

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 3 • 2022

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## ON THE HIGH GROUND

A view across the high ground from Little Round Top in Gettysburg, Pennsylvania. This high ground provided Union General John Buford's forces several advantages: a good view of the entire battlefield, an excellent location to emplace artillery, and large and clear fields of fire for entrenched and defending infantry. The high ground also provided a tactical advantage of being able to observe the movements of Confederate forces and their advance into Gettysburg. The view across the high ground offers a stunning panorama of the rolling hills, sweeping fields, and rural countryside that make up this historic battlefield. (Credit: Damaris – stock.adobe.com)



## AROUND THE CORPS

Brigade Judge Advocate Major Brian A. Pristera of the 96th Sustainment Brigade, "The Deadeye Division," seizes the literal high ground atop Lone Rock in West Desert, Utah, after finishing a long day at the qualifying range. (Photo courtesy of MAJ Pristera)



# Army Lawyer

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Issue 3 • 2022

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On the cover: SSG Johnnie Luna, a paralegal NCO with 3d Special Forces Group, prepares to conduct a mass tactical combat night jump over Sicily Drop Zone at Fort Bragg, North Carolina. (Credit SSG Johnnie Luna)

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On 9 October 1990, the Black Jack Brigade deployed to Saudi Arabia in support of Operation Desert Shield. In the Persian Gulf War, the 2d Brigade of the 1st Cavalry Division was once again called to serve at the tip of the Army spear. Then-CPT Risch stands on the road to Kuwait on the eve of war. (Photo courtesy of author)

# Court Is Assembled

## I'll Meet You on the High Ground

By Lieutenant General Stuart W. Risch

In his book, *The Killer Angels*,<sup>1</sup> author Michael Shaara describes the critical decision of Union General John Buford, Jr., to take and hold the high ground on the first day of the Battle of Gettysburg. Upon surveying the terrain around the small town of Gettysburg as he entered with the lead elements of his troops, General Buford immediately recognized the high ground's location and tactical importance. His small cavalry force faced a numerically superior Confederate army. However, he quickly arrayed his troops in defensive positions to deny, or at least delay, the enemy's advance—initially northwest of the town, on the higher ground of Seminary Ridge. Thereafter, as the initial fighting progressed,

his forces occupied the high ground south of town, primarily consisting of four hills—Culp's Hill, Cemetery Hill, Little Round Top, and Round Top—all connected by a long, crescent-shaped ridge called Cemetery Ridge. This high ground provided Buford's forces several advantages: a good view of the entire battlefield, an excellent location to emplace artillery, and large and clear fields of fire for entrenched and defending infantry. In particular, the jagged rocks on Little Round Top afforded excellent cover and extended fields of fire.<sup>2</sup> It is fair to say, and many historians agree,<sup>3</sup> that General Buford's foresight to continually secure the high ground as the initial battle unfolded around Gettysburg directly contributed to

the Union victory, which very likely turned the tide of the Civil War.

I have long been fascinated by Shaara's account of Buford's leadership and his decision to occupy the high ground and have his cavalry forces fight dismounted. I particularly enjoy how he provides the reader with Buford's internal dialogue as he contemplates and then executes the significant decisions of wartime command. In my own moments of trials and critical decision points, I find myself frequently reflecting on Buford's pivotal decisions on those fateful days at Gettysburg—listening to my own internal dialogue and determining how we, individually as legal professionals and collectively as a Corps, can (and must) timely occupy the "high ground." Of course, our decisions are not whether to physically occupy key terrain, but they are no less significant. As legal professionals and Service members, we are very frequently faced with certain questions and/or difficulties that have wide-ranging consequences. My edict to our Corps, in every one of these decisions, and beyond, is to at all times resolutely seek to scale atop the ethical, moral, and legal high ground. Much like Buford found, it will not always be an easy battle, but the high ground places you in the best position from which to engage in battle.

As I consider the ethical and moral high ground, I am continually reminded of the many challenges facing our Corps as we navigate—and provide sound counsel and guidance on—such a wide range of legal issues. Take, for example, the contract and fiscal law discipline. As we all know, determining the proper expenditure of funds is a legally-intensive process, many times occurring in the heat of a contingency, such as the short-notice deployment of forces, or the crisis of a civil disturbance—both of which we have faced numerous times over the past few years alone. This sense of urgency may often result in what feels like pressure on our counsel to simply endorse the request for the use of funds and keep the process

moving, or to develop “novel” authority for such use. However, despite this impulse, I am extremely proud of the feedback I receive from the field about how our counsel consistently maintain the legal and ethical high ground as they expertly advise on the proper use of funds. The contract and fiscal law practice is, and always has been, of vital importance to our Army, and I commend those of you who consistently provide principled counsel to the individuals entrusted to properly spend our tax dollars.

Other practice areas that often present legal and ethical challenges involve the attorney-client relationships into which our Trial Defense Service, special victims’ and legal assistance counsel enter countless times every day around the globe. Our teammates in these vital practice areas represent Soldiers of all ranks facing all types of adverse action, assist clients in resolving complex personal legal matters, or advise victims as they navigate what may appear to them to be confusing military justice procedures or administrative processes. These are incredibly demanding roles that require not only diligence, commitment, and competence, but a truly perceptive ethical and moral compass. Our counsel admirably perform these duties in a manner in concert with our values, laws, policies, and regulations. Standing with, and advocating on behalf of, an accused Soldier is no easy task, nor is assisting a sexual assault or domestic violence victim as they tell investigators a difficult fact pattern and/or confront an accused individual. Furthermore, I am acutely aware that the brunt of these client-service efforts is borne by the more junior members of our team. Yet, time and again, I am impressed by the decisions these dedicated professionals make as they face ethical and moral dilemmas; they consistently advocate in zealous fashion for their clients and are not at all hesitant to speak truth to power on their behalf.

As a final illustration, I reflect on the tremendous work performed daily by our paralegals and paraprofessionals. In most cases they serve on the front line as our first echelon of interaction with Soldier and/or family clients seeking advice and counsel. In this regard, they often must traverse the narrow and sometimes indiscernible line between providing legal advice and what I will term “legal support”—that is, being able

**Those of us in the brigade tactical operations center brushed the dust off as best we could, proceeded through the receiving line to shake hands with, and pass along holiday greetings to, the CSM and commander, and then assembled under the shelter—in the middle of the Saudi desert, a few short miles from the Iraqi border and berm, and on the brink of war with Iraq.**

to assist a client with an issue, respond to a question, or simply point them in the right direction. Many times, they must identify legal issues, in the absence of an attorney, and bring them to the command’s attention, serving as the “honest broker,” telling the command what it needs to hear vice wants to hear. I witnessed this on countless occasions during my time as a brigade judge advocate, deputy staff judge advocate, and staff judge advocate, where our enlisted or civilian teammates effortlessly recognized where that line was, and navigated the situation perfectly. This is clearly a testament to their training, experience, and professionalism, and I truly appreciate both their clear-eyed understanding of their role, their desire to timely and thoroughly assist our clients, and their impact on our Regiment and Army.

To properly recognize, occupy, and hold the high ground means that we who operate in the dual professions of arms and law must master both of our crafts. We must continually seek broad expertise and experience in our core legal competencies—we simply cannot be one-dimensional. Before we advise our clients, we must know the law, policy authorities, and regulations, as well as the pragmatic aspects of decisions and actions. This means we must strive to both receive—and provide—the best education and training: institutional, operational, and individual. Your Corps leadership will ensure that your institutional education and training is the best there is, always incorporating the latest legal developments.<sup>4</sup> An example of this is our advocacy training. Over the course of the last decade or more, given the significant efforts of our esteemed schoolhouse, both Trial Counsel and

Defense Counsel Assistance Programs, and others, we have made tremendous strides in addressing what some perceived as a proficiency deficit among our counsel: our advocacy skills. In May 2022, we officially opened the Judge Advocate General’s Corps Advocacy Center at Fort Belvoir, Virginia. The intent of the Advocacy Center is simple—to consistently train our counsel to be the best legal advocates across the whole of government. The Advocacy Center and the results it will produce is but one of the many steps up the hill to mastery of our crafts.

To this end, you have likely heard me use the phrase, “I’ll meet you on the high ground.” Admittedly, it’s not an original phrase. Instead, it is one that my brigade commander—when I was a trial counsel advising him in the 2d Brigade, 1st Cavalry Division (yes, the Blackjack Brigade is *the* best brigade in the Army) in the early 1990s—similarly used at the end of every speech he gave, letter he wrote, or meeting he held. A personal story that best reflects what he intended when using the phrase, and that has stayed with me for over thirty years, occurred in 1990 as a young Captain Risch stood in a jagged formation in a deployed environment in the dusty desert of Saudi Arabia. It was New Year’s Day, and the commander was intent on holding his annual New Year’s reception, notwithstanding our incredibly hot, bleak, and isolated location. The engineers built a set of rudimentary steps up the side of the one outcropping in the vast wilderness, the command sergeant major (CSM) set up the U.S. and unit flags, and the cooks set out some warm Kool-Aid and stale cookies under a make-shift shelter from the sun.

**So, as you go about your professional *and* personal endeavors, I challenge each of you to seek the high ground and lead your teams to the Cemetery Ridge of whatever challenge or trial that is placed before you.**

Those of us in the brigade tactical operations center brushed the dust off as best we could, proceeded through the receiving line to shake hands with, and pass along holiday greetings to, the CSM and commander, and then assembled under the shelter—in the middle of the Saudi desert, a few short miles from the Iraqi border and berm, and on the brink of war with Iraq. For just a moment, we devoured the food and drink—something just a tad different from our steady diet of MREs, and enjoyed the camaraderie, had a few laughs, and toasted the New Year. Yet as the impromptu “reception” began to close, my commander’s face grew serious and his demeanor revealed a grim determination. He then read a few passages from his favorite book—*The Killer Angels*. I can’t remember precisely what those passages were, but I do remember *exactly* how they made me feel. And then, when he reminded us of the fighting that was to begin shortly—and that the next time we similarly gathered, many of us might not be present—I can still remember how the hair on the back of my neck rose. If it had not been “real” before that session with him, it got real, fast. He then reminded us of how proud he was to be serving alongside us, and that he had every confidence that we would serve with distinction in the coming days and weeks. And he ended by saying that, no matter what transpired, “I’ll meet you on the high ground!” Standing there as a young officer about to enter into the unknown of a combat environment for the first time, I completely understood that what he meant was the high ground in a metaphoric sense. That it was not only the tactical high ground that we sought in the fighting, but the moral, ethical, and, I believe, spiritual high ground that we desired to attain. That, regardless of our religious or philosophical views or beliefs, our race, ethnicity, or gender, we were bound together as a team and were prepared to enter

battle together—knowing that not everyone would make it home—and would endure all of its challenges, hardship, and tragedy together as we resolutely sought the high ground. Simply put, we were ready.

You, too, are ready. You have the tools, knowledge, experience, and moral courage and compass—you know where to go and how to get there. As our Chief of Staff of the Army, General James McConville, continually reminds us, you know how to “do the right things, the right way, for the right reasons.”<sup>5</sup> My leadership philosophy is similar, and as straightforward: “Work hard, work smart, and be people of character, and I guarantee you that everything else will work out just fine.” The high ground is where we as a Nation, as an Army, and as a Regiment always want to be. We strive to be that “City on a Hill”—that shining beacon of freedom for the rest of the world to look to.<sup>6</sup> Many times, we fall short. We are all far from perfect. But that doesn’t mean that we don’t consistently strive to get back to where we want to, and should, be—always holding ourselves to the highest standards. So, as you go about your professional *and* personal endeavors, I challenge each of you to seek the high ground and lead your teams to the Cemetery Ridge of whatever challenge or trial that is placed before you. Like General Buford, you must always scout out the high ground as early as you can, occupy it, and then steadfastly defend it against all those who would attempt to dislodge you. Trust me, while the fight may not always be easy, the top of the hill inevitably provides the most advantageous position from which to fight.

And, as always, *I’ll meet you on the high ground!* **TAL**

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*LTG Risch is the 41st Judge Advocate General of The Judge Advocate General’s Corps at the Pentagon.*

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## Notes

1 MICHAEL SHARA, *THE KILLER ANGELS* (1974).

2. ERIC J. WITTENBERG, “THE DEVIL’S TO PAY”: JOHN BUFORD AT GETTYSBURG 74–147 (2014); STEPHEN W. SEARS, *GETTYSBURG* 155–58 (2003); Joel Achenbach, *Gettysburg: The Battle and Its Aftermath*, WASH. POST (Apr. 29, 2013), [https://www.washingtonpost.com/national/health-science/gettysburg-the-battle-and-its-aftermath/2013/04/26/539125d8-ab60-11e2-a8b9-2a63d75b5459\\_story.html](https://www.washingtonpost.com/national/health-science/gettysburg-the-battle-and-its-aftermath/2013/04/26/539125d8-ab60-11e2-a8b9-2a63d75b5459_story.html).

3. *See, e.g.*, JAMES MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 664–65* (1988); Scott D. Hartwig, *The Defense of McPherson’s Ridge*, *GETTYSBURG: HIST. ARTICLES OF LASTING INTEREST*, July 1989, at 15, 24.

4. This is an enduring by echelon effort from the institutional to the individual level. The Legal Center and Center for Law and Military Operations at The Judge Advocate General’s Legal Center and School are responsible for institutional training. Staff judge advocates and local supervisors resource and provide for continuing operational training. And at the end of the day, each of us bears the responsibility for our own individual training—from The Judge Advocate General to the newest member of our Corps.

5. *See, e.g.*, General James C. McConville, 40th Chief of Staff of the Army Initial Message to the Team (Aug. 12, 2019).

6. On 9 January 1961, then-President-elect John F. Kennedy delivered his famous speech, “City Upon a Hill,” wherein he stated:

[I] have been guided by the standard John Winthrop set before his shipmates on the flagship *Arabella* three hundred and thirty-one years ago, as they, too, faced the task of building a new government on a perilous frontier. “We must always consider,” he said, “that we shall be as a *city upon a hill*—the eyes of all people are upon us.” Today the eyes of all people are truly upon us—and our governments, in every branch, at every level, national, state and local, must be as a *city upon a hill*—constructed and inhabited by men aware of their great trust and their great responsibilities. For we are setting out upon a voyage in 1961 no less hazardous than that undertaken by the *Arabella* in 1630. We are committing ourselves to tasks of statecraft no less awesome than that of governing the Massachusetts Bay Colony, beset as it was then by terror without and disorder within. History will not judge our endeavors—and a government cannot be selected—merely on the basis of color or creed or even party affiliation. Neither will competence and loyalty and stature, while essential to the utmost, suffice in times such as these. For of those to whom much is given, much is required.

John F. Kennedy, U.S. President-Elect, Address Delivered to a Joint Convention of the General Court of the Commonwealth of Massachusetts, The State House, Boston: *City Upon a Hill* (Jan. 9, 1961), <https://www.jfklibrary.org/learn/about-jfk/historic-speeches/the-city-upon-a-hill-speech#> (emphasis added).



The Honorable Elena Kagan delivered the thirty-ninth Decker Lecture in a question-and-answer format facilitated by LTC Emilee Elbert. (Credit: Billie Suttles, TJAGLCS)

# News & Notes

## Great Power and Responsibility Justice Kagan and the Thirty-Ninth Decker Lecture

By Lieutenant Colonel Josiah T. Griffin

On 17 October 2022, the Honorable Elena Kagan, Associate Justice of the United States Supreme Court, delivered the thirty-ninth Charles L. Decker Lecture in Administrative and Civil Law at The Judge Advocate General’s Legal Center and School (TJAGLCS). Students of the 71st Graduate Course and 218th Officer Basic Course were in attendance, along with TJAGLCS and University of Virginia (UVA) School of Law faculty, staff, and students. To facilitate viewing from the entire legal community on UVA’s North Grounds, the lecture was simulcast to

overflow rooms at both TJAGLCS and the UVA School of Law.<sup>1</sup> Many distinguished guests from the Army, our sister services, and the Department of Justice also attended this year’s lecture.<sup>2</sup>

Major General (MG) Charles L. Decker served as the twenty-fifth Judge Advocate General of the Army from 1 January 1961 until his retirement on 31 December 1963.<sup>3</sup> Among many other notable accomplishments, MG Decker was the dominant force responsible for establishing The Judge Advocate General’s School, U.S. Army at UVA in 1951, thereby making Charlottesville the

regimental home of the Army Judge Advocate General’s (JAG) Corps.<sup>4</sup> He also served as the JAG School’s first commandant.<sup>5</sup> In recognition of MG Decker’s significant contributions, the school established the Charles L. Decker Lecture in Administrative and Civil Law on 11 May 1977, when MG Decker delivered the first chaired lecture of the series named in his honor.<sup>6</sup> His lecture, entitled “The Chair and Challenge,” discussed past achievements and future challenges for the Corps and the school.<sup>7</sup> Thanks in no small part to MG Decker’s work as both school commandant and later as The Judge Advocate General (TJAG), the partnership between TJAGLCS and UVA Law continues to support a strong legal community on UVA’s North Grounds.<sup>8</sup>

In the years since MG Decker’s inaugural lecture, many luminaries of administrative and civil law have honored the series with their remarks, including distinguished professors, judges, cabinet secretaries, and other former TJAGs.<sup>9</sup> A United States Supreme Court Justice delivered the lecture once previously, just over thirty years ago. On 20 February 1992, Justice Antonin Scalia became the sixteenth Decker lecturer, delivering remarks entitled “The Use of Legislative History—Judicial Abdication to Fictitious Legislative Intent.”<sup>10</sup>

Justice Kagan’s lecture was informative, entertaining, and unique. In contrast to a traditional lecture format, Justice Kagan delivered the lecture as a question-and-answer conversation. Brigadier General Alison Martin, TJAGLCS Commanding General, hosted the lecture, and Colonel Tonya Blackwell, Dean of TJAGLCS, introduced Justice Kagan. The current Chair of the Administrative and Civil Law Department at TJAGLCS, Lieutenant Colonel Emilee Elbert, guided the conversation with Justice Kagan through topics including legal writing, pop culture, mentorship, and the role of humor on the Court. Highlights of the discussion included Justice Kagan’s description of the process she uses to author opinions, her thoughts on the mentorship that she benefited from



as a judicial clerk, her time as the United States' Solicitor General, the role of dissenting opinions, and the accessibility of Supreme Court oral arguments.<sup>11</sup>

At the conclusion of the lecture, Lieutenant General Stuart Risch, the forty-first TJAG, expressed thanks for Justice Kagan's distinguished service and for her visit to the regimental home of the Army JAG Corps. Justice Kagan's visit to TJAGLCS and delivery of the thirty-ninth Decker lecture was a treat for the legal community in attendance, and a significant highlight for students of the 71st Graduate and 218th Officer Basic Courses. **TAL**

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*LTC Griffin is the Vice Chair of the Administrative and Civil Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. The lecture was recorded and is available for public viewing at TJAGLCS TELEVISION, *39th Major General Charles L. Decker Lecture in Administrative and Civil Law*, YouTube (Nov. 9, 2022) <https://www.youtube.com/watch?v=VFQ2aDZZ4SE>.
2. Distinguished guests included the Honorable Carrie Ricci, Army General Counsel; the Honorable Christopher Kavanaugh, United States Attorney for the Western District of Virginia; Denise Council-Ross, Army Principal Deputy General Counsel; Rear Admiral Christopher French, Deputy Judge Advocate General for the Navy; Colonel Valerie Danyluk, Chief Defense Counsel of the Marine Corps; and Risa Goluboff, Dean of the UVA School of Law.
3. THE U.S. ARMY JAG CORPS, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 234 (1975).
4. *Id.* at 233.
5. *Id.*
6. *JAG School Notes*, *ARMY LAW.*, June 1977, at 21.
7. *Id.*
8. Katie McNally, *A Shared Calling*, UNIV. OF VA SCH. OF L. (June 13, 2017) <https://www.law.virginia.edu/news/201706/shared-calling>.
9. Previous Decker Lecturers: Lieutenant General (Retired) Dana Chipman (2021), the Honorable Edwin Meese III (2019), the Honorable Patrick Shanahan (2018), Leigh A. Bradley (2017), the Honorable Patrick J. Murphy (2016), the Honorable Bruce E. Kasold (2015), the Honorable Stuart Delery (2014), Dean Thomas J. Romig (2013), the Honorable Thomas P. Lamont (2012), Hollister K. Petraeus (2011), Lieutenant General (Retired) Russel L. Honoré (2010), the Honorable Donna E. Shalala (2008), the Honorable Donald L. Korb (2007), Major General Michael D. Rochelle (2006), the Honorable David S.C. Chu (2005), Mr. Adrian Cronauer (2004), the Honorable Kay Coles James (2003), the Honorable Anthony J. Principi (2002), the Honorable Janice R. Lachance (1999),



The Honorable Elena Kagan delivered the thirty-ninth Decker Lecture to staff, faculty, and students from both The Judge Advocate General's Legal Center and School and the University of Virginia School of Law. (Credit: Billie Suttles, TJAGLCS)



The Honorable Elena Kagan poses with the faculty of the Administrative and Civil Law Department. (Credit: Billie Suttles, TJAGLCS)

the Honorable Sara E. Lister (1997), Major General (Retired) Hugh J. Clausen (1994), Professor Lillian R. BeVier (1993), the Honorable Antonin Scalia (1992), Judge Laurence H. Silberman (1991), Judge Robert R. Merhige, Jr. (1990), Judge William W. Wilkins, Jr. (1989), Senator Strom Thurmond (1988), Professor John C. Jeffries, Jr. (1987), Mr. Robert M. O'Neil (1986), Dean Eugene V. Rostow (1985), Judge Robert K. Bork (1984), Professor Henry J. Abraham (1983), Professor Richard C. Wydick (1982), Major General (Retired) Lawrence H. Williams (1981), Professor John J. Broderick (1980), Professor Charles H. White-

bread, (1979), Professor A.E. Dick Howard (1978), Major General (Retired) Charles L. Decker (1977). Event Program, *The Judge Advoc. Gen. Legal Ctr. and Sch., The Thirty-Ninth Charles L. Decker Lecture in Administrative and Civil Law* (Oct. 17, 2022) (on file with author).

10. U.S. CT. OF MIL. APPEALS, *ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 1991 TO SEPTEMBER 30, 1992*, at 39 (1992).

11. See TJAGLCS TELEVISION, *supra* note 1.



BG David Mendelson opened the panel with the history of the Army JAG Corps. (Photo courtesy of author)

## The JAG Corps at the Hispanic National Bar Association's Fiftieth Anniversary Conference

By Captain Ellis R. Cortez

In celebration of its fiftieth anniversary, the Hispanic National Bar Association (HNBA) hosted attorneys, judges, Fortune 100 business leaders, public officials, and law students at its annual convention on 17-19 September 2022.<sup>1</sup> Throughout the three-day event, which took place at the Grand Hyatt in Washington, D.C., national policy makers and leading practitioners met for fruitful discussions. They provided expert guidance and discussion on a variety of practice areas, recent Supreme Court developments, advocacy, mentorship, and Hispanic representation throughout the legal profession.<sup>2</sup> The convention's theme, "Honoring our

Legacy," illuminated the HNBA's proud history and accomplishments.

Judge advocates (JAs) from the Army, Navy, and Air Force Judge Advocate General's (JAG) Corps were present for all three days of the convention to represent the various Corps by engaging with attendees at networking events and panels. They, too, celebrated the HNBA's anniversary milestone.

On the first night of the convention, the Army, Navy, and Air Force JAG Corps collaborated to host a reception for young lawyers and law students.<sup>3</sup> More than a dozen JAs interacted with attendees, educating them about their respective military

services, their experience in a variety of practice areas, and the diverse opportunities available to military attorneys. The litigation experience that JAs can gain relatively early in their careers and the wide variety of roles that JAs can have throughout their time in the Corps resonated with many attendees who expressed their interest through pointed questions about how to apply.

On the convention's second day, the HNBA's Military and Veteran Law Section presented a continuing legal education (CLE) panel composed of active duty Service members from multiple military services. The panel, titled "Hispanics Serving as Legal Advisors on the Front Lines: Diversity Equity & Inclusion in the Service," fell within the convention's "Hot Button Issues for 2022 and Beyond" category of events.<sup>4</sup>

The panel consisted of Service members from diverse Hispanic backgrounds, including Colonel Luis Rodriguez, Deputy Director, U.S. Army JAG Corps Office of Diversity, Equity and Inclusion; Colonel



BG Ronald Sullivan highlighted the uniqueness of our dual profession and described the oath that JAs take to the Constitution. (Photo courtesy of author)

Jose Cora, Chief, U.S. Army Contract Litigation and Intellectual Property Division; Captain Geraldo Padilla, Force Judge Advocate, Naval Surface Force, U.S. Pacific Fleet, U.S. Navy; and Major Marisol Salvejo, Deputy Staff Judge Advocate, 502d Installation Support Group, U.S. Air Force.

Major Lynmarie Rivera, LL.M. candidate, The Judge Advocate General's Legal Center and School, U.S. Army, moderated the panel, and Captain Gabrielle Luce-ro, Trial Counsel, III Corps, U.S. Army, provided the opening remarks and introductions. The panel discussed the principles of national security law, including rules of engagement, the use of force, operational funding, and how the United States addresses actions against state and non-state actors. Colonel Cora shared his experience at Army Futures Command, and Majors Rivera and Salvejo described their combat deployment experiences.

Senior leadership from the Office of the Army General Counsel and the Army JAG Corps provided remarkable support to the event. The Honorable Carrie Ricci, Brigadier General David Mendelson, and Brigadier General Ronald Sullivan were all in attendance. They each addressed the audience, emphasizing the importance

of service and the inherent strength that comes from having a diverse legal team.

Brigadier General Mendelson opened the panel with a history of the Army JAG Corps. He described the nature of our rules-based organization and discussed different practice areas within the Corps. He then addressed how we are still standing alongside commanders on the front lines on today's battlefields, just like Lieutenant Colonel William Tudor, the Army's first Judge Advocate General, stood with General George Washington. Later in the panel, Brigadier General Sullivan highlighted the uniqueness of our dual profession and emphasized that JAs take their oath not to an individual, but to the U.S. Constitution.

Within a matter of minutes, the CLE presentation quickly became a standing-room only event! Audience members expressed that they were intrigued by the roles JAs play in the national security realm and the assistance they provide to their legal assistance and trial defense clients. Attendees asked questions concerning legal ethics, immigration and refugee law, military courts-martial, and humanitarian law. The panelists also discussed Hispanic representation in the U.S. military services' JAG Corps, and provided a presentation

on the diversity and inclusion initiatives of each Corps.

After the formal portion of the CLE panel concluded, many audience members quickly approached the panelists and the senior leadership to ask follow-up questions about the presentation and careers in the Corps. Attendees also inquired about opportunities to serve as JAs in the Army Reserves.

The military panel—along with the entire HNBA convention—was a notable event that addressed issues of importance to the Nation's Hispanic community and celebrated Hispanic legal professionals' many contributions. The Army JAG Corps's robust participation throughout the convention was also a reminder of our own diversity. The event's theme, "Honoring our Legacy," brought to mind the recent sentiments of Lieutenant General Stuart Risch, The Judge Advocate General, U.S. Army, and Brigadier General Alison Martin, Commanding General of The Judge Advocate General's Legal Center and School: that thanks to our rich JAG Corps history and diverse background, "we share a legacy of which we can justifiably be proud."<sup>5</sup> **TAL**

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*CPT Cortez is the Editor-in-Chief of the Military Law Review at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. 2022 Annual Convention, HISPANIC NAT'L BAR ASS'N, <https://hnba.com/2022-annual-convention> (last visited Dec. 9, 2022).

2. See *id.*

3. HISPANIC NAT'L BAR ASS'N, 2022 HNBA/VIA ANNUAL CONVENTION 87 (2022), <https://hnba.com/wp-content/uploads/2022/09/FINAL-NOTI-CIAS-2022-AC-AGENDA-2.pdf>.

4. *Id.* at 91.

5. Lieutenant General Stuart W. Risch et al., *JAG Corps Birthday Message*, U.S. ARMY JAGCNET (July 29, 2022, 10:03 AM), [https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=ECA29618AB185BF28525888E004C9A29;E-mail from Brigadier General Alison Martin, Commanding General, The Judge Advocate General's Legal Center and School to The Judge Advocate General's Legal Center and School Personnel](https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=ECA29618AB185BF28525888E004C9A29;E-mail%20from%20Brigadier%20General%20Alison%20Martin%20Commanding%20General%20The%20Judge%20Advocate%20General's%20Legal%20Center%20and%20School%20Personnel) (Nov. 13, 2022, 4:00 PM EST) (on file with author) (In her weekly TJAGLCS message, Brigadier General Martin stated, "I'm grateful that you all chose to be part of [the military] legacy, and I encourage you to reflect again on the oath you took to support and defend those values.").



## Rim of the Pacific 2022 A Plethora of Operational Law Challenges

By Dr. Jan P. Ganschow

*[K]now the enemy and know yourself [and your allies];  
in a hundred battles you will never be in peril.<sup>1</sup>*

**Rim of the Pacific 2022 (RIMPAC22)**, the world's largest international maritime exercise, concluded on 4 August 2022. It included over a month of realistic combined operations training in and around the Hawaiian Islands and Southern California.<sup>2</sup> Spanning thirty-seven exercise days, RIMPAC22 was divided into harbor, force integration, and tactical phases. Twenty-six nations,<sup>3</sup> thirty-eight surface ships, three submarines, nine national land forces, more than thirty unmanned systems, approximately 170 aircraft and more than 25,000 personnel (with approximately thirty U.S. Navy and U.S. Marine Corps judge advocates and approximately 10 multinational legal advisors) participated in the twenty-eighth edition of the biennial RIMPAC.<sup>4</sup>

In line with RIMPAC22's theme of "Capable Adaptive Partners," the forces exercised a wide range of capabilities to display the inherent flexibility of maritime forces and to help promote a free and open Indo-Pacific.<sup>5</sup> RIMPAC22 included

"gunnery, missile, anti-submarine and air defense exercises, as well as amphibious, counter-piracy, mine clearance, explosive ordnance disposal, diving and salvage operations . . . [and] space and cyber operations,"<sup>6</sup> all of which provided a plethora of operational law challenges at the tactical and operational levels.

To prepare for the anticipated legal challenges at RIMPAC22, the U.S. Third Fleet Judge Advocate, Commander Jessica Pyle, organized a two-day international legal symposium, which served to synchronize and educate legal participants. The National Security Law Attorney of the 25th Infantry Division and U.S. Army Hawaii, Captain Shane Bagwell, attended the symposium.

In addition, as a result of the varied operations at RIMPAC22, the multinational legal community synchronized daily throughout the exercise to interpret and apply relevant legal regimes (peacetime domestic and international law, and domestic and international laws of armed conflict).

U.S. Marine Corps MV-22B Ospreys perform deck-landing maneuvers aboard a Royal Australian Navy Canberra-class landing helicopter dock during RIMPAC 2022. (Photo by Royal Australian Navy Petty Officer Christopher Szumlanski)

Having an observer from the Center for Law and Military Operations (CLAMO) present during the exercise served to inform CLAMO's efforts, particularly in light of future multinational legal interoperability challenges within multi-domain operations.

The exercise brought to light the importance of joint, multi-domain operations—especially in the primarily maritime Indo-Pacific theater—and the coordinated efforts that are necessary for such operations to occur.<sup>7</sup> Overall, RIMPAC22 led to a wide array of legal lessons learned and strengthened working relations with U.S. allies and partners. As this article's introductory quotation of Sun Tzu's age-old adage implies, in a coalition warfare scenario, this knowledge and enhanced interoperability could prove decisive to the outcome of war. **TAL**

*Dr. Ganschow is the Action Officer for Multinational Operations and Interoperability with the Center for Law and Military Operations at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.*

### Notes

1. SUN TZU, *THE ART OF WAR* 84 (Samuel B. Griffith trans., Oxford Univ. Press 1971) (n.d.).
2. Commander, U.S. Third Fleet Public Affairs, *RIMPAC 2022 Concludes*, *AMERICA'S NAVY* (Aug. 5, 2022), <https://www.navy.mil/Press-Office/News-Stories/Article/3118649/rimpac-2022-concludes>.
3. This year's exercise included units and personnel from Australia, Brunei, Canada, Chile, Colombia, Denmark, Ecuador, France, Germany, India, Indonesia, Israel, Japan, Malaysia, Mexico, Netherlands, New Zealand, Peru, the Republic of Korea, the Republic of the Philippines, Singapore, Sri Lanka, Thailand, Tonga, the United Kingdom and the United States. *Id.*
4. *Id.*
5. Edward Lundquist, *RIMPAC Naval Exercise Brings Together 'Capable Adaptive Partners' from 28 Nations*, *MARINELINK* (Aug. 5, 2022), <https://www.marinelink.com/news/rimpac-naval-exercise-brings-together-498546>.
6. U.S. NAVY, *Rim of the Pacific 2022 Officially Begins*, U.S. INDO-PACIFIC COMMAND (June 30, 2022) <https://www.pacom.mil/Media/News/News-Article-View/Article/3081151/rim-of-the-pacific-2022-officially-begins>.
7. A detailed discussion of the topics covered is provided in the National Security Law Quarterly article on RIMPAC22.



**Photo 1**  
 LTG A.C. Roper, Deputy Commander, U.S. NORTHCOM, awarded the Joint Service Achievement Medal to SGT Demetrius C. Childress, a court reporter for U.S. Army Cadet Command, for outstanding support as a court reporter and investigative support

staff for a high-profile U.S. NORTHCOM investigation. In addition to supporting the deputy commander as the investigating officer, SGT Childress assisted the full investigating officer team of a BG, two COLs, a MAJ, and a CSM. SGT Childress's contributions to the investigation included transcrib-



ing 35 witness interviews, totaling over 200 hours of recording, and more than 900 pages of transcription. SGT Childress traveled to multiple locations across the country in order to interview necessary witnesses.

**Photo 2**  
 Jumpers, hit! From left to right, MAJ Jayne Leemon, then-Special Victim Prosecutor; COL Sue McConnell, Staff Judge Advocate; and SGT Emma Larson, Special Victim Noncommissioned Officer, in front of the new HQ, 11th Airborne Division, and U.S. Army Alaska sign.



### Photo 3

CPT Kuhlman of the 21st Theater Sustainment Command in Germany joined his wife, Emanuela, at the Mozart 100 Ultra Marathon in Salzburg, Austria. The couple ran 65 miles over 14,000 feet of elevation in 20 hours and 25 minutes.

### Photo 4

Student Detachment Command Team, CPT Zara Scribner and 1SG Tiffany Diringer, along with G1 staff, SPC Musgraves, and 1SG Diringer's twin sister, Tabitha Sturgill, working together to change weights out more efficiently.

### Photo 5

SPC Barber (left) and SGT Preston (right) of the 1st Brigade Combat Team Legal Shop conducted their first night jump in the 82d Airborne Division. "That was the most terrifying but awesome experience ever!" - SGT Preston, a third-generation paratrooper. AATW!

### Photo 6

The 335th Signal Command (Theater) Office of the Staff Judge Advocate took the high ground during an Officer Professional Development/Noncommissioned Officer Professional Development at Kennesaw Mountain National Battlefield Park (Kennesaw, GA). From left-to-right: 1LT John Travers; COL Paul Thompson (Staff Judge Advocate); LTC Chris Ellis (Deputy Staff Judge Advocate); SPC Brighton Zeutenhorst; MSG Antonelle Jones; SGT Alejandro Osorio; and CPT Derrick Hall (front). The Battle of Kennesaw Mountain witnessed desperate fighting and was a key engagement during the Atlanta Campaign of 1864.

### Photo 7

MAJ Louie Pejic received graduation honors at the Western Hemisphere Institute for National Security Cooperation (WHINSEC). WHINSEC conducted a year-long resident Command and General Staff Officer Course 2021-22 with a class of 66



officers from 13 nations of the Western Hemisphere, with all lecture and communication conducted in Spanish language. MAJ Pejic graduated with superior honors and was the only U.S. officer to prepare, publish, and defend a thesis for a degree of Master of Military Arts and Science, in addition to the Intermediate Level Education and Advanced Operations Course curriculum.



The author (seated center in the white shirt) attends a networking event with other former active-duty and current reserve JAs who are in private practice in the Seattle region. (Photo courtesy of author)

# Pivotal Perspective

## The Career Benefits of Being a Reservist

By Major Faisal Akhter

**Military service is a privilege that sometimes requires sacrifice.** While I have found this oft-repeated adage to be true (particularly during permanent change of station season), fortunately, this phrase also includes “sometimes.” When I transitioned to the civilian sector after eight years on active duty, I chose to continue serving in the Reserves. I did so because I deeply value both my military service and the opportunity to continue serving alongside the amazing people in our Corps.

That said, another advantage of continued military service, which I candidly never predicted, is how it supports my civilian career. One might think that reserve duty would be a hindrance to civilian careers. Without diminishing anyone’s hesitation,

which can be highly dependent on personal considerations and goals, there are under-appreciated benefits to continued service. Through the skills I continue to learn and hone, the people I continue to meet, and the development opportunities I continue to receive, I have found the sacrifice that “sometimes” comes with the Reserves has positively contributed to my civilian profession.

### Skills that Military Service Requires

As judge advocates (JAs), we are continually asked to labor on ever-changing, highly visible work that lacks precedent. For example, the sweeping reforms that the National Defense Authorization Act for Fiscal

Year 2022 (NDAA)<sup>1</sup> made to our military justice system directly impacted my work as a defense counsel in the Reserves. This new system requires forward-thinking, agile mindsets from military legal professionals. It demands our Corps be quick to adapt, appreciate different stakeholders, anticipate problems, and find ways to incorporate long-term thinking that will likely result in subsequent refinement through policy advocacy and feedback.

While such substance can differ starkly from what is managed in a civilian career, speaking as someone who does not practice criminal law outside of the Army, there is tremendous value in being part of these changes. Specifically, knowing how to navigate this new and evolving system as a defense counsel fosters the legal skills that benefit any civilian position. As a senior corporate counsel at Microsoft, I am asked to advise on and incorporate new business ideas that significantly differ from our current processes. These can be initiated through many channels: business leaders, regulatory pressure, shareholder proposals, and other, similar external sources.

Take, for instance, the continually evolving area of data, privacy, and its

surrounding global regulations. In October 2022, the European Union published the Digital Services Act, which goes into effect in 2024.<sup>2</sup> Savvy legal professionals must know the business well, advise business strategy based on this new regulation, and help the business evolve in this new and changing landscape.

Judge advocates are continually expected to exercise these skillsets to manage updates and changes, such as legislative and administrative evolutions within the NDAA. Their ability to work closely with different stakeholders, just as they would with command teams, staff, and clients, is critically important. Listening to my reserve clients' desires and communicating how this different military justice approach can potentially impact their military careers is very similar to advising civilian clients on how a new regulation can impact their business. No matter the underlying subject, the ability to listen, learn, and communicate legal implications to the command or "the business" gets sharpened in more ways as a reservist.

### Continued Connection to the Corps

When I interned as a first-year law student with 3d Infantry Division in Fort Stewart, I discovered that our Corps, both uniformed and civilian, is filled with hardworking team players with strong values and a diverse set of experiences and opinions. Of all the reasons that I continue military service, our people are right near the top of this list.

As a reservist, I get to stay connected to other reservists from different parts of the country, practice in different areas of the law, and continue to be part of the JAG network. If there is a legal issue in a reservist's civilian practice, they now have a vast network of other legal professionals from whom they can learn. Moreover, if reservists' civilian work intersects, they now have peers with whom they can teach or attend a continuing legal education, jointly work on a pro bono matter, or find occasions to introduce each other to colleagues and extend their networks. Just like the legendary "third file" and by-name requests suggest, building and maintaining a great reputation is key. Those strong relationships where others, like your Reserve unit colleagues, will vouch for you remain priceless.



The author (second from left) attends Defense Counsel/Paralegal 101 in New Orleans with other Reserve and National Guard JAs from across the country. (Photo courtesy of author)

### JAG Corps's Professional Development Offerings

This past year, my Reserve unit sent me to the Contract Attorney Course (CAC) at The Judge Advocate General's Legal Center and School. The course was a great opportunity to learn, augment my skillset to benefit our Corps, and meet other contract attorneys who work across the federal government. Since attending the course, I am more competent when it comes to advising a command on contract issues, and am better connected to experts in the field.

Furthermore, my civilian employer has a government contracts department. I now have a stronger baseline to support these teams where I can, which adds to my civilian skillset and helps generate opportunities for professional growth within my organization. Though the CAC had little to do with my current reserve position or my civilian practice, it was a fantastic learning opportunity that I would not have otherwise had were I not in the Reserves.

Again, one of the best things about continuing to serve in the Reserves is how it has unexpectedly helped my civilian career. I have had the ability to practice in new areas with a diverse group of people,

learned about different areas of the law from world-class practitioners, and built countless relationships with incredible people who are similarly dedicated to public service. For those considering joining the Reserves or continuing military service beyond active duty, I hope you consider not just what you and your family will, undoubtedly, sacrifice, but also, what you and your career will gain. **TAL**

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*MAJ Akhter serves in the U.S. Army Reserves as the Deputy Group Judge Advocate for the U.S. Army Reserve Theater Support Group-Pacific. In his civilian career, he is a senior corporate counsel and leads a team of attorneys at Microsoft.*

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### Notes

1. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021).
2. Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), art. 93, 2022 O.J. (L 277) 1.





(Credit: icholakov – stock.adobe.com)

# What's It Like?

## The OTJAG Experience

By Major Jason "Jay" McKenna

*OTJAG is like a box of chocolates.<sup>1</sup>*

Envision this scenario: it is Monday morning. You are a judge advocate (JA) sitting at your desk. You just closed your last open action<sup>2</sup> in the Administrative Law Case Tracking System (ALCS),<sup>3</sup> and it appears this could finally be a relatively slow day, during which you might find time to write an article for *The Army Lawyer*. You consider visiting Starbucks, a trip that requires a lap around the "ring"<sup>4</sup> located one floor beneath the Office of The Advocate

General (OTJAG), and one corridor past the Personnel, Plans, and Training Office. An email arrives in your inbox. The email does not have the red, "high importance" designation; however, in the subject line you see, "short suspense, TJAG brief, information paper." If this occurs during your first few months working as an action officer, your heart likely drops as you wince and open the email. If this occurs one year later, you routinely open the email and

prepare to confidently execute. Either way, it is 0930 and that information paper (IP) is due to The Judge Advocate General (TJAG) no later than 1200 because you will brief the IP's content at 1300.

Wait, did I say 1200? The IP is actually due at 1100, and you will brief at 1200 because the Director of the Army Staff (ARSTAF) just moved his meeting with TJAG one hour to the left. Do not worry; the topic is one of eight in your portfolio, so at least you have background knowledge regarding the subject matter. What is that, you say? You did not know that topic is in your portfolio? Have no fear, open the ALCS and begin your research. Whew. An IP in ALCS discusses this particular issue, and the OTJAG Administrative Law Division (ALD) issued an opinion on this topic. Simply cross-reference the authorities, internalize the content, walk down the hallway, and brief TJAG!

Every day, someone in OTJAG experiences that exciting example. A popular synonym for Major League Baseball is "the show." OTJAG is, in my opinion, *the show*,

and senior leaders expect that you will perform at the major-league level.<sup>5</sup>

### **Working your Quad(ricle) Every Day**

Action officers in ALD work in “quad-ricles,” which are sets of four, randomly assigned, open cubicles. Upon first glance, “quad-life” appears non-conducive to thoroughly reviewing draft Army policies and advising principal officials on the ARS-TAF.<sup>6</sup> These “quads,” however, facilitate the perfect environment for action officers to discuss ideas and opinions. In many cases, someone in your quad worked issues in your portfolio the prior year, either because they maintained that portfolio or substituted for a fellow action officer during leave. These teammates are invaluable resources of information, support, and proverbial “sanity checks.” Every action officer needs an action officer.

You are welcome to decorate your quad but be prepared to embrace relics such as a giant bronze eagle, apparently awarded during the Aviation Branch Ball in 2005. There is probably a story behind this, but nobody knows what that story entails. Check ALCS for details.

### **Organizational Structure in ALD**

Three branches comprise OTJAG ALD: 1) General Law (G-Law) Branch; 2) Personnel Law (P-Law) Branch; and 3) Ethics, Legislation, and Government Information Practices (ELGIP) Branch. Branch chiefs supervise action officers’ work, but action officers are ultimately responsible for providing advice “from cradle to grave,” which includes briefing Army senior leaders.

All branches report through the deputy chief to the chief of ALD. The division chief is the senior administrative law practitioner in the Army. Like all other assignments, leaders shape the experience; however, I believe that is more pronounced in the Pentagon, where every issue could be a “crisis” if the division chief treats it that way. The leadership billets are often, but not always, filled by individuals who previously served in an OTJAG division. Prior experience likely provides necessary perspective, knowing when to be “on,” and reassuring action officers that it is okay to be “off” at times.



While a picture is worth a thousand words, the backstory of this eagle remains a mystery. (Photo courtesy of author)

The G-Law Branch is typically comprised of a lieutenant colonel branch chief, five active-duty majors who serve as action officers, two civilian attorneys, eight full-time and part-time attorneys who work remotely and review draft regulations, and a civilian paralegal. The G-Law Branch action officers serve as “utility players,” providing advice regarding any action in their respective portfolios. The portfolios are typically aligned with an ARSTAF section. For example, an action officer’s portfolio might include all matters pertaining to the

Office of the Provost Marshal General, but also include matters pertaining to Army Corrections Command, arming policy, Army Futures Command, and extremism. When issues arise within that portfolio, the action officer serves as the primary attorney to provide advice. If five issues simultaneously arise from those areas, that same action officer serves as the primary attorney on all five issues. The workload associated with each portfolio ebbs and flows. OTJAG is like a box of chocolates.



(Credit: Andrii Yalanskyi – stock.adobe.com)

The P-Law Branch consists of a lieutenant colonel branch chief, five active-duty majors, one Active Guard Reserve major, two civilian attorneys, and one civilian paralegal. The P-Law Branch advises ARSTAF regarding all matters pertaining to military personnel law and policy including, but not limited to appointments, enlistments, promotions, administrative separations, retirements and status, force drawdown boards, credentialing health care providers, transgender service, and senior leader accountability.

The ELGIP Branch consists of a civilian branch chief, three civilian attorneys, one active-duty major, and one civilian paralegal. The ELGIP Branch administers the ethics program for the ARSTAF. Furthermore, the ELGIP Branch prepares draft bills for Army legislative proposals, develops the Army's position regarding legislation pending before Congress, drafts executive orders, and serves as the Congressional Affairs Contact Office for OTJAG. Finally, the ELGIP Branch prepares legal opinions and furnishes advice regarding the Freedom of Information Act, Privacy Act, Health Insurance Portability and Accountability Act, and information management.

Upon arrival, you will likely wonder why you are assigned to a particular branch,

but you are likely never to learn that rationale. Indeed, ALD leaders meet to discuss incoming action officers' experiences prior to their arrival, and the ALD leadership decides portfolio assignments during that meeting, but even looking behind the curtain will not reveal a reason. Eventually, you will accept the fact that branch assignment is irrelevant. Every action officer, regardless of branch or portfolio, will experience the "brief TJAG scenario" described above.

### **Coordination with the Larger Legal Team**

Early during your experience, you will submit an action to your branch chief for approval, which is required prior to sending an opinion to your client. Your branch chief will query, "Have you coordinated this opinion with OGC?" Panicked, attempting to quickly respond, you will ask your roommate, "Who is OGC?"

During the Graduate Course,<sup>7</sup> JAs receive instruction that thoroughly explains the distinction between the Army Secretariat and ARSTAF. Nevertheless, I neither appreciated that distinction nor understood its importance prior to arriving at OTJAG. The acronym, OGC, stands for the Army's Office of General Counsel, which advises the Secretariat,<sup>8</sup> including the Secretary of

the Army. The Office of The Judge Advocate General advises ARSTAF, including the Chief of Staff, Army. Thorough staff work includes, in many cases, OTJAG coordination with OGC prior to rendering opinions. The Office of The Judge Advocate General renders the opinion—after coordinating with OGC—if the action requires ARSTAF approval. The Office of General Counsel renders the opinion—after coordinating with OTJAG—if the action requires Secretariat-level approval. Army OGC's office is next to OTJAG ALD's office, and action officers develop working relationships with OGC attorneys who maintain similar portfolios.

Many actions will also require coordination with other OTJAG divisions and Judge Advocate General's (JAG) Corps elements, including coordination with JAs and civilian attorneys assigned to the Joint Staff and the Department of Defense (DoD). Teammates on this larger legal team prove helpful when reviewing matters that pertain to multiple core competencies. For example, draft policy pertaining to "missing Soldiers" requires coordination with the Criminal Law Division and may require coordination with the Legal Assistance Policy Division if issues arise regarding the missing Soldiers' benefits. The Office of The Judge Advocate General ALD

coordinated with the Contract and Fiscal Law Division to review relatively recently approved policy permitting reimbursement of bar dues. Support to the Presidential inauguration requires coordination with the National Security Law Division. Congressional interest in Army actions prompts coordination with attorneys in the Office of the Chief Legislative Liaison. Information papers pertaining to Army policies that potentially impact Soldiers' constitutional rights may require coordination with the Litigation Division. The takeaway, of course, is that issues for which you will provide advice are significant. These issues require input from, and coordination with, attorneys at the highest echelons. The teamwork required to resolve these issues fosters professional relationships and creates fantastic opportunities to learn from some of the best attorneys in the DoD.

### “Exposure”

Friends and mentors counseled me prior to arrival at OTJAG: “This assignment will provide great exposure for you.” I surmise that if their assessment contemplates exposure to senior leaders, it is a correct assessment. You will work within walking distance to TJAG, the Deputy Judge Advocate General, the Assistant Judge Advocate General for Military Law and Operations, and senior executive service personnel. You will interact with these leaders on a daily basis. If you walk to the other end of their hallway, you will encounter the Secretary of the Army, the Chief of Staff of the Army, and the Sergeant Major of the Army. Exposure, however, is not limited to interacting with, and learning from, senior leaders. Perhaps the most valuable exposure pertains to learning how the Army operates, which is the second part of the counseling I received before arrival.

Prior to this assignment, I did not know how OTJAG is organized, what work it performs, how it impacts policy, and how it impacts the field. Moreover, I did not know how the Army operates at its highest echelon. Here, action officers are exposed to the inner workings of the Army and its JAG Corps. In the field I read TJAG's policy letters; here, action officers review the letters for legal sufficiency. In the field I read the announcement of new JAG Corps general officers; here, action officers review the board

results to ensure compliance with federal law and DoD policy. My fellow action officer effectively renamed the “combat patch” in Army Regulation 670-1.<sup>9</sup> Another action officer helped shape policy pertaining to female grooming standards.<sup>10</sup> Last example, I promise, is substantive input we provided to DoD that helped develop policy pertaining to participation in extremist activities.<sup>11</sup>

Substantially contributing to Army policy is an invigorating experience. You will require that vigor when, for example, the Strategic Initiatives Office relays a short notice request for you to brief during “General Officer Day,” which is a monthly meeting that JAG Corps senior leaders attend. Hold onto that motivation when preparing to brief the JAG Corps Board of Directors regarding the policy you helped revise. These are just a few of the tremendous opportunities for professional development during your assignment to OTJAG.

### Conclusion

The motivation for requesting assignment to OTJAG differs among JAs. Some request the assignment for “exposure,” while others avoid it for the same reason. Regardless of your preference, if you find yourself at OTJAG hopefully this article helps you manage expectations. You cannot “hide out” at OTJAG, but you should not request assignment to OTJAG hopeful that you will stand out *among* your peers. Everyone works high-level, important actions, followed by a brief to JAG Corps senior leaders. Your action is hot, until it is not, then rinse and repeat. You will work with the best, most talented officers, and no matter how strong that internal imposter dialogue may be, you should take heart that you stood shoulder to shoulder among them. Teamwork is the most important element of this assignment.

I submit that my assignment to OTJAG is the most rewarding professional experience of my career thus far. It is a fun, unparalleled, formative adventure, and that is just the fifteen-minute walk from North Parking Lot during winter. Seriously, though, if offered a ticket to the show, take it. **TAL**

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*MAJ McKenna is the Brigade Judge Advocate for the 3d Infantry Brigade Combat Team, 25th Infantry Division at Schofield Barracks, Hawaii. He was formerly an attorney in the*

*Administrative Law Division in the Office of The Judge Advocate General at the Pentagon.*

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### Notes

1. This saying derives from a quote in the 1994 film *Forrest Gump*, which reads: “My momma always said, life was like a box of chocolates. You never know what you're gonna get.” *Life is Like a Box of Chocolates*, THIS DAY IN QUOTES (Sept. 15, 2020), <http://www.thisdayinquotes.com/2020/09/life-is-like-box-of-chocolates-misquote.html>.

2. “Action” is the colloquial term for tasks that your branch chief assigns to you.

3. The Administrative Law Case System is a digital repository for all research and actions completed by the OTJAG Administrative Law Division.

4. The Pentagon is organized into floors, rings, and corridors. Office addresses correlate accordingly. For example, Pentagon Building, 3D548, means that office is located on the third floor, D ring, 5th corridor, number 48.

5. The author makes no representation that he did, indeed, perform at the major-league level; he simply notes that there is an expectation to perform.

6. See Headquarters, U.S. Dept of Army, Gen. Order No. 2020-01 (6 Mar. 2020); 10 U.S.C. §§ 7011-7024; 10 U.S.C. §§ 7031-7038 (explaining the Army's organizational structure, including the statutory authorities pertaining to the Secretary of the Army, the Secretariat, and ARSTAF).

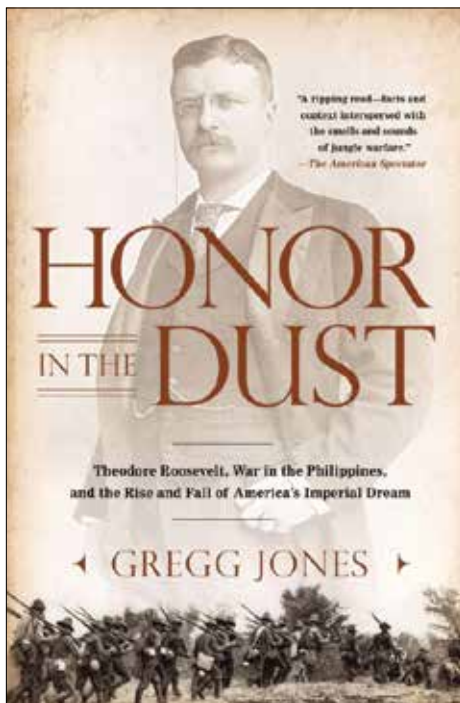
7. The Graduate Course is offered to qualifying officers annually at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. The course prepares JAs for senior roles in the JAG Corps, and successful graduates receive an LL.M. in military law. *JA Professional Military Education/Command Courses*, TJAGLCS, <https://tjaglcs.army.mil/student-services/pmecourses#collapseTwo> (last visited Dec. 16, 2022).

8. “The [Office of the Army] General Counsel serves as legal counsel to the Secretary, Under Secretary, five Assistant Secretaries, and other members of the Army Secretariat.” *General Counsel of the U.S. Army*, OFF. OF THE ARMY GEN. COUNS., <https://ogc.altess.army.mil> (last visited Dec. 16, 2022). See also Headquarters, U.S. Dept of Army, Gen. Order No. 2020-01 (6 Mar. 2020); 10 U.S.C. §§ 7011-7024; 10 U.S.C. §§ 7031-7038 (explaining the Army's organizational structure, including the statutory authorities pertaining to the secretary of the Army, the secretariat, and ARSTAF).

9. See U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 21-18 (26 Jan. 2021) (discussing the renaming of the Shoulder Sleeve Insignia-Former Wartime Service to Shoulder Sleeve Insignia-Military Operations in Hostile Conditions, colloquially referred to as the “MOHC,” pronounced “mock”).

10. See Devon Suits, *Army Announces New Grooming, Appearance Standards*, U.S. ARMY (Jan. 31, 2022), [https://www.army.mil/article/242536/army\\_announces\\_new\\_grooming\\_appearance\\_standards](https://www.army.mil/article/242536/army_announces_new_grooming_appearance_standards).

11 See U.S. DEP'T OF DEF., INSTR. 1325.06, HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (27 Nov. 2009) (C2, 20 Dec. 2021).



*History . . . is a larger way of looking at life . . . . It is about who we are and what we stand for and is essential to our understanding of what our own role should be in our time . . . . Our history, our American story, is our definition as a people and a nation.<sup>2</sup>*

The following scenario seems like it might have been ripped from the headlines in the early years of the twenty-first century:

*I'm going to die.* The terrifying realization seized the slight, middle-aged man as he lay pinned to the . . . floor. . . . A stick prevented him from closing his mouth while water poured down his throat, strangling him and swelling his stomach and intestines until surely they must explode. . . . A bearded officer asked the questions through a native interpreter. . . . After less than ten minutes, [he] could endure no more. . . . He would tell [them] what they wanted to hear.<sup>3</sup>

If asked to identify when and where this event occurred, most judge advocates (JAs) would likely say Guantanamo Bay, Cuba, in the early 2000s. This would be a reasonable conclusion given the intense debate that occurred regarding so-called “enhanced interrogation techniques,” specifically “waterboarding” in the early days of the War on Terror.<sup>4</sup> But, the reality is that this event occurred on Panay Island in the Philippines on 27 November 1900. Journalist and author, Gregg Jones, uses it as the prologue to his compelling book, *Honor in the Dust: Theodore Roosevelt, War in the Philippines, and the Rise and Fall of American Imperialism*.<sup>5</sup> While Jones’s work is now ten years old, it remains an important read for JAs, effectively emphasizing the need to undergird our principled legal practice with lessons drawn from historical knowledge. In a work of readable length, Jones crafts a captivating story of the jingoistic mindset that led to American imperialism in the late nineteenth and early twentieth centuries. *Honor in the Dust* covers the travails of guerrilla warfare and its impact on the psyche, morale, and behavior of American Soldiers and leaders. Also, Jones unflinchingly discusses the inadequate response of the mili-

tary legal system prior to the Uniform Code of Military Justice (UCMJ) when addressing allegations of atrocities by U.S. troops.

Works of historical non-fiction often fail to tell a story, losing the reader in an academic prose that is accurate but not compelling.<sup>6</sup> A journalist by trade, Jones avoids this trap by weaving the historical narrative into an intensely engaging story framed in the context of America’s rise on the world stage. Jones covers his topic with an eye towards presidential politics and the Spanish-American War that led to the United States’ involvement in the Philippines. Jones provides fascinating and contextually useful descriptions of the domestic impacts of the United States’ imperialist impulses during the first administration of President William McKinley and McKinley’s campaign for reelection in 1900.<sup>7</sup> That said, the focus of Jones’s book is the United States’ effort to annex the Philippine Islands, despite the initial belief by the Philippine resistance that America’s involvement would bring them freedom and self-government.<sup>8</sup> Arguably, the United States was an improvement over Spanish colonial administration, at least espousing a policy of “benevolent assimilation”<sup>9</sup> even establishing “the first parliament ever freely elected in Asia,”<sup>10</sup> in 1907. However, the United States would not recognize the Philippines as a sovereign nation until 1946, after liberation from Japanese occupation.<sup>11</sup>

In describing the rising imperialist impulses in the minds of the Americans and their leaders, Jones provides exceptional opportunities for discussion on diversity, equity, and inclusion (“DEI”) and the Army value of respect, particularly in his chapter entitled, “The White Man’s Burden.”<sup>12</sup> While the ideas and language seem shocking to the modern mind, beliefs of white superiority were sincerely held at the time. Many, including President McKinley, espoused altruistic motives for the paternalistic approach the United States took in administering the Philippines.<sup>13</sup> Of course, the Filipinos neither appreciated these motives nor wanted American governance. They wanted freedom and self-government—something that they had been fighting for against the Spanish colonialists before the United States ever arrived in the Philippines.<sup>14</sup> Despite the disparaging view

# Book Review

## To Remain Principled in Our Counsel, We Must Continually Learn from Our History: A review of *Honor in the Dust*

By Maurice “Moe” A. Lescault, Jr.

*Those who fail to learn from history are condemned to repeat it.<sup>1</sup>*

of American leaders to the contrary, the Filipinos were fully capable of governing themselves, having already established a revolutionary government under Emilio Aguinaldo.<sup>15</sup> Jones's description of the U.S. approach to the Philippines and attitude toward the Filipinos would form an excellent basis for DEI discussions about racial attitudes, the impact that discriminatory beliefs and a lack of respect has on policies and decisions (whether local or national), and the rationalization of prejudicial actions with misplaced motives that viewing people with disrespect and racial animus engenders.

Central to Jones's narrative is the rise of a legendary American leader, President Theodore Roosevelt. Coming to prominence in New York politics, Roosevelt would begin to develop true national renown as the hero of San Juan Hill in the Spanish-American War.<sup>16</sup> Jones includes short episodes from Roosevelt's life, specifically those that intersect with policy in the Philippines, including his ascendancy to the presidency after McKinley's assassination in 1901.<sup>17</sup> Throughout this time, Roosevelt's views on diplomacy are squarely in the jingoistic, imperialist camp.<sup>18</sup> Roosevelt is also left with the problem of accountability when courts-martial are held for crimes committed in the Philippines by U.S. military personnel.<sup>19</sup> As a well-known and admired leader, Roosevelt's inclusion in the book adds depth to the study of this period. Roosevelt is often lionized for progressive policies and achievements, including establishing the Department of Commerce to regulate corporations (so-called "trust busting"), beginning the Panama Canal, and establishing national parks and monuments.<sup>20</sup> However, his views on imperialism and racial equality are certainly not what we would expect today from a national leader. This text studies the entire person, recognizing both achievements and flaws—even serious moral failures. Professor Wilfred M. McClay of the University of Oklahoma expresses this well, saying:

[T]he history of the United States . . . includes the activity of searching self-criticism as part of its foundational makeup. There is immense hope in that process if we go about it in the right way. That means approaching the work of criticism with construc-



American Soldiers of the 20th Kansas Volunteer Infantry in trenches in the Philippines during the insurrection. (Credit: Library of Congress)

tive intentions and a certain generosity that flows from the mature awareness that none of us is perfect and that we should therefore judge others as we would ourselves wish to be judged, blending justice and mercy. One of the worst sins of the present—not just ours but any present—is its tendency to condescend toward the past, which is much easier to do when one doesn't trouble to know the full context of that past or try to grasp the nature of its challenges as they presented themselves at the time.<sup>21</sup>

Studying history, in the way that Professor McClay suggests, creates a truly human picture that provides valuable lessons that all of us, with our own limitations, biases, and failings, can realistically either seek to emulate or avoid. In short, we should learn from historical figures not as deities or devils, but as frail human beings with the same weaknesses and propensities for both good and evil that we all possess. By doing so, we can seek to accurately develop principles and live out what we learn from these figures, recognizing that we, like they, have equal propensity for both great success and great failure.

A real strength of *Honor in the Dust* is that it intertwines the political events on the home front with the situation on the ground in the Philippines. This conflict was teaching the United States that conventional forces face difficulty when fighting an enemy using guerilla tactics on their home terrain in tropical jungles.<sup>22</sup> America would ostensibly forget this lesson and have to relearn it at great cost during the Vietnam War over sixty years later.<sup>23</sup> Judge advocates will see in Jones's detailed accounts of warfare in the Philippines many of the common scenarios that they might think about when conducting training about the law of war with their units. Soldiers and Marines in the Philippines faced intense natural conditions, disease, and privation.<sup>24</sup> Marines and Soldiers experienced atrocities committed by the enemy, they received vague orders, committed atrocities themselves, and attempted the defense of following orders when called to account.<sup>25</sup> Among the photos included in the center of the book are pictures of Soldiers posing with Filipino corpses and a set of three pictures of American Soldiers administering the "water cure" to Filipinos.<sup>26</sup> Consequently, one great use of Jones's work is that it provides interesting historical training



Maurice "Moe" Lescault is the Senior Civilian at TJAGLCS and the Associate Dean for Academics. (Photo courtesy of author)

scenarios that remain applicable today—particularly in a counter-insurgency environment. And the fact that the scenarios are drawn from history provides a real-world response to the scenario that can serve to set up discussion about the propriety of the response at the time of the events as well as a comparison to a proper response under today's standards.

*Honor in the Dust* also presents contextual situations that are useful when thinking about the military legal system, how it is structured today, and why the system must sometimes change. The main protagonist in the story, Littleton Tazewell Waller, commonly referred to as Tony Waller, serves as a "judge advocate" in the Marines as a line officer with no legal training, even arguing before the United States Supreme Court as a Marine lieutenant.<sup>27</sup> Waller later faces his own court-martial for his actions in the Philippines.<sup>28</sup> Jones's description of Waller's acquittal and its aftermath would form the basis of very interesting discussions about the pre-UCMJ court-martial system and the importance of changes to that system over the latter half of the twentieth century.<sup>29</sup> The impact of politics and popular opinion on the Philippine courts-martial would foster excellent discussions about the responsibilities of convening authorities and

command influence of leaders within the court-martial system, up to and including the President of the United States.<sup>30</sup> The actions of the then-Judge Advocate General, Major General George B. Davis, who dealt with the originator of the term "bully pulpit," Theodore Roosevelt, highlight issues touching on principled counsel.<sup>31</sup>

Academic historians would likely find Jones's work too lightly noted, despite the extensive bibliography that he provides. Jones also has a clear viewpoint that is critical of the U.S. role in the Philippines, the atrocities committed there, and the outcome of the courts-martial proceedings throughout the book. Some portions stray into opinion and commentary. Still, for most readers, the factual structure of the work is sound, and the presentation carries the reader along in almost the same way as a novel. An engaging read, *Honor in the Dust* will be a profitable addition to the leader development reading list for any JA office. Not only does it provide reading enjoyment, but it also provides excellent material that will support profitable discussions of numerous aspects of JA practice, from national security law and military justice to leadership, officership, and DEL.

On the back cover, Jones's editors describe *Honor in the Dust* in this way:

From Admiral George Dewey's legendary naval victory in Manila Bay to the Rough Riders' daring charge up San Juan Hill, from Roosevelt's ascendancy to the presidency amid national tragedy to charges of U.S. military misconduct and torture in the Philippines, Gregg Jones brilliantly captures America's exuberant and at times painful coming of age.<sup>32</sup>

Given the many parallels between issues in the Philippines and those faced once again in the War on Terror over one-hundred years later, one might question whether America has ever truly "come of age." Of course, it is beyond question that America did emerge as a world leader in the twentieth century, starting with the McKinley and the Roosevelt administrations and continuing through America's critical participation in two world wars. The real question of America's growth, then, should not be

*whether* we have come of age as a nation, but whether we have effectively learned the critical lessons that we should have learned in that process. Given the fact that our republican form of government changes to some degree with every election, the tumult of history can drown out critical policy and moral lessons. It is therefore essential for our culture to maintain an accurate and honest approach to our history within the educational system, which itself should be aimed primarily at producing informed citizens. Failure to do so will undercut our Nation's ability to remain principled in its leadership on the world stage because we will not develop the type of citizens that understand the lessons of the past and can hold our leaders accountable to the constitutional principles that undergird our republic.

The same challenge is true in our military, including the Judge Advocate General's Corps. In our military culture, where we also transition to new jobs and locations every two or three years with new leadership forming (or re-forming) teams, it is the study of history—works like *Honor in the Dust*—that can help us to learn (or remember) timeless lessons, sustain defining principles, and pass these principles on to the next generation. It is only through this type of learning, self-reflection, and application of timeless principles that we can ensure that our military maintains its place as one of our Nation's most trusted institutions.<sup>33</sup> **TAL**

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## Notes

1. Winston Churchill spoke this version of the oft-used quote in a 1948 speech before the House of Commons. However, Churchill was paraphrasing the quote generally attributed to philosopher George Santayana: "Those who cannot remember the past are condemned to repeat it." Laurence Geller, *Folger Library — Churchill's Shakespeare*, CHURCHILL INT'L SOC'Y (21 Oct. 2018), <https://winstonchurchill.org/resources/in-the-media/churchill-in-the-news/folger-library-churchills-shakespeare>.

2. DAVID McCULLOUGH, *THE AMERICAN SPIRIT: WHO WE ARE AND WHAT WE STAND FOR* xiii (2017).

3. GREGG JONES, HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA'S IMPERIAL DREAM 1-2 (2012).

4. See Major General Thomas J. Romig, *The Thirty-First Charles L. Decker Lecture in Administrative and Civil Law*, 221 MIL. L. REV., 257, 274-77 (2014); Alberto Mora, *The First Thomas J. Romig Lecture in Principled Legal Practice*, 227 MIL. L. REV. 433 (2019).

5. JONES, *supra* note 3.

6. No less of an authority than bestselling historian David McCullough levelled this critique in a 2011 interview with the Wall Street Journal, where he stated the following about history texts:

They're boring! Historians are never required to write for people other than historians . . . Most of them are doing excellent work. I draw on their excellent work. I admire some of them more than anybody I know. But, by and large, they haven't learned to write very well.

Brian Bolduc, *Don't Know Much About History*, THE WALL ST. J. (June 18, 2011), <https://www.wsj.com/articles/SB10001424052702304432304576369421525987128>.

7. JONES, *supra* note 3, parts I and II.

8. See STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 110-11 (1990); JONES, *supra* note 3, at 45-46, 86-87.

9. KARNOW, *supra* note 8, at 134; JONES, *supra* note 3, at 107.

10. DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 525-26 (2013) (quoting KARNOW, *supra* note 8, at 238).

11. KARNOW, *supra* note 8, at 323.

12. JONES, *supra* note 3, ch. 8. Jones takes the title of his chapter from a poem by British author Rudyard Kipling which, according to Jones, was written to shore up American resolve in the Philippines. JONES, *supra* note 3, at 106. Kipling's poem in part says:

Take up the White Man's burden—  
Send forth the best ye breed—  
Go send your sons to exile  
To serve your captives' need  
To wait in heavy harness  
On fluttered folk and wild—  
Your new-caught, sullen peoples,  
Half devil and half child

George Mason Univ., *The White Man's Burden: Kipling's Hymn to U.S. Imperialism*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/5478> (last visited Dec. 16, 2022).

13. See, e.g., JONES, *supra* note 3, at 103 (describing at least one account of President McKinley claiming divine guidance to annex the Philippines to "educate the Filipinos, and uplift and Christianize them, and by God's grace do the very best we could by them, as our fellow men for whom Christ died"). See also KARNOW, *supra* note 8, at 131. Karnow comments that "[c]haracteristically, . . . the Americans combined contempt for the natives with an evangelical impulse to improve their conditions." For example, roads were repaired, public health clinics set up, schools were established, and even the unsavory task of removing human waste

was taken up by the Americans. KARNOW, *supra* note 8, at 131.

14. See, e.g., JONES, *supra* note 3, at 100-03 (describing the efforts of Felipe Agoncillo, the Filipino envoy from Emilio Aguinaldo's revolutionary government, to meet with President McKinley, participate in the peace negotiations with Spain, and to attain self-rule).

15. Aguinaldo's chief advisor, Apolinario Mabini had already "drafted a 'constitutional program' that . . . envisioned democratic institutions then unique in Asia, like a national legislature and elected officials." Ironically, Mabini warned Aguinaldo not to declare independence prematurely so that the Filipinos could "demonstrate to the world their ability to govern themselves," but Aguinaldo declared independence anyway on June 12, 1898—a declaration that Admiral Dewey and other U.S. leaders would ignore. KARNOW, *supra* note 8, at 116-17.

16. JONES, *supra* note 3, ch. 6. Jones quotes Roosevelt in the title of the chapter, "It Was War, and it Was Magnificent." To his credit, Roosevelt, unlike some political hawks, was willing to fight in the wars he advocated. Quoted in the New York Sun, Roosevelt said regarding the war with Spain, "I have always intended to act up on my preachings if occasion arose. Now the occasion has arisen, and I ought to meet it." JONES, *supra* note 3, at 67.

17. JONES, *supra* note 3, at 221-24 (describing the tumultuous time between McKinley's reelection, his assassination, and Roosevelt's assumption of the presidency).

18. See, e.g., JONES, *supra* note 3, at 189 (arguing that to not pursue imperialism and expansion would "mean to trail the American flag in the dust"); JONES, *supra* note 3, at 271 (calling the Filipinos "savages" in an attempt to justify the actions of U.S. troops there).

19. JONES, *supra* note 3, at 274-281 (interweaving Roosevelt's actions and reactions during the investigation of atrocities in the Philippines and the courts-martial to attempt to hold service members accountable).

20. See generally, GOODWIN, *supra* note 10. Goodwin summarizes that, following his presidency, Roosevelt enjoyed a "popularity unrivaled since Abraham Lincoln." Goodwin, *supra* note 10, at 1.

21. WILFRED M. McCLAY, LAND OF HOPE: AN INVITATION TO THE GREAT AMERICAN STORY xiv (2019). Professor McClay also expresses these sentiments in a speech he delivered at Hillsdale College. Wilfred M. McClay, *Rediscovering the Wisdom in American History*, IMPRIMIS (Aug. 23, 2019), <https://imprimis.hillsdale.edu/rediscovering-wisdom-american-history>.

22. JONES, *supra* note 3, ch. 11. This chapter, entitled "A Nasty Little War," provides a microcosm of battlefield success, challenging terrain, and disastrous losses to the guerillas that will sound reminiscent of the United States' experience in Vietnam sixty years later. This aspect of the book takes center stage in Part III labelled "The Bloody Work of Empire." From total war on the island of Panay, to the massacre of a U.S. Infantry Company at Balangiga, to operations conducted by Tony Waller on the island of Samar, under orders from General Jacob Smith to "Kill and Burn!", this part of the book would be central for any study applying the law of war to operations in the Philippines. JONES, *supra* note 3, chs. 15, 16, and 18.

23. See STANLEY KARNOW, VIETNAM: A HISTORY 11-15 (1983).

24. See, e.g., JONES, *supra* note 3, at 195. Jones describes casualties for the first seven months of the year 1900 with 995 total casualties, or 4.7 casualties per day. While 254 had been killed in action, "[t]wenty committed suicide, 40 had drowned, and 653 had died from disease." JONES, *supra* note 3, at 195.

25. See, e.g., JONES, *supra* note 3, at 193. Jones does an excellent job of providing details from the Soldier's perspective. On this page, he includes excerpts from letters Soldiers wrote to loved ones that somehow made their way to reporters. One Soldier said: "We make everyone get into his house by 7 p.m., and we only tell a man once . . . If he refuses we shoot him. We killed over 300 natives the first night." Another said:

'Last night one of our boys was found shot and his stomach cut open. Immediately orders were received from General Wheaton to burn the town and kill every native in sight, which was done to a finish. About 1,000 men, women and children were reported killed. I am probably growing hard-hearted, for I am in my glory when I can sight my gun on some dark skin and pull the trigger.'

26. Photographs of Soldiers, in JONES, *supra* note 3, at 208-09.

27. GREGG JONES, HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA'S IMPERIAL DREAM 36-37 (2012).

28. *Id.* ch. 21.

29. *Id.* ch. 21-23.

30. *Id.* chs. 21-25, Epilogue.

31. Theodore Roosevelt coined this phrase himself "to describe the national platform the presidency provides to shape public sentiment and mobilize action." GOODWIN, *supra* note 7, at xi.

32. JONES, *supra* note 3, back cover.

33. The Gallup Organization conducts an annual poll to determine the confidence America has in its institutions. The military has been included in this poll at least as far back as 1975. Since 2001, 70-80 percent of the country, on average, has a "[g]reat [d]eal" or "[q]uite a lot" of confidence in the military, placing it as the top one or two institutions in which Americans have most confidence. Since 2019, however, that number slipped three percentage points to a still strong, but slightly lower, 69 percent in 2021. That number was still enough for the military to remain the second most trusted institution. Megan Brenan, *Americans' Confidence in Major U.S. Institutions Dips*, GALLUP (July 14, 2021), <https://news.gallup.com/poll/352316/americans-confidence-major-institutions-dips.aspx>.





CPT Hannah Schlechter, the BJA for 1st Armored Brigade Combat Team, 3d Infantry Division, provides expert analysis of the law of armed conflict principle of proportionality to the brigade commander, COL Peter Moon, during a training rotation at the Joint Multinational Readiness Center in Hohenfels, Germany. (Credit: MAJ Jason Young, JMRC)

# Azimuth Check

## Advising Commanders and Leaders Stick to the Fundamentals

By Brigadier General David E. Mendelson & Major Matt Montazzoli

Regardless of your rank, assignment, or practice area, advising commanders and leaders is at the core of what judge advocates (JAs) do.<sup>1</sup> The Judge Advocate General's (JAG) Corps's primary mission is to provide "independent legal advice to commanders" at all echelons of the Army.<sup>2</sup> All JAG Corps senior leaders expect JAs to be competent leaders of character, ready

to provide principled counsel across the legal disciplines and throughout the conflict continuum.<sup>3</sup>

What makes one JA more effective than another is difficult to say, but there are a few commonalities. This article lays out skills and behaviors that may appear straightforward but sometimes go unpracticed, so you can refine your practice.

### Legal Advice: Legal is Only Half of It

Senior leaders look for an attorney who can take "a broader view" and provide "prudential and legal advice mixed together."<sup>4</sup> Mastery of the law is table stakes for a successful JA—always necessary but almost never entirely sufficient. You must also be proficient staff officers, able to build and maintain staff products, identify and analyze problems and issues, and, most critically, provide holistic advice.<sup>5</sup>

Holistic advice to leaders should at least include the following: available courses of action (COAs), risks associated with each COA, a COA recommendation, and the reasons for that recommendation.<sup>6</sup> As a legal advisor, you must highlight when you base your advice on external factors other than the law, but failing to offer prudential advice could make your recommendation incomplete.<sup>7</sup>



(Credit: Dzmitry – stock.adobe.com)

### **Communication is Key**

Effectively communicating advice and information is a JA's primary weapons system. Have you considered how your commanders and leaders best receive information? Are they visual, auditory, verbal, or physical learners?<sup>8</sup> Do they prefer written advice or deskside briefings? Do they want those briefings to be with slides, charts, or just a straight-forward discussion? Believe it or not, the easiest way to determine a leader's learning style is by simply asking them.

A JA's ability to effectively deliver advice is almost as important as the quality of their advice, and knowing how the client thinks and takes in information is invaluable.<sup>9</sup> Leave the "legalese" back in your office. There is no reason to tell a group of infantrymen that the enemy is "*hors de combat*" when simply saying "out of the fight" will work just as well.<sup>10</sup> Leaders are smart people. They already assume that you are smart. While there are times that require legal terms (such as "proximate

cause"), "making the complex simple"<sup>11</sup> will make you a much more effective (and welcome) advisor.

### **Listen and Learn**

Admit it: many lawyers enjoy talking. While talking and advocating have their place, it is even more important to be an active listener. Active listening, defined as listening to comprehend and internalize the speaker's thoughts and meaning, is paramount.<sup>12</sup> Legal advisors often enjoy special access to the commander, and that relationship can yield insights into the commander's thoughts and manner of deliberation.<sup>13</sup> As a member of a commander's special staff, you are often in a unique position to listen and learn about issues beyond the legal arena.<sup>14</sup> Active listening combined with experience will improve your delivery of advice.

### **Lawyers Advise, Commanders Decide**

You advise. Even if your advice is legally correct and flawlessly delivered, it remains just

that: advice. Commanders and leaders make decisions, and sometimes they decide not to act in accordance with a JA's recommendation. Thoughtfully and thoroughly advising your leaders is the coin of the realm. Whether they accept your specific recommendation is not as important as them understanding the scope of the COAs available and making the decision they determine is best.<sup>15</sup>

It is natural for the rejection of carefully crafted advice to sting—there is pride of authorship in any recommendation. However, assuming the COA they select is not unlawful, "salute and execute" it.<sup>16</sup> In the event a leader selects a COA that is unlawful, JAs have special duties pursuant to the rules governing professional responsibility,<sup>17</sup> but such cases are rare—you will more often encounter instances of decisions that are "lawful, but awful"<sup>18</sup>—and it is critical to differentiate between the two.<sup>19</sup>

### **Soldier First, Lawyer Always**

Commanders, leaders, and peers do not care if you are the fastest or strongest officer

in their PT formation, or that you are the best at executing basic Soldier skills. Sure, physical readiness is critically important not only to maintain military bearing and remain ready for ground combat, but also to ensure your overall good health.<sup>20</sup> But physical readiness is not what sets apart the best JAs. A positive attitude and giving your best efforts is what will stand out to your leaders and colleagues.

That said, your leaders and colleagues will also take notice if you are regularly absent from readiness training, weapons qualification, or if you give less than a complete effort at non-legal tasks. The earnest development of Soldier skills not only builds a JA's credibility within the unit, but it also demonstrates your commitment to our dual profession and may save lives in combat.<sup>21</sup>

## Be Available

Legal issues do not always neatly arise during business hours. Commanders and leaders expect their legal advisors to be reasonably available while understanding that their staff need a sustainable work-life balance. Work-life balance may be harder to come by in some jobs than others, but, over the long run, you must always steward yourself and your subordinates to protect against burnout.<sup>22</sup>

When receiving a late night, early morning, or weekend phone call, you may not have all the resources you need to answer the question. Do not shoot from the hip and guess. Commanders will understand and appreciate your honesty, telling them: "Boss, I don't have a good answer for you at this time, but I have it for action and will circle back first thing."<sup>23</sup>

## Conclusion

The JA's many roles, being "counselors, advocates, and trusted advisors to commanders," is rarely easy, but it is often rewarding.<sup>24</sup> Your responsibility is to enable leaders to think through complex problems and help resolve them. Some leaders and commanders will be openly appreciative of your guidance and advice; however, some will not.

That notwithstanding, find the reward in knowing you are doing your job well if you clearly provide a continuum of well-

thought-out COAs, articulate the risk of each (legal and prudential), and provide a recommendation with its accompanying rationale. If you can accomplish this while refraining from using unnecessary legalese and provide it in a manner that the leader best receives information, victory is yours.

Remember—you are engaged in the world's most consequential practice of law. Take your responsibilities seriously, but don't take yourself too seriously. Have fun! **TAL**

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## Notes

1. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS vii (8 June 2020) [hereinafter FM 1-04].
2. 10 U.S.C. § 7037(e)(2).
3. U.S. DEP'T OF ARMY, TECHNIQUE PUB. 5-0.2-1, STAFF REFERENCE GUIDE VOLUME I, UNCLASSIFIED RESOURCES para. G-163 (7 Dec. 2020) [hereinafter STAFF REFERENCE GUIDE] ("Commanders at all levels consult their legal advisor before and during the conduct of operations").
4. Duke University School of Law, *LENS 2021 A Conversation with General Jim Mattis*, YOUTUBE, at 51:40 (Feb. 26, 2021), [https://www.youtube.com/watch?v=Z-ZLXC\\_Z94ks](https://www.youtube.com/watch?v=Z-ZLXC_Z94ks).
5. STAFF REFERENCE GUIDE, *supra* note 3, para. M-3.
6. Lieutenant Colonel Richard P. DiMeglio, *Training Army Judge Advocates to Advise Commanders as Operational Law Attorneys*, 54 B.C. L. REV. 1185, 1206 (2013).
7. Brigadier General (Ret.) Rich Gross, *Find Your Yoda – Ten Rules for Being a Rock-Star Operational Attorney*, ARMY LAW. No. 1, 2019, at 43, 45 ("Be careful to be crystal clear to your clients that you are giving them counsel and not a legal opinion, because you owe it to them.") [hereinafter *Find Your Yoda*]. See also Major General (Ret.) Thomas J. Romig, *Judge Advocates Must Have the Courage That Principled Counsel Requires*, ARMY LAW., No. 4, 2020, at 102, 103 ("If your advice is not based on law or regulation, tell your client, but then explain the basis of your advice.").
8. Brianna Hansen, *Your Guide to Understanding and Adapting to Different Learning Styles*, LIFELONG LEARNING MATTERS (Apr. 16, 2018), <https://www.cornerstone.edu/blog-post/your-guide-to-understanding-and-adapting-to-different-learning-styles>. But see Casper Tucker, *Content Dictates Delivery, Learning Styles Do Not*, THE COVE (Jan. 21, 2020), <https://cove.army.gov.au/article/content-dictates-delivery-learning-styles-do-not> (arguing learners should adapt to professional military education delivery instead of altering delivery to suit learning styles).

9. U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, PLANNING AND ORDERS PRODUCTION para. 3-50 (16 May 2022).

10. See, e.g., then-Brigadier General Charles N. Pede, *Communication is Key— Tips for the Judge Advocate, Staff Officer and Leader*, ARMY LAW., June 2016, at 4, 6 (discussing the need for clarity, brevity, and audience awareness in communication).

11. *Find Your Yoda*, *supra* note 7, at 46.

12. See U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, LEADER DEVELOPMENT para. 4-80 (1 Nov. 2022)

13. Romig, *supra* note 7, at 103 (recounting a commander's observation that "I have only two staff officers who tell me what I need to hear, not what they think I want to hear: the Chaplain and the JAG").

14. See U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-143 (16 May 2022).

15. *Id.* para. 2-31 ("[U]nderstand that all staff work serves the commander, even if the commander rejects the resulting recommendation.").

16. See U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION, paras. 2-6, 2-19 (31 July 2019) (C1, 25 Nov. 2019).

17. See U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.13(b) (28 June 2018) [hereinafter AR 27-26].

18. *Find Your Yoda*, *supra* note 7, at 44.

19. AR 27-26, *supra* note 17, r. 1.13 cmt., para. (3) (When commanders "make decisions for the Army, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not, as such, in the lawyer's province.").

20. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 1-22 (10 Dec. 2017) (Admin. Revision 13 Aug. 2019).

21. See THE JUDGE ADVOC. GEN., U.S. ARMY, JAGC POSTER (2014), [https://www.jagcnet.army.mil/Sites/jagc.nsf/91EFF120637EC24D85257DB7005D879C/\\$File/JAGC%20Poster%202014.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/91EFF120637EC24D85257DB7005D879C/$File/JAGC%20Poster%202014.pdf).

22. Major General Stuart W. Risch, *Resilience is a Shared Responsibility*, ARMY LAW., No. 6, 2019, at 2, 3 ("You simply cannot serve those whom you lead—and we are all leaders, regardless of position—without taking good care of yourself."). See also Colonel Carol Brewer, *Closing Argument: People First Care-Wellness-Resilience*, ARMY LAW. No. 1, 2022, at 70, 71 ("We acknowledge that certain jobs just come with the expectation of long hours and rare breaks."); Lieutenant Colonel Aimee M. Bateman, *People First, Including You: The Importance of Self-Care*, ARMY LAW. No. 6, 2019, at 35, 37 ("[W]e cannot 'outwork' the fact that we are humans. Respect that limitation and use your humanity to your advantage."); Major Rebecca A. Blood, *Preventing Burnout in the JAG Corps*, ARMY LAW., No. 6, 2019, at 39, 41 ("[M]ost Soldiers struggle with the concept of self-care.").

23. See U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-31 (16 May 2022) (explaining effective staff members "anticipate requirements rather than waiting for instructions").

24. FM 1-04, *supra* note 1, para. 1-8.



Regimental Sergeant Major Edmond G. Toomey (standing) was one of the first noncommissioned officers in The Judge Advocate General's Department. In this photo, taken in Vladivostok, Siberia in 1919, he is assisting the Division Judge Advocate, Major Albert J. Galen (seated). (Photo courtesy of author)

# Lore of the Corps

## Edward G. Toomey

### An Early Noncommissioned Officer in Corps History

By Fred L. Borch III

Prior to World War I, there were no enlisted men<sup>1</sup> in the Judge Advocate General's Department (JAGD), as the Corps was then known. Given the small size of the JAGD—

there were a total of seventeen uniformed lawyers in the Army in 1916—the War Department no doubt felt that any necessary clerical work could be done by civilian

employees and that enlisted soldiers should be utilized elsewhere. The rapid expansion of the U.S. Army after April 1917, however, combined with the realization that it would be difficult to find civilians willing to deploy with Army lawyers on combat operations overseas, caused the War Department to authorize "enlisted personnel" in the JAGD for the first time. Edward G. Toomey, who was appointed "Regimental Sergeant Major" in May 1918, was one of the first to wear stripes on his sleeves. This is his story.

Born in Deer Lodge, Montana, on 12 September 1892, Edmond Galbraith Toomey attended public schools in Deer Lodge and Pomona, California. In 1911, he entered the University of Wisconsin, Madison, from which he received an undergraduate degree in 1913. He then entered Wisconsin's law school.<sup>2</sup> After graduating in June 1916, Toomey returned to Montana, where he joined the law firm of Galen and Mettler. After eighteen months as an associate, Toomey became a partner in the firm, which was renamed Galen, Mettler and Toomey.<sup>3</sup>

After the United States declared war on the Central Powers in April 1917, Toomey's law partner, Albert Galen, decided that he wanted to serve as an Army lawyer. Galen had previously served as Montana's Attorney General, having practiced the law for more than twenty years. Consequently, it was not a surprise when Galen obtained a commission as a Reserve major in the JAGD and was ordered to active duty with the 8th Division in California.<sup>4</sup>

Edmond Toomey also wanted to serve in the active-duty Army. But unlike Galen, Toomey had less than two years as a lawyer. There is some dispute about whether Toomey applied to become an judge advocate at the same time that Galen applied. Assuming that Toomey did apply, his lack of experience meant he was simply not competitive. After all, some 5,000 civilian lawyers from every state in the Union applied for roughly 400 judge advocate po-

sitions—which meant that the JAGD could afford to be very selective in deciding who would be a judge advocate in World War I.<sup>5</sup> But Edmond Toomey wanted to serve and, when the War Department announced in March 1918 that “enlisted personnel” were now authorized for the JAGD, Toomey saw a way into the Army and the JAGD—as a noncommissioned officer (NCO).<sup>6</sup>

On 22 April 1918, the Army’s Adjutant General sent the following telegraph to the Lewis and Clark County, Montana, draft board: “Defective vision Edmond G. Toomey is waived. If inducted send him to Camp Fremont, Palo Alto, California.” Toomey was “voluntarily inducted” the following day and reported to the commanding general, 8th Division, Camp Fremont, on 29 April. He received an assignment to the Office of the Judge Advocate—headed by Major (MAJ) Galen. Toomey also received an appointment as “Regimental Sergeant Major (RSGM), Judge Advocate General’s Department.”<sup>7</sup> While he now held the senior most NCO rank in the U.S. Army, Toomey was certainly not making the money that he made as an attorney in Montana: his military pay was \$51 a month. But then again, pay for an Army private was \$30 a month, so RSGM Toomey was making more than most of his fellow Soldiers.<sup>8</sup>

In August 1918, RSGM Toomey—along with the 7,000 soldiers of the 8th Division—arrived in Vladivostok, Siberia, as part of the American Expeditionary Force-Siberia (AEF-Siberia). Under the command of Major General William S. Graves, the Americans, along with the Japanese, British, Czechoslovakian, and French contingents also in Siberia, were charged with guarding the Trans-Siberian Railroad. While officially neutral in the ongoing struggle between the Bolshevik and non-Communist White Russian forces in Siberia, many of the American Soldiers hoped for a non-Communist victory.<sup>9</sup>

Between August 1918 and May 1919, when he returned to American soil, RSGM Toomey assisted MAJ Galen in handling all legal matters for the American forces. In their offices located at No. 38, Svetlanskaya Street, Vladivostok, Toomey and Galen reviewed the records of trial of every single general and special court-martial. It was a considerable task: between September

and December 1918 alone, more than 750 Soldiers were prosecuted, including 207 for being absent without leave and 248 for disobeying orders. Officers also got in trouble, with two being court-martialed for drunkenness “under such circumstances as to bring discredit upon the service.”<sup>10</sup>

Toomey also assisted in the investigation and adjudication of claims made against the United States, which meant that Russians whose property had been damaged by American military personnel were able to obtain compensation. He also assisted MAJ Galen in determining whether a large number of German and Austro-Hungarian soldiers whom the Russians had shipped to Siberia were entitled to prisoner of war status.<sup>11</sup>

Edmond Toomey proved to be a valuable asset in AEF-Siberia legal operations. As MAJ Galen later wrote:

Regimental Sergeant Major Toomey accompanied me here [in Siberia] and, since the establishment of this Headquarters, has been detailed to my office. In reality, he has acted in the capacity of an assistant, and his work has been faithful and meritorious. Without him it would not have been possible for me to have conducted my office with so limited an office force.<sup>12</sup>

After receiving his discharge from the Army, Edmond Toomey had a successful career in Montana. He practiced law in Helena and served as legal counsel for Montana Governors Samuel V. Stewart (1913-1921), Joseph M. Dixon (1921-1925) and John E. Erickson (1925-1933). He also was the top lawyer for the Montana Railroad and Public Service Commission. Toomey also was active in Montana politics, as he served four terms in the Montana Legislative Assembly.<sup>13</sup>

Long after Edmond Toomey had taken off his uniform, and when the howling winds, bitter cold, and long winter nights of Siberia were a fading memory, Toomey stayed engaged with the Army. During the administration of Harry S. Truman, he served as Montana’s Civilian Aide to Secretary of the Army, Frank Pace. These aides are “business and community leaders appointed by the Secretary to advise and support Army leaders across the country.”<sup>14</sup>

Toomey’s appointment reflects that he was held in high regard by the Department of the Army, as this is a prestigious position.<sup>15</sup>

Edmond G. Toomey died in his law office on 7 September 1960. He was “just short of his 68th birthday.”<sup>16</sup> **TAL**

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## Notes

1. Only men were permitted to enlist in the Army prior to World War I; Congress did not authorize military status for women until 1 September 1943, when it established the Women’s Army Corps. War Dept., Gen. Order No. 27, para. XII (22 Mar. 1918).
2. Questionnaire for the Judge Advocates Record of the War, Edmond G. Toomey, Record Group (RG) 153, entry 45 (on file with the U.S. National Archives and Records Administration in College Park, MD).
3. *Id.*
4. Questionnaire for the Judge Advocates Record of the War, Albert J. Galen, RG 153, entry 45 (on file with the U.S. National Archives and Records Administration in College Park, MD).
5. FRED L. BORCH, JUDGE ADVOCATES IN THE GREAT WAR 1917-1922, at 16 (2021).
6. War Dept., Gen. Order No. 27, para. XII (22 Mar. 1918).
7. Toomey, *supra* note 2.
8. BORCH, *supra* note 5, at 2. Major Galen, on the other hand, would have been making \$275 a month. Thomas Goering, *Military Pay Chart 1908-1919*, NAVY CYBERSPACE, <https://www.navy.mil/press/1908-military-pay-chart.html> (last visited Jan. 20, 2023).
9. For more on the American military presence in Siberia, see ANDREW J. BIRTLE, U.S. ARMY COUNTER-INSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE, 1860-1941, at 208-218 (1998). See also WILLIAM S. GRAVES, AMERICA’S SIBERIAN ADVENTURE (1931).
10. Fred L. Borch III, *Bolsheviks, Polar Bears, and Military Law: The Experiences of Army Lawyers in North Russia and Siberia in World War I*, 30 PROLOGUE 181, 187 (1998).
11. *Id.* at 189.
12. Toomey, *supra* note 2.
13. Orbis Cascade Alliance, *Edmond G. Toomey Papers, 1907/1961*, ARCHIVES W., <https://archiveswest.orbiscascade.org/ark:80444/xv77679#top> (last visited Jan. 9, 2023).
14. *Civilian Aides to the Secretary of the Army*, U.S. ARMY, <https://casacac.army.mil/Pages/AboutUs.aspx> (last visited Jan. 9, 2023).
15. Today, men and women who agree to serve as civilian aides do so without salary or benefits but are afforded the protocol status of a lieutenant general. *Id.*
16. Orbis Cascade Alliance, *supra* note 13



MAJ Osvaldo Beto Martinez. (Photo courtesy of MAJ Osvaldo Martinez)

## The Judge Advocate General's Legal Center and School Hosts its First Mexican Judge Advocate Student

By Fred L. Borch III

Many nations have sent their military attorneys to The Judge Advocate General's School and The Judge Advocate General's Legal Center and School (TJAGLCS) over the years.<sup>1</sup> Military lawyers from more than twenty-five countries have studied alongside their American colleagues. To name a few: Afghanistan, Australia, Canada, Colombia, Egypt, Ghana, Iraq, Israel, Japan, Jordan, Mongolia, Morocco, Netherlands, Nigeria, South Korea, Taiwan, Turkey, and Ukraine.

Now, for the first time in history, a Mexican Army legal services officer, Major Osvaldo Martinez, is at TJAGLCS as a 71st Graduate Course student. This certainly is a welcome development, given Mexico's proximity to the United States and its importance not only in U.S. history but also in current foreign policy. Major Martinez is amazed by the wealth of knowledge that U.S. Army judge advocates (JAs) have on different areas of the law to accurately advise commanders during military operations.

Born in Mexico City, Major Martinez earned his law degree at the Universidad Anahuac in Mexico City. Today, he is one of about 400 uniformed lawyers in Mexico's

Army of some 250,000 active duty personnel.<sup>2</sup> While they do not wear the crossed pen and sword familiar to U.S. Army JAs, Major Martinez's branch insignia is similarly comprised of crossed swords over a fasces: a bundle of rods with a projecting axe blade.<sup>3</sup> The fasces was a symbol of a magistrate's power in ancient Rome and has remained a symbol of legal authority throughout modern times.<sup>4</sup>

After graduating from law school, Major Martinez decided to join the army as a uniformed attorney. He says that "60 percent of the reason I joined the Mexican Army was because my father was in the army." Major Martinez's father, Major Guillermo Martinez Ramos, served on the general staff in the National Defense Ministry, and his grandfather, Colonel Guillermo Martinez Angeles, fought in the Mexican Revolution. As for the other 40 percent? Major Martinez says that was "because I needed a job."

Major Martinez served his first JA role as a prosecutor. He has spent most of his twenty-two-year career in the military justice field, including a stint as a special prosecutor in an organized crime investigation involving drug cartels. Major Martinez also served

on the Mexican Army general staff as a legal advisor on military intelligence matters.

Major Martinez's wife, Maria de Lourdes Ancheyta Palacios, is also a JA in the Mexican Army. She recently promoted to lieutenant colonel and specializes in administrative law. About 20 percent of the attorneys in the Mexican Army legal service are female.

The Martinezes have a fifteen-year-old daughter, Lourdes Regina, who has accompanied her father to Charlottesville for the year. She is attending the local public high school and perfecting her English.

As for the future? Officer promotions in the Mexican Army are tough; one must take a promotion exam and then be ranked high enough to be promoted. Soldiers in the Mexican Army are eligible to retire after twenty years of active duty, at which point they receive 60 percent of their pay. Those who elect to stay for twenty-five years receive 75 percent, and soldiers who serve thirty years on active duty receive 100 percent of their pay for the rest of their lives. Major Martinez, who has already crossed the twenty-year threshold, has no plans to retire anytime soon.

In addition to his many accomplishments throughout his service, Major Osvaldo Martinez has made history as the first Mexican JA to study at TJAGLCS, and, when he graduates in May, he also will be the first Mexican JA to be awarded an LL.M. in military law. **TAL**

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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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### Notes

1. When The Judge Advocate General's Legal Center and School opened at its present location in Charlottesville, Virginia in 1951, it was known as The Judge Advocate General's School, U.S. Army or TJAGSA for short. Fred L. Borch III, *Military Legal Education in Virginia: The Early Years of The Judge Advocate General's School in Charlottesville*, *ARMY LAW.*, Aug. 2011, at 1, 12.

2. *2022 Mexico Military Strength*, *GLOBAL FIREPOWER*, [https://www.globalfirepower.com/country-military-strength-detail.php?country\\_id=Mexico](https://www.globalfirepower.com/country-military-strength-detail.php?country_id=Mexico) (last visited Dec. 13, 2022).

3. *Fasces*, *BRITANNICA* (June 9, 2017), <https://www.britannica.com/topic/fasces>.

4. *See id.*



(Credit: f11photo – stock.adobe.com)

## Practice Notes

# A Primer on the National Defense Authorization Act

*By Michael Jones*

In a historic move, President Trump vetoed the National Defense Authorization Act (NDAA) in 2020, claiming that it failed to include certain critical national security measures and contradicted efforts to put America first in national security and foreign policy actions.<sup>1</sup> Lawmakers on both sides of the aisle spoke out against the President's veto and his accompanying demands for changes to the legislation.<sup>2</sup> Signifying the importance of the NDAA to national security, the Senate easily turned aside the veto in an extraordinary

New Year's Day session.<sup>3</sup> Congress ultimately overrode President Trump's veto with the Senate voting 81-13 and the House voting 322-87.<sup>4</sup>

This extraordinary series of events reveals the emphasis lawmakers and their constituents place on the NDAA each year. Of all legislative actions that occur in Congress on an annual basis, the NDAA is the bill of the most consequence for most judge advocates (JAs). Typically in excess of two-thousand pages, this important

piece of legislation “authorizes appropriations and establishes policy for the Department of Defense (D[o]D), nuclear weapons programs at the Department of Energy (DOE), defense intelligence programs, and other defense activities of the Federal Government (e.g., military construction projects, homeland security programs).”<sup>5</sup> Because of its significance, JAs should have at least a basic understanding of how the bill is constructed and passed each year, as well as ways in which the Army, the DoD, and the White House can influence the legislative process.

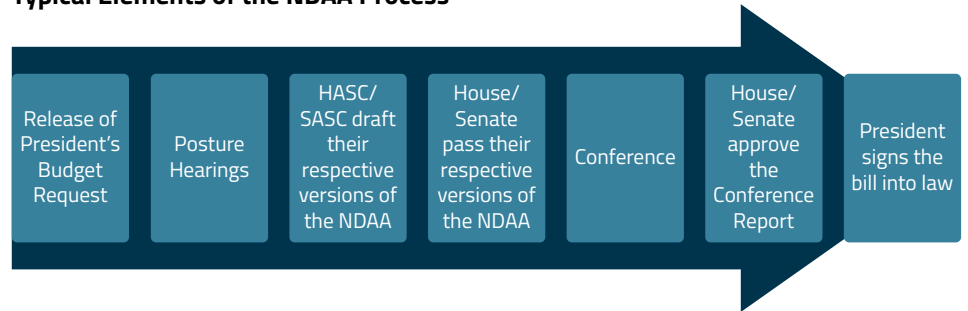
### Purpose of the NDAA

At its core, the NDAA authorizes the appropriation of funds for the DoD.<sup>6</sup> The key elements are items such as end strength authorizations and funding allocation tables.<sup>7</sup> Although this may sound like a relatively mundane process, in practice, it has become the primary method by which Congress influences national defense policy.<sup>8</sup> For example, the fiscal year (FY) 22 NDAA contained a multitude of new provisions that materially impacted legal practice in the military, including major changes to the military justice system through the creation of the Office of the Special Trial Counsel.<sup>9</sup> Such sweeping changes to how the military conducts business are not uncommon and can go well beyond just authorizations for funding levels. In other words, the NDAA is much more than simply authorizing legislation. Because of its potential to generate significant change, JAs should try to follow the NDAA each year to be prepared for the potential reforms that can impact both military structure and process. This will ensure that they are providing the most accurate and current legal advice to their clients.<sup>10</sup>

### The NDAA Legislative Process

The NDAA process begins with the release of the President’s budget request for the coming fiscal year.<sup>11</sup> This triggers the House and Senate Armed Services Committees (HASC and SASC), working in parallel, to begin construction of the text of the NDAA.<sup>12</sup> This is also the time when both committees conduct a series of hearings, generally referred to as posture hearings, with senior military leaders to discuss the budget request and related defense matters.<sup>13</sup>

### Typical Elements of the NDAA Process



The various defense subcommittees also hold hearings during this time on issues that are specific to the subcommittee’s respective area of jurisdiction.<sup>14</sup> For example, in June of 2020, the House Armed Services Subcommittee on Military Personnel held a hearing on racial disparity in the military justice system,<sup>15</sup> which was and continues to be a focus of the defense committees.<sup>16</sup> These hearings provide information to the committees and subcommittees that can be used in conjunction with the President’s budget request and other information from various sources to begin developing the legislative text.<sup>17</sup>

Generally, in late spring, the HASC and SASC release the text of their proposed bills, referred to as the “Chairman’s Mark,” after which the subcommittees review, amend, and pass.<sup>18</sup> The HASC markups<sup>19</sup> are usually publicly viewable and can last late into the night as members propose and debate various amendments for inclusion.<sup>20</sup> The HASC traditionally holds its markup process in public, while the SASC generally holds their markup sessions in private.<sup>21</sup> Once the committees pass their bills, the legislation then moves to the floors of the House and Senate for consideration.<sup>22</sup> This presents another opportunity for members to offer amendments for inclusion in the final version of the bill.<sup>23</sup>

The Constitution requires that the House and Senate approve the same version of a bill before it can be signed into law by the President.<sup>24</sup> As a result, each chamber passes its own version of the NDAA and then goes into conference to resolve differences between the two bills.<sup>25</sup> Conferences consist of House and Senate members, usually from the HASC and SASC.<sup>26</sup> Their role is to resolve disagreements between the House and Senate positions and ultimately

create a conference report that captures the agreements.<sup>27</sup> Once the House and Senate agree to the conference report, the NDAA is enrolled and presented to the President for signature.<sup>28</sup>

### The Army’s Ability to Influence the NDAA

As the NDAA develops each year, the services and DoD are not without recourse to influence provisions that would negatively impact the services. As part of the formal process of engaging with Congress on pending legislation, there are three separate, formal submissions to Congress that can be employed to express concern or dissatisfaction with a provision before it becomes law. Each are covered individually below, but they are as follows: Statements of Administration Policy (SAPs), language and budgetary appeals, and the Secretary of Defense’s “Heartburn Letter.”<sup>29</sup>

#### Statements of Administration Policy

Statements of Administration Policy are the means by which the Office of Management and Budget (OMB) formally communicates the administration’s views on a particular piece of legislation.<sup>30</sup> These SAPs provide a mechanism for an administration to go on record with its justifications for objecting to, supporting, opposing, or in some cases, threatening a veto of certain legislation.<sup>31</sup> To be effective, the OMB must release a SAP at such a time in the legislative process to maximize the administration’s influence on the policy outcome.<sup>32</sup> Release of a SAP when the legislation is with the House Rules Committee,<sup>33</sup> or on the floor of the House or Senate, is usually considered optimal.<sup>34</sup>

Within the DoD, the Office of Legislative Counsel (OLC) prepares the initial draft of the SAP after soliciting input across



the Office of the Secretary of Defense.<sup>35</sup> Then, OLC works with the Assistant Secretary of Defense for Legislative Affairs (ASD(LA)) to refine the draft and coordinate staffing of the product throughout DoD.<sup>36</sup> Once there is a consensus, DoD forwards the approved input to OMB for coordination and White House review.<sup>37</sup> The OMB will then forward the complete SAP to the White House for final coordination and approval.<sup>38</sup> Occasionally, the administration will strongly oppose a provision in the bill, in which case the OMB may authorize language stating that the President's senior advisors will recommend that he veto the bill if Congress does not modify or remove the provisions.<sup>39</sup>

DoD generally reserves SAP input to address only those provisions that would have a significant negative impact, because

criminal investigative organizations (MCIOs) lack the personnel and resources to complete section 528's notification requirement within 180 days. Many of the individuals who would have to be notified are no longer in the military and MCIOs would have to conduct a search for their current contact information. Therefore, the 180-day timeframe is not feasible.<sup>40</sup>

#### *Legislative Appeals*

The appeals process is another opportunity by which DoD, in coordination with the administration, can submit detailed concerns and objections to specific NDAA provisions to Congress.<sup>41</sup> With respect to the National Defense Authorization Act, DoD typically reserves appeals for issues that do not rise to the level that would

reside).<sup>46</sup> The Senate included no similar provision, so the Army urged rejection of this provision. In doing so, the Army cited concerns that imposing unduly restrictive experience requirements on attorneys serving legal assistance clients would create personnel shortages and hiring challenges.<sup>47</sup>

It is important to note that appeals often receive a lower priority relative to the SAP input and the Heartburn Letter, which can result in submission delays.<sup>48</sup> Guidance requires that the military departments and components within DoD submit NDAA language appeals to the Office of the Assistant Secretary of Defense Legislative Affairs (OASD(LA)).<sup>49</sup>

#### *The Heartburn Letter*

The Heartburn Letter is another mechanism by which the DoD can express dissatisfaction with the NDAA.<sup>50</sup> The Heartburn Letter is a letter sent by the Secretary of Defense to the HASC and SASC, prior to conference.<sup>51</sup> In this letter, the Secretary of Defense conveys his opposition to or support for major provisions of the bills.<sup>52</sup> For example, in 2017, Secretary Mattis sent a Heartburn Letter to Chairman McCain expressing his concern over several provisions, including the creation of the Space Force, reforms to the military healthcare system, and non-waivable cost increase caps on military construction projects.<sup>53</sup> The OLC prepares the initial draft of the letter after soliciting input from other organizations within DoD.<sup>54</sup> As with the SAP, the OLC then works with ASD(LA) to refine the letter.<sup>55</sup> Once the Secretary of Defense approves the final version, it is forwarded to the OMB for review and final administration clearance.<sup>56</sup> Subject to OMB approval, the letter may recommend a veto if the bill contains a provision that is strongly opposed by the Secretary of Defense and the administration.<sup>57</sup>

Statements of Administration Policies, Appeals, and the Heartburn Letter are powerful tools that can shape the final version of the NDAA by formally expressing the views of the White House and the DoD. Judge Advocates often play an important role in drafting and reviewing these inputs to ensure that they convey accurate information and support U.S. Army programs and initiatives.<sup>58</sup>

## **Statements of Administration Policies, Appeals, and the Heartburn Letter are powerful tools that can shape the final version of the NDAA by formally expressing the views of the White House and the DoD.**

of the high level of coordination required. For example, in 2021, the administration included the following language in the SAP input to the House version of the NDAA:

#### **Other Military Justice Measures.**

Though the [a]dministration similarly appreciates the commitment to further improving the military justice system, the [a]dministration opposes provisions that could have unintended and deleterious impacts on the administration of justice and D[o]D's related programs. The [a]dministration strongly opposes section 517 as currently written, which authorizes the Secretaries of the Military Departments to act on characterization of service determinations notwithstanding the separation board's recommendation, and recommends that a study be undertaken instead to assess potential changes. Further, the [a]dministration is concerned that military

require a SAP input but are problematic nonetheless.<sup>42</sup> Appeals are primarily for highlighting differences between the House and Senate bills and expressing a preference for one approach over the other.<sup>43</sup> They can also address technical issues with legislative text in similar House and Senate provisions to ensure that the final language does not have unintended impacts that are contrary to the congressional intent for the provision.<sup>44</sup>

As part of the FY22 NDAA appeals process, the Army submitted an appeal to address a House provision that would clarify the qualifications for attorneys who provide legal services to Families enrolled in the Exceptional Family Member Program.<sup>45</sup> This provision would have imposed a requirement that such attorneys have experience in the practice of education law in the state in which the military installation is located (and any other state or states in which a significant portion of the personnel assigned to such military installation

## Conclusion

As legal professionals, it is critical to stay current with changes in the law. Within the military legal community, following the NDAA as it moves through the legislative process gives JAs an important glimpse as to what the immediate future holds for how the military organizes and operates. Recent changes to the Uniform Code of Military Justice have been especially relevant to the practice of JAs as they work to advise their clients on the future of disciplinary practices. Understanding the NDAA process and how the services and DoD can influence that process enhances the ability of JAs to provide timely, accurate, and relevant legal advice. **TAL**

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## Notes

1. Amanda Macias, *Trump Vetoes Colossal \$740 Billion Defense Bill, Breaking with Republican-Led Senate*, CNBC (Dec. 24, 2020, 8:35 PM), <https://www.cnbc.com/2020/12/23/trump-vetoes-740-billion-ndaa-defense-bill.html>. President Trump raised concerns that the defense bill did not address laws surrounding social media platforms. Nandita Bose & David Shepardson, *Trump Vows Defense Bill Veto Unless Internet Liability Shield Scrapped*, REUTERS (Dec. 1, 2020), <https://www.reuters.com/article/us-usa-trump-tech/trump-vows-defense-bill-veto-unless-internet-liability-shield-scrapped-idUSKBN28C0AO>.
2. Macias, *supra* note 1.
3. Matthew Daly, *In a First, Congress Overrides Trump Veto of Defense Bill*, AP NEWS (Jan. 1, 2021), <https://apnews.com/article/election-2020-donald-trump-defense-policy-bills-85656704ad9ae1f9cf202ee76d7a14fd>.
4. *Id.*
5. Monica Montgomery, *The NDAA Process, Explained*, CENTER FOR ARMS CONTROL AND NON-PROLIFERATION: NUKES OF HAZARD BLOG (Dec. 10, 2020), <https://arms-controlcenter.org/the-ndaa-process-explained>.
6. *See* Macias, *supra* note 1.
7. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 401, 4101, 135 Stat. 1541, 1673, 2246 (2021).
8. *See* Tom Barkley, *National Defense Authorization Act (NDAA)*, INVESTOPEDIA (Nov. 29, 2022), <https://www.investopedia.com/national-defense-authorization-act-5113289>.
9. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531-539C, 135 Stat. 1541, 1692-99 (2021).
10. This article does not address the annual defense appropriations process, which results in a separate, but also significant, piece of defense legislation considered each year.
11. VALERIE HEITSHUSEN & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IF10515, DEFENSE PRIMER: THE NDAA PROCESS (2021).
12. *Id.*
13. *Id.*
14. *Id.*
15. Courtney Vinopal, *WATCH: House Armed Services Holds Hearing on Racial Disparities in Military Justice System*, PBS NEWS HOUR (June 16, 2022, 11:12 AM), <https://www.pbs.org/newshour/nation/watch-live-house-armed-services-holds-hearing-on-racial-disparities-in-military-justice-system>.
16. *See The Facts: Delivering Real Reforms to Address the Military Sexual Assault Crisis*, H. ARMED SERVS. COMM., (Dec. 13, 2021), <https://armedservices.house.gov/2021/12/the-facts-delivering-real-reforms-to-address-the-military-sexual-assault-crisis> (describing the manner in which the House's draft National Defense Authorization Act for Fiscal Year 2022 "address[es] the challenges of racial and ethnic inequity in the military justice system").
17. *See* HEITSHUSEN & MCGARRY, *supra* note 11.
18. Montgomery, *supra* note 5.
19. Markup is the process by which a committee reviews the text of a bill and makes amendments prior to voting on it. HEITSHUSEN & MCGARRY, *supra* note 12.
20. *See, e.g.*, U.S. House Armed Service Committee, 20220622 FC Hearing: "Markup of the National Defense Authorization Act for FY 2023" (Part One), YOUTUBE (June 22, 2022), [https://www.youtube.com/watch?v=U-tiN\\_HsHEXU](https://www.youtube.com/watch?v=U-tiN_HsHEXU).
21. Monica Montgomery, *The NDAA Process, Explained*, CENTER FOR ARMS CONTROL AND NON-PROLIFERATION: NUKES OF HAZARD BLOG (Dec. 10, 2020), <https://arms-controlcenter.org/the-ndaa-process-explained>.
22. *Id.*
23. *Id.*
24. U.S. CONST. art. I, § 7.
25. VALERIE HEITSHUSEN & BRENDAN W. MCGARRY, CONG. RSCH. SERV., IF10515, DEFENSE PRIMER: THE NDAA PROCESS (2021).
26. *Id.*
27. *Id.*
28. *Id.*
29. The "Heartburn Letter" is a letter signed by the Secretary of Defense that outlines the Department of Defense's concerns or heartburn with the NDAA. *See* Eli Okun et al., *Mattis 'Heartburn Letter' Lays Out Pentagon's NDAA Objections*, POLITICO (Oct. 19, 2017, 10:00 AM), <https://www.politico.com/tipsheets/morning-defense/2017/10/19/mattis-heartburn-letter-lays-out-pentagons-ndaa-objections-222889>.
30. MEGHAN M. STUESSY, CONG. RSCH. SERV., R44539, STATEMENTS OF ADMINISTRATION POLICY 1 (2016).
31. *Id.*
32. *Id.* at 3.
33. "[T]he Rules Committee is arguably one of the most powerful in the House. It controls any legislation reported out by another committee, determining such things as the debate time (if any), the number and types of amendments allowed (if any) on the House floor, etc." *House Committee on Rules*, THE LUGAR CTR. (Dec. 29, 2022), <https://oversight-index.thelucifer.com>.
34. *Id.*
35. CHRISTIAN P. MARRONE, DEP'T OF DEF., OFF. OF LEGIS. COUNS., AN OVERVIEW OF DoD'S LEGISLATION PROGRAM 14 (2006).
36. *Id.*
37. *Id.*
38. *Id.* at 14-15.
39. *Id.* at 15.
40. EXEC. OFF. OF THE PRESIDENT, OFF. OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 4350 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2022, at 2,3 (2021).
41. Memorandum from Office of the Secretary of Defense to Secretaries of the Military Departments et al., subject: Appeals Process for FY 2023 National Defense Authorization Act (NDAA) (June 22, 2022).
42. This assertion is based on the author's recent professional experiences as the Legislative Attorney, Office of The Judge Advocate General, from Aug. 2019 to present [hereinafter Professional Experience].
43. *See, e.g.*, OFF. OF THE SEC'Y OF DEF., NDAA LANGUAGE APPEAL FORMAT (n.d.) (on file with author).
44. Professional Experience, *supra* note 42.
45. Priority Department of Defense Language Appeal FY 2022 National Defense Authorization Bill, subject: Clarification of Qualifications for Attorneys Who Provide Legal Services to Families Enrolled in the Exceptional Family Member Program (unpublished on file with author).
46. *Id.*
47. *Id.*
48. Professional Experience, *supra* note 42.
49. Memorandum from Office of the Secretary of Defense to Secretaries of the Military Departments et al., subject: Appeals Process for FY2022 National Defense Authorization Act (NDAA) (n.d.).
50. CHRISTIAN P. MARRONE, DEP'T OF DEF., OFF. OF LEGIS. COUNS., AN OVERVIEW OF DoD'S LEGISLATION PROGRAM 15 (2006), [https://ogc.osd.mil/Portals/99/OLC\\_overview.pdf](https://ogc.osd.mil/Portals/99/OLC_overview.pdf).
51. *Id.*
52. *See, e.g.*, Letter from James Mattis, Sec'y of Def. to the Hon. John McCain, Chairman of the Senate Armed Servs. Comm. (Oct. 17, 2017).
53. *Id.* at 2.
54. CHRISTIAN P. MARRONE, DEP'T OF DEF., OFF. OF LEGIS. COUNS., AN OVERVIEW OF DoD'S LEGISLATION PROGRAM 15 (2006), [https://ogc.osd.mil/Portals/99/OLC\\_overview.pdf](https://ogc.osd.mil/Portals/99/OLC_overview.pdf).
55. *Id.*
56. *Id.*
57. *Id.*
58. Professional Experience, *supra* note 42.



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## Practice Notes

# Reflections on Resident Foreign Intermediate Level Education at the 66th Japan Ground Self-Defense Force Command and General Staff Course

*By Major Alec P. Rice*

As the U.S. Army reorients towards strategic competition with the People’s Republic of China (China) and the Russian Federation (Russia), there is an increasingly urgent and pressing need for the development of leaders with “regional focus and cultural fluency” in the Indo-Pacific theater both in the Judge Advocate General’s (JAG) Corps and the Army, writ large.<sup>1</sup> As part of the U.S. Army effort to strengthen and build on international relationships with key partner nations, I was a student at the 66th Japan Ground Self-Defense Force (JGSDF) Command and General Staff (CGS) Course for one year of Resident Foreign Intermediate Level Education (ILE) under the auspices of the U.S. Army Schools of

Other Nations (SON) Program. It was an unrivaled opportunity to see the JGSDF from the inside, specifically: to come to understand how it functions as an organization, to befriend and learn from its brightest officers and future leaders, to share as much as I could about the U.S. Army and the JAG Corps, and to make efforts to strengthen the U.S.-Japan alliance at a pivotal point in history.

### **East Asia—Frontline in the New Cold War**

As the United States faces immense large-scale national security threats in East Asia, it finds itself in a geo-strategic competition with modern, powerful, nuclear-equipped adversaries, a new Cold

War. Because of these challenges, Japan has emerged as an essential U.S. ally in the Indo-Pacific theater. Despite a U.S. security commitment to defend Japan in the event of an armed attack, which has existed for over sixty years,<sup>2</sup> opportunities to learn more about our Japanese partners remain.

Japan is physically located at the frontline of the new Cold War. The entire Japanese archipelago is an integral component of both the First and Second Island Chains.<sup>3</sup> To break out of the barriers these “chains” present, China has devised its own “Island Chain Strategy,”<sup>4</sup> by which it seeks to aggressively assert hegemony in Asia through control of key waterways in the Western Pacific and beyond.<sup>5</sup> As a string of almost 7,000 islands,<sup>6</sup> the territory of Japan stretches from Hokkaido in the north, only forty-three km from the Russian territory of Sakhalin across the Soya Strait connecting the Sea of Japan and the Sea of Okhotsk,<sup>7</sup> all the way to Yonaguni Island in the East China Sea, just 111 km from Taiwan.<sup>8</sup> For the United States’ collective East Asian adversaries, Japan’s stretch of islands looms as a massive barrier blocking their access to the East China Sea, the Pacific, and the Arctic.<sup>9</sup> Japan’s geopolitical and strategic significance underlines the enduring importance of the U.S.-Japan military alliance and partnership between the Japan Ground Self-Defense Force (JGSDF) and the U.S. Army.

### Japan: A Key Ally

Current U.S. national security priorities require a renewed focus on East Asia. Thus, the United States’ emphasis shifted to international partnerships as a necessary component to counterbalance the threat posed by China.<sup>10</sup>

Surprising to many Soldiers, the population of roughly 54,000 active-duty U.S. military troops of all services stationed in Japan<sup>11</sup> exceeds that of any other foreign nation and is nearly twice the approximate population of 28,500 U.S. troops stationed in the Republic of Korea (South Korea).<sup>12</sup> Yet within Japan, the U.S. Army is almost an afterthought. The United States has only about 2,600 active-duty Soldiers stationed throughout the entirety of Japan, representing less than 5 percent of total U.S. military forces in the country.<sup>13</sup> In stark

contrast to the sparse U.S. Army presence in Japan, the JGSDF is by far the largest and most robust branch of the Japan Self-Defense Forces (JSDF). The JGSDF has about 138,000 active-duty Soldiers, approximately three times the size of either the Japan Air Self-Defense Force (JASDF) or the Japan Maritime Self-Defense Force (JMSDF).<sup>14</sup>

Japan’s size also puts it in the first rank of U.S. allies. Consider that, in addition to being the third largest economy in the world, following the United States and China,<sup>15</sup> Japan has a population nearly twice that of the United Kingdom and only slightly less than the United Kingdom, Canada, Australia, and New Zealand combined.<sup>16</sup> With 247,200 active duty military personnel, Japan’s military is also substantially larger than those of the Anglophone nations, with roughly 60 percent more personnel than the United Kingdom, more than three times the personnel of the Canadian military, four times the personnel of the Australian military, and over twenty-five times the personnel of the New Zealand military.<sup>17</sup> Even when compared with South Korea, the East Asian nation with which U.S. Army personnel are most familiar, Japan is much bigger, both geographically and in terms of population. South Korea’s land area, 96,920 sq km, is not even a third of Japan’s 364,485 sq km,<sup>18</sup> and its population of 51 million people is only 40 percent that of Japan.<sup>19</sup> Although the JSDF has fewer overall personnel than the South Korean military,<sup>20</sup> it is still ranked as being more powerful,<sup>21</sup> and Japan exceeds South Korea in defense spending.

In fact, Japan’s military budget is the seventh highest in the world, despite a tradition of limiting defense spending to 1 percent of the nation’s gross domestic product (GDP).<sup>22</sup> Furthermore, in the Global Firepower 2022 Military Strength Ranking, Japan is rated as having the fifth most powerful military in the world, following only the United States, Russia, China, and India. Japan’s ranking is higher than other U.S. allies: France (7), the United Kingdom (8), Germany (16), Australia (17), Israel (18), and Canada (23).<sup>23</sup> Notwithstanding the importance of Japan’s key geographic location in the Far East—on the doorstep of Russia, North Korea, China, and Taiwan—its military strength alone makes Japan and the

JGSDF crucial partners of the U.S. Army. Similarly, the U.S. Army should prioritize and leverage its alliance with Japan in its efforts to build international relationships and increase interoperability, particularly in the 21st century Indo-Pacific theater.

### The Japanese Ground Self-Defense Force: In the Midst of Change

The roots of the modern relationship between Japan and the United States grew out of the U.S. occupation of Japan following its defeat in World War II. Part of the restructuring of Japanese society, undertaken by Supreme Commander Allied Powers (SCAP) General Douglas MacArthur and his General Headquarters (GHQ), involved introducing a new constitution to Japan.<sup>24</sup> Born out of idealism and hopes for a peaceful postwar world, Article 9 of the Japanese constitution states:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of the belligerency of the state will not be recognized.<sup>25</sup>

Since the promulgation of the Japanese constitution on 3 November 1946<sup>26</sup> until the present day, there has been intense debate over the meaning and import of Article 9.<sup>27</sup> Despite this controversy, the Japanese constitution has never been amended (although Japan’s official interpretation of what Article 9 actually means has changed over time).<sup>28</sup> Shortly after Japan’s “war-renouncing constitution” came into effect, however, (in order to realistically function as a modern state) General MacArthur decided that some form of self-defense capability was necessary.<sup>29</sup> This realization led to the creation of an armed organization that eventually evolved in 1954 into the JSDF with ground, air, and maritime components.<sup>30</sup>

The leadership of the JGSDF operates out of the Ground Staff Office, based out of the Ministry of Defense in Ichigaya, Shinjuku Ward, Tokyo.<sup>31</sup> The JGSDF also has a Ground Component Command based out of Camp Asaka in Nerima Ward, Tokyo, with multiple subordinate units; subordinate units include the 1st Airborne Brigade, 1st Helicopter Brigade, the Special Operations Group, and others.<sup>32</sup> The bulk of the JGSDF soldiers and capabilities, however, fall into five Regional Armies,<sup>33</sup> which are loosely akin to U.S. Army corps in responsibility and authority. Each Regional Army Headquarters has subordinate divisions and independent brigades normally under their command and control.<sup>34</sup> Overall, there are currently a total of nine divisions and eight independent brigades in the active-duty JGSDF.<sup>35</sup>

The original vision for the JGSDF, at its inception at the onset of the Cold War, was to serve as a force to deter and fight against a Soviet invasion of Japanese territory in northern Japan.<sup>36</sup> Following the end of the Cold War in the 1990s, the JGSDF oriented itself towards expanding from an entirely domestic role towards an emphasis on international contributions and participation in United Nations Peacekeeping Operations.<sup>37</sup>

In the past several years, the JGSDF has shifted towards countering Chinese territorial expansion in the East China Sea.<sup>38</sup> Japan is paying particular attention to Chinese incursions near the Senkaku Islands, which Japan claims as its sovereign territory.<sup>39</sup> This priority led to the development of the first JGSDF Amphibious Rapid Deployment Brigade as a force to respond to hostile island takeovers.<sup>40</sup> Japan has also established new bases on the Japanese islands in the East China Sea and deployed surface-to-ship missile and surface-to-air missile batteries to those locations.<sup>41</sup> Of particular interest to the U.S. Army, the JGSDF possesses a significant and well-developed surface-to-ship missile capability<sup>42</sup> (a capability the U.S. Army has, until very recently, ignored).<sup>43</sup> The JGSDF has also adopted the “multi-domain” concept with what it refers to as “cross-domain operations,” which emphasize space, cyberspace, and electromagnetic capabilities.<sup>44</sup> Each of these new JGSDF endeavors provides new



A coin presented to the author on the occasion of his graduation from the 66th Japanese Command and General Staff Course. (Photo courtesy of author)

and untapped possibilities for integration, cooperation, and training between the JGSDF and the U.S. Army.

### The JGSDF Command and General Staff (CGS) Course

The JGSDF CGS Course is held at Camp Meguro, a JGSDF base in the Meguro Ward of southwest Tokyo.<sup>45</sup> JGSDF CGS falls under the purview of the JGSDF Training, Education, and Research Command, which is somewhat akin to the U.S. Army Training and Doctrine Command. JGSDF CGS is currently one year and four months in duration for JGSDF personnel (shortened from two years in past iterations) and one year long for most foreign personnel.<sup>46</sup>

There were approximately one hundred students in the 66th JGSDF CGS, nine of whom are non-Japanese—the largest class ever. The nine foreign students in the 66th JGSDF CGS consisted of four

Americans (two U.S. Army Foreign Area Officers, one Marine Corps infantry officer, and myself) and one student each from the armies of Mongolia, Indonesia, Thailand, Singapore, and Cambodia.

Japanese JGSDF students are selected to attend CGS by means of an annual competitive examination and interview process. The JGSDF officers have a four-year career window in which to pass the CGS examination, after which they lose eligibility. All Japanese attendees started the course as O-3s, though approximately twenty were promoted to O-4 in the first month.

The Japanese students come from all sixteen JGSDF career fields: infantry, armor, field artillery, anti-aircraft artillery, military intelligence, aviation, engineer, signal, ordnance, quartermaster, transportation, chemical, military police, medical, finance, and band.<sup>47</sup> In addition, there was one student each from the JMSDF and JASDF amongst the student body. There

were five female students in the 66th CGS, and the average age of the JGSDF students was thirty-three.

Of particular interest to judge advocates, there are no specialized JGSDF legal officers in the course, as the JGSDF does not have a separate JAG Corps. In all branches of the JSDF, legal billets are standard staff assignments—as opposed to a designated career field in the U.S. military—and service in a legal billet does not require a license to practice law. Perhaps, part of the reason for this difference with the U.S. military is Japan has had no historical impetus to develop a military justice system with universal jurisdiction over troops who could be potentially deployed to foreign nations. Therefore, the JSDF has had no need for deployable military trial counsel, defense counsel, military judges, courts-martial, or the creation of a Uniform Code of Military Justice analogue. Hence, JSDF legal officer responsibilities consist of what U.S. Army officers would characterize as international law, operational law, administrative law, and claims.

Coursework at JGSDF CGS consists of a combination of large-group lectures, smaller seminars, group presentations, and practical planning exercises. The curriculum includes classes in the history of operational thought, operational planning (including multiple practical group exercises), national security strategy, military history, national security law, exercise planning and training, and leadership, amongst other topics. Most instructors are O-4 and O-5 JGSDF officers, with frequent guest lecturers, to include members of the media, diplomats from the Japanese Ministry of Foreign Affairs, representatives from the Diet (Japan's legislative body), members of Japanese business and industry, and university academics. Foreign students are responsible for completing a project and presentation on military leadership. In addition, they must complete a research paper on a faculty-approved topic, which they then present to the student body and instructors.

In traditional Japanese fashion, all classes begin and end with a standing bow to the instructors as a sign of respect—the proper angle of which is 10 degrees. All instruction and class discussion are conducted

in Japanese. Although the foreign students are given the option of submitting their final thesis in either English or Japanese, they must deliver presentations in Japanese. As one might imagine, the language hurdles can be formidable. Furthermore, in general, Japanese social norms are initially extremely reserved (particularly in comparison with American social norms), and it takes a significant amount of time to build deep relationships.<sup>48</sup> One benefit of the year-long length of the course is that it allows time for each of the foreign students to gradually integrate with their classmates, meaningfully contribute to the academic environment, and earn the trust of their fellow students, who are expected to be the future elite leaders of the JGSDF.

### **The JGSDF and the U.S. Army JAG Corps: Fields for Future Collaboration and Education**

For decades, Article 9 of the Japanese constitution has been legally and politically contorted to create, legitimize, and define the scope of the JSDF.<sup>49</sup> Over time, efforts to reinterpret Article 9 have led to the evolution of an extremely complex national security law structure, which has never been tested in the real world (as the JSDF have never engaged in actual combat).<sup>50</sup>

In conjunction with its post-World War II dependence on the United States, the JGSDF has developed within these constitutional confines as a highly controlled and (almost purely) domestically oriented armed governmental self-defense organization.<sup>51</sup> This war-renouncing, non-expeditionary comportment of the JGSDF has profound ramifications for U.S. military personnel when they try to work with the JSDF.

Properly trained judge advocates of all services are in a unique position to guide commanders through the maze of Japanese legal and policy limitations, and to utilize cultural understanding and diplomatic skills to facilitate understanding, communication, and teamwork.

Although, JGSDF legal officers do not occupy the same role that U.S. military JAG officers do within their respective military staffs (for a variety of historical, cultural, and organizational reasons), national security law is potentially the most fruitful area of collaboration and instruction between

the two groups. As just one example, much can be done to integrate the law of armed conflict and rules of engagement into both bilateral training and exercises and actual operational planning, which is essential to integrate U.S. and Japanese fighting capabilities. A mutual understanding of U.S. Army and JGSDF authorities and how corresponding permissions and limitations will directly affect bilateral operations is indispensable. In the past several years, Japan has also become particularly concerned about the application of international law to Chinese “grey zone” activities: harassing and provocative actions deliberately taken below the threshold of traditional armed conflict.<sup>52</sup> This is another area of potential training, discussion, education, and collaboration. Furthermore, with the increased emphasis by both the U.S. Army and the JGSDF on multi-domain operations, the application of law in the space, cyber, and electromagnetic realms are other emerging areas of collaboration.

On the JGSDF side, there is a strong desire to work with, learn from, and teach with the U.S. Army JAG Corps. In recent years, this has been clearly evidenced by the JGSDF dispatching new officers to attend the Judge Advocate Officer Basic Course and field-grade officers to the Judge Advocate Officer Advanced Course. JGSDF officers started attending the Judge Advocate Officer Advanced Course with the 67th Graduate Course in 2018-2019.<sup>53</sup> The ability for the U.S. Army JAG Corps to reciprocate in some fashion by sending judge advocates for training and education with the JGSDF is of immense benefit to the U.S.-Japan alliance, the U.S. Army, and the JAG Corps. Engaging in such bilateral exchanges and training vastly increases the U.S. Army's knowledge and interoperability with an essential ally. Not only that, it also has rich symbolic meaning in that such activities concretely demonstrate that we, the United States, are making efforts to understand our allies.

### **The Japanese Ground Self-Defense Force and the U.S. Army—Unparalleled Opportunity to Cooperate**

As the U.S. Army focuses on the Indo-Pacific and seeks to redefine its role in areas



MAJ Rice takes a break from his studies to glance at the camera in class. (Photo courtesy of author)

such as the First and Second Island Chains<sup>54</sup> and the Arctic,<sup>55</sup> the United States' relationship with Japan and the JGSDF has taken on renewed importance. For the U.S. Army, there are unrivaled opportunities to work with the JGSDF in multiple domains and geographic areas; and as long as the United States maintains a substantial military presence in East Asia, the need to develop this relationship will only become more imperative.

It will undoubtedly require tremendous effort by both Japan and the United States to further build the U.S. Army-JGSDF relationship and realize all of the potential of this pairing. However, that also means that there is plenty of constructive, meaningful work that can be done, and great opportunity and benefit for both Japan and the United States. These potential fields of future collaboration and cooperation include multi-domain operations and long-range precision fires, as well as concepts long-neglected by the U.S. Army such as coastal defense and surface-to-ship missile capability.<sup>56</sup>

Despite the likely difficulties, the potential benefits to both nations in proactively increasing JGSDF-U.S. Army interaction are too important to pass up or put off for another day. Within the JGSDF, there is a

powerful desire to increase bilateral training, exercises, planning, and operations with the U.S. Army.

Although the Japan-U.S. alliance faces daunting adversaries in the Indo-Pacific, my experience at the 66th JGSDF CGS has acutely shown me that the relationship between the U.S. Army and the JGSDF is primed to reach an even more meaningful and integrated level that I believe would help us to counter those adversaries. As shown by recent national security endeavors in the theater, such as the reanimation of the Quadrilateral Security Dialogue (“the Quad”) relationship between Japan, India, Australia, and the United States,<sup>57</sup> the time is clearly ripe for the U.S. Army to grow its partnership with the JGSDF as a key component of its Pacific reorientation. The U.S. Army is unlikely to find a more eager and more capable military partner than the JGSDF. **TAL**

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## Notes

1. See, e.g., Colonel George R. Smawley & Colonel (Retired) Pamela M. Harms, *Developing Regionally-Focused Leaders*, *THE ARMY LAW.*, Nov./Dec. 2018, at 58, 60. Then-Colonel Smawley and Colonel (Retired) Harms make the compelling argument that the Army and the JAG Corps need to identify and cultivate leaders possessing regional focus and fluency with the nations of the Indo-Pacific. *Id.* at 59-60.

2. Treaty of Mutual Cooperation and Security, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1632. The current commitment of the United States to respond to an armed attack on Japan is discussed in art. V: “Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes.” *Id.* at 1634. The provision providing for U.S. basing rights in Japan is addressed in art. VI: “For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air and naval forces of facilities and areas in Japan.” *Id.*

3. These island chains have been a part of U.S. security strategy in the Pacific going back to the middle of the last century. See, e.g., John F. Dulles, *Security in the Pacific*, *FOREIGN AFFS.*, <https://www.foreignaffairs.com/articles/united-states/1952-01-01/security-pacific> (last visited Jan. 14, 2023) (discussing American security strategy to contain the Soviet Union and Communist China during the Korean War).

4. For an explanation of China’s maritime strategy in the Pacific (and beyond), see JENNIFER RICE & ERIK ROBB, *CHINA MAR. STUD. INST.*, *CHINA MARITIME REPORT* No. 13: THE ORIGINS OF “NEAR SEAS DEFENSE AND FAR SEAS PROTECTION” (2021).

5. See, e.g., Joshua Espena & Chelsea Bompig, *The Taiwan Frontier and the Chinese Dominance for the Second Island Chain*, *AUSTRALIAN INST. OF INT’L AFFS.* (Aug. 13, 2020), <https://www.internationalaffairs.org.au/australianoutlook/taiwan-frontier-chinese-dominance-for-second-island-chain>; Christopher P. Cavas, *Powers Jockey for Pacific Island Chain Influence*, *DEF. NEWS* (Feb. 1, 2016), <https://www.defensenews.com/global/asia-pacific/2016/02/01/powers-jockey-for-pacific-island-chain-influence>. The First Island Chain runs south to north roughly from Malaysia, Indonesia, the Philippines, Taiwan, Okinawa and the Japanese Nansei Islands up through and including the main Japanese islands of Kyushu, Shikoku, Honshu, and Hokkaido, thorough the Kurils on the Sea of Okhotsk to the Russian Kamchatka Peninsula. See Espena & Bompig, *supra*. The Second Island Chain extends from Micronesia and Guam north to include the Japanese Ogasawara Islands through and including the Japanese archipelago through the Kurils to the Kamchatka Peninsula. Espena & Bompig, *supra*. The Cavas article includes U.S. DoD and Chinese People’s Liberation Army Navy (PLAN) versions of maps of the First and Second Island Chains. See Cavas, *supra*. Notably, where the DoD version includes the islands of the South China Sea, the Philippines, Taiwan, and the Nansei islands of Japan in the East China Sea, its delineation terminates at the Japanese island of Kyushu. Cavas, *supra*. The Chinese map of the First Island Chain does not terminate in southern Japan, but instead includes all of Japan up through and including Honshu, Hokkaido, and the entire Kurile Island chain to the Russian Kamchatka Peninsula. Cavas, *supra*.

6. The Japanese archipelago is made up of 6,852 islands. *Japan: A Nation of Nearly 7,000 Islands*, NIPPON.COM (Sept. 11, 2020), <https://www.nippon.com/en/japan-data/h00806>. Of these islands 416 are inhabited, and 6,847 are classified as “remote.” *Id.*
7. *Le Perouse Strait*, BRITANNICA (Mar. 22, 2016), <https://www.britannica.com/place/La-Perouse-Strait>.
8. *Yonaguni Island*, VISIT OKINAWA JAPAN, <https://www.visitokinawa.jp/destinations/yaeyama-region/yonaguni> (last visited Nov. 29, 2022).
9. See JAPAN MINISTRY OF DEF., 2020 DEFENSE OF JAPAN PAMPHLET 4 (2020).
10. See, e.g., Jim Garamone, *Austin Signs Internal Directive to Unify Department’s China Efforts*, U.S. DEP’T OF DEF. (June 9, 2021), <https://www.defense.gov/Explore/News/Article/Article/2651742/austin-signs-internal-directive-to-unify-departments-china-efforts>. Secretary of Defense Austin is quoted as stating the initiatives he is putting forth, based on recommendations from the China Task Force he formed in February 2021, “are intended to streamline and strengthen cooperation with [United States] allies and partners, particularly in the Indo-Pacific.” *Id.*
11. *Guidance from the Commander, U.S. Forces Japan*, U.S. FORCES JAPAN, <https://www.usfj.mil/About-USFJ> (last visited Nov. 29, 2022).
12. Robert Burns, *Seoul Agrees to Pay More for Hosting American Troops in 2021*, ASSOCIATED PRESS (Mar. 10, 2021), <https://apnews.com/article/joe-biden-world-news-seoul-south-korea-asia-640d3811b01c7eae-552c7bbf31fea68d>.
13. MINISTRY OF FOREIGN AFFS. OF JAPAN, JAPAN-U.S. SECURITY ARRANGEMENTS, REFERENCE4: DEPLOYMENT OF U.S. FORCES IN JAPAN (2019), [https://www.mofa.go.jp/region/n-america/us/security/pdfs/arrange\\_ref7.pdf](https://www.mofa.go.jp/region/n-america/us/security/pdfs/arrange_ref7.pdf). According to the Ministry of Foreign Affairs, as of September 2019, there are 55,227 total U.S. troops in Japan, made up of 20,392 Navy personnel, 12,602 Air Force personnel, 19,607 Marine personnel, and only 2,626 Army personnel (all numbers approximate). *Id.* Ministry of Foreign Affairs compiled this data based on references from the Defense Manpower Data Center, Deputy Secretary of Defense, and Department of Defense (DoD). *Id.*
14. According to the Japan Ministry of Defense, as of March 31, 2022, the Japanese Ground Self-Defense Force (JGSDF) has 139,620 personnel (150,590 authorized); the Japanese Maritime Self-Defense Force has 43,435 personnel (45,307 authorized); and the Japanese Air Self-Defense Force has 43,720 personnel (46,928 authorized) for a total of 230,754 total personnel (247,154 authorized) across all services. 防衛省・自衛隊の人員構成, 防衛省・自衛隊 (Mar. 31, 2022) [MINISTRY OF DEF., PERSONNEL COMPOSITION OF THE MINISTRY OF DEFENSE AND THE SELF-DEFENSE FORCES], [https://www.mod.go.jp/j/profile/mod\\_sdf/kousei](https://www.mod.go.jp/j/profile/mod_sdf/kousei).
15. *GDP Ranked by Country 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/countries-by-gdp> (last visited Nov. 30, 2022). Japan’s nominal Gross Domestic Product is \$5.15 trillion, compared with \$20.49 trillion for the U.S. and China at \$13.4 trillion. *Id.*
16. See *Military Size by Country 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/country-rankings/military-size-by-country> (last visited Nov. 30, 2022). The respective populations are as follows: Australia: 26,177,413; Canada: 38,454,327; New Zealand: 5,185,288; United Kingdom: 67,508,936.
17. See *id.* The respective sizes of the active-duty militaries of these nations are as follows: Australia: 58,600; Canada: 67,400; New Zealand: 9,000; United Kingdom: 148,500. *Id.*
18. *Compare Korea, South*, CIA.GOV: THE WORLD FACTBOOK (Nov. 14, 2022), <https://www.cia.gov/the-world-factbook/countries/korea-south>, with *Japan*, CIA.GOV: THE WORLD FACTBOOK (Nov. 14, 2022), <https://www.cia.gov/the-world-factbook/countries/japan>.
19. The population of South Korea, as of 2022, is 51,844,834. *Korea, South*, *supra* note 18.
20. *Compare, Korea, South*, CIA WORLD FACTBOOK (Jan. 24, 2023), <https://www.cia.gov/the-world-factbook/countries/korea-south>, with *Japan*, CIA WORLD FACTBOOK (Jan. 24, 2023), <https://www.cia.gov/the-world-factbook/countries/japan>.
21. The Global Firepower Rankings assess Japan as fifth in military strength, with South Korea as sixth. *2022 Military Strength Ranking*, GLOB. FIREPOWER, <https://www.globalfirepower.com/countries-listing.php> (last visited Nov. 30, 2022).
22. *Defense Spending by Country (2022)*, GLOB. FIREPOWER, <https://www.globalfirepower.com/defense-spending-budget.php> (last visited Nov. 30, 2022). Japan’s military budget is estimated to be \$51.7 billion, only slightly less than number four ranked Germany (\$57.43 billion), and the number five ranked United Kingdom (\$56.042 billion). *Id.* For a detailed breakdown of the latest Japanese military budget see MINISTRY OF DEFENSE, DEFENSE PROGRAMS AND BUDGET OF JAPAN, OVERVIEW OF FY2021 BUDGET, [https://www.mod.go.jp/en/d\\_act/d\\_budget/pdf/210331a.pdf](https://www.mod.go.jp/en/d_act/d_budget/pdf/210331a.pdf).
23. *2022 Military Strength Ranking*, *supra* note 21 (assessing a nation’s non-nuclear theoretical fighting capability to determine the rankings).
24. See *Japan’s Postwar Constitution*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/japan-constitution/japans-postwar-constitution> (last visited Jan. 31, 2023).
25. NIHONKOKU KENPŌ [KENPŌ][Constitution], art. 9 (emphasis added).
26. *The Constitution of Japan*, PRIME MINISTER OF JAPAN AND HIS CABINET, [https://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html) (last visited Nov. 30, 2022).
27. See Sheila A. Smith & Ayumi Teraoka, *Early Postwar Attitudes on Constitutional Revision*, COUNCIL ON FOREIGN RELS. (July 28, 2016, 6:24 PM), <https://www.cfr.org/blog/early-postwar-attitudes-constitutional-revision>.
28. For a historical analysis on the formation and meaning of the Japanese post-war constitution, see JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 346-404 (1999). For a discussion on recent changes to official Japanese constitutional interpretation regarding collective self-defense, see Masahiro Kurasaki, *Japan’s Evolving Position on the Use of Force in Collective Self-Defense*, LAWFARE (Aug. 23, 2018, 3:27 PM), <https://www.lawfareblog.com/japans-evolving-position-use-force-collective-self-defense>.
29. The seeds of the JSDF grew as a direct result of the Korean War. As U.S. forces in Japan were dispatched to the Korean Peninsula after the invasion of South Korea by the North in 1950, General MacArthur directed the formation of a Japanese “National Police Reserve” of 75,000 personnel (approximately four divisions) to provide for Japanese defense. FRANK KOWALSKI, AN OFFENSIVE REARMAMENT: THE MAKING OF THE POSTWAR JAPANESE ARMY 21-32 (Robert D. Eldridge, ed., 2013).
30. The National Police Reserve was expanded to 110,000 troops in October of 1952 and rechristened the “National Safety Force.” *Id.* at 72. The National Security Force name was again changed to the Japan Self-Defense Forces, consisting of the Ground, Maritime, and Air components on July 1, 1954, with the promulgation of the Japan Self-Defense Force Law. Jieitaihō [Self-Defense Forces Law], Law No. 165 of 1954.
31. *About Ministry*, JAPAN MINISTRY OF DEF., <https://www.mod.go.jp/en/about/index.html> (last visited Jan. 31, 2023).
32. MINISTRY OF DEF., JAPAN GROUND SELF-DEFENSE FORCE 27 (2019), [https://www.mod.go.jp/gsd/fan/pamphlet/pdf/2019\\_02.pdf](https://www.mod.go.jp/gsd/fan/pamphlet/pdf/2019_02.pdf).
33. The five Regional Armies are (from northernmost to southernmost): the Northern Army, based out of Camp Sapporo, Hokkaido; the Northeastern Army, based out of Camp Sendai, Miyagi Prefecture; the Eastern Army, based out of Camp Asaka, Nerima Ward, Tokyo; the Middle Army, based out of Camp Itami, Hyogo Prefecture; and the Western Army, based out of Camp Kengun, Kumamoto Prefecture. See 駐屯地・組織, 陸上自衛隊, <https://www.mod.go.jp/gsd/fan/station/na/index.html> (last visited Nov. 30, 2022) [Garrison/Organization, JAPAN GROUND SELF-DEFENSE FORCE].
34. *Id.*
35. *Id.*
36. In the days of monolithic communism, Russia was the enemy of Japan, as it had been in the eyes of the Japanese people for several generations. Now [in 1952] reports were heard on the debating platforms that Russia was bolstering its forces in Far East Asia. There were rumors that Russian air force and airborne units were being deployed on Kamchatka, Sakhalin, and the Kuril Islands. According to those who said they knew, the Russians were preparing for the invasion of Japan. With the United States committed in Korea, immediate, massive rearmament was the only hope for Japan.
- KOWALSKI, *supra* note 29, at 136.
37. See *Japan’s Contribution to UN Peacekeeping Operations (PKO): Outline of Japan’s International Peace Cooperation*, MINISTRY OF FOREIGN AFFS. OF JAPAN, [https://www.mofa.go.jp/fp/ipc/page22e\\_000683.html](https://www.mofa.go.jp/fp/ipc/page22e_000683.html) (last visited Jan. 31, 2023).
38. See JAPAN MINISTRY OF DEF., DEFENSE OF JAPAN 2022, at 4 (2022), [https://www.mod.go.jp/en/publ/w\\_paper/wp2022/DOJ2022\\_EN\\_Full\\_02.pdf](https://www.mod.go.jp/en/publ/w_paper/wp2022/DOJ2022_EN_Full_02.pdf).
39. See *Japanese Territory: Senkaku Islands*, MINISTRY OF FOREIGN AFFS. OF JAPAN, <https://www.mofa.go.jp/region/asia-paci/senkaku/index.html> (last visited Nov. 30, 2022).
- There is no doubt that the Senkaku Islands are clearly an inherent part of the territory of Japan, in light of historical facts and based upon international law. Indeed, the Senkaku Islands are under the valid control of Japan. There exists no issue of territorial sovereignty to be resolved concerning the Senkaku Islands.
- Id.*



40. Eric Johnston, *Japan's Marine Corps: The Nation's First Responders for Remote Island Defense*, THE JAPAN TIMES (Jan. 28, 2021), <https://www.japantimes.co.jp/news/2021/01/28/national/japan-sdf-brigade>.

The Amphibious Rapid Deployment Brigade was established in March 2018, under the Ground Self-Defense Force. It was set up to respond to security situations that require faster mobilization of land, sea, and air forces at a national level than had been traditionally available. The brigade was formed with 2,100 personnel—that includes the Western Army Infantry Regiment, which was established in 2002 for the purpose of specializing in amphibious operations. The brigade's primary duty is to secure any islands that have been illegally occupied.

*Id.*

41. These new JGSDF bases are Camp Amami (Amami Oshima Island, Kagoshima Prefecture), and Camp Miyakojima (Miyakojima, Okinawa Prefecture), both of which were activated in 2019. *GSDf Launches New Bases in Kagoshima and Okinawa for Defense of Japan's Southwestern Islands*, THE JAPAN TIMES (Mar. 16, 2019), <https://www.japantimes.co.jp/news/2019/03/26/national/politics-diplomacy/gsd-f-launches-bases-kagoshima-okinawa-defense-japans-southwestern-islands>. An additional base is currently being constructed on Ishigakijima (Okinawa Prefecture). *Remote Control: Japan's Evolving Senkakus Strategy*, ASIA MAR. TRANSPARENCY INITIATIVE (July 29, 2020), <https://amti.csis.org/remote-control-japans-evolving-senkakus-strategy>.

42. “The JGSDF's role in coastal defence [sic] and control of certain straits was manifested in the decision in the early 1980s to develop a surface-to-surface anti-ship missile, designated the SSM-1 Type-88 and also called the Shibusata, specifically for the JGSDF.” DESMOND BALL & RICHARD TANTER, THE TOOLS OF OWATSUMI: JAPAN'S OCEAN SURVEILLANCE AND COASTAL DEFENCE CAPABILITIES 20 (2015). See also Steven Stashwick, *Japan Considering New Anti-Ship Missiles for its Southwestern Islands*, THE DIPLOMAT (Mar. 1, 2018), <https://thediplomat.com/2018/03/japan-considering-new-anti-ship-missiles-for-its-southwestern-islands>.

While Japan has long deployed truck-mounted anti-ship missiles, its close ally the United States has not. As they consider how to counter the growing size and capability of China's fleet, both countries are looking at how to leverage the geographic advantage the first island chain provides against China's ability to project power beyond its near seas.

*Id.* The United States could do well to learn from its alliance partner Japan in this field.

43. All U.S. Army Coast Artillery units were deactivated between 1944 and 1946, and the Coast Artillery Corps was dissolved in 1950. *Coast Artillery Corps: U.S. Army Coast Artillery Corps 1901-1950*, COAST DEFENSE STUDY GROUP, <https://cdsg.org/coast-artillery-corps> (last visited Nov. 30, 2022). The extensive reanimation of the capability to target and destroy sea vessels from land-based launching sites seems an obvious and fruitful way the U.S. Army can meaningfully contribute to joint warfighting in the twenty-first century Indo-Pacific theater.

44. See, e.g. Daisuke Akimoto, *Japan's Emerging 'Multi-Domain Defense Force'*, THE DIPLOMAT, (Mar. 18, 2020), <https://thediplomat.com/2020/03/japans-emerging-multi-domain-defense-force>. The Japanese refer to these new domains collectively as “USADEN”, an

abbreviation of *Uchu* (宇宙-outer space), *Saiba* (サイバー-cyber), and *Denjiha* (電磁波-electromagnetic waves). See 宇宙・サイバー・電磁波領域における挑戦, 防衛省・自衛隊, [https://www.mod.go.jp/j/publication/wp/wp2021/special\\_cyber/index.html](https://www.mod.go.jp/j/publication/wp/wp2021/special_cyber/index.html) (last visited Nov. 30, 2022) [*Challenges in Space, Cyber, and Electromagnetic Domains*, MINISTRY OF DEF.].

45. Pamphlet, JAPAN GROUND SELF DEFENSE FORCE TRAINING EVALUATION RESEARCH AND DEVELOPMENT COMMAND, <https://www.mod.go.jp/gsd/f/tercom/pamphlet.html> (last visited Nov. 30, 2022). Several courses for all of the JSDF branches are held concurrently year-round on Camp Meguro, to include the JGSDF Advanced Command and General Staff Course, the JGSDF Technical Advanced Course, and the JGSDF Command Sergeant Major Courses, as well as both the Japanese Maritime Self-Defense Force and Japanese Air Self-Defense Force Command and General Staff Courses. *Id.*

46. The course typically runs from August each year, but due to disruptions from the coronavirus, the 66th JGSDF CGS commenced in December 2020. Most foreign personnel graduated in December 2021, and the JGSDF officers graduated in Spring of 2022. The 67th JGSDF CGS commenced on schedule in August 2021, with one U.S. Army foreign area officer and one U.S.M.C. officer as the only two American representatives.

47. MINISTRY OF DEF., *supra* note 32, at 24 (2019).

48. Blaine Goss, *Friendliness Does Not Make Friends in Japan*, 10 INTERCULTURAL COMM'N STUD. 39, 42 (2000) (detailing the cultural differences between building friendships in America and Japan and noting that “[f]or outsiders, developing friendships with Japanese can be a slow process”).

49. See generally DAVID HUNTER-CHESTER, CREATING JAPAN'S GROUND SELF DEFENSE FORCE, 1945-2015: A SWORD WELL MADE (2016) (examining the impact of Japan's constitutional, policy, and legal restrictions on the formation of the JSDF).

50. See generally JEFFREY W. HORNUNG, JAPAN'S POTENTIAL CONTRIBUTIONS IN AN EAST CHINA SEA CONTINGENCY 89-101 (2020).

51. *Other Basic Policies*, MINISTRY OF DEF., [https://www.mod.go.jp/en/d\\_policy/basis/others/index.html](https://www.mod.go.jp/en/d_policy/basis/others/index.html) (last visited Nov. 30, 2022). The Japanese government maintains an “Exclusively Defense-Oriented Policy” (Senshu boei - 専守防衛). According to the Ministry of Defense:

The exclusively defense-oriented policy means that defensive force is used only in the event of an attack, that the extent of the use of defensive force is kept to the minimum necessary for self-defense, and that the defense capabilities to be possessed and maintained by Japan are limited to the minimum necessary for self-defense. The policy including these matters refers to the posture of a passive defense strategy in accordance with the spirit of the Constitution.

*Id.*

52. See, e.g., James Kraska, *Japan's Legal Response in the Gray Zone*, THE DIPLOMAT (Aug. 6, 2020), <https://thediplomat.com/2020/08/japans-legal-response-in-the-gray-zone>. Although such Chinese maritime activities are more familiar to most people in reference to the South China Sea, China's provocations in the East China Sea are extensive and frequent. *Id.* These include the dispatch of fishing vessels (with Chinese

Coast Guard protection) and its “maritime militia” in the vicinity of the uninhabited Senkaku Islands, which Japan claims as its sovereign territory. *Id.* The intent of these activities by the Chinese is multi-fold. Their aims likely include probing the boundaries of Japanese law enforcement and military response to provocation, as well as creating a *fait accompli* for possession of the islands, and the concomitant rights to the sea and resources surrounding them (to include oil deposits). See ADAM P. LIFF, BROOKINGS INST. CHINA, JAPAN, AND THE EAST CHINA SEA: BEIJING'S “GRAY ZONE” COERCION AND TOKYO'S RESPONSE (2019).

53. This statement is based on the author's professional experience as a fellow student of the 67th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

54. See generally U.S. DEP'T OF THE ARMY, U.S. ARMY PACIFIC, AMERICA'S THEATER ARMY FOR THE INDO-PACIFIC (2021).

55. See generally U.S. DEP'T OF THE ARMY, REGAINING ARCTIC DOMINANCE: THE U.S. ARMY IN THE ARCTIC (2021).

56.

Following nearly two decades of counterinsurgency operations, the Army has made long-range precision fires its top modernization priority as the Defense Department refocuses on great power competition. Major initiatives underway or under consideration include the Extended Range Cannon Artillery; Precision Strike Missile; Strategic Long-Range Cannon; Long-Range Hypersonic Weapon; and modification of existing Navy SM-6 and UGM-109 missiles for ground launch, according to the Congressional Research Service.

Jon Harper, *Sibling Rivalry: Military Services in High-Stakes Tussle Over Long-Range Fires*, NAT'L DEF. (June 1, 2021), <https://www.nationaldefensemagazine.org/articles/2021/6/1/military-services-in-high-stakes-tussle-over-long-range-fires>. Harper's article provides background on development in this field, discusses the current friction between the U.S. Air Force and Army regarding this capability, and also touches on basing options in the Indo-Pacific, to include Japan. *Id.*

57. For a brief synopsis on the Quad, see Sheila A. Smith, *The Quad in the Indo-Pacific: What to Know*, COUNCIL ON FOREIGN RELS. (May 27, 2021), <https://www.cfr.org/in-brief/quad-indo-pacific-what-know>. The Quad's 2021 joint statement provides a demonstration of the Quad as a source of international collaboration and diplomacy. *Joint Statement from Quad Leaders*, WHITE HOUSE (Sept. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/09/24/joint-statement-from-quad-leaders>. However, any U.S. and Japanese expectations regarding the potential for the Quad to serve as a viable future security partnership must be tempered by the fact that, for some time, India has maintained an extensive and robust strategic partnership with Russia. See, e.g., Isabel Van Brugen, *Russia and India Sign Military Agreement Despite U.S. Threat of Sanctions*, NEWSWEEK (Dec. 6, 2021, 6:24 AM), <https://www.newsweek.com/russia-india-weapons-agreement-cooperation-us-sanctions-1656272>; Geeta Mohan, *India-Russia Summit: 28 Agreements Inked, Afghanistan, Chinese Incursions Discussed*, INDIA TODAY (Dec. 7, 2021, 2:19 AM), <https://www.indiatoday.in/india/story/india-russia-summit-agreements-inked-afghanistan-chinese-incursions-discussed-1884890-2021-12-07>.



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## Practice Notes

# You, the GOSC, and the JAG Corps Assignments Process

By Chief Warrant Officer Five Tammy Richmond

*Transparency breeds legitimacy.<sup>1</sup>*

Since 1775, the most frequently asked question within the Judge Advocate General's (JAG) Corps has nothing to do with the law—it is, in fact: “Where are you going next?” This topic increasingly occupies the thoughts of most of the JAG Corps as the summer personal-change-of-station season approaches, yet for many of us, the assignment process may be shrouded in mystery. Even after working directly for our general officers over the past few years and understanding the General Officer Steering Com-

mittee (GOSC) process, I did not truly appreciate our process until I observed the GOSC this year and talked to my counterparts in other branches to compare our process to theirs. In the spirit of increasing transparency, I am sharing what I learned.

### **Logistics<sup>2</sup>**

For the uninitiated, the GOSC is the leadership engagement during which senior leaders finalize assignments for the forma-

tion. The GOSC reviews assignments for judge advocate majors through colonels, legal administrators (except new accessions and nominative assignments), and chief and command paralegal NCOs. The process all starts with synchronizing four general officers' calendars, which is no easy task—especially at the beginning of Article 6 travel season. Five to seven GOSCs begin in mid-October and normally finish discussions right before Thanksgiving. For this most recent cycle, the Personnel, Plans, and Training Office (PPTO) scheduled one GOSC (to validate leadership teams) for half a day, while they scheduled

flected in writing in someone's assignment history. This prompt by DJAG spurred us on to identify and discuss biases or preferences that went beyond assignment history. This discussion caused us to slow down and be wary of those thinking traps or personal biases and preferences, which served as an additional level of accountability.

Once DEI training was complete, the committee dove into the assignment slate beginning with colonels (COLs) and staff judge advocates (SJAs). The PPTO chief kept the process on track by reminding the committee where they need to be by the end of each GOSC. These targets do not

vant information. The GOSC consists of DJAG, The Judge Advocate General's Legal Center and School commander, the U.S. Army Legal Services Agency commander, and the Assistant Judge Advocate General for Military Law and Operations, but the chief of PPTO, deputy chief of PPTO, and all career managers are in the room even when they are not briefing their population. Your Regimental Command Sergeant Major and I are only required to attend the GOSC while discussing our respective populations, but we are invited to attend all of them. The Judge Advocate General's executive officer also attends sessions as the schedule permits.

**The career managers try hard to get as many people as possible the assignments they request, but their primary focus is ensuring that talent is as equally dispersed as possible across the JAG Corps.**

all other GOSCs for a full day. Within a few days of each GOSC, PPTO meets with The Judge Advocate General (TJAG) and the Deputy Judge Advocate General (DJAG) to brief the progress, highlight any issues, and obtain TJAG's approval<sup>3</sup> on some assignments that are unlikely to change throughout the remaining GOSCs.

**The Room Where It Happens<sup>4</sup>**

This cycle's first GOSC started with opening comments from DJAG, followed by training from the JAG Corps's Office of Diversity, Equity, and Inclusion (DEI) to help us to recognize thinking traps<sup>5</sup> and avoid them.<sup>6</sup> At the end of the training, DJAG asked everyone in the room to share something we value that affects our decision-making but isn't necessarily evident from looking at our records or uniforms. For example, if you look at a leader's records, you might *assume* they value assignments in certain units or geographical areas, but those assumptions would be faulty. We all expressed that it did not matter whether we shared an assignment history with someone, what was more important to us was that they were a good team-player. This intangible quality would not be re-

rush decision-makers; rather, they mean there are fewer or shorter breaks and longer days to make sure the GOSCs stay on the projected timeline. For most positions, PPTO lists at least two, but sometimes more, possible fits.

Personnel, Plans, and Training Office groups assignments by major command or field operating agency, such as U.S. Army Forces Command, U.S. Army Training and Doctrine Command, U.S. Army Legal Services Agency, The Judge Advocate General's Legal Center and School, or the Office of The Judge Advocate General. A separate reference list details dual-JAG Corps couples so the GOSC can place them in a reasonable commuting distance when possible. Factors such as Married Army Couples Program (MACP),<sup>7</sup> Exceptional Family Member Program (EFMP),<sup>8</sup> or other special circumstances are listed in the career manager's notes to facilitate discussion. These items are available in hard copy, and each individual's service record brief<sup>9</sup> was on a large monitor for reference during the discussion.

For this and other sessions, DJAG ensured everyone in the room knew they could speak up at any point to share rele-

**Career Managers and Assignment Slating**

It is difficult to appreciate just how challenging the assignments process is until you see it in action. One career manager told the GOSC, "There are any number of qualified people to put in some of these positions. I picked one of several that fit into the overall puzzle, but you may know of a better fit for the position or a better position for the person."<sup>10</sup> Their ability to advocate for each person without being personally tied to the outcome was impressive.

The career managers come to the process thoroughly prepared. They are deeply familiar not only with the preference sheets from the field, but with the hundreds of hand-written notes in the margins from countless calls coming in after the sheets were due. They also had an incredible amount of knowledge about individual movers in their population and why some assignments were a better fit than others. The career managers try hard to get as many people as possible the assignments they request, but their primary focus is ensuring that talent is as equally dispersed as possible across the JAG Corps. The addition of the Office of the Special Trial Counsel made this goal incredibly challenging this year.

**General Officer Investment**

If you add it up, the Army spends a significant amount of time to get JAG Corps assignments right. Because this is such a significant focus during this season, I reviewed the schedules to see just how long this process took. My review revealed that,



(Credit: Uladzislau – stock.adobe.com)

on paper, PPTO scheduled the GOSCs for forty-three hours, with an additional seven hours for PPTO assignment meetings with TJAG and DJAG. That is what the calendar shows, but many of those assignment meetings went way over the allotted seven hours. Also, this does not include any follow-up meetings PPTO had with DJAG or any of the one-stars to resolve emerging issues.

Anecdotally, I have found that no other military branch comes close to this level of involvement with assignments. Many JAs might wonder about the substance of the discussions that take place; I know I have. While I cannot disclose specific details, I will say I was impressed with the thought put into individual assignments. Everyone did their homework prior to each GOSC to make sure they knew about the position and the individuals being considered. Here is what stood out to me: performance, potential, reputation, and assignment history *all* matter; exceptional circumstances are almost non-negotiable and it is okay if no one knows who you are.

Past performance, potential, reputation, and assignment history were all important during the discussions. I could not say whether one factor stood out as having more weight than another; it was all about finding a balance, understanding the person's stated needs and desires, mitigating risk to the mission, and capitalizing on talent. For example, when presented with a recommendation for someone who did not perform well in a key assignment in the past, but the individual had exhibited potential and earned a great reputation, the GOSC was willing to assume risk by placing them in another key position. But, the GOSC also mitigated that risk by placing a team around them to account for the area where they had previous performance issues. Obviously, it is up to the individual to empower and motivate that team effectively, but the GOSC absolutely provided second chances when warranted.

When looking at assignment history, not one member of the GOSC required an officer to leave a particular legal discipline

or geographical area. Instead, there was a robust discussion of personal goals versus concern for future career progression. Additionally, members focused on opening opportunities to those who may not have had the chance to serve at that location or in that capacity. As GOSC members evaluated those factors, they often asked career managers to reach out to individuals directly to clarify certain points or ask the individual to prioritize requests regarding their assignment.

While it can be a challenge to balance the Family First concept with the needs of the JAG Corps, some circumstances are practically non-negotiable to the GOSC. For example, when the career manager highlighted ongoing medical treatment for a JAG Corps member or a dependent that required continuity of care, members needed no additional information before agreeing with the assignment. These situations were in addition to the normal EFMP process, and there were far more than I could have imagined.



(Credit: vegefox.com – stock.adobe.com)

The GOSC also went to great lengths to support high school stabilizations and place MACP couples together. The number of all these situations combined with a fairly small population means the puzzle will almost never fit together perfectly. This is where our leaders identify where they are willing to assume risk with decisions like leaving a position vacant or asking an individual to do something outside of their stated preference.

There was at least one situation where no one in the room knew the senior judge advocate under consideration. Nothing unusual happened to cause the rare circumstance; the individual simply had not crossed paths with anyone in that room during their career. The individual still got a great assignment. Why? Because the GOSC talked to people who knew the individual (superiors, peers, and subordinates) and one of the general officers made it a

point to reach out directly to the individual. I have heard many times, “I won’t ever be considered for X because none of the general officers know me.” That simply is not accurate. Do not avoid the Corps’s leaders, of course, but it is okay if there has not been an opportunity to cross paths yet.

#### **General Officer Steering Committee vs. AIM2 Marketplace**

When the Army first introduced the Assignment Interactive Module 2.0 (AIM2)<sup>11</sup> a few years ago, I was excited about the possibilities and hopeful the JAG Corps would find a way to participate while retaining TJAG’s authority over assignments. After three years of learning about AIM2 and talking to counterparts in other branches, I am confident our process is better. Don’t get me wrong; I would still love a system that helps create the initial assignment slate based on preferences so career managers

are not pouring over hundreds of preference sheets to match people to positions. However, I believe our senior leaders’ level of involvement in the assignments process does a much better job of managing talent and eliminating bias than AIM2 ever could.

The AIM2 system does not consider the intangible qualities and attributes we value, such as reputation and character. Moreover, even though AIM2 allows units to conduct interviews and talk to references, the process is not conducive to the thorough discussions that take place during the GOSC process. I am mindful that interviewing is a skill and making a good impression—although important—is learnable. Although statistics to validate this assessment are impossible to obtain, I truly believe we are at least on par or better than the larger Army at matching people with their preferences while simultaneously making opportunities available to

everyone. Some of my counterparts in other branches have asked how we avoided AIM2, a question usually prompted by their belief that they can better manage their population without it. Moreover, AIM2 is also a time-intensive process for the user to manage; users must constantly monitor their account and readjust their list based on available assignments during the open period.

## What I Learned

The career managers have a difficult job, much tougher than I previously gave them credit for. Not only are they trying to slot a small population against positions while managing MACP, EFMP, high school stabilization, career progression, skills and experience, personal preference, and a variety of assignments, but also, they are inevitably going to disappoint people because not everyone will get their top preference.

The JAG Corps is fortunate to consist of many talented individuals. As a branch, that is a positive fact because it increases flexibility to take on new missions like Office of the Special Trial Counsel (organizational growth) as well as place someone in a challenging position in an area of the law entirely new to them (individual growth). Unfortunately, it means some of those talented individuals may end up with positions or locations they are not thrilled about. As I heard on a podcast recently, “Just because you weren’t the right fit, doesn’t mean you weren’t qualified.”<sup>12</sup> There are any number of reasons you might not be the right fit for a position or location. Sometimes it is because someone else needed that opportunity or it is a matter of timing within your own career. Sometimes it is because, despite how talented you are, there is someone else who is equally or possibly more talented. Rest assured though, the “right fit” is not determined on a whim; it is the result of an extensive and deliberate assignments process.

Returning to the concept of transparency, knowing how a process works increases faith in the entire system and makes participants more confident in the fairness of an outcome. Gratitude for the dedication and hard work of those advocating on our behalf makes us more receptive to considering a career move or assignment that was not necessarily what we had in mind. And,

comparing our thoughtful, fastidious JAG Corps assignment process to one that leaves more to chance makes us appreciate what we can contribute as we chart our careers under the guidance of career managers and JAG Corps senior leaders. I encourage you to ask questions about the function of GOSCs wherever you are assigned; your leaders may have experiences that illuminate the process even more. If you have ideas or thoughts that might be beneficial, share them! You can do so anonymously through the Virtual Suggestion Box<sup>13</sup> on MilSuite or JAGCNET. From what I have experienced so far, all our senior leaders have been receptive and open to trying new ideas, and they are happy to give credit to whomever suggested it.

I am thankful to have learned more about it, and I hope reading this has helped demonstrate that it is a difficult process, executed fairly and as transparently as possible.

Now, when you and your colleagues inevitably ask, “Where are you going next?”, you will feel more confident that the answer will come from the GOSC’s careful deliberation and consideration for your personal needs, your career and professional growth, and your organization’s talent distribution plans in mind. **TAL**

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*CW5 Tammy Richmond is the 12th Regimental Chief Warrant Officer of The Judge Advocate General's Corps at the Pentagon.*

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## Notes

1. John C. Maxwell (@TheJohnCMaxwell), TWITTER (Oct. 11, 2016, 12:00 PM), <https://twitter.com/TheJohnCMaxwell/status/785872806244474882>.
2. One quote, often attributed to Napoleon Bonaparte, offers “[t]he amateurs discuss tactics: the professionals discuss logistics.” *Logistics Quotes*, AZ QUOTES, <https://www.azquotes.com/quotes/topics/logistics.html> (last visited Feb. 1, 2023).
3. See 10 U.S.C. § 806 (detailing The Judge Advocate General’s (TJAG’s) authority to direct judge advocates’ (JAs’) duty assignments); see also U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 7-1 (24 Jan. 2017) (describing the function of the active Army and Reserve Component General Officer Steering Committees (GOSCs) as it pertains to mobilizing and assigning Reserve Component JAs). Note that a Reserve JA must apply to a GOSC, whereas active-duty JAs receive an assignment through the GOSC process when they become available for reassignment.
4. After finishing this article, you, unlike the tragic Aaron Burr, will not have to wonder what goes on “in

the room where it happens.” See LIN-MANUEL MIRANDA, *The Room Where It Happens*, on HAMILTON, AN AMERICAN MUSICAL, ORIGINAL BROADWAY CAST RECORDING (Atl. Recording Co. 2015).

5. See, e.g., *Thinking Patterns*, ARMY READY & RESILIENT, <https://www.armyresilience.army.mil/ard/R2/Counterproductive-Thinking.html> (last visited Feb. 1, 2023) (discussing how to avoid thinking traps and pursue more productive thinking patterns). Thinking patterns can help quickly process the huge amounts of information we encounter and allow us to arrive at timely decisions. Every virtue casts a shadow though and thinking patterns can become traps leading to faulty decisions and bias when we are not aware that we are engaging in them. *Id.*
6. The JAG Corps Office of Diversity, Equity, and Inclusion’s mission is “[t]o provide leadership and direction in the formulation, execution, and management of policies and practices that foster a diversity, equity, and inclusion environment consistent with the core values of the [Judge Advocate Legal Service].” *Office of Diversity, Equity and Inclusion*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/DivInc.nsf> (last visited Jan. 27, 2023). For additional background information on the Diversity, Equity, and Inclusion Council, see Karen H. Carlisle et al., *The JAG Corps’s DEI Council Established*, ARMY LAW., no. 3, 2021, at 28.
7. *Married Army Couples Program*, U.S. ARMY HUM. RES. COMMAND (Aug. 17, 2022), <https://www.hrc.army.mil/content/Married%20Army%20Couples%20Program> (explaining the Army program’s aim to assign married couples together when possible).
8. *[Exceptional Family Member Program] Overview*, U.S. ARMY MED. DEP’T, <https://efmp.amedd.army.mil/> (last visited Jan. 27, 2023) (explaining the Army program that identifies Army dependents with exceptional medical needs to ensure availability of proper care and support services).
9. This will become the Soldier Talent Profile in the future. See *Talent Management*, INTEGRATED PERS. AND PAY SYS. (July 22, 2022), <https://ipps-a.army.mil/talent/> (detailing how the new Soldier Talent Profile will enhance Army talent management).
10. This statement is based on the author’s professional experiences as the JAG Corps Regimental Chief Warrant Officer and first-hand observations of the GOSC process.
11. Nicole Hawk, *Five Things Army Officers and Units Should Know about the Assignment Interactive Module*, DEF. VISUAL INFO. DISTRIB. SERV. (May 14, 2019), <https://www.dvidshub.net/news/322367/five-things-army-officers-and-units-should-know-about-assignment-interactive-module>. For an overview of the Assignment Interactive Module 2.0 (AIM2) Marketplace, see *Assignment Interactive Module 2.0 (AIM 2.0)*, HUM. RES. COMMAND (Apr. 4, 2017), <https://www.hrc.army.mil/site/assets/directorates/OPMD/What%20is%20AIM%202.pdf>.
12. Re:Thinking with Adam Grant, *Reese Witherspoon on Turning Imposter Syndrome into Confidence*, TED, at 16:28 (Oct. 25, 2022), <https://link.chtbl.com/eB-t9UqMU>.
13. Jim Steddum, *JAGC Virtual Suggestion Box*, MILSUITE (Oct. 16, 2017), <https://www.milsuite.mil/book/docs/DOC-352968>.



## No. 1

# Helping Your Client Navigate an Army Audit

By William J. Dobosh, Jr.

Although the U.S. Army Audit Agency (AAA) conducts approximately one hundred audits each fiscal year, many organizations below Headquarters, Department of the Army<sup>1</sup> or the headquarters of an Army command (ACOM)/Army service component command (ASCC)/direct reporting unit (DRU) do not have regular contact with AAA auditors. As a result, visits from AAA audit teams may be stressful for members of an audited organization and lead to a flurry of questions for you as the organization's uniformed judge advocate (JA) or civilian legal advisor.<sup>2</sup>

But fear not, counsel. This article will explain preliminary actions that you can take upon learning that one of your clients is going to be audited and the four steps that you can advise your client to take as the audit unfolds: 1) *comprehend* the fundamentals of AAA and internal audits; 2) *collaborate* with the audit team, so it can access requested information; 3) *communicate* with the audit team during fieldwork and the command-reply process; and 4) *correct* deficiencies that the audit team finds. The article will also present some questions you can anticipate from your client-organization's members along the way. Armed with this knowledge, military and civilian attorneys alike will be able to assist their supported organizations capably during an audit.

### Actions on Contact: Initial Responses to an Announced Audit

After learning that one of your client-organizations will be involved in an audit by AAA, you can take immediate action to enable the best possible legal support later.

First, research the program or function being audited to identify previous audit reports. A repository of published AAA reports is available on its extranet site,<sup>3</sup> which is accessible to anyone with a Department of Defense (DoD) common access card. If you cannot reach the site or cannot find relevant reports, contact the AAA Audit Coordination and Follow-Up Office.<sup>4</sup> Explain fully your official need for the reports in case they have been controlled. You may also search the public websites of the Government Accountability Office or the DoD Inspector General (DoDIG) for any non-Army audits on the upcoming audit's subject.<sup>5</sup>

Second, determine the audit focal point, which is usually an individual in the supporting Internal Review (IR) Office.<sup>6</sup> The IR program<sup>7</sup> "provides an independent, objective audit and analysis activity" within an organization.<sup>8</sup> Ask the audit focal point to include you on invitations and announcements for key audit events, such as the entrance conference and interim progress reviews. You will then be able to better anticipate legal support requirements. The audit focal point may also be able to provide you contact information for the audit team leadership to enable direct coordination with them.





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Third, take advantage of institutional knowledge, especially from senior Army civilian attorneys, concerning audits and the audit process. Even if no one in your brigade legal shop or immediate legal office has experience with AAA, an attorney at a higher echelon likely does. Use this experience to fill in gaps in your understanding and to provide effective counsel for your client during the audit.

### **Step 1: Comprehend the Fundamentals of AAA and Internal Audits**

#### ***What is AAA, and what does it do?***

The U.S. Army Audit Agency is a field operating agency of the Secretary of the Army (SECARMY)<sup>9</sup> that executes SECARMY'S auditing function within the Department of the Army.<sup>10</sup> Each fiscal year, AAA develops an Army-wide audit plan by determining areas of risk from

Army corporate planning documents and soliciting input from senior leaders in HQDA, ACOMs, ASCCs, and DRUs.<sup>11</sup> The Secretary of the Army approves the final plan,<sup>12</sup> which AAA may modify as needed throughout the year to address emerging or high-visibility issues.

The Army Auditor General,<sup>13</sup> an HQDA principal official,<sup>14</sup> heads AAA. Although AAA has its headquarters at Fort Belvoir, Virginia, most of its workforce is located at seventeen field offices in the continental United States, Hawaii, Korea, and Germany.<sup>15</sup> Auditors are task-organized into audit teams to complete audits. An audit team generally has one GS-13 auditor-in-charge (AIC) who manages the day-to-day conduct of the audit and oversees multiple staff auditors in grades GS-7 to GS-12.<sup>16</sup> A GS-14 audit manager (AM) and a GS-15 program director (PD) supervise.<sup>17</sup>

Although many HQDA organizations rely on the Army Office of General Counsel

or the Office of The Judge Advocate General for legal support, AAA receives legal advice from its own organic legal office.<sup>18</sup> If you have a concern with an audit team's legal conclusions, especially its interpretations of applicable statutes or regulations, you may find it helpful to raise these issues with both the audit team (AIC, AM, and PD) and the AAA Office of Counsel.

#### ***Can AAA conduct audits of issues that do not involve financial information?***

The Army Audit Agency conducts internal audits of Army organizations, programs, and activities. Department of Defense policy defines an "internal audit" as a "function that helps DoD management . . . by providing information, analyses, assessments, and recommendations."<sup>19</sup> Internal audits are *not* limited to financial statements, contract pricing, or similar fiscal areas and may instead cover any Army program, operation, or function. When conducting internal



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audits, “[a]uditors independently and objectively analyze, review, and evaluate existing procedures, controls, and performance” and “constructively present conditions, conclusions, and recommendations so as to stimulate or encourage corrective action.”<sup>20</sup>

Auditors from AAA primarily conduct the following types of internal audits: performance audits, financial audits, attestation engagements, and follow-up audits.<sup>21</sup> *Performance audits* “provide objective analysis, findings, and conclusions to assist management . . . with . . . improving program performance and operations, reducing costs, facilitating decision making by parties responsible for . . . corrective action, and contributing to public accountability.”<sup>22</sup> *Financial audits* “provide independent assessments of whether entities’ reported financial information . . . is presented fairly, in all material respects, in accordance with recognized criteria.”<sup>23</sup> Financial audits include financial statement audits<sup>24</sup> to achieve

the statutory requirement of DoD audit readiness.<sup>25</sup> *Attestation engagements* consist of reviews,<sup>26</sup> examinations,<sup>27</sup> and agreed-upon procedure (AUP) engagements. The AUP engagements, in which the audit team performs customer-designated analysis (i.e., “audit procedures”<sup>28</sup>) on the subject matter,<sup>29</sup> are AAA’s most common type of attestation engagement.<sup>30</sup> In AUP engagements, the organization that will use the audit’s results is responsible for the procedures being sufficient to achieve their intended purposes.<sup>31</sup> *Follow-up audits* “verify that management officials took corrective actions” with respect to AAA’s previously issued audit recommendations. The report of a follow-up audit also contains the audit team’s “conclusions as to whether . . . the actions achieved the desired results and monetary benefits.”<sup>32</sup>

Some technical terms (italicized for quick reference) are common to all these audit types. You should understand these concepts to help your clients better under-

stand communications and written materials received from the audit team. The *audit subject matter* is the program, operation, or function that an audit analyzes.<sup>33</sup> The *audit objective* describes what the audit is supposed to achieve<sup>34</sup> and raises “questions about the program that the auditors seek to answer.”<sup>35</sup> Auditors answer these questions by assessing evidence against applicable laws, regulations, standards, or similar benchmarks,<sup>36</sup> which are collectively called *audit criteria*.<sup>37</sup> Audit teams answer the audit objective by conducting *audit fieldwork*, during which an audit team gathers “sufficient, appropriate evidence that provides a reasonable basis for findings and conclusions.”<sup>38</sup> The results of an audit are presented in a written *audit report*.<sup>39</sup> As a DoD auditing organization, the AAA must conduct its audits according to *generally accepted government auditing standards* (GAGAS) established by the Government Accountability Office (GAO). These standards enable “high-quality audit work



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

with competence, integrity, objectivity, and independence.<sup>40</sup> To comply with GAGAS, an audit's findings and conclusions must be adequately supported<sup>41</sup> and "valid, accurate, appropriate, and complete with respect to the audit objectives."<sup>42</sup>

Finally, as a point of clarification, an audit is not an investigation. Nonetheless, because audits and investigations have key similarities, clients may find audits easier to understand in relation to investigations. An audit team performs tasks comparable to an Army Regulation (AR) 15-6 investigating officer with respect to collecting evidence and presenting findings, conclusions, and recommendations in a written report.<sup>43</sup> Like an investigating officer, an audit team must analyze impartially and independently the issues it faces.<sup>44</sup> One significant difference between audits and investigations is an audit's official Army position (OAP). In an investigation, the approval authority approves or disapproves the investigating officer's findings and recommendations.<sup>45</sup> An audit does not have an approval authority *per se*. Instead, the OAP establishes whether the Department of the Army agrees with the findings, conclusions, recommendations, and potential monetary benefits in the audit re-

port.<sup>46</sup> If the OAP concurs with a recommendation, then the responsible organization must implement it before an agreed-upon completion date. If the OAP does not concur with a recommended corrective action, however, then that action is not required.<sup>47</sup>

***"How does AAA relate to Internal Review? How does it relate to the Army Inspector General?"***

Auditors assigned to an organization's IR program are not part of AAA. The IR program is typically established and resourced by commanders of ACOMs, ASCCs, and DRUs; heads of HQDA activities; and U.S. property and fiscal officers.<sup>48</sup> An IR director advises supported commanders on "internal control and audit matters" and tracks the implementation of audit recommendations.<sup>49</sup> Thus, although a supporting IR office may facilitate and coordinate a audit that AAA performs, that office is not assigned to or controlled by AAA.

Similarly, the AAA and the Department of the Army Inspector General (DAIG) are different organizations in HQDA. Like the Army Auditor General, the Army Inspector General assists SE-CARMY with oversight of Army programs

and activities.<sup>50</sup> Organizational IGs conduct four functions on behalf of the Army IG: inspections, assistance, investigations, and teaching and training.<sup>51</sup> The DAIG, however, is not part of AAA.<sup>52</sup>

**Step 2: Collaborate with the Audit Team so It Can Access Requested Information**

***"Do we have to provide the audit team the information it asks for?"***

Auditors may seem to be constantly asking your client for information during audit fieldwork, but this is a normal part of the audit process. As previously discussed, during audit fieldwork auditors gather evidence to answer audit objectives and support the audit's findings and conclusions.<sup>53</sup> Evidence may include physical evidence that the team obtains by "direct inspection or observation"; testimonial evidence through oral or written statements from members of the audited organization; and documentary evidence, such as command policies and guidance, emails, and electronic and hardcopy records.<sup>54</sup> In addition, sometimes an audit team identifies additional information requirements weeks or months



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after the initial site visit, as the team conducts additional fieldwork and learns more about the audit subject matter.

Department of Defense policy requires that, subject to limitations imposed by law or regulation, audit teams “must have full and unrestricted access” to all personnel, facilities, and information “related to accomplishing an announced audit objective when requested by an auditor with proper security clearances.”<sup>55</sup> Access includes “the authority to make and retain copies of . . . information or material until no longer required for official use.”<sup>56</sup> Army policy reiterates and refines this requirement as follows: “Audit organizations will have full access to all personnel, facilities, records, reports, databases, and documents. Audited activities will make all accounts, books, records, documents, papers, facilities, equipment, and other assets available for examination and observation by auditors and make available knowledgeable personnel who can discuss the information.”<sup>57</sup>

Granting access to information also involves responding to requests for information (RFIs) from the audit team. As a legal matter, Army policy requires organizations to cooperate fully with audit teams. Army

Regulation 36-2 forbids an audited activity from “unreasonably delay[ing] the progress of the audit” when providing requested information.<sup>58</sup> As a practical matter, promptly addressing RFIs expedites an audit’s progress. The sooner an audit team receives the information it needs, the sooner the team can complete its fieldwork and provide audit results to all stakeholders.

In summary, auditors have the authority to access nearly all information relevant to their audit. You can save your client precious time and effort by encouraging organizations to facilitate this access.

***“Are audit teams allowed to receive information prepared by attorneys, such as internal legal reviews? What about information subject to the Privacy Act?”***

*Attorney-Client Confidentiality and Privilege*

Neither attorney-client confidentiality nor attorney-client privilege prevents you or your client-organization from complying with an audit team’s request for any relevant legal opinions that the organization received.

With respect to confidentiality, when an Army organization’s legal advisor is providing advice to organizational officials on matters within the scope of the organization’s official business, the advisor’s actual client is the Department of the Army.<sup>59</sup> Therefore, because the audit team is acting in an official capacity, and the audit relates to your representation of the Army, you may provide the audit team with memoranda, emails, or other records that contain your legal advice relevant to the audit without violating attorney-client confidentiality, even if that advice was initially provided to specific individuals in the command.<sup>60</sup> With respect to attorney-client privilege, your client-organization’s sharing such materials with the team, which has an official need to know the information, does not waive the privilege in other contexts or proceedings.<sup>61</sup>

*Privacy Act*

Auditors may also access personally identifying information or other materials protected by the Privacy Act of 1974 without first obtaining the consent of the subject of the information.<sup>62</sup> As explained in DoD policy, records pertaining to an individual may be disclosed to a DoD employee

without the individual's consent when:

(1) the DoD employee has a need for the record to perform assigned official duties; (2) the intended use of the record generally relates to the purpose for which the record is maintained; and (3) only the minimum amount of records or portions of records required to accomplish the intended use are disclosed.<sup>63</sup> In most audits, disclosures to an audit team will clearly satisfy these criteria. You and your client should raise specific concerns, especially the extent of the disclosure that the team has requested, with the AIC and the AAA Office of Counsel.

### **Step 3: Communicate with the Audit Team During Audit Fieldwork and in the Command-Reply Process**

***"The audit team invited us to an 'entrance conference.' What's the purpose, and what should we try to accomplish there?"***

Before fieldwork begins, the audit team conducts an entrance conference with the audited organization.<sup>64</sup> At this conference, the team explains the audit's objective, scope, and potential benefits and proposes fieldwork sites.<sup>65</sup> The organization may then raise additional issues for the team to consider or may suggest changes to the audit objective.<sup>66</sup> Because the members of the organization probably have more knowledge of the audit subject matter than the audit team does, reasonable and well supported suggestions to the team will likely be adopted.<sup>67</sup>

As legal advisor, you should either attend the entrance conference or review the conference presentation afterwards to ensure that the audit team has identified all legal authorities relevant to the organization's mission and the audit subject. Helping the audit team start its fieldwork with accurate and complete audit criteria will prevent erroneous conclusions and ill-conceived recommendations in the draft audit report.

***"What is our responsibility for explaining the audited subject to the audit team? Isn't the team a group of subject matter experts?"***

In preparing for an audit, the audit team researches governing law, regulation, and policy to determine the audit criteria. The audit team members, however, are not everyday practitioners in the subject of the audit. Consequently, the team often relies

on the insight of the audited organization to understand the program or function at issue.

Encourage members of your client-organization to explain fully to the audit team how they execute their missions concerning the audit subject. Such dialogue will ensure the team understands how a program operates and might prevent the team from recommending corrective actions that would be infeasible, impractical, or otherwise undesirable.

***"At the entrance conference, the audit team mentioned PMBs. What are they, and why are they important to the audit?"***

In a performance audit, which is the most common type of audit that AAA conducts,<sup>68</sup> auditors try to make recommendations that will result in both potential monetary benefits (PMBs) and nonmonetary benefits for the Army.<sup>69</sup> Potential monetary benefits arise from eliminating questioned costs and from identifying "funds put to better use."<sup>70</sup> A questioned cost involves an "alleged violation of a provision of a law, regulation, contract, grant, cooperative agreement, or other agreement or document"; is "not supported by adequate documentation"; or is for an "unnecessary or unreasonable" purpose.<sup>71</sup>

Just as important as PMBs, however, are nonmonetary benefits. These benefits improve such areas as "operational readiness, personnel safety, data accuracy, internal controls, compliance with laws and regulations, or streamlining of organizations or processes."<sup>72</sup> Nonmonetary benefits often have Army-wide impacts that transcend concerns of resource management or fiscal prudence.

Encourage subject matter experts in your client-organization to suggest monetary and nonmonetary benefits during the audit. The audit gives these practitioners an opportunity both to point out shortcomings in current policy or guidance from HQDA organizations or ACOM/ASCC/DRU headquarters and to suggest viable solutions. The audit report may make recommendations to members of the Army Secretariat, Army Staff, and senior Army commanders, so it can quickly elevate operational-level concerns and proposed improvements. Simply put, audits provide a powerful forum for your client to trigger significant, Army-wide change.

***"We're concerned that the audit report might make findings, conclusions, or recommendations that are inaccurate or unworkable. Will we have a chance to review the report before it is published?"***

The findings and conclusions that appear in a draft audit report should never surprise an audited organization. Army Audit Agency policy requires the audit team to routinely present this information to the organization as the audit progresses.<sup>73</sup> These updates confirm that the audit team understands the audit subject and that the team's tentative results are reasonable.

Audited organizations may also use the command-reply process at the conclusion of fieldwork to shape the final audit report. In this process, each organization to which a draft finding, conclusion, recommendation, or PMB is addressed has the opportunity to concur or non-concur with these items and to submit comments and responses.<sup>74</sup> As a result, a command reply may formally disagree with recommendations that the organization believes are infeasible or impossible.<sup>75</sup> The organization may also propose alternatives to the recommended actions that will produce the desired results. Command comments are critical to the success and usefulness of an audit, and the OAP official must consider them before issuing the Army's position.<sup>76</sup> The audit report summarizes applicable comments immediately following each recommendation and reprints command replies in their entirety in one of the report's standard annexes.<sup>77</sup>

If you are reviewing your client's command comments prior to submission, ensure subject matter experts have thoroughly, clearly explained objections to any aspect of the report and have proposed reasonable revisions. Advise your client to avoid unhelpful criticism of the audit team and find another way to raise these issues, such as direct communication with the audit manager, program director, or other AAA official. Finally, help your client justify any legal objections to a tentative finding or recommendation. The audit team will send these objections to the AAA Office of Counsel for review. The better organized and articulated a legal argument is, the more effectively that AAA attorneys can analyze it and give appropriate feedback to the audit team.



(Credit: Wolfilser – stock.adobe.com)

#### Step 4: Correct Deficiencies that the Audit Team Finds

The audit process does not necessarily end when the audit report is published. If an audit team identifies a deficiency that is not fixed during the audit, the team should recommend corrective action. Once the OAP approves such a recommendation, responsible HQDA principal officials and commanders must implement it by performing the actions they have agreed to take.<sup>78</sup> The AAA Audit Coordination and Follow-up Office tracks this implementation regularly. As required by DoD policy, AAA reports to the DoDIG twice per fiscal year on “the status of management’s corrective actions on [AAA] audit reports.”<sup>79</sup> The DoDIG, in turn, reports this data to Congress.

Advise your client that unimplemented recommendations in high-profile audits sometimes generate congressional interest and action. For example, in April 2018, AAA issued an audit report<sup>80</sup> on the Army’s Marketing and Advertising Program.<sup>81</sup> The objective of the audit was to “verify that

the Army’s investments in marketing and advertising generated a positive return” for recruiting.<sup>82</sup> The audit report concluded that the Army Marketing and Research Group (AMRG) had to “refine its measurement and goal development to ensure programs are demonstrating a positive return based on their intended purpose(s).”<sup>83</sup> The audit report then made seven recommendations, which AMRG agreed to implement at various points between 30 June 2018 and 30 September 2020.<sup>84</sup> In August 2018, however, the National Defense Authorization Act for Fiscal Year 2019 required SECARMY to submit to the House and Senate Armed Services Committees a report on the status of the recommendations contained in the AAA audit.<sup>85</sup> The National Defense Authorization Act further stated that until the Secretary submitted this report, AMRG was not permitted to obligate or expend more than 60 percent of the amounts appropriated to it for FY 2019.<sup>86</sup>

Although the AMRG audit situation was unusual, you can cite it as a cautionary

tale. Advise your clients that audit recommendations matter, their implementation is tracked, and unreasonable implementation delays can create embarrassing consequences for an organization and its senior officials.

#### Conclusion

An audit can be a stressful event for the members of an audited organization, but as a legal advisor, you can reduce this stress for your client. By researching previous audits in the relevant area, coordinating with audit focal points, and using institutional knowledge, you will be able to provide relevant assistance when the audit team starts its work. Your legal analysis and practical advice during the audit process can help your client efficiently endure and successfully navigate an Army audit. **TAL**

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## Notes

1. These organizations comprise the Army Secretariat and the Army Staff. The Army Secretariat advises and assists the Secretary of the Army in exercising authority to conduct Army matters. The Secretariat consists of the Under Secretary of the Army, Deputy Under Secretary of the Army; Assistant Secretary of the Army (Manpower and Reserve Affairs); Assistant Secretary of the Army (Civil Works); Assistant Secretary of the Army (Financial Management and Comptroller); Assistant Secretary of the Army (Acquisition, Logistics and Technology); Assistant Secretary of the Army (Installations, Energy and Environment); and a number of functional officials, including Army General Counsel; Administrative Assistant to the Secretary of the Army; Chief Information Officer; the Inspector General; and the Army Auditor General. The Army Staff reports to the Chief of Staff of the Army and provides professional, independent military advice and assistance to the Secretariat in developing policies and programs and supports the Army Chief of Staff in executing responsibilities as a member of the Joint Chiefs of Staff. Headquarters, Department of the Army, Gen. Order No. 2020-01, Assignment of Functions and Responsibilities within Headquarters, Department of the Army paras. 7–24 (6 Mar. 2020) [hereinafter AGO 2020-01].

2. “Audited organization” in this article means an organization whose programs, operations, or functions are the subject of an audit, especially those organizations selected as audit fieldwork sites. The article uses “organization” rather than “command” to apply broadly to all types of Army entities, even those without a “commander.”

3. The United States Army Audit Agency (AAA) extranet site may be reached at <https://armyeitaas.sharepoint-mil.us/sites/HQDA-AAA-extranet>.

4. The Audit Coordination and Follow-up Office’s email address is [usarmy.pentagon.hqda-aaa.mbx.acfo@army.mil](mailto:usarmy.pentagon.hqda-aaa.mbx.acfo@army.mil), and its entry in the Outlook Address Book is USARMY Pentagon HQDA AAA Mailbox ACFO.

5. GAO reports may be found at <https://www.gao.gov>. DoDIG reports may be found at <https://www.dodig.mil/Reports/Audits-and-Evaluations>.

6. For more information on the Internal Review (IR) program, see *infra* Section “How does the Army Audit Agency relate to Internal Review? How does it relate to the Army Inspector General?”

7. The Assistant Secretary of the Army (Financial Management & Comptroller) manages and oversees the IR program. U.S. DEP’T OF ARMY, REG. 11-7, INTERNAL REVIEW PROGRAM para. 1-4a (29 Mar. 2017) [hereinafter AR 11-7].

8. *Id.* para. 2-3a (noting that “IR helps an organization accomplish its objectives by bringing a systematic, disciplined approach to foster a positive and strong management control environment and to evaluate and improve effectiveness of risk management and governance processes”).

9. AGO 2020-01, *supra* note 1, para. 19a; U.S. DEP’T OF ARMY, REG. 36-2, AUDIT SERVICES IN THE DEPARTMENT OF THE ARMY para. 2-1a (30 Oct. 2015) [hereinafter AR 36-2] (“[AAA] is a field operating agency that reports to The Army Auditor General . . .”).

10. 10 U.S.C. § 7014(c)(1)(B) (2022) (establishing the Secretary of the Army’s auditing function); AR 36-2, *supra* note 9, para. 1-5a (“[AAA] is the Army’s internal audit organization.”).

11. AR 36-2, *supra* note 9, para. 2-3. The process of briefing the tentative plan to Army senior officials for their input is informally called the “Road Show.” This statement is based on the author’s professional experiences as Deputy Counsel (Audits) for the Army Audit Agency from 6 April 2015 to the present [hereinafter Professional Experiences].

12. AR 36-2, *supra* note 9, para. 2-3.

13. The Army Auditor General is a level three senior executive service official. By statute, the Auditor General must have “at least five years of professional experience in auditing or accounting.” 10 U.S.C. § 7014(c)(5). The Army Auditor General is a career reserved position. *Id.* Consequently, the position must be filled by a “career appointee,” which is an individual in a senior executive service position whose executive qualifications have been approved by the Office of Personnel Management. 5 U.S.C. §§ 3132(a)(4), 3132(a)(8).

14. AGO 2020-01, *supra* note 1, paras. 5a (stating that HQDA principal officials are “responsible to the SECARMY” and must “advise and assist SECARMY” by executing their assigned duties and responsibilities), 19a (designating the Army Auditor General as SECARMY’s principal advisor “for all audit matters”).

15. U.S. ARMY AUDIT AGENCY, 2016 PERFORMANCE REPORT 1–2 (n.d.).

16. U.S. ARMY AUDIT AGENCY, REG. 36-3, AUDIT EXECUTION paras. 1.5 (“Auditors-in-Charge”), 1.6 (“Staff Auditors”) (30 June 2021) [hereinafter AAA REG. 36-3]; Professional Experiences, *supra* note 11.

17. AAA REG. 36-3, *supra* note 16, paras. 1.3 (“Program Directors”), 1.4 (“Audit Managers”).

18. The AAA Office of Counsel consists of one GS-15 chief counsel, two GS-14 deputy counsels, and one GS-12 paralegal. PERS., PLANS & TRAINING OFF., JAGC PERSONNEL DIRECTORY 103 (2022).

19. U.S. DEP’T OF DEF., INSTR. 7600.02, AUDIT POLICIES 12 (16 Oct. 2014) (C1, 15 Mar. 2016) [hereinafter DoDI 7600.02]. By contrast, the Department of Defense (DoD) definition of “audit” is circular and unhelpful. DoD policy defines “audit” as performance audits, financial audits, and attestation engagements. *Id.*; U.S. DEP’T OF DEF., MANUAL 7600.07, DoD AUDIT MANUAL at 53 (3 Aug 15) [hereinafter DoDM 7600.07]. To compound the problem, DoD policy fails to define those individual categories. Army policy does not define “audit” at all. Even AAA’s internal guidance adopts a circular definition, explaining that “audit” includes performance, financial, and followup [sic] audits.” U.S. ARMY AUDIT AGENCY, REG. 36-2, PLANNING AND SURVEY para. F.3 (30 June 2021) [hereinafter AAA REG. 36-2]. Unfortunately, these definitions are consistent with GAO’s definition of “audit” as “a financial audit or performance audit conducted in accordance with GAGAS (generally accepted government audit standards).” U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-368G, GOVERNMENT AUDITING STANDARDS para. 1.27b (2021) [hereinafter GAO YELLOW BOOK].

20. DoDI 7600.02, *supra* note 19, at 13.

21. Professional Experiences, *supra* note 11.

22. GAO YELLOW BOOK, *supra* note 19, para. 1.21; *accord* AAA REG. 36-2, *supra* note 19, para. 3.4.

23. GAO YELLOW BOOK, *supra* note 19, para. 1.17.

24. GAO YELLOW BOOK, *supra* note 19, para. 1.17a.

25. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1003(a)(2)(A)(ii), 123 Stat. 2190, 2439–40 (2009) (requiring the DoD Chief Management Officer, in consultation with the Under

Secretary of Defense (Comptroller), to develop a plan for “ensuring the financial statements of the DoD are validated as ready for [a financial] audit by not later than September 30, 2017”).

26. In a review, an auditor “obtains limited assurance . . . about the measurement or evaluation of [the] subject matter against criteria” GAO YELLOW BOOK, *supra* note 19, para. 1.18b. For example, in 2019 AAA conducted a review of an independent outside audit of American Red Cross financial statements for the organization’s most recent fiscal year. U.S. DEP’T OF ARMY, REP. A-2019-0036-FMF, U.S. ARMY AUDIT AGENCY INDEPENDENT REVIEW OF THE INDEPENDENT AUDITOR’S REPORT OF THE AMERICAN RED CROSS FY 18 FINANCIAL STATEMENTS 1 (16 Jan. 2019). The review analyzed the methodology used to conduct the audit and determined that the independent auditor’s conclusions were reasonably reliable. *Id.* at 2.

27. In an examination, an auditor obtains reasonable assurance by drawing reasonable conclusions about “whether the subject matter is in accordance with (or based on) criteria” and whether the assertion being tested “is fairly stated, in all material respects.” GAO YELLOW BOOK, *supra* note 19, para. 1.18a. An examination has a substantially broader scope than a review and, unlike a review, expresses an opinion on the subject matter. GAO YELLOW BOOK, *supra* note 19, para. 7.76. For example, in FY 2019, USAA conducted an examination to independently validate the assertion by the HQDA Deputy Chief of Staff, G-4, that the Logistics Modernization Program (LMP) satisfied the requirements for certification as an accountable property system of record in accordance with DoD Instruction 5000.64, *Accountability and Management of DoD Equipment and Other Accountable Property*. U.S. ARMY AUDIT AGENCY, REP. A-2019-0101-BOZ, INDEPENDENT AUDITOR’S REPORT ON THE EXAMINATION OF THE LOGISTICS MODERNIZATION PROGRAM 3 (4 Sept. 2019). The review concluded that the LMP did not satisfy all requirements for a system of record. *Id.* at 3–4.

28. Audit procedures are “specific steps and tests auditors perform to address the audit objectives.” GAO YELLOW BOOK, *supra* note 19, at 212.

29. GAO YELLOW BOOK, *supra* note 19, para. 1.18c.

30. Professional Experiences, *supra* note 11.

31. GAO YELLOW BOOK, *supra* note 19, para. 1.18c.

32. AR 36-2, *supra* note 9, para. 2-20.

33. Professional Experiences, *supra* note 11.

34. GAO Yellow Book, *supra* note 19, at 211 (defining “audit objectives”). In this regard, the audit objective functions like the appointment memorandum for an administrative investigation. *See, e.g.*, U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. C-5a(2) (1 Apr. 2016) (requiring the appointment memorandum to “clearly state the purpose and scope of the investigation”); U.S. DEP’T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICIES para. 13-24a (9 Nov. 2016) (stating that the “appointment of a financial liability officer is accomplished by using a memorandum”), fig.13-12 (showing sample appointment memorandum) [hereinafter AR 735-5].

35. GAO YELLOW BOOK, *supra* note 19, at 211 (defining “audit objectives”).

36. GAO YELLOW BOOK, *supra* note 19, at 211, 213 (showing the interplay between “audit objectives” and “criteria”).

37. GAO Yellow Book, *supra* note 19, at 213 (stating that audit criteria “identify the required or desired state

... with respect to the program or operation” being audited).

38. GAO YELLOW BOOK, *supra* note 19, para. 8.01.

39. DoDM 7600.07, *supra* note 19, encl. 11, para. 3b(3); AR 36-2, *supra* note 9, fig.2-1.

40. GAO YELLOW BOOK, *supra* note 19, at 1.

41. GAO YELLOW BOOK, *supra* note 19, para. 8.06 (requiring auditors to “obtain sufficient, appropriate evidence that provides a reasonable basis for findings and conclusions based on the audit objectives”).

42. GAO YELLOW BOOK, *supra* note 19, para. 8.12.

43. AR 15-6, *supra* note 34, paras. 3-10 to 3-12; GAO YELLOW BOOK, *supra* note 19, paras. 8.90 (obtaining evidence), 9.10 (audit report contents).

44. AR 15-6, *supra* note 34, para. 1-8 (requiring the IO to “thoroughly and impartially ascertain and consider the evidence”); GAO YELLOW BOOK, *supra* note 19, para. 3.11 (requiring auditors to have “objectivity in discharging their professional responsibilities,” which includes “independence of mind and appearance when conducting engagements, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest”).

45. AR 15-6, *supra* note 34, para. 2-8b(3)(a).

46. At the start of an audit, the audit team determines which HQDA principal official has “primary responsibility for the program, process, or policy” being audited and asks that individual to provide the OAP. AR 36-2, *supra* note 9, para. 2-12c(1).

47. AR 36-2 establishes a resolution process if AAA and the OAP official cannot agree. AR 36-2, *supra* note 9, paras. 2-14a–b. Ultimately, the Under Secretary of the Army or Vice Chief of Staff of the Army adjudicate disagreements that cannot be resolved. *Id.* para. 2-14c. As a practical matter, OAP officials can often avoid the dispute resolution process by agreeing to a modified recommendation amendable to the responsible audited organization that addresses the underlying identified condition. Professional Experiences, *supra* note 11.

48. AR 11-7, *supra* note 7, para. 1-6a.

49. AR 11-7, *supra* note 7, paras. 1-7a (principal advisor function), 1-7o (recommendation tracking function).

50. 10 U.S.C. § 7020(b)(1) (requiring the Army Inspector General, “when directed by the Secretary or the Chief of Staff” of the Army, to “inquire into and report upon the discipline, efficiency, and economy of the Army”). The Inspector General function within HQDA is the sole responsibility of the Office of the Secretary of the Army. *Id.* § 7014(c)(1)(E).

51. U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 1-4a(8)–(11) (23 Mar. 2020).

52. Although the Department of the Army uses separate organizations to perform the auditing and IG functions, the DoD does not. Consequently, the DoDIG has the mission to “conduct and supervise audits, investigations, evaluations, and inspections relating to the programs and operations of the DoD” and, as relevant here, to establish DoD audit policy and to monitor AAA and other internal DoD audit organizations. U.S. DEP’T OF DEF., DIR. 5106.01, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE (IG DoD) paras. 3, 5c, 5m (20 Apr. 2012) (C2, 29 May 2020).

53. AAA REG. 36-3, *supra* note 16, paras. 5.1–5.2.

54. AAA REG. 36-3, *supra* note 16, para. 5.2.

55. DoDI 7600.02, *supra* note 19, encl. 3, para. 2. All AAA auditors have at least a Secret security clearance, and auditors assigned to intelligence-related audits have Top Secret clearances. Professional Experiences, *supra* note 11.

56. DoDI 7600.02, *supra* note 19, encl. 3, para. 2.

57. AR 36-2, *supra* note 9, para. 1-6c.

58. AR 36-2, *supra* note 9, para. 1-6c.

59. U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS r. 1.13(a)(1) (26 June 2018) [hereinafter AR 27-26].

60. *Id.*, r. 1.13, cmt. 2 (explaining that an attorney-client communication concerning Army official business “is protected by Rule 1.6 from disclosure to anyone outside the Department of the Army and to anyone inside the Army who does *not* have an official need to know”) (emphasis added).

61. *Id.*, r. 1.6, cmt. 14 (explaining that when the Department of the Army is the client, if:

client information covered by the attorney-client privilege or client-lawyer confidentiality is properly disclosed to the Army’s authorized officials who have an official need to know the information, whether the disclosure is made under implied or express authority, those officials are considered privileged persons and no waiver of privilege or confidentiality has occurred).

62. Privacy Act of 1974, 5 U.S.C. § 552a (2018).

63. U.S. DEP’T OF DEF., 5400.11-R, DEP’T OF DEFENSE PRIVACY PROGRAM paras. C4.2.1.1.1–.3 (14 May 2007).

64. AAA REG. 36-2, *supra* note 19, para. 15.1. The designated audit focal point, who is often a member of the command’s internal review office, coordinates this meeting. AR 36-2, *supra* note 9, para. 3-2a.

65. AAA REG. 36-2, *supra* note 19, para. 15.3.

66. AAA REG. 36-2, *supra* note 19, para. 15.3.

67. An internal review office can provide similar suggestions even before the entrance conference, during the pre-planning phase. Internal review cooperation with an audit team from the outset can help identify known problem areas for the team to analyze. Professional Experiences, *supra* note 11.

68. Professional Experiences, *supra* note 11.

69. The recommendations resulting from financial statement audits, follow-up audits, and attestation engagements are much narrower. A financial statement audit yields an opinion of whether “financial statements are presented fairly, in all material respects, in accordance with an applicable financial reporting framework” and, if necessary, makes recommendations to improve the statements. GAO YELLOW BOOK, *supra* note 19, para. 1.17a. A follow-up audit recommends either additional implementation of agreed-to corrective actions or, if implementation is complete, no further action. AR 36-2, *supra* note 9, para. 2-20. Among attestation engagements, only examinations may produce recommendations. GAO YELLOW BOOK, *supra* note 19, paras. 7.04 (no recommendations from review engagements), 7.84 (no recommendations from AUP engagements). An examination’s recommendations provide actions to help attain a favorable opinion on the subject matter or to address deficiencies identified during the engagement concerning internal control; noncompliance with provisions of laws, regulations, contracts, and grant agreements; or instances of fraud. GAO YELLOW BOOK, *supra* note 19, para. 7.21.

70. DoDM 7600.07, *supra* note 19, encl. 13, para. 3a. Funds may be “put to better use” when they “could be used more efficiently” for other purposes. *Id.* at 53.

71. DoDM 7600.07, *supra* note 19, at 54.

72. DoDM 7600.07, *supra* note 19, encl. 13, para. 3b(1).

73. AAA REG. 36-2, *supra* note 19, para. 15.3 (requiring audit team to explain during the entrance conference that “the AM [audit manager] or AIC [auditor-in-charge] will be available, as often as desired, to update command on the audit progress and findings”); AAA REG. 36-3, *supra* note 16, para. 5.5 (“The audit team should hold periodic meetings with command to discuss audit progress and significant issues.”).

74. AR 36-2, *supra* note 9, paras. 2-12a(1), 2-12b(1). In addition, organizations have an opportunity to discuss areas of disagreement during the audit exit conference. U.S. ARMY AUDIT AGENCY, REG. 36-4, REPORT WRITING AND REPLY PROCESS para. 8.2 (30 June 2021).

75. This input is especially important considering AAA’s tracking recommendations after the audit report is issued and reporting the status of recommendations to the DoDIG semiannually, as discussed in “Step 4,” *infra*.

76. See AR 36-2, *supra* note 9, para. 2-12c(2).

77. AAA REG. 36-4, *supra* note 74, para. 10.7.

78. AR 36-2, *supra* note 9, para. 2-17b.

79. AR 36-2, *supra* note 9, para. 2-21a; accord U.S. DEP’T OF DEF., INSTR. 7750.06, INFORMATION REQUIREMENTS FOR SEMIANNUAL REPORT TO THE CONGRESS encl. 3, tbl.1, items 3, 4, 20 (25 Sept. 2013) (C1, 29 Apr. 2020).

80. U.S. ARMY AUDIT AGENCY, REP. A-2018-0036-MTH, THE ARMY’S MARKETING AND ADVERTISING PROGRAM: RETURN ON INVESTMENT (13 Apr. 2018) [hereinafter AUDIT REP. A-2018-0036-MTH].

81. At the time of the audit, the Army Marketing and Research Group (AMRG) was a field operating agency of the Assistant Secretary of the Army (Manpower & Reserve Affairs) responsible for “national marketing and marketing research” in support of the Army’s Enterprise Strategic Brand Marketing and Communication Plan. U.S. DEP’T OF ARMY, REG. 601-208, THE ARMY BRAND AND MARKETING PROGRAM para. 4a(2) (18 July 2013). Effective 30 September 2019, the AMRG was redesignated as the Office of the Chief Army Enterprise Marketing and reassigned as a field operating agency of the Deputy Chief of Staff, G-1 with headquarters in Chicago. Headquarters, U.S. Dept of Army, Gen. Order No. 2019-18 (30 May 2019). The organization’s mission is to “coordinate the Army’s national marketing and advertising strategy, develop and maintain relationships with the marketing and advertising industry, and develop marketing expertise and talent within the Army to support the Regular Army, Army National Guard, and U.S. Army Reserve.” *Id.*

82. AUDIT REP. A-2018-0036-MTH, *supra* note 80, at 5.

83. AUDIT REP. A-2018-0036-MTH, *supra* note 80, at 6.

84. The command agreed to implement two recommendations by 30 June 2018, two recommendations by 30 September 2018, two recommendations by 31 March 2019, and one complex recommendation (to “develop a resource requirements projection model that links to and supports planned marketing efforts”) by 30 September 2020. AUDIT REP. A-2018-0036-MTH, *supra* note 80, at 14–17.

85. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 599(a)(1), 132 Stat. 1636, 1792 (2018).

86. *Id.* § 599(b).





## No. 2

# Advising Commanders During High-Profile Investigations

## Balancing the Rights of the Victim and the Accused in the Age of Social Media

By Lieutenant Colonel Shaun B. Lister & Major Joseph A. Morman

*The Army was ineffective at engaging in social media. Media, and more specifically social media, played a central role in establishing the negative information environment surrounding Fort Hood's response to the disappearance of the SPC Guillén. [The] Fort Hood Public Affairs Office and CID Public Affairs Office were ill-staffed, ill-trained, and ill-prepared to effectively address the social media information environment. The Army ceded the social media space, lost the opportunity to inform and educate the public in a timely fashion, and allowed the unhindered growth of damaging narratives about Fort Hood and the Army.<sup>1</sup>*

In the wake of Specialist (SPC) Vanessa Guillén's disappearance and murder, Fort Hood experienced unprecedented media scrutiny. In the aftermath, the Fort Hood Independent Review Commission (FHIRC) conducted an investigation into Fort Hood's culture, command climate, Sexual Harassment/Assault Response and Prevention (SHARP) program, and Criminal Investigative Division (CID) detachment.<sup>2</sup> Afterward, the United States Army Forces Command (FORSCOM) Commanding General (CG) appointed an Army Regulation (AR) 15-6 investigation to review the criminal investigation and command response to SPC Guillén's murder.<sup>3</sup> The report of investigation included a scathing assessment of Fort Hood's public affairs (PA) and public relations response.<sup>4</sup>

Both the FHIRC and the FORSCOM AR 15-6 investigations identified problems that are not unique to Fort Hood.<sup>5</sup> Also, the III Corps Public Affairs Office was not solely responsible for these

problems. Had this tragedy occurred at other similarly situated U.S. Army installations, it is likely that the same systemic problems that plagued the Army's response would have similarly afflicted those installations. Furthermore, legal advisors at all levels must own part of this problem. In an effort to safeguard the rights of the accused and protect the integrity of criminal investigations, judge advocates (JAs) may become overly conservative when advising the public affairs officer (PAO) and the command but, as we will discuss, this effectively eliminates any maneuver space to stop the spread of disinformation and misinformation. In this context, disinformation is defined as "false information deliberately and often covertly spread . . . to influence public opinion or obscure the truth."<sup>6</sup> Misinformation is defined as "incorrect or misleading information."<sup>7</sup>

The root problem is a failure to plan for and properly execute a forward-thinking PA<sup>8</sup> response to high-profile investigations at

the installation level. While it is true that high-profile investigations are uncommon, the consequences for failing to properly engage in meaningful discourse with the national news media and the American public can be catastrophic.<sup>9</sup> The Army's risk assessment matrix is a useful tool to highlight this point.<sup>10</sup> By measuring the probability of occurrence against the severity of outcome, a decision maker can assess the level of risk inherent to a certain action.<sup>11</sup> Applying the Army risk assessment matrix, even a seldom or occasionally occurring event like a high-profile investigation can result in a high-risk determination.<sup>12</sup> The bottom line is, being unprepared to engage the public during a high-profile investigation is likely to result in serious consequences for the Army and the command. Staff judge advocates (SJAs) and legal advisors can be a part of the solution!

A commander is behind the information dissemination power curve if they have failed to develop a plan for engaging with the media and the general public *before* a high-profile investigation garners public interest. As soon as an investigation piques public interest, the clock is ticking and every hour that passes without a comprehensive PA response increases the likelihood of an information void.<sup>13</sup> This information void can, and often does, lead to the proliferation of misinformation and disinformation that misleads the American public and paints the command in a negative light.<sup>14</sup> Furthermore, the advent of social media as a primary news source has increased the speed at which misinformation and disinformation proliferates. Any commander who fails to acknowledge this fact and devise a PA strategy to account for it, will have a difficult, if not impossible, time keeping the public accurately informed. This article will provide JAs in leadership positions with a blueprint to coordinate with the command PAO and develop installation-specific strategies for advising the commander on PA during high-profile investigations.

The first section of this article will thoroughly define the PA problem facing commanders during high-profile investigations. This section will highlight concerns that are unique to modern times by examining how social media complicates the PA

mission. To use a well-worn idiom, social media is a PA "game changer." The second section of this article will outline the Army's current approach to PA during high-profile investigations, fully exploring the law and rules that constrain extrajudicial statements by commanders and their staff during ongoing investigations. The final section of this article will provide JAs with a sample playbook on how to engage with the media during high-profile investigations in a more forward-thinking way. At the conclusion of this article, JAs will fully appreciate the problem facing commanders as they navigate PA during high-profile investigations and be prepared to work closely with the PAO to develop a plan to address it.

### **Public Affairs and Media Relations in the Age of Social Media**

The PAO's mission is to "fulfill[] the Army's obligation to keep the American people and the Army informed, and helps to establish the conditions that lead to confidence in America's Army and its readiness to conduct operations in peacetime, conflict, and war."<sup>15</sup> Army PAOs accomplish this by "leverage[ing] communication techniques to effectively tell the Army's story to the right audience using the right tools, doing so as rapidly as possible."<sup>16</sup> While this mission and its execution are squarely within the purview of the command's PAO, it intersects with the mission of the Office of the Staff Judge Advocate (OSJA) when the subject matter touches upon high-profile investigations. The SJA is responsible for providing legal advice to the CG on all matters pertaining to the investigation<sup>17</sup> and it is here where the missions intersect. Therefore, the responsibility for providing advice to the CG regarding PA during high-profile investigations is a joint effort between both the SJA and the PAO.

If the SJA and the PAO fail to coordinate and develop a plan to address PA during high-profile investigations, it increases the likelihood that the command's response will be untimely or unsuccessful.<sup>18</sup> As mentioned above, the resulting information void creates an opportunity for the spread of misinformation and disinformation.<sup>19</sup> If left to proliferate on social media, these false narratives can take hold in the public consciousness.<sup>20</sup> Once these false

narratives dominate public discourse, their veracity becomes largely irrelevant and commanders are faced with the near impossible task of correcting the record.<sup>21</sup>

With the ubiquity of social media, it is no longer a question of whether a high-profile investigation will stay out of the media, it is a question of what information the public will receive and who will provide it. General Robert B. "Abe" Abrams summed up the role of social media as a communications platform when he wrote, "At the end of the day, social media will proliferate with or without the presence of senior military leaders . . . it's better for us [commanders] to get on the bus and enjoy the ride."<sup>22</sup> General Abrams was referring to communication with subordinates in general terms, but his message is timely and relevant to PA in high-profile investigations. Hunkering down and ignoring the "bad press" is no longer tenable.

### **Public Relations, Social Media, and High-Profile Criminal Investigations**

The complexity of today's media landscape and the speed at which information is disseminated has put to bed any question regarding the invalidity of the "no comment" response.<sup>23</sup> Sound communications strategies must be rooted in strong foundational concepts rather than trying to "deprive the story of oxygen." Commanders must educate the public about the Army's complex processes and be as transparent as the law allows. In doing so, Army representatives must convey empathy, use plain language, and never forget to engage in person. This is especially true when engaging with the victim's Family.

#### *Failing to Care for the Family can be Catastrophic*

Public affairs and command engagement during high-profile criminal investigations have far-reaching impact, particularly when it comes to a victim's Family. Family members are primarily concerned with the safety and wellbeing of their loved ones. This concern drives their motivation to be fully informed and to search for answers.<sup>24</sup> If the command does not fully address these honest and sincere motivations, they can spur advocacy that does not necessarily align with the Army's



Army Secretary Ryan D. McCarthy briefs the media on the Fort Hood Independent Review, with SMA Michael A. Grinston, and Army Chief of Staff, GEN James C. McConville, at the Pentagon on 8 December 2020. (Credit: Lisa Ferdinando, DoD)

interest.<sup>25</sup> With this in mind, caring for the Family must be a commander's paramount concern. Caring for Family members is a high-stakes situation and getting it right can have the dual effect of addressing the Family's concerns while simultaneously fostering confidence in the command and the Army.

On the other hand, failing to care for the Family can have negative strategic-level implications. For example, the 2022 National Defense Authorization Act contains the most drastic changes to the military justice system since 1969<sup>26</sup> and these changes are arguably the result of Fort Hood's PA struggles in the wake of the disappearance and murder of SPC Vanessa Guillén. Calls to remove commanders from the referral process predated the murder of SPC Guillén,<sup>27</sup> but the Army's struggles at Fort Hood were likely the straw that broke the camel's back. At the very least, advocates for

change were able to reference the aforementioned struggles to push for military justice reform.<sup>28</sup>

#### *Disinformation as an Advocacy Tool*

It is beyond the scope of this article to comment on the constitutional right to free speech that every citizen enjoys, but commanders must be aware of certain PA strategies that advocates employ if they are to effectively tell the Army's story using the right tools at the right time. Victim advocacy groups can, and often do, use the public and media interest surrounding high-profile investigations to magnify their message.<sup>29</sup> This presents unique challenges for commanders who are trying to keep the public informed of the facts. With social media, groups can instantly connect with the public and establish the discourse surrounding the investigation.<sup>30</sup> Moreover, anyone with a social media account can

fill information voids with whatever they want, including misinformation or disinformation." Once this disinformation shapes the narrative surrounding the high-profile investigation, their PA focus shifts towards influencing elected officials and commanders.<sup>31</sup>

In most cases, traditional media bolster these efforts.<sup>32</sup> When this occurs, the media is not necessarily coordinating directly with advocacy groups, but the blanketed news coverage creates additional command considerations.<sup>33</sup> The social media narratives and traditional media reporting operate in concert to generate a ground swell of support from the American public for a particular outcome.<sup>34</sup> This paper does not stand for the proposition that commanders should take an adversarial position to advocacy groups. Rather, commanders should be aware of the information dissemination dynamics at play during high-profile in-



Photo image from KHOU news in Houston (dvids). (Credit: KHOU News, Houston)

investigations and develop strategies to keep the public informed of the facts. This is important whether advocacy groups confront the command with deliberately deceptive content, known as disinformation, which should not be confused with unintentionally incorrect or misleading information, known as misinformation, in the form of viral storytelling.

#### *Misinformation Can Become the Narrative*

The proliferation of misinformation on social media during high-profile investigations is arguably more insidious than disinformation because anyone with a social media account can unwittingly contribute to the problem. Misinformation on social media can lead to viral storytelling, false narratives, and the rooting of untruths in the public consciousness despite command efforts to inform the public.<sup>35</sup> Social media provides anyone with access to an account with a platform to post information, whether or not that information has been vetted or verified. During a high-profile investigation, the command is in a race to

inform the public before misinformation proliferates.

If the command gets behind the information dissemination curve, it has lost the chance to initially frame the issues in the minds of the public. To make matters worse, the people doing the framing will not have all the available facts,<sup>36</sup> and they may not necessarily have the Army's or the victim's interests in mind. If these initial false narratives proliferate unanswered on social media, they can evolve into viral storytelling, making it nearly impossible for the command to set the record straight and in some cases, regain the public's confidence.<sup>37</sup> Consequently, it is critical for the command to develop forward-leaning communications strategies. However, before discussing how an OSJA can contribute to developing those strategies, it is important to understand the Army's current conservative approach to PA during high-profile investigations.

#### **An Overly Conservative Approach**

The Army's conservative PA strategy during high-profile investigations re-

sults primarily, though not exclusively, from risk-averse interpretations of three legal considerations. First, a commander engaging with the public and the media during an investigation is constrained by the Privacy Act of 1974 (Privacy Act)<sup>38</sup> and the Freedom of Information Act (FOIA).<sup>39</sup> The privacy rights of Soldiers involved in an investigation can limit the release of information. Second, commanders are constrained in their media engagements by the rules pertaining to Unlawful Command Influence (UCI).<sup>40</sup> This is especially true when a commander makes extrajudicial statements,<sup>41</sup> which are defined as statements "not forming . . . part of regular legal proceedings"<sup>42</sup> during pending investigations. Third, both commanders and JAs must safeguard against pre-trial publicity that impacts an accused's right to a fair trial under the Fifth Amendment of the United States Constitution.<sup>43</sup>

Legal advisors have traditionally rendered advice that approaches these considerations in an overly risk-averse way. They prioritize protecting the various due process rights of the subject(s) of an investigation over the potential harm that the command incurs through silence. This risk-averse approach ensures that issues do not manifest at trial, but often results in "no comment" PA responses that negatively impact the Army in the court of public opinion.<sup>44</sup> Even when the command provides a response, it is typically devoid of substantive information because most investigators and JAs do not want to prejudice ongoing proceedings.<sup>45</sup> This approach unquestionably shields high-profile case outcomes from prejudicial effect during appellate review. However, this approach is unduly risk averse because the public's thirst for immediate information, sated by inaccuracy, often does not result in renewed interest once accurate information comes to light months or years after the public has lost interest and the accused has run out of appellate opportunities.

#### ***The Privacy Act and the Freedom of Information Act***

Judge advocates must have a comprehensive understanding of the Privacy Act when advising commanders on PA during high-profile investigations if they are to

help commanders develop forward-leaning PA strategies. The Privacy Act prohibits federal government agencies from disclosing any personal information contained within a system of records without the consent of the person to whom the record pertains.<sup>46</sup> There are statutory exceptions to this provision,<sup>47</sup> but for JAs advising commanders on PA, the relevant statutory exception is when FOIA requires disclosure.<sup>48</sup> Stated another way, the Privacy Act may prohibit a government agency from disclosing information, but if FOIA requires disclosure, the Privacy Act will not stand in its way.<sup>49</sup> Therefore, the relevant inquiries are whether FOIA requires release of information pertaining to high-profile investigations and under what circumstances? Does FOIA require commanders to release information solely because an investigation has captured public interest? The short answer is no.

But one cannot fully answer this question without first analyzing FOIA exceptions that complicate the interplay between the Privacy Act and FOIA in the PA context. Exceptions 6 and 7(c) exempt personnel files and law enforcement files from mandatory disclosure when their disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy,”<sup>50</sup> but when asked to decide whether public or private interests hold more weight, the Supreme Court of the United States (SCOTUS) addressed FOIA Exception 7(c) regarding law enforcement files by looking to the purpose of the FOIA.<sup>51</sup> In determining whether a disclosure was required or exempted, SCOTUS instructed the Government to look at whether disclosure would shed light on a Government agency or it was merely the provision of records that happened to be stored by law enforcement.<sup>52</sup> Further, when considering whether FOIA created a blanket exemption for personnel records, SCOTUS, in *Department of the Air Force v. Rose*, affirmatively noted that FOIA did not create a blanket exemption for personnel records, but rather created a limited exemption requiring a balancing of interests.<sup>53</sup> The Rose Court concluded, “Exemption 6 does not protect against disclosure every incidental invasion of privacy only such dis-

closures as constitute ‘clearly unwarranted’ invasions of personal privacy.”<sup>54</sup>

The Department of the Air Force has published regulatory guidance that directly addresses the SCOTUS Privacy Act analysis. The Air Force requires disclosure under FOIA when the public’s interest in disclosure of the investigation outweighs the individual’s privacy interest.<sup>55</sup> The same Air Force regulation provides JAs with relevant factors to consider when determining whether a disclosure would constitute an unwarranted invasion of an accused’s privacy. These factors include, “the accused’s rank, duties, alleged offense(s), existing publicity about the allegation(s), and stage of the proceedings.”<sup>56</sup> A plain reading of the Air Force instruction indicates that these factors address FOIA exceptions 6 and 7(c), but this is an analysis of when FOIA authorizes release, not when FOIA requires it.

There is a strong argument that the Privacy Act does not apply to the Government release of current newsworthy information, but not because of a FOIA requirement.<sup>57</sup> In a case where Army officials released a general officer’s non-judicial punishment to the media after disposition,<sup>58</sup> after dismissing the lawsuit on other grounds, the United States Court of Appeals for the Eleventh Circuit opined that this type of disclosure may be outside of the purpose of the Privacy Act.<sup>59</sup> The court noted that the Privacy Act intended to stop the release of stale private information, not “current newsworthy information of interest to the community.”<sup>60</sup>

The takeaway for JAs advising in this space is to use the SCOTUS analysis outlined above to determine if FOIA permits or requires disclosure regardless of whether the high-profile investigation is current, newsworthy information. If an investigation is current and newsworthy, that should be incorporated into the FOIA analysis, not serve as a substitute for such analysis. This is particularly important when advising on PA during high-profile investigations because timely and fact-based command updates can significantly contribute to the public’s understanding of the operations or activities of the Army. Judge advocates should recognize this legitimate public and command interest and lean forward where appropriate.<sup>61</sup> Judge advocates

should acknowledge that although privacy interests are important and the body of law surrounding them is complex, a forward-leaning media strategy need not harm privacy interests of those involved in an allegation. It is possible to engage in such a strategy without naming any of the parties involved.<sup>62</sup> This includes the subject(s) of the investigation. The next consideration for JAs advising on PA is UCI.

### ***Unlawful Command Influence and Extrajudicial Statements***

There is legal precedent that in some cases, a commander’s extrajudicial statements can constitute UCI.<sup>63</sup> It appears at first glance that the mere possibility of UCI warrants risk-averse legal advice. However, a more nuanced review of UCI case law and applicable rules establishes the contrary. As discussed below, while commanders must be careful not to commit UCI during media engagements, they are not altogether prohibited from engaging in the first place.

Unlawful command influence is not cognizably raised until defense meets its burden of production.<sup>64</sup> “The quantum of evidence necessary to raise [UCI] is the same as that required to submit a factual issue to the trier of fact.”<sup>65</sup> Once the issue of command influence is cognizably raised,<sup>66</sup> the Government has the burden to “prove beyond a reasonable doubt: (1) that the predicate facts do not exist; (2) that the facts do not constitute unlawful command influence; or (3) that the unlawful command influence . . . did not affect the findings and sentence.”<sup>67</sup> “Proof beyond a reasonable doubt of any of these three factors is sufficient to rebut a prima facie case of unlawful command influence.”<sup>68</sup> Practitioners must be cognizant that Article 37 of the Uniform Code of Military Justice now requires that the accused demonstrate that the alleged UCI materially prejudiced a substantial right before a finding or sentence of a court-martial may be held incorrect.<sup>69</sup> Stated another way, for accused Service members to cognizably raise UCI, they must present some evidence of actual UCI before the burden shifts to the government as outlined above.

While courts review every allegation of UCI as a fact-specific determination,<sup>70</sup> there is clear guidance for reviewing UCI



SPC Vanessa Guillen. (Credit: Angie Thorne)

where it intersects with pretrial publicity and a commander's extrajudicial statements. A commander, or one acting with the mantle of command authority, can commit UCI when they orchestrate pretrial publicity to influence a case or a series of cases.<sup>71</sup> However, the prohibition against UCI of this nature does not require commanders to refrain from addressing their concerns with the public "through press releases, responses to press inquiries, and similar communications."<sup>72</sup>

High-profile investigations often garner national media attention, which heightens the public's interest in the general state of discipline, at least as it pertains to that command. Consequently, commanders have a legitimate interest in addressing the public on a wide array of issues during such cases, provided they relate back to some legitimate function of command.<sup>73</sup> So long as commanders, or their PAOs, are not using press releases to put a finger on the scales of justice, they are free to use communications platforms to keep the public reasonably informed about the investigation. Commanders are not prohibited from providing updates to the public regarding ongoing criminal investigations. This should be a case-by-case determination made in consultation with the SJA and the PAO. To be in the best position to advise the CG on PA during high-profile investigations, these two command advisors should appreciate

the legal parameters of UCI in this context and reflect upon the failures of the past ultraconservative approach. An SJA can advise the CG to take a forward-leaning PA strategy by the following: balancing the UCI-related legal considerations with the command's interest in keeping the public adequately informed, explaining the process, and providing status updates.

The Marines United case is one example of a forward-leaning PA strategy amid a high-profile investigation.<sup>74</sup> Marines United was a closed Facebook page comprised of tens of thousands of active-duty Service members and retirees. In January of 2017, a retired marine informed the Marine Corps that certain members of this group were sharing explicit images of female Service members.<sup>75</sup> Early reporting on this incident suggested that hundreds or thousands of Marines were implicated in this criminal behavior when the actual number of dispositions linked to the crackdown of online-related misconduct totaled eighty.<sup>76</sup> It included seven courts-martial, fourteen nonjudicial punishments, six administrative separations and twenty-eight adverse administrative actions.<sup>77</sup>

There are two important takeaways from the official PA response to the Marines United scandal. First, the Marine Corps got out in front of the issue early and condemned the actions of those Marines who were ultimately punished. Sergeant Major Ronald L. Green, the most senior enlisted Marine at the time, stated, "We need to be brutally honest with ourselves and each other: This behavior hurts fellow Marines, family members, and civilians. It is a direct attack on our ethos and legacy. . . . It is inconsistent with our [c]ore [v]alues, and it impedes our ability to perform our mission."<sup>78</sup> Sergeant Major Green directed these statements to the American public, and he made them while the investigation was still ongoing.

Second, the Marine Corps was able to inform the public of the actual scope of the online-related criminal misconduct. Rather than let a fact-free environment run rampant, the Marine Corps published the actual number of Marines United related dispositions, thus limiting the opportunities for the American public to speculate.<sup>79</sup> The Marine Corps reinforced a values-based

message to the American public and set the record straight regarding misinformation. Importantly, the command was able to pursue UCMJ action against the accused Marines despite making public statements that condemned the abhorrent behavior.

Another example of a timely, forward-leaning PA strategy occurred at Fort Sill in the Spring of 2021. A female Soldier stationed at Fort Sill for training reported that she was sexually assaulted on 27 March 2021.<sup>80</sup> Less than one week later, Major General (MG) Ken Kamper released a statement detailing that the command cared for the victim, that they had immediately suspended the alleged perpetrators from duty, and swiftly launched a thorough CID investigation.<sup>81</sup> Critically, MG Kamper expressed support and empathy for the victim when he said, "We're proud of the courage she displayed in coming forward with these allegations. We will stay connected with this [S]oldier and her [F]amily."<sup>82</sup> MG Kamper accomplished all of this without naming the victim and the subject(s) of the investigation and thereby avoided implicating their privacy interests. While press conferences immediately following criminal allegations are rare,<sup>83</sup> this is a prime example of a commander being transparent with the public during an ongoing criminal investigation. The amount and substance of information provided to the public should be narrowly tailored to the circumstances of each case and, in addition to Privacy Act and UCI concerns, the command should consider the accused's right to a fair trial.

### ***Pre-Trial Publicity and the Right to a Fair Trial***

The doctrine of unfair pretrial publicity is based upon the constitutional right to due process under the Fifth Amendment.<sup>84</sup> The defense may raise the issue of unfair pretrial publicity by demonstrating either presumed prejudice or actual prejudice. To establish presumed prejudice, the defense must show that the pretrial publicity (1) is prejudicial, (2) is inflammatory, and (3) has saturated the community.<sup>85</sup> To establish actual prejudice, the defense must show that members of the court-martial panel had such fixed opinions that they could not judge the guilt of the accused impartially.<sup>86</sup> Using these legal standards, the United States Court of

Appeals for the Armed Forces (CAAF) reviewed the facts in *United States v. Simpson*.<sup>87</sup>

Staff Sergeant Delmar Simpson was a drill sergeant at the center of the Aberdeen sex scandal of 1996.<sup>88</sup> He was one of twelve Soldiers charged with sex crimes related to what was referred to at the time as the largest sex scandal in the Army to date.<sup>89</sup> Consequently, there was a blitz of media coverage for the associated courts-martial.<sup>90</sup> Despite all the pretrial publicity, CAAF held that no actual or presumed prejudice occurred.<sup>91</sup> Legal advisors must balance the requirement to limit prejudicial and inflammatory pretrial publicity with the command's legitimate interest in increasing both transparency with the public and the public's understanding of the military justice system and the state of discipline in the military.<sup>92</sup>

Regulation requires the U.S. Army "to communicate with its members, the U.S. public, and international publics."<sup>93</sup> Public affairs operations help to establish conditions that lead to confidence in the Army and its readiness to conduct a broad array of military missions.<sup>94</sup> The release of accurate information pertaining to high-profile cases puts command actions in context, facilitates informed perceptions about the military justice system, counters misinformation and disinformation, and reinforces public support.<sup>95</sup> Again, any statement made by the command during high-profile investigations should be narrowly tailored to these stated objectives and carefully balance the accused's right to a fair and impartial proceeding.

### Stick to the Facts while Shaping the Narrative

The starting point for any Public Affairs Guidance (PAG) for dealing with the media during high-profile investigations must include a plan for dealing with social media and misinformation. Retired General (GEN) Scott Miller was the commanding general of Fort Benning in 2015 during a social media blitz that included attacks against the first women who attended the U.S. Army Ranger School.<sup>96</sup> Emotions ran high as there were entrenched opinions on both sides of the discussion, and the Army had to become social media savvy in short order.<sup>97</sup> GEN Miller summed up his very direct approach to this problem when he stated, "Just make sure you stay with the



Taking care of Army families involved in the investigations needs to be a priority. The Guillen Family comfort each other after the unveiling of the SPC Vanessa Guillen gate at Fort Hood, Texas, on 19 April 2021. (Credit: SGT Melissa N. Lessard)

facts. Don't let a fact-free environment stay out there. There was a lot of misinformation out there . . . You can ignore it[,] but conspiracy theories build up fast[,] and you need to address them early."<sup>98</sup> General Miller also brought in the media to report on the facts firsthand, which contributed to accurate, fact-based reporting. Judge advocates should incorporate GEN Miller's guidance as they collaborate with PAO to develop strategies for dealing with the public and the media during high-profile investigations.

There are three basic components that JAs must include in their local PAG playbook. First, JAs should have a plan outlining the nature and extent of PAO collaboration and support during high-profile investigations. This plan should be the baseline for support, but it should, at a minimum, include personnel support and outline the nature and extent of legal advice rendered to the commander during high-profile investigations. Second, the OSJA must have a PA training plan that

includes training on key legal issues and training with the local PAO on Army PA policy and regulations. Third, the plan should include a strategy for engaging with the public and the media during high-profile investigations. This strategy should also incorporate basic crisis management techniques. For the purposes of developing the PAG in this context, it is helpful to think of high-profile investigations as crisis communications events. Army regulations define crisis communications as those communications in response to sudden, unpredictable incidents or situations that "develop rapidly, have the ability to affect long-term public opinion and trust in an organization, and have the potential to create conditions of . . . military importance."<sup>99</sup>

### Collaboration with the PAO and Legal Support During High-Profile Investigations

The commander of a military organization is ultimately responsible for crisis communication.<sup>100</sup> Public affairs officers at all levels serve as the principal communica-



## **When an SJA is first alerted to the possibility that a high-profile investigation may become a crisis communications event, they should immediately assign a JA to provide direct legal support to the command PAO.**

tion advisors to command teams, advising commanders on all communication and PA requirements across all mission phases and domains.<sup>101</sup> Consequently, the PAO is primarily responsible for advising the commander regarding communications and PA requirements during high-profile investigations.

Nonetheless, the PAO does not have the requisite legal training to navigate the complexities of how PA can implicate the Privacy Act, UCI concerns, or the accused's right to a fair trial if the command ultimately prosecutes the accused. Judge advocates are of particular importance to the command and the command PAO in these areas. Building the PR team is the essential first step in preparing to deal with the public and the media during high-profile investigations.

### *Build the Team*

When an SJA is first alerted to the possibility that a high-profile investigation may become a crisis communications event, they should immediately assign a JA to provide direct legal support to the command PAO. This concept of personnel support to the PAO is not without precedent in the Army or in the Department of Justice (DOJ). Army Regulation 27-10, Appendix L-5, contains guidance for the appropriate composition of a capital litigation team, and it contains a PA representative.<sup>102</sup> The regulation further advises that the command should relieve the capital litigation public affairs representative of other duties to the maximum extent practicable.<sup>103</sup> When a high-profile investigation reaches the point when it becomes a crisis communication event, the command should treat it as complex as a capital case, at least in terms of PA and media relations.

The Justice Manual for the DOJ outlines guidance for media coordination when a federal case garners interest from the news media. The DOJ's Media Contacts Policy states that "[e]ach United States

Attorney's Office and DOJ component field office shall designate at least one person to act as a point of contact on matters pertaining to the media."<sup>104</sup> Even in the DOJ, where the primary mission is to prosecute cases, there is still a recognition that engaging with the media can become a full-time job and should require special emphasis.

Assigned PA representatives for high-profile investigations must, as their number one priority, immediately begin coordinating and information sharing with the PAO. Public affairs officials must seek out experts and either support those experts in their efforts to brief the media in support of media queries or request information and training to adequately fill that role.<sup>105</sup> Put another way, when handling military justice (MJ) matters, the JA must either be prepared to brief the media directly<sup>106</sup> or bring the PAO up to speed. A good example of the type of information sharing required when the PAO takes the lead is to educate the PAO on basic MJ terminology and processes so that the PAO is capable of fielding general inquiries about the process. The JA PA representative would then work in close consultation on all future inquiries to assist the PAO with more legally complex issues. Which type of PAO support that PA representatives provide is a case-specific determination made by their SJA.

The SJA should, if mission requirements allow and to the greatest extent practicable, assign a JA with experience in FOIA, the Privacy Act, MJ, and special victim support as the public affairs representative. Assigning the right JA is critical and SJAs should take care to ensure that the PA representative has the requisite maturity and overall experience to handle this mission. At a minimum, the JA should understand special victims support programs including, at a minimum, victim witness liaison (VWL) and special victims' counsel (SVC) services.<sup>107</sup> As the supervisory JA for

the command, the choice regarding what JA to assign this critical role is within the SJA's sole discretion and purview.<sup>108</sup>

This PA representative will work in close coordination with the trial team and will likewise be constrained by the rules of professional conduct for lawyers.<sup>109</sup> The key difference between assigning the PA representative as a primary duty versus an additional duty to the trial counsel is the amount of time dedicated to this essential mission. The SJA must make this critical personnel decision as soon as he or she becomes aware of the possibility that a high-profile investigation may become a crisis communications event. Managing personnel within an OSJA presents many difficult choices and there is no "good time" to face this type of decision. However, this personnel decision can become less difficult if the SJA makes it immediately and aligns it with reporting requirements to the Office of the Judge Advocate General (OTJAG), Criminal Law Division (CLD).

### *Coordinate with Higher*

Army Regulation 27-10 mandates that the SJA coordinate with OTJAG, CLD, prior to making any decision pertaining to interviews or responses to the news media.<sup>110</sup> Forming the PA team does not directly implicate this reporting requirement, because if the SJA is addressing this matter in a timely manner, it should be done before media inquiries. However, the best practice here is to notify CLD at the earliest opportunity because that enables TJAG to track the high-profile case and potentially lean forward on critical decisions that may present themselves later in the process. Thus, to facilitate this forward-leaning strategy, SJAs should notify either TJAG or his executive officer (XO) in addition to the requirements outlined in AR 27-10.

An added benefit of early reporting is that the SJA can potentially tap into the resources of the Army JAG Corps by also coordinating with OTJAG, Personnel, Plans, and Training Office (PPTO)<sup>111</sup> and the Trial Counsel Assistance Program (TCAP).<sup>112</sup> If the SJA is struggling to resource the PA team internally, he or she can leverage PPTO to potentially resource the requirement external to the OSJA.<sup>113</sup> Whether PPTO can assist with external resources is

a case-specific determination. Additionally, if PPTO cannot assist, TCAP may be able to resource this critical personnel requirement with either training assistance or direct litigation support. Early reporting and prior coordination will put the SJA in the best possible position to receive this level of support. As with most military missions, prior planning and early reporting will place the OSJA in the best posture to receive external personnel support and to implement training programs that prepare personnel for this unique mission.

### **Training the OSJA Public Relations Team**

The SJA is responsible for ensuring that all legal personnel under his or her supervisory chain are adequately trained to accomplish the legal mission.<sup>114</sup> This is done through formal schooling and local training.<sup>115</sup> The local training mission for MJ matters is typically delegated to the chief of MJ (COJ). It is critical that COJs develop a MJ training plan that nests within the SJA's larger PA training initiative. This PA training should have three distinct training objectives.

#### *Training Focused on How Statements Can Impact the Legal Process*

The first training objective should focus on the ways that statements made by the commander and JAs impact high-profile investigations and courts-martial. This training should contain three classes. The first class should cover UCI. The second should cover the rules of professional conduct for lawyers. The final class should cover the accused's right to a fair trial. These three classes should build off each other to work in concert to accomplish the first training objective.

It is critically important for JAs advising on PA during high-profile investigations to possess a comprehensive understanding of UCI as it pertains to pretrial publicity and the accused's right to a fair trial. The first training objective must contain a thorough analysis of UCI case law and focus on the 2019 amendments to Article 37, UCMJ, particularly the requirement to demonstrate actual prejudice.<sup>116</sup>

Judge advocates must also have a firm grasp of the rules of professional conduct for lawyers. This second class should emphasize Rule 3.6 and Rule 3.8, since those rules

cover a JA's duty as it relates to extrajudicial statements.<sup>117</sup> While the investigative phase of the case may not implicate these rules, it is important to plan for the possibility that an investigation may evolve into a court-martial. In those circumstances, your JAs will be prepared to support the PAO during the trial. A high-profile investigation may quickly become a high-profile court-martial.

#### *Training Focused on Public Affairs During Investigations*

The second training objective should include cross-section training with the command PAO as the lead. This training objective should focus on PA, which as noted above, is defined as any communication activity with internal or external audiences.<sup>118</sup> For these training purposes, the PA training should emphasize communications strategies that are related to high-profile investigations.

Command PAOs receive specialized training through the Defense Information School and are primarily responsible for the public affairs mission.<sup>119</sup> Furthermore, the PAO is responsible for PA training for commanders and other members of the command, including JAs.<sup>120</sup> This training should focus on principles of crisis management and the fundamentals of PA during crisis communications. This training should occur before a crisis communications event materializes in order to posture the PA team to quickly and confidently respond when needed. As with all Army training, this should be done in preparation for the mission, not after the mission is already underway.

#### *Training Focused on Victim Services and Taking Care of the Family*

The third training objective, with arguably the highest visibility, should focus on victim services and include cross training with the regional special victims counsel (SVC). The Regional SVC is likely the most up to date on changes in the law as it pertains to victim rights within the OSJA, so the OSJA should leverage them to the greatest extent possible. The training should also include the special victims' prosecutor (SVP). By leveraging these local subject matter experts, the OSJA can put together valuable training that provides

JAs with tips that they can incorporate into their practice immediately.

At a minimum, this training should focus on how the various stakeholders in the victim's services arena work collaboratively to care for victims and their Families. As an example, JAs train on what SHARP services are available and how unit victim advocates (VA) fit into the picture.<sup>121</sup> Additionally, JAs should train on what services the sexual assault response coordinator (SARC) and SVC provide and to whom they provide it.<sup>122</sup> The training should place special emphasis on how all these important players work together to care for victims. Lastly, JAs must understand what tools are available to commanders vis-à-vis victim care. A thorough understanding of expedited transfers,<sup>123</sup> command-issued protective orders,<sup>124</sup> safety reassignments,<sup>125</sup> and other command-initiated programs is vital to the success of the PA representative. With the PA team set and supporting JAs trained, the main effort shifts to advising on the development of a forward-leaning PA strategy.

#### **Developing Public Affairs Responses and Public Relations Strategies**

The media frenzy surrounding the disappearance and murder of SPC Vanessa Guillén and subsequent proliferation of misinformation on social media illustrates the importance of timely, compassionate, and effective PA during high-profile investigations. It is the earliest opportunity for commanders to positively impact public perceptions and discourse.

#### *Focus on the Investigative Process*

Any commentary or public statement pertaining to an ongoing criminal investigation is challenging because of sensitive law enforcement concerns. Army Regulation 360-1 acknowledges this fact and requires prior coordination with the United States Army Criminal Investigative Command (USACIC) before the public release of information about criminal investigations.<sup>126</sup> After prior coordination with USACIC, regulations still constrain the PAO and they generally cannot release information that would violate the Privacy Act or impede an ongoing investigation.<sup>127</sup> For example, during a pending murder investigation, CID may not want to share



Planning for a high-profile investigation must include a public affairs strategy. No public affairs strategy is complete if it does not include social media engagement. (Credit: Patrick Buffett)

the identity of a suspect with the command or the media for fear that the suspect might become aware of the investigation and subsequently change their behavior. As another example, CID may not want the names of cooperating witnesses to be released out of concern for the witnesses' safety. These witnesses would also have certain privacy rights and would generally be protected from having their names released.<sup>128</sup>

Other organizations struggle with the same considerations when faced with PA during criminal investigations. For example, the DOJ has a policy that, generally, the department will not confirm the existence of, or otherwise comment about, ongoing investigations.<sup>129</sup> Unless exceptions apply, DOJ personnel "shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress before charges are publicly filed."<sup>130</sup> These policies address many of the same concerns as various Army policies and regulations. However, there is one major distinction. The DOJ policy allows for an exception: when the community needs reassurance that "the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety, comments about or confirmation of an ongoing investigation may be necessary" and approved in accordance with their policy.<sup>131</sup>

Much like the DOJ exception, commanders need maneuver space to focus PA efforts on the investigative process and relationship building during the criminal investigation. It is essential that the commander communicate early and often that a thorough investigation is underway and that the commander is committed to supporting victims and their Families.<sup>132</sup> Focusing on the investigative process intentionally obscures the substantive details, but that does not mean that these efforts are ineffective. The command can highlight its commitment to justice and that the investigation will proceed without constraint.<sup>133</sup> The commander can further highlight that he or she is making every resource available to CID to bring a quick resolution to the investigation.

In the end, it is about messaging and getting out in front of the harmful narratives.

The command's public communications should also include substantive investigative efforts to the greatest extent possible when it would not prejudice the ongoing investigation.<sup>134</sup> Unfortunately, there is no definition for what it means to "prejudice an ongoing investigation" so that determination is largely up to CID during the investigative phase.<sup>135</sup> To ensure that the commander maintains a forward-leaning PA strategy during high-profile investigations, it is critical that the SJA coordinate with CID to determine what information is a sensitive law enforcement matter, the release of which would prejudice the investigation. Critically, the commander must view assertions that law enforcement information is not subject to release with a skeptical eye. If nothing more, this is a vital check on the system that requires collaborative analysis between investigators and JAs. The command's SJA must coordinate with the SJA for CID command to work with investigators in a collaborative and mutually benefi-

cial way. This coordination at the SJA level can serve the dual purpose of both helping the command develop a forward-leaning PA strategy while also safeguarding law enforcement equities. Maximizing the substance of command communications is important, but SJAs should take note that this effort will be largely wasted if not accompanied by strong relationship building throughout the investigative process.

#### *Build Relationships and Support the Family*

The first and most important step to relationship building is to make it a priority. Relationship building should not be an afterthought; it must be a primary line of effort. The most analogous situation to the type of relationship building that coordinating with the Family members of victims requires is found in the Army's Casualty Assistance Program. In casualty situations, one of the Army's key objectives is to keep the next of kin (NOK) informed of the status of "any ongoing investigations and assist with obtaining copies of final investigation reports."<sup>136</sup> The casualty assistance officer (CAO) assigned to the NOK must be "emotionally mature, courteous, helpful, and compassionate toward the NOK," as the CAO is responsible for reflecting the Army's concern for its Soldiers and their Families.<sup>137</sup> If the Army is to emulate this program and apply it to caring for Family members during high-profile investigations when a victim is missing, commanders should assign an assistance officer to help the Family manage the situation. This should occur in those investigations in which the victim is missing, as they would receive this support through various victim-focused services. The assistance officer must thoroughly understand victim services and criminal investigations before there is an incident.

The Army's Casualty Assistance Program embodies its commitment to relationship building and care for fallen Soldiers and their Families in the requirements for CAOs and their scope of duties.<sup>138</sup> This is the type of commitment that commanders must make to the Families of crime victims in high-profile investigations. Regardless of whether the commander has information that the victim is deceased or missing, the commander should nonetheless appoint an

assistance officer akin to the CAO to the Family to help them navigate the criminal investigative process. This will further demonstrate the commander's commitment to keeping the victim's Family fully informed and supported throughout the process. Importantly, the tone and tenor of the support offered to Family members is almost as important as the support itself. This PA strategy must have a human touch<sup>139</sup> because supporting the Family "is the mission" and the PA component is secondary.

#### *Timeliness of the Commander's Public Relations*

While actively supporting the Family, the commander should be simultaneously focused on the timeliness of public updates. The command needs to get out in front of misinformation and disinformation before false narratives take root in the public discourse surrounding the investigation. This is especially true of high-profile criminal investigations, which commanders should treat as a crisis communication event.<sup>140</sup> How the commander chooses to address these situations is critically important. Social media platforms are the fastest way to inform and educate the public regarding matters in emerging or breaking news.<sup>141</sup> Crisis communication surrounding a high-profile investigation must include social media operations that are integrated into the PA planning efforts.<sup>142</sup> A key consideration here is that social media managers must not post *details* about an ongoing investigation.<sup>143</sup> However, there are many ways to use social media in the context of high-profile investigations without posting details. Judge advocates must coordinate with the PAO to ensure that any PA strategy employing social media is done in accordance with Army regulations and policy.<sup>144</sup>

Ultimately, balancing how to use social media in conjunction with other PA strategies is a commander's decision made in consultation with his or her PAO. Understanding the reach of social media and incorporating its use into PA strategies requires more than being aware of the misinformation and disinformation. It requires active engagement. Leveraging a forward-thinking PA strategy is critical to shaping the narrative and addressing misinformation and disinformation, and com-

manders should be empowered to engage in the information space in a proactive way.

## **Conclusion**

The ubiquity of social media has fundamentally changed the way that the American people communicate and receive information.<sup>145</sup> Leaders must develop PA strategies to account for this fact. Failure to do so cedes the information space to uninformed individuals and advocates who fill that void with misinformation and disinformation. These social media campaigns are detrimental to the Army's interests and to commanders' ability to maintain good order and discipline. The Army's most recent and notorious example of this hard truth took place at Fort Hood. The failure to develop a timely communications strategy in the wake of the disappearance and murder of SPC Vanessa Guillén resulted in the loss of trust and confidence in Fort Hood and the Army.<sup>146</sup>

The Army must adapt and update its approach to PA in high-profile investigations to bolster the American public's confidence in commanders' ability to promote and maintain good order and discipline in the Army. Staff judge advocates must understand the legal fundamentals that protect the rights of the accused and the integrity of criminal investigations. However, we must not be so conservative as legal advisors that we hamper the commander's maneuver space to stop disinformation and correct misinformation. **TAL**

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## **Notes**

1. GENERAL JOHN M. MURRAY, ARMY REGULATION (AR) 15-6 INVESTIGATION – FORT HOOD'S COMMAND INVOLVEMENT IN, AND RESPONSE TO, THE DISAPPEARANCE AND DEATH OF SPC VANESSA GUILLÉN AND OTHER SPECIFIC TOPIC AREAS 4 (5 Mar. 2021) [hereinafter GENERAL MURRAY AR 15-6 INVESTIGATION].

2. *See id.*

3. *Id.* at 1.

4. *Id.* at 4.
5. See INDEP. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 20* (July 2, 2021) [hereinafter IRC REPORT] (finding that trust between victim service members and their commanders is broken because junior enlisted personnel interviewed do not trust their commanders to do justice in sexual harassment and sexual assault cases across the services).
6. *Disinformation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/disinformation> (last visited Nov. 21, 2022). See JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, PUBLIC AFFAIRS, at III-3 (19 Aug. 2016) [hereinafter JOINT PUB. 3-61] (describing disinformation as analogous to propaganda and explaining that accurate and timely public information is an effective counter).
7. *Misinformation*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/misinformation> (last visited Nov. 21, 2022). See JOINT PUB. 3-61, *supra* note 6, at F-11 (explaining that a method to counter misinformation is to correct it, implying that the term is used when misleading information is propagated).
8. The Army defines “public affairs” as any communication activity with internal or external audiences. See U.S. DEP’T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 2-2(e)(1) (8 Oct. 2020).
9. U.S. DEP’T OF ARMY, PUB. 5-19, RISK MANAGEMENT para. 1-38 (8 Sept. 2014) [hereinafter DA PUB. 5-19]. The Army defines catastrophic in the risk management context as severity that occurs when “consequences of an event, if it occurs, are expected to include death, unacceptable loss or damage, mission failure, or the loss of unit readiness.” *Id.*
10. *Id.* para. 1-7 tbl.1-1. The risk assessment matrix in Table 1-1 is comprised of a vertical and horizontal axes, with the probability of the risk running along the horizontal axis and the severity or expected consequence running along the vertical axis. The level matrix provides a risk level where the probability intersects with the severity or expected outcome.
11. *Id.* paras. 1-6 to 1-7.
12. See *id.* para. 1-7 tbl.1-1.
13. See GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1, at 194. General Murray found by a preponderance of the evidence that social media presented a huge challenge for the command at Fort Hood. He further found that social media filled a void in command messaging that allowed a negative narrative about Fort Hood and the U.S. Army.
14. See FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE 84 (Nov. 6, 2020) [hereinafter FHIRC REPORT]. The committee found that from the time of SPC Guillén’s disappearance on 22 April 2020, through the remainder of the spring and summer months, the Fort Hood PAO found itself unable to adequately inform the public and pragmatically inform public perception. The facts became largely irrelevant as a groundswell of support for false theories and poorly informed accusations took root through social media outlets. *Id.*
15. *Telling the Army Story*, ARMY PUB. AFF., <https://www.army.mil/publicAffairs/> (last visited Nov. 21, 2022).
16. FHIRC REPORT, *supra* note 14, at 83 (quoting *The United States Army*, ARMY PUB. AFF., <https://www.army.mil/publicAffairs/>).
17. See OFF. OF THE JUDGE ADVOC. GEN., U.S. ARMY, JUDGE ADVOCATE LEGAL SERVICE PUBLICATION 1-1, PERSONNEL POLICIES 33 (June 2020) [hereinafter PUB. 1-1] (outlining the scope of the SJA’s responsibilities as the senior legal advisor to the command).
18. See GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1, at 183. General Murray recommends changes to Army Command Policy that “holds commanders accountable for protecting the reputation of their units and the Army by actively engaging the public through timely and accurate information-sharing while maintaining security and privacy.” *Id.* at 196 (emphasis added).
19. See *id.* at 194.
20. See, e.g., FHIRC REPORT, *supra* note 14, at 82.
21. See GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1, at 4.
22. General Robert B. Abrams, *Social Media; Senior Leaders Need to Get on the Bus*, THE GREEN NOTEBOOK (Oct. 8, 2019), <https://fromthegreennotebook.com/2019/10/08/social-media-senior-leaders-need-to-get-on-the-bus>.
23. See Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Proceedings, Information, and Participants in Military Criminal Cases*, 163 MIL. L. REV. 1, 5 (2000). Judge Lind opines that the services understand that the days of “no comment” are gone due to recent media scrutiny in military justice cases. *Id.* See also JOINT PUB. 3-61, *supra* note 6, at I-4 (describing the complexity of the current media landscape).
24. See, e.g., *Friends, Family of Missing Soldier Vanessa Guillen Gather Outside Fort Hood Hoping for Answers*, FOX NEWS (June 12, 2020), <https://www.fox7austin.com/news/friends-family-of-missing-soldier-vanessa-guillen-gather-outside-fort-hood-hoping-for-answers>.
25. See, e.g., *Update on Missing Ft. Hood Soldier Vanessa Guillen – 6/23/2020*, FOX NEWS (June 23, 2020), <https://www.fox7austin.com/video/699283>. During a 23 June press conference, a U.S. Representative, speaking on behalf of the Guillén Family, made several references to someone important giving her information and that, in her view, this source confirmed that the Army was lying and trying to cover something up.
26. See, e.g., Nat’l Def. Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531-539C, 135 Stat. 1541, 1692-99 (2021) [hereinafter NDAA 2022] (changing how charges are referred to trial by court-martial for covered offenses by removing commanders from the process and vesting that authority in JAs).
27. On the official website of Senator Kirsten Gillibrand, her office outlines that she first introduced the Military Justice Improvement Act in May 2013. See *Gillibrand Statement on Inclusion of Military Justice Improvement and Increasing Prevention Act in NDAA*, KIRSTEN GILLIBRAND U. S. SEN. FOR N.Y. (July 22, 2021), <https://www.gillibrand.senate.gov/news/press/release/gillibrand-statement-on-inclusion-of-military-justice-improvement-and-increasing-prevention-act-in-ndaa>.
28. On the official website for Congresswoman Jackie Speier, her office outlines a bipartisan bill named after Specialist Vanessa Guillén that would strip from commanders the decision to refer certain charges to trial by court-martial. *Speier, Turner Introduce Bipartisan Vanessa Guillén Military Justice Improvement and Increasing Prevention Act to Remove Sexual Assault Prosecution Decisions from the Chain of Command*, CONGRESSWOMAN JACKIE SPEIER (June 23, 2021), <https://speier.house.gov/press-releases?ID=27875DF4-BA18-4608-BEDF-364B34F2FDC8>.
29. See, e.g., *LULAC Launches #La Quiero Viva Campaign for Missing Latina Soldier Vanessa Guillén*, LEAGUE OF UNITED LATIN AMERICAN CITIZENS (June 28, 2020), [https://lulac.org/news/pr/LULAC\\_Launches\\_La\\_Quiero\\_Viva\\_Campaign\\_For\\_Missing\\_Latino\\_Soldier\\_Vanessa\\_Guillen](https://lulac.org/news/pr/LULAC_Launches_La_Quiero_Viva_Campaign_For_Missing_Latino_Soldier_Vanessa_Guillen).
30. See Melanie Lawson (@MelanieLawson13), TWITTER (July 3, 2020, 5:19 PM), <https://twitter.com/MelanieLawson13/status/127916277735749632> (tweeting “LULAC president urges Latinas not to enlist in the military after Vanessa Guillen’s disappearance” and linking the corresponding LULAC article with an image of SPC Vanessa Guillen on the cover).
31. See, e.g., Haley Britzky, *The Army Vowed Change After Vanessa Guillén’s Murder. One year later, it’s Just Getting Started*, TASK & PURPOSE (Apr. 22, 2021, 10:49 AM), <https://taskandpurpose.com/news/murder-of-vanessa-guillen>. Advocates for change in the wake of SPC Vanessa Guillén’s murder focus their efforts on political change.
32. See, e.g., ABC13 Houston (@abc13houston), TWITTER (July 3, 2020, 4:56 PM) <https://twitter.com/abc13houston/status/1279157194236268545> (tweeting “LULAC president urges Latinas not to enlist in the military after Vanessa Guillen’s disappearance” and linking the corresponding LULAC article with an image of SPC Vanessa Guillen on the cover).
33. See generally GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1 (discussing the blanket news coverage of SPC Vanessa Guillén’s disappearance and murder). See also FHIRC REPORT, *supra* note 14, at 86 (discussing the extensive news reporting around Vanessa Guillén’s case).
34. See, e.g., Rebecca Lopez, *LULAC President Urges Latinas not to Join the Military After the Disappearance of Vanessa Guillén*, KENS5 (June 29, 2020, 7:23 PM), [https://lulac.org/news/in\\_the\\_news/lulac\\_president\\_urges\\_latinas\\_not\\_to\\_join\\_the\\_military\\_after\\_the\\_disappearance\\_of\\_vanessa\\_guillen](https://lulac.org/news/in_the_news/lulac_president_urges_latinas_not_to_join_the_military_after_the_disappearance_of_vanessa_guillen) [hereinafter LULAC Press Release].
35. See FHIRC REPORT, *supra* note 14, at 189 (explaining that the truth about SPC Vanessa Guillén’s case was overshadowed by gross speculation, viral storytelling and false narratives).
36. See FHIRC REPORT, *supra* note 14, at 188.
37. See, e.g., FHIRC REPORT, *supra* note 14, at 4.
38. See Privacy Act of 1974, 5 U.S.C. § 552a(b) (2019) [hereinafter Privacy Act] (“No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.”). See also U.S. DEP’T OF ARMY, REG. 25-22, THE ARMY PRIVACY PROGRAM para 7-1 (22 Dec. 2016).
39. Freedom of Information Act, 5 U.S.C. § 552 (2016).
40. *United States v. Simpson*, 58 M.J. 368, 374-75 (C.A.A.F. 2004).
41. See *id.* at 375-76.
42. *Extrajudicial*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/extrajudicial> (last visited Nov. 21, 2022).
43. *Simpson*, 58 M.J. at 372 (stating that the doctrine of unfair pretrial publicity is based upon the constitutional right to due process under the Fifth Amendment of the U.S. Constitution).

44. See, e.g., *Major Golsteyn's First TV Interview Since Being Charged in the Death of a Suspected Taliban Bomb Maker*, FOX NEWS (Feb. 10, 2019), <https://video.fox-news.com/v/6000490779001#sp=show-clips>. During a televised interview, Major Golsteyn makes certain allegations of unlawful pretrial punishment, and the Army issued no comment.
45. See, e.g., Dan Lamothe, *Matt Golsteyn Planned to Join the CIA and Go to Iraq. Now He Faces a Murder Charge*, WASH. POST (Feb. 9, 2019, 12:06 PM), [https://www.washingtonpost.com/world/national-security/they-do-not-obey-their-own-rules-soldier-facing-murder-case-says-he-must-defend-himself-against-the-army/2019/02/09/a4c5b2-2ba1-11e9-97b3-ae59fbae7960\\_story.html](https://www.washingtonpost.com/world/national-security/they-do-not-obey-their-own-rules-soldier-facing-murder-case-says-he-must-defend-himself-against-the-army/2019/02/09/a4c5b2-2ba1-11e9-97b3-ae59fbae7960_story.html). The article quotes Army spokesman Lieutenant Colonel Loren Bymer, who stated, "As an active law enforcement matter, the U.S. Army cannot comment on or release information related to the case."
46. 5 U.S.C. § 552a(b) (2019).
47. See *id.* at § 552a(b)(2).
48. See *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1189 (11th Cir. 2007) ("The net effect of the interaction between the two statutes is that where the FOIA requires disclosure, the Privacy Act will not stand in its way, but where the FOIA would permit withholding under an exemption, the Privacy Act makes such withholding mandatory upon the agency.").
49. See *id.*
50. *U.S. Dep't of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989). "[W]hether disclosure of a private document under Exemption 7(c) is warranted must turn on the nature of the requested document and its relationship to 'the basic purpose of the [FOIA] to open agency action to the light of public scrutiny.'" *Id.* at 772 (citation omitted).
51. *Id.* at 772.
52. See *id.* at 780. ("[A] third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted.'").
53. See *Dep't of the Air Force v. Rose*, 425 U.S. 352, 371-72 (1975).
54. *Id.* at 382.
55. See U.S. DEP'T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE para. 34.2.1 (14 Apr. 2022) [hereinafter AFI 51-201].
56. *Id.* para. 34.2.1.1.
57. See *Cochran v. United States*, 770 F.2d 949, 959 (11th Cir. 1985).
58. One should note that at the disposition phase of an investigation, meaningful engagement with the media remains important, but the purpose of this article is to inform the SJA during the investigation phase. For information regarding privacy interests after disposition, see Memorandum from The Judge Advoc. Gen., U.S. Army, to Judge Advoc. Legal Servs. Pers., subject: Policy Memorandum 22-04 – Protecting Personal Privacy and Communication with the Media (1 Mar. 2022).
59. *Cochran*, 770 F.2d 949, 959 (11th Cir. 1985).
60. *Id.*
61. See *Schmidt v. U.S. Air Force*, No. 06-CV-3069, 2007 U.S. Dist. LEXIS 69584, at \*31-32 (D. Ill. Sept. 20, 2007) (holding that although Major Schmidt had a legitimate privacy interest in keeping his disciplinary records confidential, the competing public interest in disclosure clearly outweighed said interest).
62. See, e.g., text accompanying notes 76-79.
63. *United States v. Simpson*, 58 M.J. 368, 374-75 (C.A.A.F. 2004).
64. *United States v. Ayala*, 43 M.J. 296, 299 (C.A.A.F. 1995).
65. *Id.* at 300 (citing *United States v. Cruz*, 20 M.J. 873, 886 (A.C.M.R. 1985)).
66. 10 U.S.C. § 837(c) (2000) ("No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.").
67. *United States v. Biagase*, 50 M.J. 143, 151 (C.A.A.F. 1999).
68. *United States v. Simpson*, 55 M.J. 674, 685 (A. Ct. Crim. App. 2001).
69. 10 U.S.C. § 837(c).
70. See *United States v. Simpson*, 58 M.J. 368, 375-76 (C.A.A.F. 2004).
71. *Id.* at 374.
72. *Id.*
73. See *id.*
74. The "Marines United case" was an investigation into a group of active duty and retired Marines who were members of a closed Facebook page with over 30,000 members. A smaller number of those members shared nude photographs of female Marines and other women. Certain members also made threats of physical violence against the whistle blower who reported this group to Marine leadership. A criminal investigation ensued, which resulted in disciplinary action for certain perpetrators. See Andrew deGrandpre & Jeff Schogol, *A Nude Photo Scandal Has Shaken the Entire Marine Corps*, MARINE CORPS TIMES (Mar. 5, 2017, 2:45 AM), <https://www.marinecorpstimes.com/news/your-marine-corps/2017/03/05/a-nude-photo-scandal-has-shaken-the-entire-marine-corps>.
75. *Id.* See also Shawn Snow, *Seven Marines Court-Martialed in Wake of Marines United Scandal*, MARINE CORPS TIMES (Mar. 1, 2018), <https://www.marinecorpstimes.com/news/your-marine-corps/2018/03/01/seven-marines-court-martialed-in-wake-of-marines-united-scandal>.
76. Snow, *supra* note 71.
77. Snow, *supra* note 71.
78. See Thomas J. Brennan, *An Attack From Within: Male Marines Ambush Women in Uniform*, THE WAR HORSE (Mar. 4, 2017), <https://thewarhorse.org/an-attack-from-within-male-marines-ambush-women-in-uniform>.
79. See Snow, *supra* note 71.
80. *Army: Soldier Says She Was Sexually Assaulted at Fort Sill*, AP NEWS (Apr. 4, 2021), <https://apnews.com/article/us-news-army-oklahoma-sexual-assault-lawton-ec74544781e627a640b7470661264f31>.
81. *Id.*
82. Steve Beynon, *Fort Sill Army Trainers Suspended Amid Allegations of Trainee's Sexual Assault*, MILITARY.COM (Apr. 2, 2021), <https://www.military.com/daily-news/2021/04/02/fort-sill-army-trainers-suspended-amid-allegations-of-trainees-sexual-assault.html>.
83. *Id.*
84. See *United States v. Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2004) (detailing the source of the doctrine of unfair pretrial publicity as it pertains to criminal trials).
85. See *United States v. Curtis*, 44 M.J. 106, 139 (C.A.A.F. 1996) (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554, (1976)) (outlining the standard that the accused must prove to established presumed prejudice of pretrial publicity).
86. See *id.* at 139 (citing *Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991)).
87. *United States v. Simpson*, 58 M.J. 368, 372 (C.A.A.F. 2004).
88. Jay Apperson & Scott Shane, *Who is Sgt. Delmar G. Simpson? Conflicting Accounts of a Man at the Center of the Aberdeen Storm*, THE BALTIMORE SUN (Nov. 29, 1996, 12:00AM), <https://www.baltimoresun.com/news/bs-xpm-1996-11-29-1996334006-story.html>.
89. See generally *Three Soldiers Arraigned in U.S. Army Sex Scandal*, CNN (Dec. 6, 1996), <http://www.cnn.com/US/9612/06/aberdeen.arraign/index.html>. Reporting labeled the Aberdeen sex scandal the Army's biggest sex abuse scandal on record. The U.S. Army recalled a retired Army major general to active duty in order to head a military-civilian panel tasked with looking into allegations of sexual abuse in the military. *Id.*
90. See *United States v. Simpson*, 55 M.J. 674, 679-82 (A. Ct. Crim. App. 2001) (detailing the nationwide media blitz that surrounded the investigation and subsequent court-martial); *Simpson*, 58 M.J. at 372 (reviewing the lower court's assessment of the "nationwide media blitz").
91. *Simpson*, 58 M.J. at 373.
92. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-67a (20 Nov. 2020) [hereinafter AR 27-10 (2020)] (outlining that those responsible for administering military justice and those providing information to the public pertaining to military justice must "strike a fair balance among the following: protection of individuals accused of offenses, the presumption of innocence until guilt is proven, public understanding and transparency of the military justice system, and the state of discipline in the military").
93. See U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 1-6a (8 Oct. 2020) [hereinafter AR 360-1] ("The U.S. Army is required, according to DoDI 5400.13, to communicate with its members, the U.S. public, and international publics. The proactive release of accurate information puts U.S. military operations in context, facilitates informed perceptions about military operations, counters misinformation and disinformation, reinforces public support to Army Title 10, United States Code (10 USC) responsibilities, and helps achieve national, strategic, operational, and tactical objectives.").
94. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-61, COMMUNICATION STRATEGY AND PUBLIC AFFAIRS OPERATIONS para. 1-1 (25 Feb. 2022) [hereinafter FM 3-61] (setting forth the communication strategy for the Army and the intended goal of "establish[ing] conditions that lead to trust and confidence in the Army and its readiness to conduct multi-domain operations, deter competitors, and defeat adversaries").
95. AR 360-1, *supra* note 93, para. 1-6a.

96. Chuck Williams, *Part 4: Social Media Uproar Became a Concern During Ranger School Gender Integration in 2015*, WBL.COM (Sept. 1, 2020, 4:52AM), <https://www.wrbl.com/news/military/fighting-for-the-tab/part-4-social-media-uproar-became-a-concern-during-ranger-school-gender-integration-in-2015>.
97. *Id.*
98. *Id.*
99. U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 7-3 (8 Oct. 2020).
100. *Id.*
101. *Id.* para. 1-6e.
102. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. L-5b (20 Nov. 2020) (outlining the recommended composition of capital litigation team to the SJA but emphasizing that a case-specific determination should be conducted and resourced individually).
103. See *id.* (suggesting that all members designated to a capital litigation team be relieved from other duties).
104. See U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-7.200 (Apr. 2018) [hereinafter JUSTICE MANUAL] (This Department of Justice policy acknowledges the importance of a single point of contact within each field office for matters pertaining to the media.)
105. See AR 360-1, *supra* note 93, para. 6-3 ("PAOs will seek out experts to brief the media in support of media queries or request for further information."). Legal expertise or expertise on court-martial procedure clearly fall within this provision.
106. Note that directly briefing media requires coordination with OTJAG-CLD. See discussion *infra* "Coordinate with Higher" Section.
107. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013) (establishing the special victim counsel under the Legal Assistance program authority).
108. See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-11a(2) (24 Jan. 2017) [hereinafter AR 27-1] (defining the term supervisory judge advocates, which in most cases is the SJA, who has the "authority over, or responsibility for, the direction, coordination, evaluation, or assignment of responsibilities and work of subordinate lawyers, paralegals and other non-lawyer assistants").
109. See U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 3.6(a) (28 June 2018) [hereinafter AR 27-26] ("A lawyer who is participating or has participated in the investigation or litigation of a matter, to include adverse administrative or disciplinary proceedings, shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter or an official review process thereof."); *id.* at app. B, r. 3.8(f) ("A Trial Counsel in a criminal case shall: . . . except for statements that are necessary to inform the public of the nature and extent of the Trial Counsel's actions and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the Trial Counsel in a criminal case from making an extrajudicial statement that the Trial Counsel would be prohibited from making under Rule 3.6 or this Rule.").
110. See AR 27-10, *supra* note 103, para. 5-67(b)(5) (specifically requiring coordination with OTJAG-CLD prior to conducting interviews with, or giving response to, the news media).
111. AR 27-1, *supra* note 108, para. 2-8 (establishing that the Chief, PPTO, will act pursuant to authority delegated by TJAG to manage and direct the JAGC).
112. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2 (20 Nov. 2020) ("TCAP's mission is to provide assistance, resources, and support for the prosecution function throughout the Army and to serve as a source of resolution of problems encountered by trial counsel."). See also *id.* para. 21-5b ("TCAP counsel and GAD counsel are available for on-site assistance in unique or difficult cases. SJAs may request such assistance through the Chief, TCAP; the Chief, GAD; and the Assistant Judge Advocate General for Military Law and Operations.").
113. See *id.* para. 28-6a ("Prosecution support. SJAs will ensure that prosecution teams are resourced. The SJA will use internal resources to the maximum extent practicable. For additional personnel support, the SJA may coordinate with PPTO and TCAP."). See also AR 27-1, *supra* note 104, para. 2-8.
114. See AR 27-1, *supra* note 108, para. 2-11c (establishing that supervisory judge advocates must ensure that legal personnel are adequately trained to accomplish the legal mission, including through local training and attendance at TJAGLCS courses).
115. *Id.*
116. See 10 U.S.C. § 837(c) (2020).
117. See AR 27-26, *supra* note 109, app. B, r. 3.6(a), 3.8(f).
118. See U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 2-2e(1) (8 Oct. 2020).
119. See *id.* para. 1-10b.
120. See *id.* para. 2-2e(1)(d).
121. See U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 7-1 to 7-11 (24 July 2020) [hereinafter AR 600-20] (outlining the parameters for the Army SHARP program including, but not limited to, the scope, purpose, eligibility, program fundamentals, and other key aspects of the program).
122. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1701(a)(1), 127 Stat. 672, 952 (2013) (establishing the special victims' counsel under the Legal Assistance Program authority).
123. See U.S. DEP'T OF DEF. INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE: PROGRAM PROCEDURES vol. 1, encl. 5, para. 6 (28 Mar. 2013) (C7, 6 Sept. 2022) [hereinafter DoD 6495.02] (outlining the authority for an expedited transfer and when such a move is appropriate).
124. See *id.* (establishing a commander's authority to issue a military protective order). See also 10 U.S.C. § 806b(a)(1) (2019) (establishing a victim's right to be reasonably protected from an accused).
125. U.S. DEP'T OF ARMY, REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT para. 5-18d (25 Jan. 2019). See also U.S. DEP'T OF ARMY, REG. 614-100, OFFICER ASSIGNMENT POLICIES, DETAILS, AND TRANSFERS para. 5-8d (3 Dec. 2019).
126. U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 7-14 (8 Oct. 2020).
127. *Id.* para. 7-15.
128. See Privacy Act of 1974, 5 U.S.C. § 552a(b) (2019).
129. See U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-7.400(B) (Apr. 2018) (establishing the general rule that the DOJ does not comment on ongoing investigations).
130. *Id.*
131. *Id.* § 1-7.400(C) (outlining the situations when comment on an ongoing investigation may be necessary).
132. See GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1, at 4 (finding that senior leaders at Fort Hood failed to communicate with the family, the public, and key stakeholders during the disappearance of SPC Vanessa Guillén resulting in a loss of trust in the command and the Army).
133. See Beynon, *supra* note 82 (discussing how MG Ken Kamper leaned forward with a proactive press release regarding allegations of sexual assault by Fort Sill cadre despite the ongoing nature of the criminal investigation).
134. See U.S. DEP'T OF ARMY, REG. 360-1, THE ARMY PUBLIC AFFAIRS PROGRAM para. 7-15 (8 Oct. 2020) (establishing the requirement that PAOs coordinate with law enforcement prior to the release of information, but not prohibiting the release of information outright).
135. See *id.* The Army Public Affairs Program does not define what prejudice of an ongoing investigation is or factors to assess that concept. The PAO must closely coordinate with the OSJA and CID to navigate this rule.
136. See U.S. DEP'T OF ARMY, REG. 638-8, ARMY CASUALTY PROGRAM, para. 5-1f (7 June 2019) [hereinafter AR 638-8] (establishing key objectives of the Army Casualty Program).
137. *Id.* para. 5-3 (establishing the general parameters for the selection of Army casualty assistance officers including, but not limited to, their training, their temperament, leader characteristics, etc.).
138. See *id.* para. 5-8.
139. See FHRC REPORT, *supra* note 14, at 84 (citing the lack of human touch in Fort Hood's PAO response to the disappearance and murder of SPC Vanessa Guillén, as well as the negative consequences to the trust in, and reputation of, the command and the U.S. Army).
140. See AR 360-1, *supra* note 134, para. 7-3 (defining crisis communication).
141. See AR 360-1, *supra* note 134, para. 8-5 (providing basic guidance regarding how to integrate social media responses into the command PA strategy during a crisis communication event).
142. *Id.*
143. See *id.* para. 8-3g(8). The Army Public Affairs Program does not define the term "details" in the context of social media posts pertaining to criminal investigations.
144. See *id.* para. 2-5m. The PAO is the commander's web and social media content manager, so any PA strategy to leverage social media must involve extensive coordination with the PAO.
145. See JOINT PUB. 3-61, *supra* note 6, at I-4 (commenting on the complexity of the communications landscape).
146. See GENERAL MURRAY AR 15-6 INVESTIGATION, *supra* note 1, at 4.

## **Appendix. One-Page Guide to Public Affairs Legal Advice During High-Profile Investigations**

It is critical for SJAs to develop a plan regarding how to advise commanders and PAOs before a high-profile case garners public interest. Furthermore, SJAs should develop forward-thinking strategies that **create maneuver space** for the commander to engage with the public.

1. **Guiding Principles:** SJAs must advise commanders to **“stick to the facts.”** Sound communications strategies are rooted in strong foundational concepts:
  - a. Army representatives must always convey empathy, use plain language, and never forget to engage in person.
  - b. Do not allow a fact-free environment to persist; use social media and other communications strategies to inform the public of the facts in a timely manner.
  - c. Overly conservative legal advice is not an option in the age of social media.
2. **Build the legal team** that will support PA efforts. Select a JA from within the OSJA who can serve as a designated public affairs representative with the following experience:
  - a. Experience working with FOIA and the Privacy Act;
  - b. At least one assignment in a military justice billet; and
  - c. Experience working with special victim support, either in military justice or as SVC.
3. **Institute a local training program** designed to address the following areas of practice:
  - a. How extrajudicial statements can impact the investigative and court-martial process. This should cover UCI case law, the 2019 amendments to Article 37, UCMJ, and Rules 3.6 and 3.8 of AR 27-1, Rules of Professional Conduct for Lawyers.
  - b. Local training with the command PAO regarding the fundamentals of public affairs communications strategies during crisis communications events.
  - c. Training focused on victim services and taking care of the Family.
4. **Develop forward-leaning PA strategies** that incorporate the following principles:
  - a. Focus on the investigative process by educating the public about the Army’s complex processes and being as transparent as the law allows. Judge advocates can be particularly helpful engaging with law enforcement to determine what information can be released and when.
  - b. Build relationships and care for the Family, always!
  - c. Command updates must be timely! The command needs to get out in front of misinformation and disinformation before false narratives are rooted in the public discourse surrounding a high-profile investigation.





(Credit: EtiAmmos – stock.adobe.com)

# Closing Argument

## Professional Responsibility

The Means and Methods of Achieving the Ethical, Moral, and Legal High Ground in the JAG Corps

By Colonel Thomas Schiffer & Mr. William “Rick” Martin

*No one is coming, it's up to us.<sup>1</sup>*

**The Judge Advocate General's (JAG) Corps and Judge Advocate Legal Services,<sup>2</sup>** like many professional legal

organizations, is self-regulating. Through the Rules of Professional Conduct for Lawyers contained in Army Regulation

(AR) 27-26 and the procedures outlined in AR 27-1, the JAG Corps polices itself.<sup>3</sup> Our self-policing program has a long history of ensuring the highest level of professional practice.<sup>4</sup> With these rules and processes, how does the JAG Corps achieve and retain the moral high ground? How do we, as individual legal professionals, uphold our duties and professional obligations to Army commands, individual clients, and the American people? How does The Judge Advocate General (TJAG), as the JAG Corps's supervisory lawyer, ensure the highest level of professional practice? The answer is remarkably simple: rigor in our process.

### Professional Responsibility (PR) Approach

“An Army lawyer is a representative of clients, an officer of the legal system, an officer of the Federal Government, and a public citizen having special responsibility

for the quality of justice and legal services provided to the Department of the Army and to individual clients.<sup>5</sup> Despite this lofty and powerful mandate, there is neither an outside agency nor a team of special investigators tasked to monitor attorney conduct in the JAG Corps; we are our own watchdog. This makes it even more imperative that we all personally and collectively undertake our obligations to practice diligence, rigor, and discipline in all PR matters to gain and maintain the moral high ground. We practice diligence by being engaged leaders with our subordinates, monitoring work product, developing best practices, and providing guidance.<sup>6</sup> We practice rigor by taking action; making on-the-spot corrections to behavior, editing documents and correcting errors, and conducting further inquiry when the situation warrants. And we practice discipline by adhering to the principle of “choos[ing] the harder right over the easier wrong,”<sup>7</sup> and following the advice: “[i]f you see something, say something.”<sup>8</sup>

### **Professional Responsibility Review**

Professional responsibility allegations come in a variety of ways: everything from Inspector General (IG) complaints, to reports by supervisory JAs, to court rulings, to correspondence received by Army senior leaders and members of Congress. The Professional Responsibility Branch (PRB) serves as the focal point for all these allegations; however, the execution of the inquiry process is decentralized to leaders throughout the JAG Corps.<sup>9</sup> The heart and soul of the PR review process are the JAs assigned worldwide at posts, camps, and stations conducting reviews of PR allegations. Throughout the inquiry process, PRB maintains coordination with senior supervisory JAs and lower-echelon supervisors. This process highlights the point that PR matters are local matters, addressed by leaders throughout the JAG Corps, which require the engagement of all members of the JAG Corps. Thus, JAG Corps attorneys initiate inquiries, serve as inquiry officers, and review and approve inquiries. Through and through, this is *our* process, and it is our method of gaining and maintaining the moral and ethical high ground.

### **Professional Responsibility by the Numbers**

And now, the good news: this process works! Over the past ten years, the PRB has averaged about 151 inquiries annually.<sup>10</sup> More than one third of these inquiries concluded as due diligence reviews or credibility determinations: initial, lower-level inquiries to determine whether the allegations are credible and, if so, whether

**Although these reviews are informal, they result in supervisory and subordinate lawyers taking a critical look at the severity of the lawyer’s conduct, and are oftentimes resolved by counseling, additional training, mentorship, and an improvement in the provision of legal services.**

they raise a substantial question about the lawyer’s honesty, truthfulness, or fitness as a lawyer in other respects.<sup>11</sup> About eight per cent concluded with preliminary screening inquiries (PSIs): the highest-level review conducted under AR 27-1.<sup>12</sup> The statistics show that although TJAG monitors all PR allegations throughout the JAG Corps, TJAG personally exercises authority in relatively few cases per year.<sup>13</sup>

So, what can these numbers tell us about our efforts to gain and maintain the moral and ethical high ground? A few conclusions emerge. First, the PRB, as an extension of TJAG, receives and reviews *all* allegations regardless of the source. Second, many allegations are resolved at either the due diligence review or credibility determination level. Although these reviews are informal, they result in supervisory and subordinate lawyers taking a critical look at the severity of the lawyer’s conduct, and are oftentimes resolved by counseling, additional training, mentorship, and an improvement in the provision of legal services. Finally, most PSIs conclude at the senior supervisory JA level with counseling, admonishment, or other corrective action.<sup>14</sup> In summary, the PRB takes all allegations seriously. Most are disposed of at a lower level with corrective action, training, or counseling, and for a very few, TJAG finds

substantiated rules violations with impactful consequences.

A phrase commonly used in the PRB illustrates another takeaway from these numbers and facts: “It’s called the *practice of law for a reason*.” Everyone makes mistakes because at every level, all of us are learning. Paralegals come from advanced individual training and are new to the Army and JAG Corps; captains enter the military court-

room for the first time; majors are leaders, often for the first time, despite more experience. In fact, colonels with twenty years of service are first-time staff judge advocates, learning and gaining experience. The point is that the entire enterprise is *practicing* law, learning, growing, and evolving. No one is perfect, and mistakes are both commonplace and expected. And that is precisely why gaining and maintaining the moral and ethical high ground includes rigor in mentoring, counseling, and developing Judge Advocate Legal Services members at every echelon. Not every mistake is a PR violation, and not every case of misconduct is a PR violation. But, addressing these matters with intentionality and deliberation, rather than ignorance or carelessness, makes all the difference.

It’s good to love your people—your team, your colleagues, your subordinates, your office. “People First,” the Chief of Staff of the Army says!<sup>15</sup> But, gaining and maintaining the moral high ground requires an elevated view of the organization, the enterprise, and the system. “Taking care” of people (peers, subordinates, and supervisors alike) by failing to enforce standards and discipline, letting them slide, breaks the entire system down. That is why we all, jointly and severally, as a JAG Corps and as an institution, only gain and maintain the

moral and ethical high ground by holding other members of the JAG Corps bar accountable to the highest ethical standards. The PR program is but one way that we, the JAG Corps, gain and maintain the moral and ethical high ground. **TAL**

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## Notes

1. This popular quote and sentiment is on military-style morale patches. See, e.g., 30 SEC OUT, <https://thirtysecondsout.com/collections/no-one-is-coming-its-up-to-us> (last visited Jan. 27, 2023). This quote is also pervasive on social media and is a slight alteration to a quote attributed to Adam Weishaupt. See, e.g., GOOD READS, <https://www.goodreads.com/quotes/10581925-it-s-up-to-us-no-one-is-coming-to-help> (last visited Jan. 27, 2023).

2. The Judge Advocate Generals Corps and Judge Advocate Legal Services is referred to collectively as “the JAG Corps” throughout the rest of this article. See U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-1 (24 Jan. 2017) [hereinafter AR 27-1] (stating:

The JALS consists of— a. Officers, warrant officers, enlisted personnel, and other members of the Army detailed to the JAGC. b. Civilian attorneys for whom TJAG is the qualifying authority (see AR 690-200, subchapter 213) and executive level civilian attorneys who are under the technical supervision of TJAG. c. Professional consultants, legal technicians, civilian employees, and other personnel on duty with the JALS..”).

3. See AR 27-1, *supra* note 2, para. 11-2(a) (explaining:

TJAG and supervisory lawyers (as defined in this regulation and AR 27-26) are responsible for making reasonable efforts to ensure that all lawyers in the JALS conform to the Army Rules of Professional Conduct for Lawyers, the Code of Judicial Conduct for Army Trial and Appellate Judges, and other applicable ethical standards”).

Lawyers also have individual responsibilities. See, e.g., U.S. DEP’T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS para 6(g) (28 June 2018) [hereinafter AR 27-26] (stating:

[m]any of a lawyer’s professional responsibilities are prescribed in these Rules of Professional Conduct, as well as in substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, to exemplify the legal profession’s ideals of public service, and to respect the truth-finding role of the courts).

Additionally, Inspector General (IG) complaints against attorneys are referred to Professional Responsibility Branch (PRB), Office of The Judge Advocate General and fall outside the purview of IG. See U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES paras. 7-1(i)(4)–(5) (23 Mar. 2020).

4. Professional Responsibility Branch (PRB) has documents and opinions dating back nearly 50 years, to the mid-1970s. While individual cases are expunged from professional responsibility (PR) records in accordance with our system of records notice (SORN), see Privacy Act of 1974; Adding Systems of Records, 58 Fed. Reg. 3936 (Jan. 12, 1993); Privacy Act of 1974; System of Records, 76 Fed. Reg. 40343 (July 8, 2011), other documents and opinions reveal a long and thorough history of self-regulation in the JAG Corps. The files maintained by PRB are not public and are heavily protected by the Privacy Act. These files are accessed only by PRB and shared with The Judge Advocate General (TJAG), Deputy Judge Advocate General (DJAG), and those with a need to know acting on behalf of TJAG and DJAG.

5. AR 27-26, *supra* note 3, para. 6(a).

6. See AR 27-26, *supra* note 3, app. B, R. 5.1 (Responsibilities of Senior Counsel and Supervisory Lawyers). Rule 5.1 states, in part:

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) [Modified] the lawyer has direct supervisory authority over the other lawyer and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

7. *Cadet Prayer*, UNITED STATES MILITARY ACADEMY, <https://www.west-point.org/academy/malo-wa/inspirations/cadetprayer.html> (last visited Dec. 15, 2022).

8. This slogan was originally implemented by the New York Metropolitan Transportation Authority in the aftermath of 9/11 and later adopted by the Department of Homeland Security in 2010. *About the Campaign*, U.S. DEP’T OF HOMELAND SEC. (Jan. 4, 2023), <https://www.dhs.gov/see-something-say-something/about-campaign>.

9. See, e.g., AR 27-1, *supra* note 2, para. 11-2(c).

Supervisory lawyers at *all levels* are responsible for receiving and reviewing all alleged or suspected violations of the Army Rules of Professional Conduct for Lawyers, the Code of Judicial Conduct for Army Trial and Appellate Judges, or other applicable ethical standards by subordinates that come to their attention to determine if they are credible.

AR 27-1, *supra* note 2, para. 11-2(c) (emphasis added).

10. From calendar year 2012 through the end of 2021 (ten-year period), PRB entered 1,511 total cases. These numbers are recorded in the Professional Responsibility Case Management System, an online

database that retains Professional Responsibility records and is only accessed by Professional Responsibility Branch, Office of The Judge Advocate General. See the discussion, *supra* note 4, regarding Professional Responsibility records.

11. See AR 27-1, *supra* note 2, para. 11-2(c). From calendar year 2012 through the end of 2021, PRB entered 211 due diligence reviews and 447 credibility determinations.

12. See AR 27-1, *supra* note 2, para. 11-4. From calendar year 2012 through the end of 2021, PRB entered 88 PSIs. In addition to due diligence reviews, credibility determinations, and preliminary screening, PRB responds to FOIA and Privacy Act requests, monitors command investigations of attorney misconduct, monitors court rulings and Army Court of Criminal Appeals opinions, and a variety of other information pertaining to attorney conduct throughout the JAG Corps.

13. See AR 27-1, *supra* note 2, paras. 11-6(d)-(f) (providing a non-exhaustive list of actions TJAG may take).

14. See AR 27-1, *supra* note 2, para. 11-5 (providing actions taken at the senior supervisory JA level).

15. See, e.g., Gen. James C. McConville, *People First: Insights from the Army’s Chief of Staff*, U.S. ARMY (Feb. 16, 2021), [https://www.army.mil/article/243026/people\\_first\\_insights\\_from\\_the\\_armys\\_chief\\_of\\_staff](https://www.army.mil/article/243026/people_first_insights_from_the_armys_chief_of_staff).

A person in a U.S. Army uniform is sitting at a desk, writing in a notebook. The person is wearing a camouflage uniform with a "U.S. ARMY" patch on the chest. They are holding a black pen and writing on a lined notebook with a green cover. The desk is dark wood, and there is a lamp to the right. The background is a brick wall.

U.S. ARMY

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