artillery and fires. Your theme may be that the accused saw the victim as a “high payoff target.”<sup>44</sup> If someone on your panel has served as an inspector general, you—as a defense attorney—could surmise that they value their role as the “conscience” of the command.<sup>45</sup> Maybe your theory of the case allows you to remind them in closing argument of their oath to try the case “according to the evidence, *your conscience*, and the laws.”<sup>46</sup>

We broaden our cultural understanding with experience and interaction with others. Even if you have not been in the military for long and have spent little time in operational units, you can gain insights into Army culture. After a trial, ask the bailiffs for their thoughts.<sup>47</sup> They sit quietly, hearing the same evidence as the panel, they are lay Soldiers drawn from the same populations as the panel, and they have no personal stake in the outcome.<sup>48</sup> They may have a valuable perspective on how your presentation of the case was received. Another source of understanding is our paralegals. By virtue of their training and utilization, paralegal Soldiers are often more immersed in the larger Army culture, as well as the subcultures of their respective units, than judge advocates, particularly military justice practitioners. They understand “enlisted culture” and “NCO culture” better than most officers do. They may have keen insight into how the panel will respond to a particular theory or witness, and they are indispensable when practicing your opening statement and closing argument.

The Red Team approach to culture is not revolutionary; it is merely a deliberate, functional, and systematic approach to assessing culture.<sup>49</sup> It helps “avoid spurious correlations and conclusions.”<sup>50</sup> Culture is a useful shortcut and starting point for assumptions, but is not a source of predictive conclusions.<sup>51</sup> Cultural empathy recognizes that “[i]nstitutions [like courts-martial] can be engineered to perform a function,

**Figure 1. Hofstede’s Onion Model**



but the [environments] outside of institutions are more complex.”<sup>52</sup> As military justice practitioners, we seek to perfect our understanding of military culture “to communicate well,” “to set reasonable objectives,” and “to correctly time actions and activities.”<sup>53</sup> In other words, we use it to aid in presenting our case. By thinking deliberately and systematically about how the culture impacts the institution, we can make better decisions about how we will engage that institution to achieve our goals. In order to do that effectively, we must think critically and mitigate the effects of groupthink.

**Groupthink Mitigation**

Trying to prepare an entire case by yourself is a doomed endeavor. There is simply too much work. Moreover, if you try to do it yourself, you are almost certainly going to miss a significant aspect of your case. We know this, and the collaboration in most JAG Corps military justice and trial defense offices is first-rate. Working as a team brings “varied experience, knowledge, and perspectives” to bear on solving a problem.<sup>54</sup> However, these benefits are lost if the group succumbs to groupthink. Groupthink mitigation works in tandem with applied critical thinking to help us make more sound decisions.

“Groupthink” is a “mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override

their motivation to realistically appraise alternative courses of action.”<sup>55</sup> As judge advocates, our multiple accessions systems foster a diverse corps,<sup>56</sup> but we still remain susceptible to groupthink. We are self-selected Army officers who are trained by the same institutions (which are themselves staffed mostly with the individuals they once trained). Even expanding the team to include our paralegals (an absolute necessity), we intentionally cultivate a strong group identity. As such, our shared culture and similar frames amplify the natural “human affinity for grouping and hierarchy,” which can lead us into trouble.<sup>57</sup>

The forming of a group can immediately create an “us-against-them” mentality. This leads to both an often-unfounded sense of moral and intellectual superiority for group members and a sense of pressure toward conformity and uniformity for members. . . . [T]his pressure artificially drives group members to agree on a single line of reasoning. It also impacts the group’s perception of adversaries by assuming they have the same level of group conformity.<sup>58</sup>

This “us versus them” mentality is even stronger when we are placed into structurally adversarial roles (i.e., prosecutors and defense lawyers). In your “16-Ways of Seeing” chart, when you look at your assessment of the opposing side—and vice

versa—can you see any indications of “sense of moral and intellectual superiority,” or an assumption “they have the same level of group conformity”? When you receive a motion or filing from opposing counsel, what is your immediate visceral reaction? This adversarial relationship triggers our

**One of the most important functions of Red Teaming is *identifying the correct problem*. If we do not fully understand the problem, we risk developing a solution to the wrong problem.**

instinct to band together, which makes us more susceptible to groupthink.

Another issue with groupthink, especially acute in the military, is the inhibition of hierarchy, where people are unwilling to directly challenge “the boss.”<sup>59</sup> Thankfully, despite the inherent rank structure of the military, most court-martial trial teams do not suffer from this dilemma. Nonetheless, chiefs of justice, senior defense counsel, and other leaders should be on guard against this tendency.

More frequently, military justice practitioners are prone to the “everyone knows” phenomenon, where more experienced group members relying on past experience inadvertently discourage questions or alternate viewpoints. Reflect on your own experience, whether as a prosecutor or defense counsel. As a prosecutor in a sexual assault case, when a victim has relevant *post hoc* behavior, do you immediately seek out a counterintuitive behavior expert? As a defense counsel, do you react to notice of expert witness from the prosecution by immediately requesting an expert in the same subject before considering whether that is even necessary to your theory of the case? Both of these are predictable “go-to” moves from the prosecution and defense playbooks; after all, “everybody knows” that’s the play you run when you are faced with this situation.

Groupthink inhibits our critical thinking about these common practices. If you think you need an expert for a specific case, start with the question, “Why do

we need this expert?” and complete the “5 Whys” exercise—see what you learn. Using the example of a counterintuitive behavior expert for the prosecution, you may realize that you’ve made three assumptions: 1) the panel suffers from the bias the expert aims to address; 2) you can’t “kill that gorilla”

by shifting their frame in *voir dire* or in argument; and 3) the expert can effectively change their minds. Without challenging these assumptions,<sup>60</sup> you run the risk of boring the panel with hours of testimony that doesn’t move the needle, or worse, breeds resentment among members who are thinking, “We all agreed in *voir dire* that victims can behave differently, so why are we listening to this?”<sup>61</sup>

Red Teaming provides several tools to mitigate groupthink and encourage creative and critical thinking within organizations. You did a variation of one of already in the “Who am I?” exercise, called “Circle of Voices.”<sup>62</sup> This technique is great for complex, open-ended issues like developing your case theory and theme. In “Circle of Voices,” each member of the team gets a chance to speak uninterrupted, and nobody can speak twice until everyone has spoken at least once.<sup>63</sup> Begin with a period of silence, giving everyone an opportunity to think about the issue, and then give each person a turn of “uninterrupted airtime” (with a reasonable limit on length).<sup>64</sup> While each person speaks, the others in the group listen actively without expressing any reaction—including crossed arms, eye rolls, sighs, nods of agreement, knowing grins, et cetera. To further mitigate against hierarchical intimidation, consider going from the most junior to most senior member of the team. Once everyone has had their turn, open the floor to a free discussion.<sup>65</sup>

A variation of the “Circle of Voices” is called “Yes, And.”<sup>66</sup> Have you ever had a discussion with someone pre-disposed to disagree with you? In those conversations we are often not really listening to what the other person says; we’re waiting to respond with the phrase, “Yes, but . . .” to make our own counter-argument.<sup>67</sup> The “Yes, And” technique reverses that tendency by facilitating more respectful dialogue.<sup>68</sup> In this technique, the participants build off of each other’s ideas. The group (ideally three to four members, but no more than six) sits in a circle and begins by writing down their individual thoughts.<sup>69</sup> Person A then shares their idea.<sup>70</sup> Person B embellishes Person A’s idea by beginning their turn with, “Yes, and . . .” Continue clockwise or counterclockwise until everyone has added something to Person A’s idea.<sup>71</sup> Then, Person B shares what they wrote down, and the group takes turns around the circle with everyone adding something to Person B’s idea.<sup>72</sup> Continue until everyone has contributed something to everyone else’s idea.<sup>73</sup>

Another technique is “1-2-4-Whole Group” (or, in smaller groups, just “1-2-Whole Group”).<sup>74</sup> This is useful “when a group needs to critically review an issue of importance, seek new solutions or approaches to a problem, highlights the vast range of views that surround a certain issue, or hear ideas/solutions from all individuals.”<sup>75</sup> It works in iterations. Begin with a “well-defined” question.<sup>76</sup> This can be an open-ended question or a more binary choice like “should our client testify?” After receiving adequate time to reflect on the question, each person “pre-commits by writing down their answer or idea before they have heard from or been influenced by any other participant.”<sup>77</sup> Then, each member finds a single partner to discuss, sharing feedback and adding refinements, developing new ideas, or merging ideas together.<sup>78</sup> After that, each pair joins with another pair, and then the group comes together as a whole.<sup>79</sup> In the whole group, “discuss insights discovered during the process . . . [including] new discoveries, novel solutions, and an understanding of how [members’] view of the issue has changed.”<sup>80</sup> This way, everyone’s input is considered.

As discussed above, reality requires us to make decisions initially based on assumptions. The danger is when we make assumptions without realizing we've done so. The technique of "Devil's Advocacy" is useful "to help expose implicit assumptions and faulty reasoning."<sup>81</sup> It has three steps. First, take your position and state the opposite—for example, "the sexual encounter *was* consensual" or "our client *did not* act in self-defense."<sup>82</sup> Second, examine the evidence you already have and identify what evidence supports that proposition.<sup>83</sup> Third, consider what additional evidence could make that proposition true, and see if you uncover it.<sup>84</sup> Based on that analysis, act appropriately going forward, consistent with your ethical responsibilities to do justice or advocate for your client's interests.

Groupthink mitigation is necessary to aid in both creative and critical thinking. Military culture tends to inhibit creative thinking, due to "time pressures, hierarchical structures, emphasis on uniformity and training standards, and a predilection for risk avoidance."<sup>85</sup> Many of these same influences also cause us to "make unfounded assumptions, take mental shortcuts, and allow biases to hijack logic," which can impede critical thinking.<sup>86</sup> Groupthink only makes these problems worse. Since military justice litigation is a team endeavor, the team leaders need to mitigate the effects of groupthink in order to successfully apply critical and creative thinking to make sound decisions.

### Applied Critical Thinking

As used in Red Teaming, applied critical thinking is "the deliberate process of analyzing and evaluating the way we perceive and interpret the world around us, performed to improve our understanding and decision making."<sup>87</sup> The term is exactly the "sum of the words"—being critical of the way we think, and applying that critical approach to making better decisions.<sup>88</sup>

Applied critical thinking helps us resolve the dilemma of "not enough time." When we have limited time (or we convince ourselves that we have limited time), we tend to make decisions intuitively, on "cognitive autopilot," taking mental shortcuts and making decisions based on what is easy or familiar.<sup>89</sup> "[W]e react to

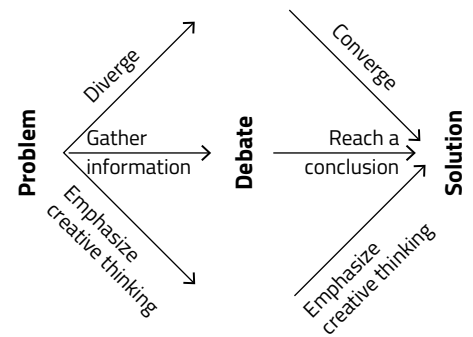
time constraints by settling, accepting a solution as good enough."<sup>90</sup> The applied critical thinking techniques of Red Teaming train us to think critically even in time-constrained environments, so that "where shortcuts are required, we can learn to use better ones."<sup>91</sup>

The Red Team framework for applied critical thinking in conjunction with groupthink mitigation is "Divergence-Convergence."<sup>92</sup> It is useful "[d]uring decision support activities for any particularly complex, important, or polarizing issue"<sup>93</sup>—which litigation presents by the dozen. Begin by describing the situation, then *diverge* by capturing as many ideas as possible without stifling creativity.<sup>94</sup> "Circle of Voices" works well for this step.<sup>95</sup> Then, debate. At this stage, you combine and aggregate similar ideas while eliminating those that are impractical or inappropriate.<sup>96</sup> Finally, you *converge*, "narrow[ing] to find the most viable solution."<sup>97</sup> During debate and convergence, tools like the "5 Whys" and "1-2-4-Whole Group" help guide the narrowing process while avoiding groupthink and maintaining a critical focus. Figure 2<sup>98</sup> depicts the process.

Note that the starting point is identification of the problem. One of the most important functions of Red Teaming is *identifying the correct problem*. If we do not fully understand the problem, we risk developing a solution to the wrong problem. "When presented with problems, we often define them too broadly, focus on only part of the issue, or make invalid assumptions. As a result, we identify and settle on solutions too quickly."<sup>99</sup> When a thousand-page casefile lands in your inbox with what appear to be nothing but bad facts, you may struggle just to comprehensively define the problem.

Usually, problems arise from "facts beyond change."<sup>100</sup> If your client lied to the police, you cannot change that. If the alleged victim also committed misconduct, you cannot change that. Your case strategy needs to account for these facts.<sup>101</sup> But be careful of identifying the problem too quickly. Sometimes the facts beyond change or "bad facts" of your case are only symptoms of a deeper root issue. Make sure you solve the root problem, not the symptom.

Figure 2. Divergence-Convergence



Beware of problem statements that are "misdirected, too narrow, too vague, or lack focus."<sup>102</sup> For example, "how do we win our case" doesn't identify a real problem. "How do we get the panel to believe our witness" is too narrow and assumes a solution. "How do we get the judge to let us talk about prior sexual history" is unfocused. Identify the real obstacles and their root causes.

In some cases, a "double diamond" technique is useful to identify and solve a problem. Effectively, we diverge and converge twice: first we diverge and then converge on a problem statement, next we diverge and converge again on the solution.

Another, more abbreviated technique to ensure we solve the right problem is "Problem Restatement."<sup>103</sup> When a problem "seems tidy and straightforward," any of the following creative techniques can help us to reexamine the problem and increase the chances of reaching the best solution:<sup>104</sup>

1. "Paraphrase the problem statement. Restate it using different words without losing the original meaning."<sup>105</sup> For example, "How do we show our client acted in self-defense?" may become "How can we show our client had a reasonable apprehension of harm even though they struck first?"<sup>106</sup>
2. Restate the problem in an opposite manner, similar to Devil's Advocacy.<sup>107</sup> For example, "How do we prove this was sexual assault?" may become "How does the evidence establish consent?"<sup>108</sup>
3. "Expand the view. Restate the problem in a larger universal context."<sup>109</sup> For example, "How could they have access to the supply room?" might become "What

was happening in the unit at the time of the robbery?”

4. “Redirect the focus.”<sup>110</sup> For example, “Should our client testify?” may become “How will the panel react if our client testifies?”
5. Employ the “5 Whys” technique, starting with rephrasing the original problem statement as a “why” question.<sup>111</sup> For example, “How do we overcome the fact that they had a consensual relationship?” could start with, “Why would the victim continue their relationship with the accused after the accused assaulted them?”

Groupthink mitigation and creative thinking will serve us well in divergence, but groupthink and other intuitive shortcuts will still prove tempting during convergence. Therefore, to avoid those pitfalls, Red Teaming gives us several applied critical thinking and groupthink mitigation techniques geared toward convergence.

When a complex or uncertain situation can unfold in multiple ways, an “Alternative Futures Analysis” helps plan for multiple possible outcomes.<sup>112</sup> It consists of identifying the “two most critical and uncertain” factors of an issue and forming a matrix to characterize and anticipate the outcomes depending on how those factors combine.<sup>113</sup> In most trials, if you are prepared, the presentation of evidence will play out mostly as you anticipate. But there are usually one or two major uncertainties for which we need to prepare as best we can.

For prosecutors (and occasionally for the defense as well), one significant uncertainty is often “Will the accused testify?” Most prosecutors will prepare some form of a “branch plan” to react if the accused takes the witness stand, including cross-examination and possibly rebuttal evidence.<sup>114</sup> Another common dilemma for trial counsel is whether to charge an “exculpatory no” as a false official statement.<sup>115</sup> If the accused changes their story, for example, first telling law enforcement “we never had sex,” then later admitting “we had sex,” they have committed a crime. But, usually, the accused makes exculpatory statements with a revision; for example, “we had sex and it was consensual.” In this situation, the prosecution has a choice. By placing false official statement on the charge sheet alongside

the principal accusation in the case, the prosecution is more likely to obtain at least one conviction, and perhaps the members discount the defense theory of the case based on the internal contradiction within the statements. On the other hand, the evidence that proves the charge also tells an exculpatory version of events—allowing the defense to get their story out through the prosecution’s own evidence thanks to the rule of completeness.<sup>116</sup>

Imagine you are a prosecutor deciding whether to charge an “exculpatory no.” You can make an “Alternative Futures Analysis” chart to assess the different outcomes depending on both the variables described in the preceding paragraph. In this case, the *y*-axis is whether the accused testifies and the *x*-axis is whether the prosecution charges the “exculpatory no” as a false official statement. Fill in each quadrant with possible outcomes depending on the interaction of those two variables. Perhaps you can employ the “Circle of Voices” or “Yes, And” techniques to fill them in.

Within ethical boundaries, the government has near-total control over whether to charge false official statement and no control over whether the accused testifies. By thinking critically about the various alternatives during divergence, you can make a sound charging decision in convergence. (And over in the Trial Defense office, the defense team is probably assessing whether or not it would be advantageous for their client to testify, depending on how you charge them.)

Another technique useful at any stage in planning, or even during a break in an ongoing trial, is the “Key Assumptions Check.”<sup>117</sup> As discussed before, assumptions are a necessary part of planning, but “[f]lawed assumptions will quickly waste time and efforts.”<sup>118</sup> Furthermore, “hidden assumptions . . . are often ideas unconsciously held to be true, and therefore are seldom examined and almost never challenged.”<sup>119</sup> A key assumptions check helps us to challenge the logic of our assumptions and acknowledge the conditions under which they might change.<sup>120</sup>

Begin by identifying a fundamental decision and writing down the current “analytical line”—your current position.<sup>121</sup> Then, write the key assumptions that must

be true for that analytical line to be valid.<sup>122</sup> Next, challenge each assumption by asking:

1. Why must it be true?
2. Does it remain valid under all conditions?
3. How much confidence exists that this assumption is correct, and what explains this degree of confidence?
4. What circumstances might undermine this assumption?
5. Is this assumption most likely a key uncertainty or key factor?
6. Could this assumption have been true in the past but false now?
7. If the assumption proves to be wrong, how does it significantly alter the analytical line?
8. Has this effort identified new factors that need further analysis?<sup>123</sup>

Imagine you are on a defense team deciding how to advise your client on selecting the forum for sentencing.<sup>124</sup> Your starting position (analytical line) is that the enlisted panel you plan to select for findings will also be the best forum for sentencing. Now, write down all of the assumptions that make that true. Perhaps your theory of the case is that your client just made an immature decision, and you assume the enlisted members of the panel will remember what it is like to be a young, immature junior Solider. Part of your analytical line includes an implicit assumption that the military judge would sentence your client more harshly than the panel. Write that down.

Now challenge your assumptions. For this example, we’ll focus on the second assumption, that the military judge would treat your client more harshly:

1. Why must that be true? *Because enlisted panel members remember what it is like to be young and immature, and this judge was never enlisted. Also, our client’s service record would be stronger mitigation before a panel of combat veterans.*<sup>125</sup>
2. Does it remain valid under all conditions? *If he’s convicted of only a minor offense, we may change our assessment—since a divided panel may acquit on some things but then sentence him hard on what’s left.*

3. How confident are you that the assumption is correct, and why? *Not really, just based on past courts-martial and the way this judge has sentenced.*
4. Could this assumption have been true in the past but false now? *If the panel convicts him of everything, and we think they're out for blood, they're less likely to be lenient.*

The next question is, “If this assumption proves to be wrong, how does this affect the analytic line?” Unfortunately, there’s no way to know this one—after the military judge says “you may be seated” and sends the panel members back into the deliberation room, your client has to make a decision. But now you have identified some factors that could change your initial assumptions while you still have the time to think critically about that decision, and you won’t be relying solely on intuition when the time comes.

When you have nearly finished trial preparation, you should have a trial plan built on sound decisions, reasonable assumptions, and clear frames. That is a dangerous moment. “People can become overconfident once they have arrived at their plan.”<sup>126</sup> It is an ideal time for “active inquiry aimed at foiling trouble,” known as “Premortem Analysis.”<sup>127</sup> “Premortem Analysis” is a self-contained iteration of “Divergence-Convergence” with elements of “Devil’s Advocacy,” to “question a course of action and its assumptions/tasks.”<sup>128</sup>

Gather your team together. Everyone on the team, paralegals included, must know the plan.<sup>129</sup> Now, imagine the plan failed—assume you lost the case—and reflect on that for a few minutes.<sup>130</sup> Pose the question to the group, “Why did we lose?”<sup>131</sup> Have everyone write down their thoughts. Then, as a group, use techniques like “Circle of Voices,” “1-2-4- Whole Group,” or other divergent techniques to make a list of possible explanations.<sup>132</sup> Finally, revisit the plan, look for ways to address the sources of failure that you identified, and converge on remedies.<sup>133</sup> Keep the list in mind as you proceed to trial.<sup>134</sup>

Self-awareness and groupthink mitigation set the conditions for us to use applied critical thinking. Applied critical thinking forces us to examine not just the questions and problems, but the manner in which we

address those questions and problems. It helps us work through our intuitions and biases. The more we use applied critical thinking to guide our decisions during preparation, when we are calm and have the time to work systematically, the less we will be surprised at trial. Moreover, if we

**The more we use applied critical thinking to guide our decisions during preparation, when we are calm and have the time to work systematically, the less we will be surprised at trial. Moreover, if we practice critical thinking as we build the plan, we will make better decisions in the heat of the moment when we’re on our feet in the courtroom and have to react to the unexpected.**

practice critical thinking as we build the plan, we will make better decisions in the heat of the moment when we’re on our feet in the courtroom and have to react to the unexpected.

### Conclusion

Red Teaming can help us make better decisions in military justice. To make sound decisions, we have to overcome our natural cognitive instincts. Thinking slowly and deliberately takes effort, which is why our minds are wired to use shortcuts of experience and intuition.<sup>135</sup> When we feel overwhelmed by complexity or pressured by time, this tendency only increases.<sup>136</sup> Even when we dedicate time to sit down, clear our heads, and intentionally focus on the problem at hand, our minds are always looking for the shortcuts that let us validate our initial impressions and accept what we are already inclined to accept.<sup>137</sup>

Some of the techniques described in this article probably seem similar to approaches you already use and may get to the same results you would get just by relying on your experience and intuition. We should not disregard experience or suppress intuition; both are essential to decision-making in trial advocacy and in everyday life. But we need to understand their limits when applied to complex work

like court-martial litigation. Red Teaming allows us to avoid taking the intuitive shortcuts that can lead to less optimal decisions.

Avoid saying “there’s not enough time” to apply formal techniques. Train our paralegals in the Rules for Courts-Martial

and the Rules of Evidence to increase the value they add to the team. Resist the lure of convincing yourself “it’s too hard.” In the end, formal techniques take less time and produce better results than aimlessly floundering about looking for a solution to an ill-defined problem. Stick with a deliberate process even when you think you already know the answer, because the difference between an 85 percent solution and a 90 percent solution (you will never completely eliminate all uncertainty) may be the difference between winning and losing your case. Moreover, if you are deliberate and thorough in preparation when you have the luxury of time, you will be better positioned for when you have to react quickly and make immediate decisions in trial.

Fundamentally, trial advocacy is about making decisions. In every case, we make thousands of decisions, some easy and some difficult. For some, we have the luxury of months, while others we have to make in seconds. All of them have the potential to be consequential.

Even the most prepared lawyers with the best-litigated cases will sometimes lose. Red Teaming is not a silver bullet and Red Teamers do not claim to have all the answers—Red Teaming is about getting closer to the answers through clearer understanding and alternate ways of thinking.

It facilitates challenging assumptions, analyzing problems without relying solely on what is easy and familiar, and identifying causes of failure before it happens. Red Team techniques yield “improved understanding, more options generated by everyone (regardless of rank or position), better decisions, and a level of protection from the unseen biases and tendencies inherent in all of us.”<sup>138</sup> Military justice practitioners can and should take advantage of these benefits. If they do, while they can never be certain why a particular trial ended the way it did, they can rest assured knowing it was not for lack of effort and preparation on their part. **TAL**

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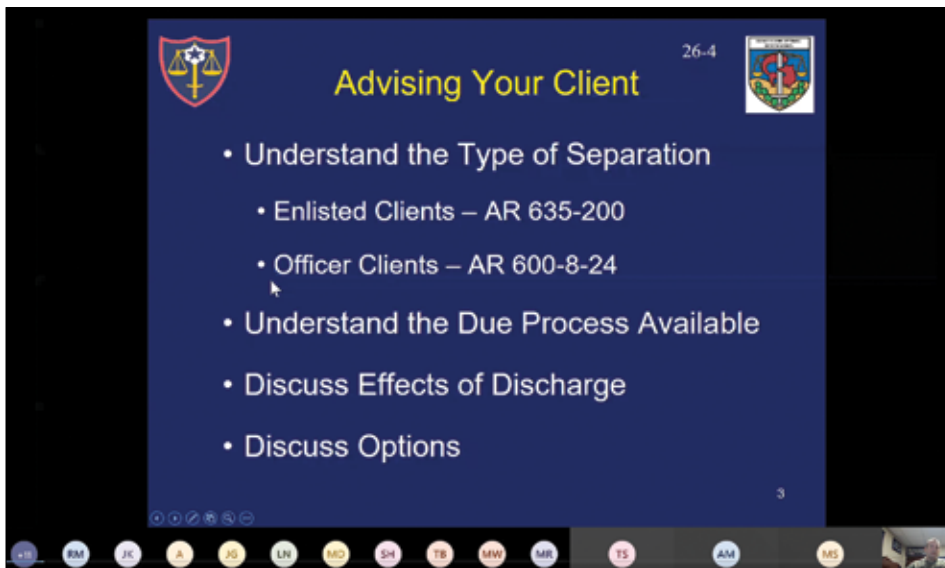
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## Notes

1. See also LARRY POZNER & ROGER J. DODD, *CROSS-EXAMINATION: SCIENCE AND TECHNIQUES* 4 (3d ed. 2018) (“Cases come with good facts and bad facts . . . no set of techniques can make every case into a winning case. Go easier on yourself. Winning and losing are not the only measuring sticks of real trial lawyers.”).
2. U.S. DEP’T OF ARMY, *THE RED TEAM HANDBOOK* 3 (9th ed. 2020) [hereinafter *RED TEAM HANDBOOK*].
3. *Id.* at 2-3 (citing DIETRICH DÖRNER, *THE LOGIC OF FAILURE: RECOGNIZING AND AVOIDING ERROR IN COMPLEX SITUATIONS* 10 (Metropolitan Books 1996) (1989)).
4. *Id.* at 3.
5. *Id.* at 3-5.
6. *Id.* at 210-11. This technique is valuable both as a team-building exercise and a tool to build individual self-awareness. *Id.*
7. *Id.* at 210.
8. *Id.*
9. *Id.*
10. *Id.* at 211.
11. *Id.*
12. *Id.*
13. *Id.* at 8.
14. *Id.* at 17.
15. Cf. *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(d)* (2019) [hereinafter *MCM*] (establishing standards and processes for employment of expert assistance).
16. See POZNER & DODD, *supra* note 1, at 4 (“We often [cross-examine] with inadequate focus. We term everything we ask as cross, when in fact too often we are engaged in discovery, sarcasm, one-upmanship, or simply argument.”).
17. *RED TEAM HANDBOOK, supra* note 2, at 79-80. The handbook refers to this technique as 4-ways of seeing (2x2), but it can be scaled as needed, e.g., 9-ways of seeing (3x3), 16 ways of seeing (4x4), etc. *Id.*
18. Seeking to disprove assumptions, rather than only looking to confirm them, applies strong critical thinking. See *infra* notes 88-91 and accompanying text.
19. For that reason, it is best to destroy the records once you have completed the exercise. The point is to move *beyond* bias and stereotypes, but you have to honestly acknowledge them first. Out of context, they could produce significant misunderstanding.
20. *RED TEAM HANDBOOK, supra* note 2, at 81-82.
21. Even if you did the *n*-ways of seeing activity individually, it may be helpful to do this exercise in a small group.
22. Also keep in mind that the selection of court-martial forum belongs to the accused, not the defense counsel. See *MCM, supra* note 15, R.C.M. 903.
23. It is also conceivable that delving deep enough will uncover legitimate bias on the part of the judge, which would form the basis for a challenge. See *MCM, supra* note 15, R.C.M. 902 (discussing challenges to the military judge). If this is the rare case where a challenge may be appropriate, you will be far better positioned to support your challenge having done the necessary critical analysis rather than providing a superficial reason like “they always rule against us in motions.” Cf. *United States v. Loving*, 41 M.J. 213, 253 (C.A.A.F. 1994) (citing *Liteky v. United States*, 114 S. Ct. 1145, 1157 (1994)) (holding that a military judge’s alleged “track record” of ruling for the government in prior cases did not indicate pro-government bias).
24. J. EDWARD RUSSO & PAUL J.H. SCHOEMAKER, *WINNING DECISIONS: GETTING IT RIGHT THE FIRST TIME* 21 (2001).
25. *Id.* at 22-23.
26. *Id.* at 23.
27. *Id.* at 49-55.
28. Lieutenant Colonel Eric R. Carpenter, *Rethinking Voir Dire*, *ARMY LAW.*, Feb. 2012, at 5, 7. Keep in mind, the military judge controls the scope and form of voir dire. *MCM, supra* note 15, R.C.M. 912(d). Thus, be prepared to articulate how your proposed questions or style of questions will uncover bias and further the goals of voir dire and are not a less-than-subtle attempt to pre-commit the members to your theory of the case.
29. See *MCM, supra* note 15, R.C.M. 912(f)(1)(N); *United States v. Bragg*, 66 M.J. 325, 327 (C.A.A.F. 2008) (“The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the members’ sincerity, and to adjudicate the members’ ability to sit as part of a fair and impartial panel.”).
30. Carpenter, *supra* note 28, at 7 (“Of course they know that cops sometimes lie. What they want to know is, did a cop lie in *this* case. And they want to wait until they hear the case to deal with that issue.”).
31. *Id.* at 8.
32. *Id.* at 9.
33. *Id.* at 8.
34. *Id.*
35. *Id.* Optimally, the military judge will allow open-ended questions in group voir dire, but you will have to tailor your approach to the expectations of your particular military judge. By thinking critically and deliberately about how you plan your voir dire, you will be better-positioned to advocate for why open-ended questioning will further the purpose of voir dire and will not taint the panel.
36. *Id.* at 9.
37. *RED TEAM HANDBOOK, supra* note 2, at 37.
38. *Id.* at 27.
39. *Id.* at 24.
40. See U.S. DEP’T OF ARMY, REG. 601-100, *APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY* para. 2-8 (21 Nov. 2006) (providing the various means of accessions into the JAG Corps, including “Direct commissions to qualified civilians”).
41. See generally UCMJ art. 6 (2017) (protecting the role of judge advocates in their relations with commanders); UCMJ art. 37 (2019) (protecting the independence of judge advocates acting on behalf of their clients); 10 U.S.C. § 7037 (establishing the role and duties of The Judge Advocate General of the Army).
42. *RED TEAM HANDBOOK, supra* note 2, at 28 (citing GEERT H. HOFSTEDE AND GERT JAN HOFSTEDE, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND: INTERCULTURAL COOPERATION AND ITS IMPORTANCE FOR SURVIVAL* 8 (3d ed. 2010)).
43. See UCMJ art. 93a (2019).
44. Cf. U.S. DEP’T OF ARMY, *TECHNIQUES* PUB. 3-60, *TARGETING* glossary-3 (7 May 2015) (defining high-payoff target as “[a] target whose loss to the enemy will significantly contribute to the success of the friendly course of action”).
45. U.S. DEP’T OF ARMY, REG. 20-1, *INSPECTOR GENERAL ACTIVITIES AND PROCEDURES* paras. 1-4.a.(2), 1-7.e.(1) (23 Mar. 2020).
46. *MCM, supra* note 15, R.C.M. 807(b)(2) discussion (emphasis added).
47. Note that, during trial, bailiffs may not discuss “the testimony of witnesses or the happenings within the courtroom.” U.S. ARMY TRIAL JUDICIARY, *RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL* app. C, para. 2.j. (1 Dec. 2020).
48. *Id.* r. 31 (“[A] bailiff should neither have an interest in the case nor a close association with the accused or an alleged victim of a charged offense”).
49. *RED TEAM HANDBOOK, supra* note 2, at 37-38.
50. *Id.* at 37.
51. *Id.* at 38.
52. *Id.* at 34.
53. *Id.* at 38-40 (citing GEOFFREY DEMAREST, *WINNING IRREGULAR WAR* 153-54 (2014)). See also GEOFF DEMAREST, *WINNING IRREGULAR WAR: CONFLICT GEOGRAPHY* (2017).
54. *Id.* at 51.
55. IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* 9 (1982).
56. See *supra* text accompanying note 44.
57. *RED TEAM HANDBOOK, supra* note 2, at 52.
58. *Id.* at 52-53.
59. *Id.* at 53.
60. Since you will likely never be able to prove or disprove these assumptions to a level of factual certainty, the Key Assumptions Check is a useful tool for analyzing these assumptions and making an optimal decision. See *infra* notes 120-26 and accompanying text.

61. This discussion is not a blanket argument against counterintuitive behavior experts. It is another example of the need for us to question assumptions and think critically, by making the implicit explicit, to decide what is the right decision for a specific and unique case without relying on the categorical shortcut of “that’s what we always do.”
62. RED TEAM HANDBOOK, *supra* note 2, at 112 (citing STEPHEN BROOKFIELD, *THE SKILLFUL TEACHER: ON TECHNIQUE, TRUST, AND RESPONSIVENESS IN THE CLASSROOM* (2015)).
63. *Id.*
64. *Id.*
65. *Id.* at 113.
66. *Id.* at 212 (citing KELLY LEONARD & TOM YORTON, *YES, AND: HOW IMPROVISATION REVERSES “NO, BUT” THINKING AND IMPROVES CREATIVITY AND COLLABORATION* (2015)).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 212-13.
72. *Id.* at 213.
73. *Id.*
74. *Id.* at 75 (citing HENRI LIPMANOWICZ & KEITH MCCANDLESS, *THE SURPRISING POWER OF LIBERATING STRUCTURES* (2013)).
75. *Id.*
76. *Id.*
77. *Id.* This practice of giving each individual a chance to reflect and then “pre-committing” to their answer is the simple “Think-Write-Share” technique, which can be used in conjunction with almost any other Red Team technique, giving each group member an equal chance to lend their voice to the discussion without “grandstanding [or] thinking aloud.” *Id.* at 201.
78. *Id.* at 76.
79. *Id.*
80. *Id.*
81. *Id.* at 142 (citing RICHARDS J. HEUER JR. & RANDOLPH H. PHERSON, *STRUCTURED ANALYTIC TECHNIQUES FOR INTELLIGENCE ANALYSIS* (2015)).
82. *Id.* at 143.
83. *Id.*
84. *Id.*
85. *Id.* at 57.
86. *Id.* at 43.
87. *Id.* at 44.
88. *Id.* at 43.
89. *Id.* at 45-46.
90. *Id.* at 46.
91. *Id.*
92. *Id.* at 144 (citing MORGAN D. JONES, *THE THINKERS TOOLKIT: 14 POWERFUL TECHNIQUES FOR PROBLEM SOLVING* 80-86 (rev. ed., Three Rivers Press 1998) (1995); RUSSO & SCHOEMAKER, *supra* note 24, at 162).
93. *Id.* at 144.
94. *Id.* at 144-45.
95. *Id.* at 145.
96. *Id.*
97. *Id.*
98. *See* RED TEAM HANDBOOK, *supra* note 2, at 73, 146.
99. *Id.* at 175.
100. POZNER & DODD, *supra* note 1, at 64 (“Facts beyond change are the givens of a lawsuit that will be believed by the jury as fair, accurate, and highly relevant regardless of any part’s best efforts to dispute or modify them.”).
101. *Id.* at 65-71.
102. RED TEAM HANDBOOK, *supra* note 2, at 176.
103. *Id.* at 175.
104. *Id.*
105. *Id.*
106. *Cf.* MCM, *supra* note 15, R.C.M. 916(e)(3)(A) (explaining the elements of self-defense).
107. RED TEAM HANDBOOK, *supra* note 2, at 175-76.
108. *Cf.* UCMJ art. 120(b)(2)(A) (2017) (establishing the crime of sexual assault as, *inter alia*, commission of a sexual act upon another person without their consent).
109. RED TEAM HANDBOOK, *supra* note 2, at 176.
110. *Id.*
111. *Id.* at 176.
112. *Id.* at 87 (citing PETER SCHWARTZ, *THE ART OF THE LONG VIEW: PLANNING FOR THE FUTURE IN AN UNCERTAIN WORLD* (1996)).
113. *Id.* at 89.
114. A “branch plan” in military doctrine refers to a “contingency option[] built into a base plan” that may or may not be executed based on anticipated events or conditions. U.S. DEP’T OF ARMY, *DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS glossary-2* (31 July 2019).
115. UCMJ art. 107 (2016).
116. *See* MCM, *supra* note 15, M.R.E. 304(h). Hopefully, you did not accept these assumptions uncritically.
117. RED TEAM HANDBOOK, *supra* note 2, at 163 (citing HEUER. & PHERSON, *supra* note 81).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 164. If necessary for further analysis of which assumptions are “key,” continue the key assumptions check by identifying which assumptions are dependent on other assumptions.
124. *See* MCM, *supra* note 15, R.C.M. 1002(b).
125. You can also see an opportunity to use the “Five Whys” here.
126. RED TEAM HANDBOOK, *supra* note 2, at 172.
127. *Id.* at 173 (citing GARY D. KLEIN, *SOURCES OF POWER: HOW PEOPLE MAKE DECISIONS* (1999)).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 174.
133. *Id.*
134. *Id.*
135. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 31, 40 (2011).
136. *Id.* 36-37.
137. *Id.* 44-45.
138. RED TEAM HANDBOOK, *supra* note 2, at 3.



MAJ Joe Wheeler, DCAP Deputy Chief, conducts training for defense counsel during the COVID-19 pandemic. (Photo courtesy of LTC Jeremy Stephens)

relying on formulaic injects from higher. A Senior Defense Counsel leading three defense counsel, who likely have varying levels of advocacy, needs to devise a training plan to make each person better and make the whole office ready for the next client. This is where DCAP—with a staff of six attorneys, including two esteemed former military judges—joins the fight. We empower counsel with hundreds of pages of outlines; regular case updates; and practice notes to the field. Among other things, we supplement those with short-course training in digital evidence, advanced advocacy, and working with expert witnesses.

Succeeding as a trial advocate requires a clear set of skills: confidence, competence, and an ability to think on one's feet. Counsel become competent and gain confidence in their craft by knowing the law and knowing military criminal procedure. However, a litigator can only learn the art of responding to objections or cross-examining a witness through repetition. But how does this happen in a pandemic when something that trial advocacy training historically requires—an in-person small-group setting—is off-limits indefinitely? As the old adage reminds us all, necessity breeds innovation.

As a young defense counsel, I learned that the way to success was often via the vast Trial Defense Service (TDS) network. While the COVID-19 pandemic has hindered the ability for new counsel to integrate seamlessly into the network, the network is alive and well. From Senior Defense Counsel leading TDS-wide officer professional development trainings, to virtual ice-breakers during our online training, TDS remains an amazing team that I am proud to be a member of.

Just as our practitioners require constant refinement in the age of the pandemic, so too did the mission and focus of DCAP. Our team was faced with an interesting scenario: many defense counsel had to work from home, while several were joining TDS without prior criminal law experience and would soon be detailed to cases. Before COVID-19, DCAP was on the road training counsel around the world at least

# Closing Argument

## Mastering Military Justice Advocacy During a Pandemic

By Lieutenant Colonel Phil M. Staten & Lieutenant Colonel Jeremy Stephens

**Advocacy matters.** Effective advocacy matters more. Soldiers facing courts-martial and the loss of liberty demand it, and so too do the victims and commanders turning to the military justice system for help. However, effective trial advocacy is not a fire-and-forget mission; the military justice system and its practitioners require constant training and nurturing. The Judge Advocate General's (JAG) Corps meets this need for constant training and support through the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP), which exist to train counsel across the Corps.<sup>1</sup> Clients demand the best of our counsel and our counsel demand our best training and support. Mastering military justice advocacy takes practice and repetition. And, unlike

riding a bike, advocacy skills often deteriorate as we move out of justice jobs; and, as the last ten years have shown, massive shifts in our criminal law practice affect advocacy training as well. This article discusses the need for constant training on advocacy and how our programs continue to meet our training mission during the Coronavirus Disease 2019 (COVID-19) pandemic.

### Defending Those Who Defend America

At DCAP, our goal for practitioners is clear: be better. At the end of any DCAP course, counsel are able to look themselves in the mirror and know how they got better. Our training and support style requires first-line leaders to invest in their people and know their strengths as opposed to



twice a month. But, while the pandemic shuttered those plans, it did not end our mandate to train counsel. We owed them and their clients training resources and support the moment they hit the ground. Beginning in March 2020, DCAP looked at everything: various technological meeting platforms; delaying our planned training to create time and space in the pandemic;<sup>2</sup> and private sector resources.<sup>3</sup> In August 2020, we released our first fully-virtual Defense Counsel 101 course. Counsel across the world came together and got better. Yes, initially—like elsewhere—there were technological hurdles and video lags. But there were also pleasant surprises. Our course was fully integrated across all components as we included Reserve and Guard personnel. This was only possible due to the work of our Reserve colleagues, Major (MAJ) Marc Stewart and MAJ Richard Meng, and DCAP's ability to train at scale without attendees being forced to travel.

The trial docket never stops, and neither does DCAP's training. We constantly seek to improve our teammates in the field who are defending those who defend America, and our team is always looking for new members.

### Representing the U.S. Government

Adversity brings challenges, but it also brings opportunities. The COVID-19 pandemic has certainly presented challenges, and the Army and our Corps haven't been immune to them. At TCAP, COVID-19 has presented arguably one of TCAP's greatest challenges of all: if we can't train our prosecution teams in person when advocacy learning is at its best, then how do we train them? After all, part of TCAP's mission is to provide assistance, resources, and support for the prosecution function throughout the Army, as well as to conduct advocacy training and assist OSJAs in the prosecution of specific cases. Indeed, since its very inception, one of TCAP's most important services to trial counsel has been to provide direct advocacy assistance, especially in particularly challenging cases. The Trial Counsel Advocacy Program was determined not to be defined by COVID-19, and we worked to create the best possible solution. The answer was Microsoft Teams (or MS Teams). Although not ideal, TCAP

replaced physical presence with the next best thing: a remote platform which still allows the next best "face-to-face" contact and, better yet, advocacy training. The Trial Counsel Advocacy Program Headquarters Team, or "TCAP Main" as it's often referred to, consists of three training officers; three Highly Qualified Special Victim Litigation Experts, former career civilian criminal prosecutors; two complex litigators with significant military criminal law experience; a deputy who is a former special victim prosecutor (SVP); and SVP teams. Each member worked diligently to become MS Teams "experts," which has translated into effective online advocacy training for our litigators worldwide. From the Basic Trial Advocacy Course to the Military Institute for Prosecution of Sexual Violence, MS Teams has allowed TCAP to provide realistic and pragmatic advocacy training which allows our prosecutors to zealously represent the United States in courts-martial. The participants' office or home became their new courtroom, and we gave them "on-your-feet" practice with everything from an opening to a closing statement.

However, TCAP's mission goes beyond these short courses and also includes "Outreaches." Normally, absent COVID-19, TCAP travels for a three-day outreach—providing formal instruction in the morning while conducting case reviews with trial counsel in the afternoon. The Trial Counsel Advocacy Program generally sends three-to-five TCAP personnel, including a training officer, Special Victim Litigation Expert, and either the chief or deputy chief. For regional outreaches which involve trial counsel from multiple installations in a geographic area, such as Germany and Korea, TCAP usually sends eight-to-ten personnel. The team obviously became frustrated when COVID-19 took away our ability to travel in order to conduct this training, which included advocacy training in the courtroom. However, what COVID-19 took away, TCAP decided to get back through MS Teams. Working closely with Offices of the Staff Judge Advocate, we designed and tailored outreach agendas to maximize the training conducted in this new operational environment. While this presented challenges in terms of time difference, etc., TCAP has

successfully continued this important and invaluable training.

TCAP spends a significant amount of time and resources contracting for and providing advocacy training to the field. Much of the training focuses on how to investigate, charge, and prosecute special victim cases—which includes child physical and sexual abuse, sexual assault, and domestic violence. The Trial Counsel Advocacy Program also provides logistical and technical supervision for the twenty-nine SVPs, twenty-three Special Victim Noncommissioned Officers, and twenty-three Special Victim Witness Liaisons. Given this important and critical mission, TCAP refused to allow COVID-19 to win by disrupting its advocacy training to field, and will continue to do so.

### Conclusion

Mastering trial advocacy is not like riding a bicycle. The skills we learn as advocates are perishable—even before accounting for new cases, rules, and policy guidelines. Our teams exist to remind judge advocates—and all justice leaders—that while you may be the only one standing for your side in the courtroom, you do not stand alone. Both TCAP and DCAP fulfill a global 24/7 mission and, whether it's fine-tuning theme and theory or proofreading a motion, trial support and resources always exist. **TAL**

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*LTC Staten is the Chief of the Trial Counsel Advocacy Program at Fort Belvoir, Virginia.*

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*LTC Stephens is the Chief of the Defense Counsel Advocacy Program at Fort Belvoir, Virginia.*

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### Notes

1. For training missions regarding the Trial Counsel Assistant Program (TCAP) and Defense Counsel Assistant Program (DCAP), see U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 21-4, 22-2 (20 Nov. 2020).
2. Rather than cancelling programs and activities, we pushed our calendar to the right to create decision making time for us and Regional Defense Counsel in the field (i.e., we started our training later than normal in August and September hoping the pandemic would slow down—which it didn't). And, since we were removed from the Permanent Change of Station chaos, it created space to potentially do more.
3. As an example, in response to an increase in DUI cases, DCAP funded virtual training for counsel in DUI Defense offered through the National Association of Criminal Defense Lawyers in summer 2020.

## AROUND THE CORPS

SSG Daniel Winn, 5th Security Force Assistance Brigade (SFAB) paralegal NCOIC, is recognized by BG Curt Taylor, the 5th SFAB commander, for getting after some very demanding PT at Joint Base Lewis-McChord in Washington.





## AROUND THE CORPS

After 24 years of service, COL Lora Rainey retires from the Idaho Army National Guard in April 2021 as the organization's highest ranking female officer and its only female officer to have served as a state staff judge advocate. (Credit: Crystal Farris)



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