Army Lawyer

U.S. Army Judge Advocate General's Corps

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CPT Raynold S. Kinslow (bottom right), administrative law attorney, Joint Readiness Training Center and Fort Polk, assists in medical operations with 1st Battalion, 5th Aviation Regiment while suspended at 100 feet above Fort Polk, LA. (Source: JAGCNet)

Army Lawyer

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Cover: CPT Kristen Coppock, national security law/administrative law attorney, 2nd Mobile Brigade, 25th Infantry Division and U.S. Army Hawaii, traverses the Jungle School obstacle course in the Philippines while supporting Exercise Pacific Pathways 2025. (Photo courtesy of MAJ Ian P. Smith)

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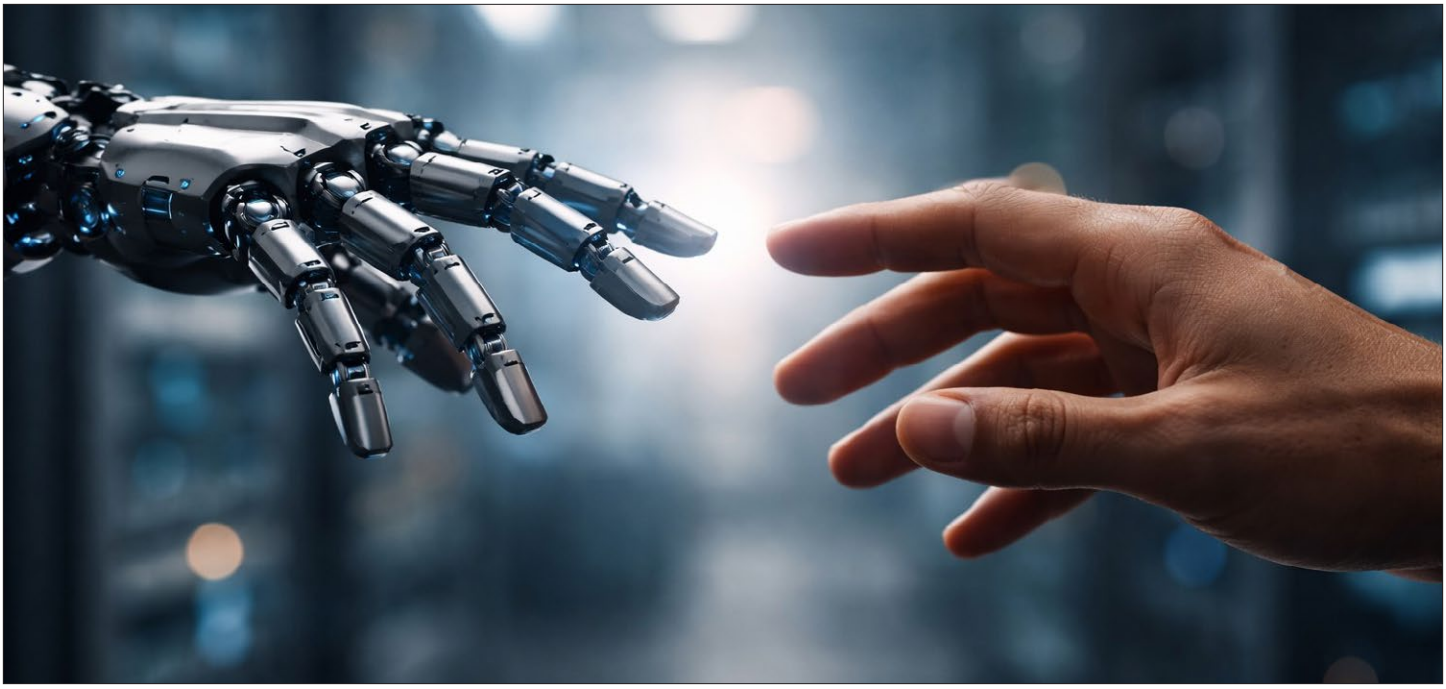

(Illustration generated by ChatGPT).

Court Is Assembled

Forging the Bimodal Judge Advocate
Human-Machine Integration and the Future of the JAG Corps

By Colonel Ryan A. Howard

My military education and experience in the First World War have all been based on roads, rivers, and railroads. . . . During the last two years, however, I have been acquiring an education based on oceans, and I've had to learn all over again. It became clear to me . . . I would need to learn new tricks that were not taught in the military manuals or on the battlefield . . . I must become an expert in a whole new set of skills. — General George C. Marshall [1]

Artificial intelligence (AI) is driving a revolutionary transition from the information age to a cyber-physical age, where data and physical domains will fuse, enabling machines to perceive, learn, decide, and ultimately act.[2] The National Security Commission on AI best described the scale of this transformation:

> No comfortable historical reference captures the impact of AI . . . . [It] is not a single technology breakthrough . . . . [It] is not like the space race to the moon. . . . [It] is not even comparable to a general-purpose technology like electricity. However, what Thomas Edison said of electricity encapsulates the AI future: "It is a field of fields . . . it holds the secrets which will reorganize the life of the world."[3]

Virtually every industry and government sector will be impacted by AI—many are already profoundly disrupted. Within the manufacturing sector, six-foot bipedal humanoids are currently operating autonomously in warehouses and factories.[4] In Texas, commercial

self-driving trucks transport goods between Dallas and Houston, driving hundreds of miles multiple times each week.[5] The Army is also leaning into this groundbreaking opportunity; a Soldier, with no aviation education or training, recently flew an optionally piloted Black Hawk helicopter using a handheld tablet.[6] In this context, growing numbers of judge advocates (JAs) are currently advising clients on the development and employment of AI capabilities.

For its part, the legal profession is aggressively embracing AI. Moving beyond research and writing, law firms are now assessing how to automate workflows and leverage agentic-AI.[7] In parallel, prospective clients are pivoting from law firms toward procuring their own AI legal capabilities.[8] With innovative disruption impacting both the profession of law and the profession of arms, the task before us is momentous. *How should the Judge Advocate General's (JAG) Corps responsibly leverage AI*?

Army lawyers have both professional responsibility and profession of arms obligations to integrate emerging technologies into their practice of law. Doing so will require a reimagining of JAG Corps structures, processes, and professional identity. The JAG Corps must immediately transform its information technology (IT) and position itself to modernize its legal practice through strategic leadership, astute planning, technical advancement, world-class education, and professional reflection. The JAG Corps's competitive advantage is the bimodal JA who expertly leverages AI through human-machine integration and who can effectively operate without AI in austere operating environments.

This article offers a roadmap for JAG Corps AI integration that unfolds over four planning horizons: an immediate modernization of JAG Corps enterprise architecture, a near-term AI-*enabled* legal practice, a medium-term AI-*operated* legal practice, and a long-term AI-*managed* legal practice. These hypothetical scenarios aim to capture the rising tension between AI's advancing capabilities and their implications for the legal profession. Each horizon invites the reader to step into a specific future context to explore opportunities and assess risks. Significantly, the technology in this article, other than artificial general intelligence (AGI), already exists and is in widespread use across industry and government. Finally, our discussion concludes by exploring the JAG Corps's response to this evolving operating environment—an enterprise commitment to developing bimodal JAs capable of operating with and without AI. This article is a call to action. JAG Corps thought leaders should immediately begin thinking, hypothesizing, and debating within the context of each time horizon: *how should the JAG Corps approach an AI-enabled, AI-operated, and AI-managed legal practice*?

JAG Corps 2025

Setting the Conditions for Integrating AI

With rapidly advancing technology and new challenges emerging throughout its legal operations, JAG Corps senior leaders recognized the need to transform its IT capabilities to enable a modern legal practice. Accordingly, the JAG Corps established the IT Operational Planning Team (IT-OPT) in October 2024 to identify capability gaps and create a blueprint for the Corps's future. Our goal is to modernize the JAG Corps's enterprise architecture (EA) and enable sound knowledge management (KM) to align our technology, data, people, and operations. This initial phase is critical—any technical errors will undermine AI integration and slow the modernization of our legal practice.

In June of 2025, the IT-OPT completed a strategic current-state analysis of the JAG Corps's EA, encompassing technology, applications, data, and governance.[9] Our assessment revealed significant organizational strengths, including a talented workforce and extensive high-quality data assets that will enable IT modernization.

The IT-OPT also identified significant opportunities. First, the JAG Corps will address connectivity gaps between users, applications, and data to realize total force integration. Second, the JAG Corps will rationalize its suite of applications.[10] Third, the JAG Corps will address its data, which is currently stratified by organization and siloed by legal function, undermining the data visibility and accessibility required to train AI models effectively.[11] Finally, the JAG Corps will establish the governance layer of its EA, including executive IT leadership, a comprehensive IT strategy, and specific IT policies that create foundational standards, systems, and procedures. With significant improvements to applications, data, and governance, the JAG Corps will be postured to integrate AI capabilities into legal operations. But modernizing the EA is not in and of

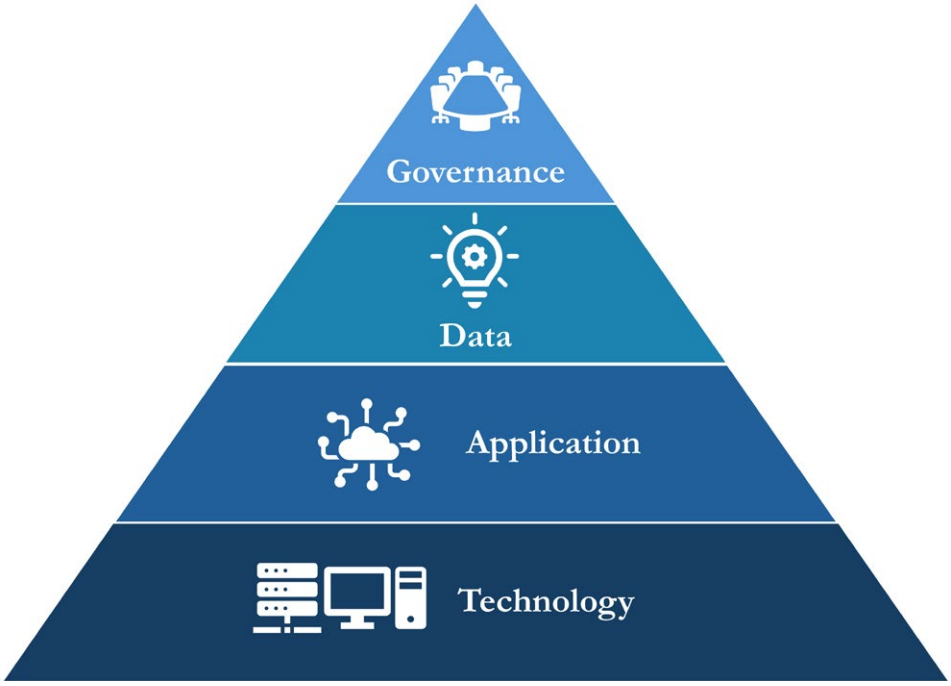

Figure 1. Enterprise Architecture (Credit: COL Ryan A. Howard)

itself sufficient; the JAG Corps must drive a fundamental shift in organizational strategy to exploit AI's potential.

While much has been written about the AI revolution, it's worth emphasizing the breadth and depth of its impact. AI is a *radical innovation* that transcends technology—it is a transformative breakthrough that will disrupt entire industries and reshape society.[12] AI will not simply introduce new capabilities; it will reconfigure processes, redefine professional roles, and alter decision-making dynamics.[13] Institutions that succeed will acknowledge this new reality, make difficult decisions, and leave outdated approaches behind. Institutions that resist, however, will not merely plateau; they will collapse, undermined by half-measures aimed at preserving fading paradigms.[14]

The JAG Corps now stands at an inflection point. For the JAG Corps to navigate this *creative destruction,* it must be willing to overhaul traditional approaches, established systems, and long-standing organizational structures.[15] The JAG Corps *will* meet this moment through visionary leadership, proactive strategic planning, and a sustained institutional commitment to modernizing our enterprise architecture.

JAG Corps 2029
The AI Legal Assistant: An AI-Enabled Legal Practice

Vignette

It is the summer of 2029, and the JAG Corps has incrementally deployed AI "legal assistants" capable of delivering high-quality decision-support. Following three years of EA modernization, the Corps now operates on aligned applications, data, and workflows. These AI systems perform at the level of an experienced paralegal; they augment the human practice of law by resolving administrative matters and enabling many routine legal activities.[16] Throughout the JAG Corps, AI chatbots serve as the first line of legal triage. These systems screen non-legal issues; retrieve, organize, and label relevant documents; and respond to basic questions concerning authorities and procedures. More robust AI applications, trained on applicable law, policy, and regulation, analyze legal issues and draft detailed, context-specific legal opinions for attorney review and approval. JAG Corps leaders employ AI management tools to accelerate and resolve virtually all administrative processes.

These JAG Corps initiatives are advancing within the strategic context of Army modernization. AI-enabled systems now support most staff and warfighting functions, from information management and running estimates to drafting orders and conducting risk assessments.[17] The deployment of the AI "Enhanced Common Operating Picture," integrated with staff systems and thousands of multimodal sensors, provides commanders with near real-time situational awareness.[18] Command update briefs have shortened markedly, and traditional command and staff meetings have virtually disappeared. Finally, the resolution of routine "authorities" questions has shifted from the JAG Corps to the responsible staff proponent. AI-enabled staff tools now allow commanders and staff officers to resolve their own questions concerning policy, regulation, and doctrine.

The integration of AI "legal assistants" has measurably strengthened the JAG Corps's legal practice and accelerated core workflows. Early assessments indicate that AI applications supporting specific legal functions can generate draft products with a high degree of consistency within minutes of receipt. These efficiencies have eased long-standing personnel pressures: With administrative and routine matters largely automated, the Corps can direct its human capital toward a more focused set of legal functions aligned with Army operational demands. Legal reviews are leaner and faster, and the added tempo allows commanders and staff judge advocates (SJAs) to devote greater attention to leadership and professional development.

As AI systems mature, conventional staff responsibilities are narrowing, and Army processes, roles, and force structure are evolving. Human JAs increasingly concentrate on reviewing AI-generated products, while continuing to provide in-person counsel to commanders. Broader legal-industry trends suggest that AI adoption has reduced demand for certain categories of legal work, while increasing demand for new practice areas. By 2029, AI will have replaced 15 percent of the legal professionals in the broader legal industry.

Strategic Framework

Having described the expected legal-technological environment in 2029, this section offers an organizational path to AI integration. For the JAG Corps to field AI-enabled "legal assistants" capable of decision-support, it will successfully execute a coordinated campaign plan to close IT capability gaps, align the EA, and modernize legal applications for AI integration. This plan unfolds across four lines of effort: (1) organizational restructuring; (2) strategy and policies; (3) enterprise-architecture design; and (4) modernization of applications.

First, the JAG Corps will establish the leadership and organizational structures required to direct and sustain enterprise-wide modernization. This begins with establishing an Executive IT Leader to spearhead technical strategy, cross-enterprise alignment, and cultural change. Additionally, the JAG Corps will create an enabling staff of technology and data experts to oversee KM, process mapping, machine learning, technical training, and Army integration. Finally, the JAG Corps will identify forward leaders embedded within offices of the staff judge advocate (OSJAs) to implement IT guidance and data management at the installation level. This realignment is foundational: without sufficient authority, human capital, and resourcing, IT modernization efforts will fail to scale or endure.

Second, the JAG Corps will establish a coherent IT strategy, governance framework, and doctrinal foundation aligned with JAG Corps and Army guidance. These modernization documents will articulate the vision and mission, establish sound IT resourcing processes, and set enforceable KM standards. Significantly, the JAG Corps will adopt an AI governance policy that operationalizes the responsible use of AI systems consistent with professional responsibility precepts.[19] Modernizing talent management is equally critical. Integrating IT, EA, KM, and AI competencies into JAG Corps career models will cultivate a force capable of leveraging and supervising AI systems, while ensuring compliance with legal, ethical, and policy requirements.

Third, JAG Corps IT planners, working closely with Army IT counterparts, will design a future-state EA that supports AI systems. This architecture can be

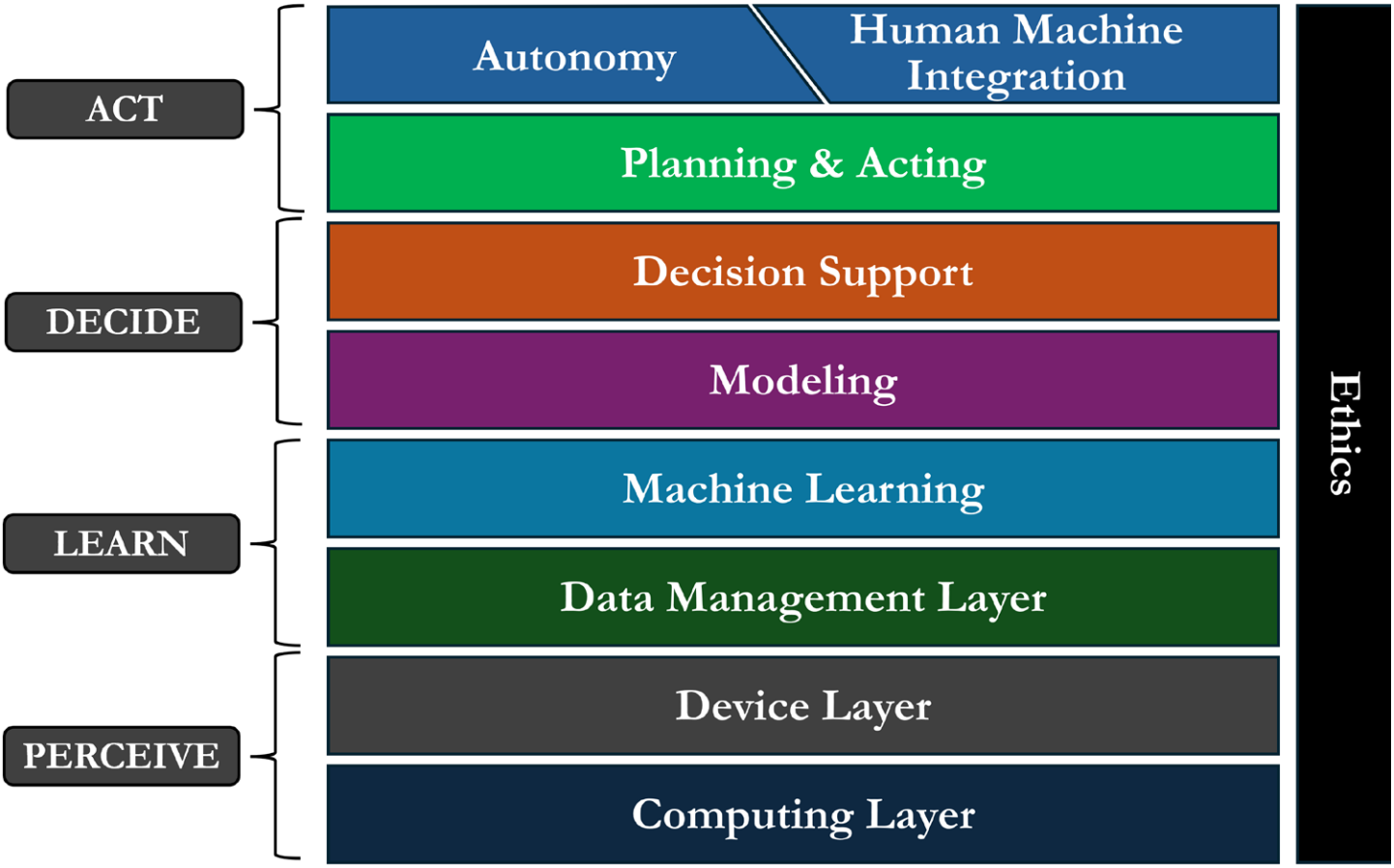

Figure 2. The "AI Stack." (Credit: COL Ryan A. Howard)

conceptualized as an "AI stack," in which the computing and device layers support the data management and machine learning layers, which in turn enable modeling, decision-support, planning, acting, and, ultimately, autonomous processes.[20] Because each layer depends on the integrity of the one beneath it, even minor defects in hardware integration, data quality, or model design will cascade upward, degrading system performance and eroding trust. Therefore, designing this architecture is a vital technical and institutional task.

Finally, the JAG Corps will modernize its applications. The JAG Corps will develop detailed requirements for desired capabilities, informed by practitioners in the field, market research, and coordination with the Army IT enterprise. Additionally, the JAG Corps will evaluate its existing applications and recommend whether each system should be retired, upgraded, or replaced. After synthesizing their market research and application analysis, IT planners will staff a future-state blueprint and a consolidated, prioritized list of IT recommendations for JAG Corps senior leader guidance and approval. In parallel, the JAG Corps will launch a comprehensive data-management initiative. A JAG Corps data-governance council will promulgate standards and guide the adoption of centralized platforms to facilitate data curation and storage.[21] This approach will enable key stakeholders to inventory, assess, migrate, and label the JAG Corps's knowledge stores, creating the data infrastructure needed for reliable and auditable AI performance.

Implications and Considerations

Realizing the benefits of AI decision-support requires a coherent framework for AI deployment and corresponding adjustments to JAG Corps force structure and talent management. First, the JAG Corps should establish an AI-employment framework that guides when, where, and how AI should be utilized. The JAG Corps, led by legal function leads, should evaluate prospective AI use by applying four criteria: accuracy, efficiency, complexity, and ethics.[22] While routine administrative activities may be fully automated, the vast majority will require hybrid processes with mandatory human review, and certain tasks should remain exclusively human because they implicate nuanced or core legal judgment.

Looking ahead, the JAG Corps should conduct a strategic assessment of its force structure and human capital. As AI assumes a greater share of routine legal work, the JAG Corps should anticipate displaced traditional tasks, emerging new activities, and corresponding organizational changes. This analysis should inform a forward-looking talent management model that develops, hires, and contracts for new skill sets, including KM and AI system administration. The JAG Corps *will* successfully integrate AI decision-support systems that augment human JAs. To do so, the JAG Corps must modernize

(Illustration generated by ChatGPT).

its EA, develop or procure AI capabilities, and evolve its force structure, while cultivating a workforce capable of integrating and employing AI.[23]

JAG Corps 2032
Agentic AI Legal Advisors: An AI-Operated Legal Practice

Vignette

It is the spring of 2032, and the JAG Corps has crossed a historic threshold—the deployment of *agentic AI* "legal advisors" capable of autonomous decision-making.[24] This milestone occurs amid acute fiscal pressure. With the national debt reaching $47 trillion, the Federal Government has imposed sweeping austerity measures, and the executive branch is fundamentally rebalancing the active-duty force, mandating a three-to-one tooth-to-tail ratio—an inversion of the longstanding support-heavy model. The demand for efficiencies has accelerated the institutional embrace of AI across warfighting functions, including legal operations.

Years of decentralized innovation have consolidated into a small set of powerful *foundation models* trained on vast legal *data lakes*, detailed automated workflows, millions of structured training simulations, and extensive *human reinforcement learning*.[25] Out of that context grew agentic AI systems that learn and adapt. These cutting-edge systems no longer merely enable human attorneys; they provide legal advice within the scope of delegated authorities. Agentic-AI systems now act as junior associates—autonomously managing workflows, conducting legal research, executing e-discovery, analyzing legal issues, drafting legal documents, and issuing legal opinions.[26]

Agentic AI initiatives have also dramatically advanced staff and warfighting functions across the Army. The "G-Staff" agentic AI systems act as autonomous staff officers over routine tasks: updating and synthesizing running estimates, integrating warfighting function inputs, detecting anomalies, and generating coordinated recommendations for command decision. The G-1 agentic AI system handles most personnel matters, including certain adverse administrative actions. For example, it assembles evidence, verifies regulatory sufficiency, and issues reprimands, leaving only the filing decision to the human commander. The JAG Corps is simultaneously piloting an agentic AI system that adjudicates low-value claims and administrative contract disputes, employing predictive analytics to increase speed and consistency.

Agentic-AI has dramatically altered the practice of law. In the private sector, substantial legal activity has shifted from traditional law offices to client-facing AI applications. Within the Federal Government, legal review is now embedded directly within many workflows. The law functions as a control input rather than a post hoc check; agentic AI validates legal compliance as "the action" is assembled, drafted,

coordinated, and approved. Consequently, the role of the human JA has shifted toward higher-order judgment, overseeing agentic AI systems and providing strategic legal advice to senior Army leaders. Across the legal industry, AI has displaced 25 percent of legal professionals.

Strategic Framework

To realize this future, the JAG Corps will elevate its ambitions and further evolve its strategy. Its next IT campaign plan will field agentic AI systems tailored to each legal function and capable of autonomous action within defined parameters. Building on its robust technology and data infrastructure, the JAG Corps will enhance its capabilities by integrating agent platforms into its EA and embedding them within core legal systems, enabled by diverse legal and administrative data sources.[27] Significantly, the JAG Corps will redesign legal workflows: IT planners will map processes, identify friction points, select appropriate AI models, automate sequences, and identify human review touchpoints.[28] Before full-scale deployment, the JAG Corps will conduct controlled pilot programs and iterative refinement to fine-tune the system's reliability and operational suitability.

Implications and Considerations

As our hypothetical shifts from an AI-*enabled* legal practice to a plausible agentic AI-*operated* legal practice, the JAG Corps must understand the ramifications and establish a methodology that reconciles the value proposition with the associated risks. The introduction of agentic AI into legal processes contemplates AI systems operating independently from human attorneys. If the JAG Corps decides to make this technological leap, it must closely coordinate with both AI architects to engineer oversight into agentic AI systems and Army senior leaders to maintain their trust. The JAG Corps should establish an Agentic AI Approval Board (AAAB) to approve the deployment of agentic AI systems based on proposals from legal function leads and technical input from IT experts.[29] Legal function leads will identify candidate agentic AI processes. Each proposal should specify the legal tasks that agentic AI will perform and the proposed level of autonomy for each step in each process.[30]

In contrast to AI decision-support, where humans review outputs, agentic AI will require the JAG Corps to engineer safeguards *into* the AI models and the workflow. The agentic AI suite must include real-time performance monitoring to assess accuracy and compliance, ensuring *auditability, traceability, and explainability*.[31] This oversight regime must also include independent verification of model outputs, enterprise fail-safe procedures, and, when required, human-on-the-loop intervention.[32]

The JAG Corps must ensure its AI engineers preserve the ability to isolate and suspend malfunctioning AI systems exhibiting unacceptable *bias, hallucination,* or *catastrophic forgetting*.[33] Functioning both ex ante (during system design and deployment) and ex post (through continuous monitoring), this oversight framework will anchor the JAG Corps's commitment to transparency, professional responsibility, and legally sound AI integration. After mitigating risk through engineered oversight, the AAAB will approve proposed agentic-AI systems based on the enhancements to workflow—accuracy, speed, and cost savings—balanced against the residual risk presented by the nature of the legal work and the level of autonomy.

Finally, the introduction of autonomous agents into legal processes will change the personal and special staff relationship between the JA and the commander.[34] Therefore, the JAG Corps should closely coordinate with Army senior leaders throughout the proposal, development, testing, and approval phases. Ultimately, agentic AI cannot be adopted simply because it is technologically possible; it should be incorporated only where there is a defensible mission benefit, a validated risk-mitigation strategy, and preserved accountability for legal outcomes.

JAG Corps 2035
The Advent of AGI: An AI-Managed Legal Practice

Vignette

By 2035—ten years into the AI revolution—the practice of law has radically transformed. Autonomous agents powered by AGI now execute complex reasoning across unlimited knowledge domains with minimal human intervention.[35] Once limited to narrow analytical tasks, AGI systems integrate perception, advanced reasoning, contextual judgment, and continuous self-learning.[36] Agentic-AI systems acted autonomously, but only within select legal workflows. Its activities were task-bound, and its knowledge was domain-specific. AGI, however, represents a paradigm shift; with multi-domain knowledge and general-purpose reasoning, AGI understands the enterprise, not just the task. Within the legal context, AGI systems apply legal judgment. They *independently* construct novel interpretations of law, develop creative arguments, and resolve legally ambiguous situations. These AGI systems can serve as advocates, expert senior counsel, adjudicators, and general counsel—fundamentally restructuring the American legal practice.

With the arrival of AGI, the JAG Corps has fielded "Tudor," its autonomous SJA. Trained on statutory law and regulations, decades of legal precedent, forty years of JAG Corps work product, and the oral histories of prominent JAG Corps leaders, Tudor possesses a deep institutional understanding of the JAG Corps's mission and its role. Tudor delivers accurate, near-instant legal support across all legal functions in any format: verbal guidance, email advisories, and fully reasoned written opinions. Operating under delegated authority and within JAG-Corps-defined parameters, Tudor issues final legal opinions in routine and complex matters alike. After a decade of working with narrow AI systems, senior commanders regard Tudor's legal support as operationally indispensable.

Parallel AI-enabled developments are also changing the art and science of command. The Army recently deployed an AGI-enabled "Deputy Commanding Officer" (DCO-AGI) system. Trained on professional military education curricula, the complete doctrinal library, extensive simulation archives, and the detailed study of its human commander's decision patterns, the DCO-AGI plans, assesses, and adapts, exercising judgment nearly indistinguishable from that of its human counterpart. While commanders retain the authority to limit the agent's span of

control, they rarely do so—the system's speed, accuracy, and reliability have made it integral to modern command decision-making.

AGI integration is also reshaping administrative proceedings and civil litigation. The G-1 AGI system now conducts routine enlisted separations and officer elimination boards, with human review limited to appeals. AGI also resolves civil litigation below designated dollar thresholds; AGI agents assemble the record, apply relevant law, and conduct thousands of adversarial simulations to arrive at an agreed result. These AGI tribunals produce results that are rarely overturned during human appellate review. Their accuracy, consistency, and speed have earned broad institutional and public support.

Autonomous AGI legal agents have fundamentally changed the legal profession. Entire legal institutions, business models, and decision-making hierarchies evolved or were destroyed.[37] Across the broader legal ecosystem, AGI has replaced 40 percent of legal professionals. Surviving law firms now operate as global AI-legal platforms, licensing proprietary AGI systems rather than selling attorney labor. Billable hours have disappeared. Firms generate revenue through subscription-based AGI legal services and by selling curated legal datasets and model architectures to corporate legal departments. Small human leadership teams supervise fleets of AGI legal agents producing integrated legal strategies and products based on deep analysis, complex risk assessments, and outcome prediction.

AGI has also fundamentally changed the practice of law throughout the military. These systems function as the command's legal mind—performing strategic, cross-domain, institutional legal reasoning. In contrast, human JAs function as the command's legal conscience—providing normative recommendations and overriding AGI outputs when necessary to preserve institutional accountability and the command's constitutional responsibility. The JAG Corps's legal practice now focuses on command judgment in ethically challenging contexts: the fusion of law, operational risk, and command responsibility in areas where policy guidance, law, and core values conflict.

Implications and Considerations

As our hypothetical transitions from narrow AI to the potential arrival of AGI, the implications for the legal profession become potentially existential. AGI will force legal scholars to consider foundational questions: *What does it mean to "practice law"? What is the social good of the human practice of law? What should be the role of AGI? What must be the role of human attorneys?* The JAG Corps should anticipate this moment and position itself now to lead the legal profession through this season of radical transformation.

JAG Corps thought leaders, including some of our youngest JAs, should develop well-researched positions grounded in the precepts that underpin the professions of law and arms. The JAG Corps should then extend its sphere of influence, leading a series of engagements with legal leaders from industry, academia, and government: *What should be the role of AGI in the law?* As a framework for addressing this question, the JAG Corps should organize its position around the four elements of a profession: special expertise, service to society, corporateness, and professional ethic.[38]

First, expertise.[39] AGI's capacity to outperform human lawyers will require a shift in how the legal profession defines "legal expertise." When AGI produces consistently superior legal research, analysis, and advice, expertise can no longer rest solely on individual cognition. Competent practice will increasingly turn on a lawyer's ability to effectively and ethically deploy and supervise AGI rather than personally perform each analytical task.[40]

Second, the legal profession should reclaim its commitment to *serving* society.[41] There remains a distinct moral and relational dimension to the practice of law—grounded in trust and accountability—that AGI systems cannot replicate.[42] Yet economic reality will test how much society is willing to pay for human judgment when AGI can deliver comparable work at a fraction of the cost. The profession should prepare for a bifurcated market: human-led services where relational judgment is indispensable, and machine-led services where speed, scale, and efficiency dominate.

Third, shared identity.[43] AGI will force the legal profession to redefine membership and accountability. As AGI systems provide legal advice and engage in advocacy, the profession should determine whether, and on what terms, such systems are included within its institutional identity. Bar associations will need new mechanisms for certifying, licensing, and overseeing AGI systems. Because AGI legal outputs derive from algorithms, training data, and system design, professional responsibility violations will extend to engineers, vendors, and law firm leadership. In the absence of clear lines of responsibility, the profession risks eroding public trust and its own identity.

Finally, the professional ethos.[44] AGI cannot possess a professional ethic; it does not have moral principles or values that guide behavior. The introduction of autonomous AGI systems will heighten, not reduce, the moral obligations of human lawyers. However, reliance on AGI risks diffusing personal accountability unless ethical duties evolve to cover AI oversight. The profession should ensure that lawyers remain accountable for outcomes shaped by the systems they operate, supervise, or rely on. Given the velocity of AI advancement, the JAG Corps must immediately prepare itself and the legal profession for this not-so-distant future. The legal profession should clearly articulate what the practice of law is, what AGI may do, and what humans must do.[45]

Forging Our Competitive Advantage: The Bimodal JA

Vignette

It was a sweltering August night at the Joint Readiness Training Center (JRTC), the first day of force-on-force. I stood on the drop zone waiting for a brigade combat team (BCT) to execute an airborne assault. From the south, C-130s roared in with their heavy drops. Through my night vision goggles, I watched wave after wave of paratroopers descend into contested terrain—a perfectly choreographed insertion, at least at first. As the operation unfolded, small clusters of Soldiers moved toward infrared strobes, trying to find their units. Minutes passed. Then hours. Formations never cohered. Soldiers grouped with the wrong elements; platoons and companies failed to assemble; the brigade structure dissolved into scattered pockets of combat power. Under normal training

conditions, the commander of operations group (COG) would have intervened—tasking observer/controller trainers (OC/Ts) to log deficiencies, reset the brigade, and keep a $25 million exercise on schedule. But this rotation was different. U.S. Forces Command and JRTC leadership had mandated a pure large-scale combat operations (LSCO) environment. No resets. No lifelines. The brigade was on its own.

For the next eighteen hours, the unit struggled to assemble. The BCT headquarters eventually produced four tactical operations centers, when there should have been two. Each of these incomplete and ineffective command-and-control nodes was located within the same kilometer grid square, sometimes separated only by a wood line. Yet each was unaware of the other's existence. When the opposing force finally struck, the engagement resembled 1916 rather than modern combined-arms maneuver: formations communicated by runners, movements were exposed, and combat power was dispersed. Questions that were usually answered instantly became paralyzing: *Where am I in relation to friendly and enemy forces? How can I shape the fight? What do my battalions need?*

The lesson was unmistakable. A formation that excelled with modern digital systems became disoriented without them. To fight and win in the fog, friction, and chance of LSCO, the Army must be able to operate in *digital and austere operating environments*.[46] That same truth now challenges the JAG Corps. As the Corps enters the AI age and integrates new capabilities into legal operations, commanders will still need JAs who have mastery of the law and can think, advise, and act when high-tech systems go dark. Put another way, in LSCO, the commander will need *you* on the team, not Tudor.

(Background source: Freepik)

Strategic Framework

The JAG Corps must field bimodal JAs who are equally capable with and without AI systems, and The Judge Advocate General's Legal Center and School (TJAGLCS) is the center of gravity for this effort. The Corps faces two intertwined strategic challenges. First, JAs must become experts at leveraging AI systems. Second, JAs must also be able to "provide timely expert legal advice . . . across the competition continuum,"[47] including when digital systems are denied or degraded. Embedded within this second challenge is an emerging risk: the AI dependency trap.

To successfully provide legal support in today's operating environment, the JAG Corps will exploit AI capabilities through *human-machine integration* (HMI): designing AI and human JAs to function as a single cognitive system, with the human firmly in command.[48] AI should be treated as a cognitive teammate, performing tasks it excels at: collecting, analyzing, synthesizing, and drafting with speed and consistency. The JA will retain independent judgment, moral reasoning, creativity, empathy, and context-specific wisdom rooted in the Corps's four constants.[49] Proper integration, therefore, requires parallel investments: building AI capability *and* strengthening independent human competence.

However, as the JAG Corps builds proficiency with AI capabilities, it risks falling into the *AI dependency trap*: the gradual erosion of human expertise, judgment, and adaptability that follows from persistent reliance on machine cognition.[50] As the JAG Corps integrates AI capabilities, field-grade JAs will experience some *cognitive offloading*.[51] New JAs, though proficient with AI systems, may never achieve mastery of the law or develop the judgment needed for ambiguous legal challenges.[52] This risk will be particularly acute in austere operating environments, where AI tools are degraded or unavailable. The Corps and the broader legal profession now confront a paradox: unprecedented technical capability paired with eroding human expertise.

Implications and Considerations

TJAGLCS is the decisive institution for producing bimodal JAs. This mandate spans two interdependent lines of effort: (1) teaching the Corps to exploit AI responsibly and (2) developing JAs to operate without it. AI, when creatively used, offers TJAGLCS the profound opportunity to reinvent legal education and achieve both of these interdependent objectives.

Achieving HMI will require substantial investment in AI education and training. TJAGLCS is already developing a robust program of instruction to strengthen digital literacy and AI acumen, and it is positioned to be able to build foundational AI fluency across all cohorts, followed by tiered training that develops intermediate skills, supervisors, and strategic leaders.[53] Beyond classroom instruction, TJAGLCS can provide hands-on, tool-specific training and assessments. JAG Corps personnel should demonstrate proficiency on AI platforms through skills tests that evaluate both employment and

troubleshooting of AI-enabled research, analysis, and drafting. While the focus of this article is the use of AI in support of legal operations, there is an important corollary—JAG Corps personnel should also be trained and educated to competently advise clients on *their* development and use of AI capabilities.[54]

Successful HMI also requires preserving independent human mastery of the law. As such, TJAGLCS must continue to design curricula grounded in Bloom's Taxonomy and tailored to the learner to ensure that foundational courses assess knowledge and reasoning without AI assistance.[55] Professors should incorporate "no-tech" assessments, such as blue-book examinations, oral presentations, and exercises. This commitment will ensure that AI training supplements, rather than supplants, the education required for principled counsel and mastery of the law.[56]

Finally, AI offers TJAGLCS opportunities to advance its pedagogy, expand its educational window, and accelerate individual learning. Before arriving at the basic course, TJAGLCS can provide new JAs with an AI-enabled preparatory program that establishes a baseline of knowledge through instruction tailored to their learning style and educational needs.[57] During resident courses, professors can use AI tutors that provide diagnostic assessments, real-time feedback, and personalized coaching. Beyond in-person offerings, TJAGLCS can use virtual reality and *digital twins*—high-fidelity virtual replicas of real environments—to provide immersive education and training at home stations.[58] Finally, the JAG Corps can empower JAs by providing agentic-AI coaches to all new JAs—a desktop AI system that observes legal practice, identifies existing research and work product, anticipates errors, and coaches the JA throughout the workflow.[59]

The bimodal JA is the JAG Corps's competitive advantage. To achieve this end-state, the JAG Corps must pursue HMI through TJAGLCS education. The program of instruction should enable JAs to operate seamlessly with AI, while also developing mastery of the law to operate without AI. With the right balance of AI and analog education and training, the JAG Corps can field JAs who can provide effective legal support in any operating environment.

Closing Reflections

The JAG Corps's integration of AI will unfold in three waves of innovation: incremental modernization (2029: AI Legal Assistants), profound advancement (2032: Agentic-AI Legal Advisors), and radical transformation (2035: The Advent of AGI). Each horizon presents unique challenges, requiring different focus areas: first, identifying capability gaps and strengthening EA, then fielding AI systems and integrating agentic-AI workflows, and finally preparing for AGI.

Significantly, the JAG Corps will be forced to navigate tremendous creative destruction as the practice of law transitions from AI-enabled to AI-operated to, potentially, AI-managed. While this analysis hypothesizes about potential developments over the next decade, the underlying technologies already exist—narrow AI, foundation models, agentic systems, and digital twins are widely leveraged across industry and government. AGI is the only missing element, and the titans of the AI industry are aggressively orchestrating its arrival.[60]

Taken together, these implications reveal a central insight: the JAG Corps must reimagine its structures, processes, and professional identity to thrive in an era defined by AI. In the near term, the Corps should reform its EA and build the leadership, governance, and data foundations necessary to scale AI responsibly. As the JAG Corps adopts AI for decision-support, it should adopt a coherent AI employment framework and modernize its force structure. The integration of agentic-AI for decision-making will demand even deeper reforms, requiring the JAG Corps to identify processes appropriate for autonomous workflows with embedded safeguards.

The transition here is significant; JAs will shift from reviewing AI-developed work product toward monitoring the performance of the AI system itself. Following the advent of AGI, the JAG Corps will be forced to confront foundational questions about the meaning of "practicing law." Using the foundational pillars of a profession—expertise, service, corporateness, and ethos—the JAG Corps should facilitate a discourse with the American legal community to establish the role and parameters of AGI in law.

Given the demands of LSCO, the JAG Corps must develop bimodal JAs, equally proficient with and without AI systems, to navigate operational realities. This requires exquisite HMI, with AI as a cognitive teammate and humans retaining oversight. Central to this effort is TJAGLCS, which must simultaneously teach JAs to exploit AI while ensuring they master the law. Achieving this dual mandate demands substantial investment in education and hands-on training. By balancing AI-enabled instruction with traditional pedagogy, the JAG Corps can sustain its competitive advantage and produce JAs capable of providing principled counsel in any operating environment. The JAG Corps must immediately prepare for a near-term AI-*enabled* practice and a medium-term AI-*managed* practice by addressing the challenges and opportunities before us.

It's 2040, and the American JA is the most rigorously trained and technologically capable legal officer ever to serve in uniform. Today's JA enters the force fluent in both law and machine intelligence, trained from the outset to operate in an environment defined by AI decision-support, autonomous agentic AI systems, and early AGI. Their responsibilities demand mastery of the law; fluency in data science and machine learning; skill in auditing AI performance; operational understanding of cyber and information domains; and deep training in the ethics and legality of human-machine decision chains. They learn to validate autonomous actions, detect degraded systems, and provide effective legal advice without the aid of AI. This is the bimodal JA: equally capable of independent human judgment and working seamlessly with autonomous agents. They advise commanders at machine speed while safeguarding constitutional principles in a battlespace where humans and machines act side by side. But the velocity of change continues . . . IBM just released its first *quantum* AI system. **TAL**

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Notes

1. Stewart W. Husted, *Achieving Victory Through Strategic Management and Leadership*, in George C. Marshall: Servant of the American Nation 146 (Charles F. Brower ed., 2011) (describing that, upon becoming the Chief of Staff of the Army in 1939, General Marshall reflected on his need to develop new skills); *see also* Thomas Ricks, *Gen. Marshall's Comment on How He Was Re-Educated During World War II*, Foreign Pol'y (Oct. 21, 2015), https://foreignpolicy.com/2015/10/21/gen-marshalls-comment-on-how-he-was-re-educated-during-world-war-ii [https://perma.cc/9MGF-D77G] (describing how, during the Tehran Conference of 1943, General Marshall reflected on his need for education as the Allies planned the cross-channel landings).

2. Marty Trevino, *Cyber Physical Systems: The Coming Singularity*, Prism, no. 3, 2019, at 3.

3. Nat'l Sec. Comm'n on A.I., Final Report 7 (Mar. 2021) [hereinafter Final Report].

4. Nancy Albinson, Deloitte, Robotics & Physical AI: Intelligence in Motion (2025), https://www.deloitte.com/content/dam/assets-zone3/us/en/docs/about/2025/robotics-and-physical-ai-tech-futures-report.pdf [https://perma.cc/7RZ2-C8PA]. *See, e.g.*, *Digit by the Numbers*, Agility Robotics, https://www.agilityrobotics.com/solution [https://perma.cc/PT92-E92W] (last visited Dec. 11, 2025).

5. *Aurora Begins Commercial Driverless Trucking in Texas, Ushering in a New Era of Freight,* Bus. Wire (May 1, 2025), https://www.businesswire.com/news/home/20250501031863/en/Aurora-Begins-Commercial-Driverless-Trucking-in-Texas-Ushering-in-a-New-Era-of-Freight [https://perma.cc/X634-XHAS]. *See, e.g.*, *Aurora Driver Capability Videos*, Aurora, https://aurora.tech/capabilities [https://perma.cc/QCS5-G2SP] (last visited Dec. 11, 2025).

6. Zita Ballinger Fletcher, *Guardsman Learns to Fly Autonomous Black Hawk in Less than an Hour*, Army Times (Nov. 3, 2025), https://www.armytimes.com/air-warfare/2025/11/03/guardsman-learns-to-fly-autonomous-black-hawk-in-less-than-an-hour [https://perma.cc/ F4AD-9J7H]. *See also* Courtney Albon, *Palantir Delivers First 2 Next-Gen Targeting Systems to Army*, Def. News (Mar. 7, 2025), https://www.defensenews.com/land/2025/03/07/palantir-delivers-first-2-next-gen-targeting-systems-to-army [https://perma.cc/55VL-GSAN]; Zita Ballinger Fletcher, *Army Aims to Field 1 Million Drones in Next 2-3 Years*, Def. News (Nov. 7, 2025), https://www.defensenews.com/breaking-news/2025/11/07/army-aims-to-produce-1-million-drones-in-next-2-3-years [https://perma.cc/MZH5-UCA3].

7. Zach Warren, *Agentic AI in Legal: What It Is and Why It May Appear in Law Firms Soon*, Thompson Reuters (Dec. 9, 2024), https://www.thomsonreuters.com/en-us/posts/technology/agentic-ai-legal [https://perma.cc/PXR2-AEN5].

8. Jared Perlo & Angela Yang, *These People Ditched Lawyers for ChatGPT in Court*, NBC News (Oct. 8, 2025), https://www.nbcnews.com/tech/innovation/ai-chatgpt-court-law-legal-lawyer-self-represent-pro-se-attorney-rcna230401 [https://perma.cc/PA97-DEKF].

9. Enterprise architecture is the industry standard framework used to depict, manage, and align an organization's IT assets, people, operations, and projects with its overall strategic goals. Broadly, it consists of four layers: technology (hardware), applications (software), data (information), and governance (business). Nick Barney & Alexander Gillis, *What Is Enterprise Architecture?*, TechTarget (Sep. 12, 2025), https://www.techtarget.com/searchcio/definition/enterprise-architecture [https://perma.cc/V5CN-97R2].

10. *See* CIO Council, The Application Rationalization Playbook: An Agency Guide to Portfolio Management (n.d.), https://www.cio.gov/assets/files/Application-Rationalization-Playbook.pdf [https://perma.cc/U3RS-X9N9].

11. *See* Joe Caserta et al., McKinsey & Co., The Data Dividend: Fueling Generative AI (Sep. 15, 2023). AI systems will require the JAG Corps to identify, ingest, curate, process, and organize its data.

12. *See* Reed Kennedy, Strategic Management ch. 7.4 (2020), https://pressbooks.lib.vt.edu/strategic-management/chapter/7-4-types-of-innovation [https://perma.cc/93MK-GPMP] (defining radical innovation); Final Report, *supra* note 3, at 7.

13. Obrain Tinashe Murire, *Artificial Intelligence and Its Role in Shaping Organizational Work Practices and Culture*, 14 Admin. Scis. 316 (2024), https://www.mdpi.com/2076-3387/14/12/316 [https://doi.org/10.3390/admsci14120316].

14. Clayton M. Christensen, The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail 108 (2000).

15. *See* Joseph Schumpeter, Capitalism, Socialism, and Democracy 83 (2008). Joseph Schumpeter, one of the most influential economists of the twentieth century, coined the term "creative destruction" to explain that "capitalism . . . incessantly revolutionizes the economic structure from within, *incessantly destroying the old one, incessantly creating a new one*." *Id. See also* Eric Schmidt, *Why Technology Will Define the Future of Geopolitics*, Foreign Affs. (Feb. 28, 2023), https://www.foreignaffairs.com/united-states/eric-schmidt-innovation-power-technology-geopolitics [https://perma.cc/L795-9VYP] ("Innovation power is the ability to invent, adopt, and adapt to new technologies.").

16. *See AI Glossary/Dictionary*, MIT Media Lab, https://www.media.mit.edu/tools/ai-glossary-dictionary [https://perma.cc/38T5-KLPL] (last visited Dec. 12, 2025). The main branches of AI include machine learning (ML), natural language processing (NLP), robotics, computer vision, expert systems, and neural networks (deep learning). *Id.* While NLP and expert systems offer the most immediate use case for the legal practice, attorneys can anticipate the use of ML (predictive analytics), computer vision (interpret images and PDFs), and potentially robotics.

17. *See* U.S. Dep't of Army, Field Manual 6-0, Commander and Staff Organization and Operations para. 2-32 (16 May 2022) [hereinafter FM 6-0].

18. Multimodal sensing enables AI inference by integrating different data inputs, like images, radar, and infrared signals.

19. *See* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024); *see also* Model Rules of Pro. Conduct r. 1.1 ("Competence"), r. 1.3 ("Diligence"), r. 1.4 ("Communication"), r. 1.6 ("Confidentiality"), r. 3.3 ("Candor to the Tribunal), r. 5.1 ("Supervisory Responsibilities"), r. 5.3 ("Nonlawyer Assistance"), r. 7.1 ("Communications Concerning a Lawyer's Services") (A.B.A. 2025); U.S. Dep't of Army, Regul. 27-26, Rules of Professional Conduct for Lawyers (26 Mar. 2025); *see, e.g.*, Va. Bar Ass'n, VBA Model Artificial Intelligence Policy for Law Firms (May 2024), https://www.vba.org/docDownload/2672069 [https://perma.cc/GPD3-CBE2].

20. Shane Shaneman, The AI Stack: A Blueprint for Developing and Deploying AI, at slide 27 (Feb. 1, 2024) (unpublished presentation) (on file with author). The computing and device layers are the servers, central processing units (CPUs), graphics processing units (GPUs), and optimized combinations of chips. The data management layer includes data ingestion, cleaning, labeling, and storage. The machine learning layer is where the AI model learns from the data to recognize patterns, predict outcomes, and generate insights. The modeling and decision-support layers incorporate strategic reasoning paradigms like game theory, opponent modeling, and exploitation. The planning and autonomy layers at the top of the stack reflect the pinnacle of AI's potential—empowering a machine to act on a human's behalf or enhance human capability.

21. Alice Gomstyn & Alexandra Jonker, *What Is Data Curation?*, IBM, https://www.ibm.com/think/topics/data-curation [https://perma.cc/5YFF-9RQR] (last visited Dec. 12, 2025).

22. Accuracy: How accurate is the AI model, and how critical is accuracy for this task? Efficiency: If implemented, what is the increase in speed and cost avoidance? Does this translate to improved lawyer effectiveness in other areas? Complexity: Given Judge Advocate Legal Services AI proficiency, how difficult will it be to implement the solution throughout the JAG Corps? Ethical risk: Does the activity raise confidentiality, privilege, bias, or compliance concerns? *See* Nat'l Inst. of Standards & Tech., AI Risk Management Framework (Jan. 2024), https://www.nist.gov/itl/ai-risk-management-framework [https://perma.cc/N8B6-L3ZG]. `

23. Education and training are critical for developing JAs within each time horizon. Given its importance, the role of education is addressed in detail within this article's recommendation for developing bimodal JAs through human-machine integration. *See supra* Section titled "Forging Our Competitive Advantage: The Bimodal JA."

24. *AI Glossary/Dictionary*, *supra* note 16 ("Agentic AI refers to AI systems designed to act autonomously, perceiving their environment, making decisions, and taking actions to achieve specific goals. These systems often incorporate features like adaptability, goal orientation, and interaction with dynamic environments.").

25. A foundation model is an AI model "trained on vast, immense datasets and can fulfill a broad range of general tasks. They serve as the base or building blocks for crafting more specialized applications." Rina Diane Caballar & Cole Stryker, *What Are Foundation Models?*, IBM, https://www.ibm.com/think/topics/foundation-models [https://perma.cc/HE37-YV5V] (last visited Dec. 12, 2025). *See also* Matthew Kosinski, *What Is a Data Lake?*, IBM, https://www.ibm.com/think/topics/data-lake [https://perma.cc/NK35-J8YF] (last visited Dec. 12, 2025) ("A data lake is a low-cost data storage environment designed to handle massive amounts of raw data in any format, including structured, semi-structured and unstructured data."). *See AI Glossary/Dictionary*, *supra* note 16. There are three types of AI learning: supervised, unsupervised, and reinforcement learning. Supervised learning relies on labeled data with a benchmark ground truth to predict or classify values. Unsupervised learning is data-driven and can identify patterns and clusters from unlabeled data. Reinforcement learning is reward-based, meaning

a model can "learn" from its mistakes through human feedback or trial and error.

26. Catherine Reach, *The Emergence of Agentic AI*, N.C. Bar Ass'n. (July 14, 2025), https://www.ncbar.org/2025/07/14/the-emergence-of-agentic-ai [https://perma.cc/KXS4-5U4D].

27. *See* Deloitte, The Agentification of the Enterprise: Navigating Enterprise Transformation with Agentic AI (Oct. 2025) [hereinafter The Agentification of the Enterprise], https://www.deloitte.com/content/dam/assets-zone3/us/en/docs/services/consulting/2025/agentic-ai-enterprise-adoption-guide.pdf [https://perma.cc/8HLD-5RXS].

28. *See* Lareina Yee, Michael Chui, & Roger Roberts, *One Year of Agentic AI: Six Lessons from the People Doing the Work*, McKinsey & Co. (Sep. 12, 2025), https://www.mckinsey.com/capabilities/quantumblack/our-insights/one-year-of-agentic-ai-six-lessons-from-the-people-doing-the-work# [https://perma.cc/28XQ-KF55]; Linda Mantia, Surojit Chatterhjee & Vivian S. Lee, *Designing a Successful Agentic AI System*, Harv. Bus. Rev. (Oct. 24, 2025), https://hbr.org/2025/10/designing-a-successful-agentic-ai-system# [https://perma.cc/VL5K-85B4].

29. *See* Joint Chiefs of Staff, Joint Pub. 5-0, Joint Planning, at III-15 (July 1, 2025). An operational approach broadly describes the actions a command must take to transform the current conditions into those desired at the end state. Planners should examine the current operating environment, define the overarching goal, identify the problem, and identify the activities to change the current state to the future state. *See id.* at III-16, fig. III-7.

30. *See* The Agentification of the Enterprise, *supra* note 27.

31. *See AI Glossary/Dictionary*, *supra* note 16. Auditable AI refers to systems designed with mechanisms that allow their processes, decisions, and outcomes to be reviewed, verified, and traced by humans or external systems. This includes maintaining logs, providing detailed documentation, and enabling post-hoc analysis. *What Is Explainable AI?*, IBM, https://www.ibm.com/think/topics/explainable-ai [https://perma.cc/5KX7-ZAKK] (last visited Dec. 12, 2025) ("Explainable artificial intelligence is a set of processes and methods that allows human users to comprehend and trust the results and output created by machine learning algorithms.").

32. *See* The Agentification of the Enterprise, *supra* note 27.

33. AI bias occurs when systems produce "biased results due to human biases that skew the original training data or AI algorithm leading to distorted outputs and potentially harmful outcomes." James Holdsworth, *What Is AI Bias?*, IBM, https://www.ibm.com/think/topics/ai-bias [https://perma.cc/6P3R-ZTF7] (last visited Dec. 12, 2025). AI hallucinates when it "perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." *What Are AI hallucinations?*, IBM, https://www.ibm.com/think/topics/ai-hallucinations [https://perma.cc/H686-6TPB] (last visited Dec. 12, 2025). "Catastrophic forgetting occurs when neural networks forget previously learned tasks after being trained on new data or undergoing fine-tuning for specific tasks." Ivan Belcic & Cole Stryker, *What Is Catastrophic Forgetting?*, IBM, https://www.ibm.com/think/topics/catastrophic-forgetting [https://perma.cc/7Y3C-TTYX] (last visited Dec. 12, 2025).

34. FM 6-0, *supra* note 17, paras. 2-81, 2-129, 2-143. The staff judge advocate (SJA) is considered "a member of the commander's personal and special staff." *Id.* para. 2-143. As a member of the special staff, SJAs perform "professional [and] technical responsibilities" to "help commanders and other staff members perform their functional responsibilities." *Id.* para. 2-81. As a member of the personal staff, SJAs "have a unique relationship" and "communicate directly" with the commander. *Id.* para. 2-129. Specifically, they are "responsible for providing all types of legal support and advice" to the command. *Id.* para. 2-143.

35. Dave Bergmann & Cole Stryker, *What Is Artificial General Intelligence (AGI)?*, IBM, https://www.ibm.com/think/topics/artificial-general-intelligence [https://perma.cc/J2MJ-NN96] (last visited Dec. 12, 2025); *AI Glossary/Dictionary*, *supra* note 16. AI is divided into three main types: narrow AI, AGI, and artificial super intelligence (ASI). Narrow AI is an intelligent system focused on one specific task (e.g., language or autonomous driving). AGI refers to "human-like versatility, capable of performing a wide range of tasks across various domains with adaptability and reasoning." *AI Glossary/Dictionary*, *supra* note 16. ASI refers to a theoretical point-in-time when AI surpasses the human mind in all facets.

36. *What Is Artificial General Intelligence (AGI)?*, McKinsey & Co. (Mar. 21, 2024), https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-artificial-general-intelligence-agi# [https://perma.cc/X8Y9-TZ4T]. The eight capabilities needed for narrow AI to become AGI are visual perception, audio perception, fine motor skills, natural language processing, problem-solving, navigation, creativity, and social/emotional engagement. *Id.*

37. *See* Marjorie Richter, *How AI Is Transforming the Legal Profession*, Thomson Reuters (Aug. 18, 2025), https://legal.thomsonreuters.com/blog/how-ai-is-transforming-the-legal-profession [https://perma.cc/KAX4-H6M7].

38. *See* Richard Swain & Albert Pierce, The Armed Forces Officer 19 (2017).

39. *Id.* ("A profession has a body of expertise, built over time on a base of practical experience, which yields fundamental principles and abstract knowledge; which normally must be mastered through specialized education; which is intensive, extensive, and continuing; and which can then be applied to the solution of specific, practical problems.").

40. *See, e.g.*, Model Rules of Pro. Conduct r. 1.1(a) (N.Y. Unified Ct. Sys. 2024) ("A lawyer should provide competent representation to a client.").

41. *See* Swain & Pierce, *supra* note 38, at 22. ("A profession has a responsibility to provide a useful, even critical, service to the larger society. In exchange for the service that a profession provides, the society grants to members of that profession certain privileges, prerogatives, and powers that it does not extend to the rest of its citizens.").

42. *See* Merel Noorman, *Computing and Moral Responsibility*, Stanford Encyclopedia of Phil. (Feb. 2, 2023), https://plato.stanford.edu/archives/spr2023/entries/computing-responsibility [https://perma.cc/C7UE-PZ3J]. Intelligent machines are not moral agents and cannot be held morally responsible because AGI will never *serve* society.

43. Swain & Pierce, *supra* note 38, at 24 (stating that corporateness "reflects a sense of common endeavor . . . [with] two important dimensions: a shared identity, and the wish to exert control over membership in the profession").

44. *Id.* at 25 ("Professional ethics are the moral standards to which the profession is committed and held" and a "[p]rofessional ethos is the collective and internal sense of what each member must be as a member of the profession.").

45. The author notes that many of the considerations illuminated by this "profession" framework apply equally to earlier planning horizons (i.e., AI-enabled legal activity and the integration of agentic-AI).

46. *See* Carl Von Clausewitz, On War 89, 649 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press, 1976) (1832) (providing the Clausewitzian concepts of "fog," the uncertainty and confusion inherent in warfare; "friction," the countless small, unpredictable difficulties that hinder military operations; and "chance," the unpredictable element of luck and fortune, all of which are ever present in LSCO and will impact the availability and utility of digital capabilities, including AI).

47. Joint Chiefs of Staff, Joint Pub. 3-0, Joint Campaigns and Operations, at V-1 (June 18, 2022).

48. *See* Marty Trevino, *Cyber Physical Systems: The Coming Singularity*, Prism no. 3, 2019, at 2, 3; Jonathan P. Wong et al., RAND. Corp., One Team, One Fight: Insights on Human-Machine Integration For the U.S. Army (2025), https://www.rand.org/pubs/research_reports/RRA2764-1.html [https://perma.cc/H297-SWNL]. When applied to the legal context, attorneys and AI systems working together will exploit each other's strengths; the machines will process data and recognize patterns, while the humans will apply judgment, ethics, creativity, strategy, and persuasion.

49. The JAG Corps's four constants are mastery of the law, principled counsel, servant leadership, and stewardship. U.S. Dep't of Army, Field Manual 3-84, Legal Support to Operations 1-2 fig. 1-1 (Sep. 1, 2023) [hereinafter FM 3-84].

50. *See* Andrew R. Lee & Jason M. Loring, *From Enhancement to Dependency: What the Epidemic of AI Failures in Law Means for Professionals*, Nat'l L. Rev. (Aug. 19, 2025), https://natlawreview.com/article/enhancement-dependency-what-epidemic-ai-failures-law-means-professionals [https://perma.cc/7DS9-XB5S].

51. "Relying on AI . . . may interrupt cognitive processes that would otherwise build over time. When students used ChatGPT, their brains showed lower connectivity across key regions associated with active thinking and memory. When students worked without any tools, relying solely on their knowledge, their brains exhibited more cross-regional communication." Sascha Brodsky, *When AI Thinks for Us, the Brain Gets Quieter*, IBM, https://www.ibm.com/think/news/when-ai-thinks-brain-gets-quieter [https://perma.cc/FGH2-XRTS] (last visited Dec. 12, 2025). *See also* Betsy Sparrow et al., *Google Effects on Memory: Cognitive Consequences of Having Information at Our Fingertips*, 333 Sci. 776, 776–78 (2011) ("[P]eople are less likely to remember facts when they know that they can retrieve those facts later, via search engines. In other words, when we trust a tool to remember for us, we stop trying.").

52. Prompt engineering, the "iterative refinement of different prompts" enables Generative AI systems to "effectively learn from diverse input data and adapt to minimize biases, confusion and produce more accurate

responses." Vrunda Gadesha, *What Is Prompt Engineering?*, IBM, https://www.ibm.com/think/topics/prompt-engineering [https://perma.cc/9QBP-7REY] (last visited Dec. 12, 2025). The reliance on prompt engineering can lead to cognitive offloading—JAs may outsource core analytical and reasoning tasks to AI, eroding their own understanding of the law over time.

53. Upskilling the workforce is critical to enabling AI capabilities and yet, "companies often undervalue, underspend, and then underwhelm in their investments in human capabilities." Kimberly Borden et al., *The AI Revolution Will Be 'Virtualized'*, McKinsey & Co. (Apr. 8, 2025), https://www.mckinsey.com/capabilities/operations/our-insights/the-ai-revolution-will-be-virtualized# [https://perma.cc/73AK-ALAJ]. TJAGLCS is leaning into this challenge.

54. At the time of this writing, JAs serving at combatant commands and Service Component commands are heavily involved in advising clients on developing and employing AI capabilities in cyber and physical operations, such as neural networks and AI-enabled polymorphic malware.

55. The hierarchy of educational objectives builds through the following tasks: knowledge, comprehension, application, analysis, synthesis, and evaluation. *Bloom's Taxonomy*, Ctr. for Teaching Innovation: Cornell Univ., https://teaching.cornell.edu/resource/blooms-taxonomy [https://perma.cc/BV2D-NGVZ] (last visited Dec. 12, 2025).

56. FM 3-84, *supra* note 49, fig. 1-1.

57. *See* Diane Hamilton, *Virtual Reality in Corporate Training: A New Era of Employee Onboarding*, Forbes (Apr. 4, 2025), https://www.forbes.com/sites/dianehamilton/2025/04/04/virtual-reality-in-corporate-training-a-new-era-of-employee-onboarding [https://perma.cc/M3MP-XJFH]. Digital twins enable immersive learning as employees "move, visualize, and experience" their work environment.

58. A digital twin is a "virtual [replica] of a physical object or system that uses real-time data to accurately reflect its real-world counterpart's behavior, performance, and conditions." Nick Gallagher & Maggie Mae Armstrong, *What Is a Digital Twin?*, IBM, https://www.ibm.com/think/topics/digital-twin [https://perma.cc/HM5D-JY47] (last visited Dec. 12, 2025). Across industry, digital twins are accelerating learning by enabling employees to rehearse, experiment, and refine performance in conditions that mirror the real world. From Taiwan Semiconductor and BMW factories to Formula One drivers, digital twins have proven transformative at optimizing performance. *See* Borden et al., *supra* note 53; Alex Cosmas et al., *Digital Twins and Generative AI: A Powerful Pairing*, McKinsey & Co. (Apr. 11, 2024), https://www.mckinsey.com/capabilities/tech-and-ai/our-insights/tech-forward/digital-twins-and-generative-ai-a-powerful-pairing [https://perma.cc/J3XM-7MPU]; James McKenna, *NVIDIA Omniverse Digital Twins Help Taiwan Manufacturers Drive Golden Age of Industrial AI*, Nvidia (May 18, 2025), https://resources.nvidia.com/en-us-industrial-sector-resources-mc/en-us-industrial-sector-resources/omniverse-digital-twins-taiwan [https://perma.cc/H99H-BP9X]; SAP Insights research center, *Digital Twins at Work: 9 Examples*, SAP (Aug. 13, 2025), https://www.sap.com/blogs/digital-twins-at-work [https://perma.cc/32QJ-YB93]. Thor Olavsrud, *Digital Twins: 5 Success Stories*, CIO (Aug. 30, 2022), https://www.cio.com/article/189121/digital-twins-4-success-stories.html [https://perma.cc/5UFN-QTYK]. Similar tools could enable TJAGLCS to create environments for legal advising, advocacy, and warfighting.

59. Example coaching from the JAG Corps's desktop mentor bot: "*CPT Howard, it appears you are writing a legal opinion on Space-A noninterference travel. You are missing several key facts. Would you like me to generate email correspondence to secure that information? Here are three legal reviews on this topic that were drafted last week by OTJAG Adlaw. Would you like me to review your legal opinion at the end or coach you through this process?*"

60. OpenAI's mission statement explicitly contemplates developing AGI, by which they mean "highly autonomous systems that outperform humans at most economically valuable work." *OpenAI Charter*, OpenAI, https://openai.com/charter [https://perma.cc/6DWU-53ZC] (last visited Dec. 12, 2025); *see also Planning for AGI and Beyond*, OpenAI (Oct. 28, 2025), https://openai.com/index/planning-for-agi-and-beyond [https://perma.cc/YFZ8-SNRC] (describing OpenAI's current efforts to develop and transition to a world with AGI).

News & Notes

Photo 1
Members of the 229th OBC conduct morning PT in Charlottesville, VA. (Credit: 1SG Jeremy D. Krammes)

Photo 2
The 230th Judge Advocate Officer Basic Course. (Credit: Jason F. Wilkerson, TJAGLCS)

Photo 3
SSG Johnnie D. Luna, paralegal noncommissioned officer-in-charge, 2nd Infantry Brigade Combat Team (Airborne), 11th Airborne Division, conducts crevasse rescue and rope team movements on a glacier during Military Mountaineering School at Fort Wainwright, AK. (Photo courtesy of SSG Johnnie D. Luna)

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Photo 4
CPT Irvin Henriquez, brigade judge advocate, 18th Military Police Brigade, 7th Army Training Command, plots points on a map during land navigation training at U.S. Army Garrison Bavaria, Germany. (Credit: SFC Tanisha Karn)

Photo 5
CPT Jaren Lubrano, national security law attorney, 8th Theater Sustainment Command, presents his closing argument to a panel of Service members during a joint-Service mock trial at the Army courthouse at Wheeler Army Airfield, HI. (Credit: SGT Deneisha Owens-McParland)

Photo 6
The 3rd Brigade Combat Team, 82nd Airborne Division, command post at sunrise at the Fort Bragg, North Carolina, training area. (Credit: MAJ Andrew E. Nist)

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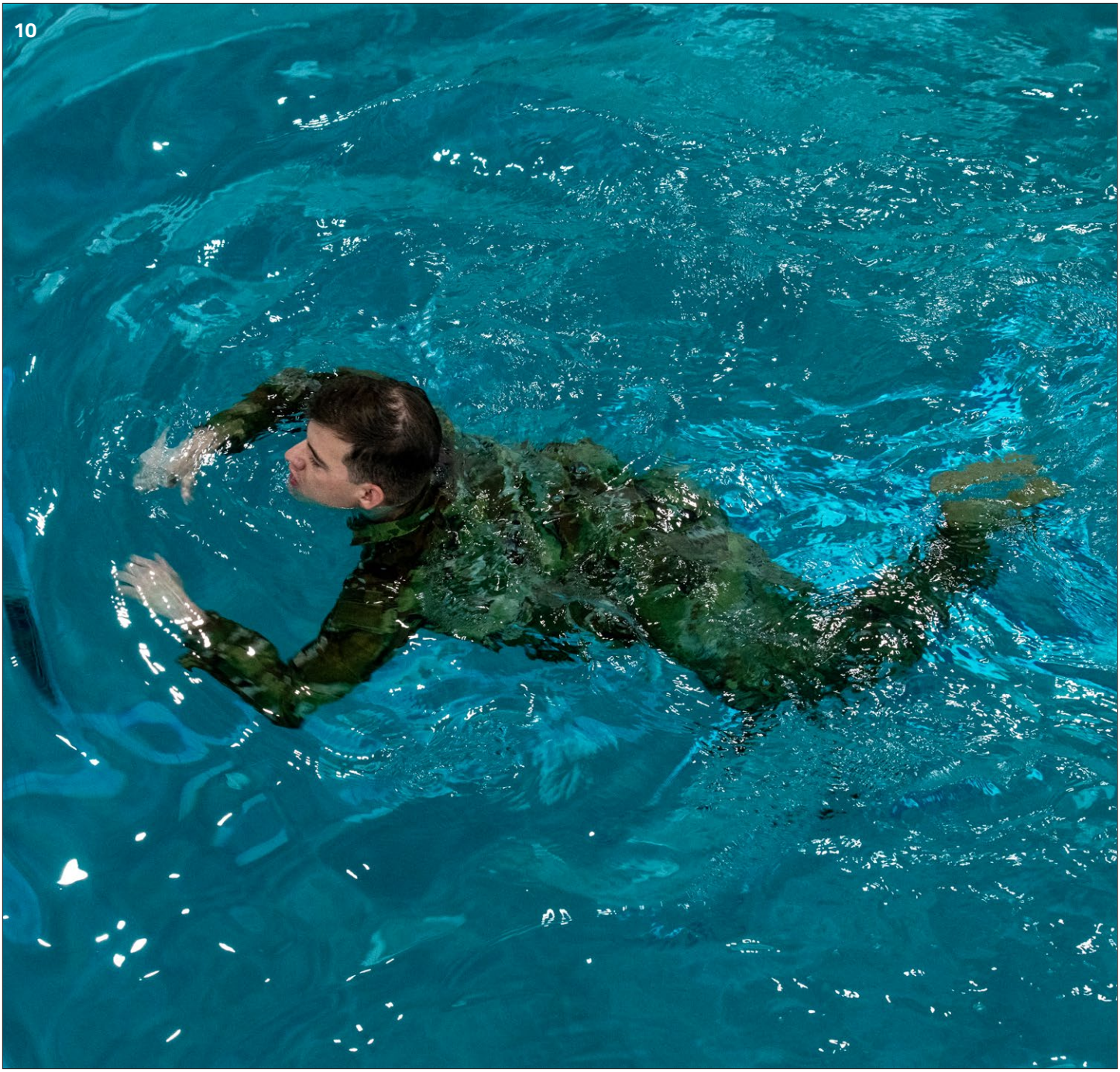


Photo 7
CPT Brooke Gomulka, international law attorney, 360th Civil Affairs Brigade, 352nd Civil Affairs Command, discusses rule of law during a subject-matter-expert exchange in Lusaka, Zambia. The exchange strengthened professional relationships and allowed participants to share perspectives on military justice, human rights, and the law of armed conflict. (Photo courtesy of SETAF-AF Civil Affairs Battalion)

Photo 8
SPC Tyrone Harrington, paralegal specialist, V Corps, assembles the first U.S. Army courtroom at Camp Kościuszko, Poland. (Credit: SGT Devin Klecan)

Photo 9
SPC Nicholas Tallant, paralegal specialist, 21st Theater Sustainment Command, takes a test during the Paralegal Employment During Large Scale Operations (PELSCO) training event at Sembach Kaserne, Germany. (Credit: PFC Kadence Connors)

Photo 10
A U.S. Army paralegal practices water survival during the Paralegal Warrior Competition at Camp Humphreys, South Korea. The week-long competition tested participants on combat and tactical mission skills. (Credit: PFC Ana Alrawi-Marque)

Interns and JAs (including CPT Petit-Bois, far left) learn about the history behind Old Ironside and see how Army units maintain readiness during Motorpool Monday at the 16th Engineering Battalion. (Photo courtesy of author)

What's It Like?

Inside the Army Legal Internship
A FLEP Candidate's Experience at Fort Bliss

By Captain Diane R. Petit-Bois

As a U.S. Army Military Police officer selected for the Funded Legal Education Program (FLEP), I approached my summer internship at the Office of the Staff Judge Advocate (OSJA) for 1st Armored Division and Fort Bliss with the mindset of becoming a future counselor. Up until that point, law enforcement and Soldier-focused development shaped my professional life. This internship offered something different: a deeper understanding of the legal backbone that supports everything from discipline to operational readiness.

During my time at Fort Bliss, I witnessed how military justice extends far beyond the courtroom. Observing administrative separations under Army Regulation 635-200[1] gave me a fresh appreciation for the stakes involved in characterizations of service. These decisions affect a Soldier's immediate separation and ripple through their long-term access to benefits and employment opportunities. While under the administrative law section, I learned that legal reviews

Civilian and FLEP summer interns stand with COL Michael Friess, Military Judge, following an engaging discussion on career pathways within the JAG Corps. From left to right: Jose Medina (University of Puerto Rico), Taylor Mayo (Penn State Law), CPT David Hazelton (Harvard Law), COL Michael Friess, CPT Diane Petit-Bois (Florida A&M University), and Zachary Sickler (Penn State Law). (Photo courtesy of author)

CPT Petit-Bois receives hands-on exposure to Bradley Fighting Vehicles and Joint Assault Bridges during Motorpool Monday at the 16th Engineering Battalion. (Photo courtesy of author)

are not just procedural; they are critical assessments aimed at preserving fairness and ensuring commanders receive sound counsel before making life-altering decisions.

Although I had not yet taken a formal evidence course, I observed how discovery obligations were discussed and applied during my time in the military justice section. Conversations surrounding *Brady v. Maryland*[2] and *Giglio v. United States*[3] emphasized the foundational role of ethical disclosure within military justice. I came to understand that legal transparency is not just a procedural requirement, but a professional ethic that safeguards both the integrity of the system and the rights of the accused. These discussions gave me an early and lasting appreciation for the defense's entitlement to exculpatory and impeachment evidence, and the Government's obligation to pursue justice.

Courtroom experiences stood out as defining moments of the internship. The judge's questions struck a careful balance between fact-finding and protecting the accused's rights. From my own experiences, I understand that emotions can run high in field incidents, but inside the courtroom, the focus was clarity, intent, and fairness.

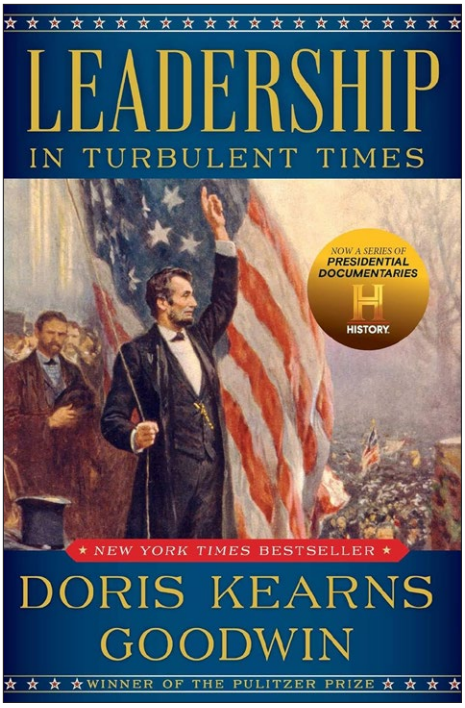
Throughout my time with the OSJA, I also participated in legal professional development sessions covering topics like unreasonable multiplication of charges and "naked" pleas—guilty pleas without an agreement with the convening authority. These sessions were not lectures; they were collaborative discussions where judge advocates encouraged our input and sharpened our understanding. I also observed voir dire during the selection of a court-martial panel. It offered a powerful reminder of how personality, perception, and even subtle phrasing can impact a panel.

In my 2L year as a FLEP candidate, I carry the lessons this internship instilled in me. Above all, I carry the understanding that every legal decision leaves a lasting imprint and that excellence in this profession requires discipline, dedication, and the grit to see justice through. This internship reaffirmed my commitment to the Judge Advocate General's Corps, and I could not be more excited to finish law school and begin this next chapter. **TAL**

CPT Petit-Bois is a 2L at Florida A&M University College of Law in Orlando, Florida.

Notes

1. U.S. Dep't of Army, Regul. 635-200, Active Duty Enlisted Administrative Separations (30 June 2025).
2. Brady v. Maryland, 373 U.S. 83 (1963).
3. Giglio v. United States, 405 U.S. 150 (1972).



Book Review

Storied Leadership

A Case for the Power of Narrative

By Major Cadence L. Coffin

Are leaders born or made? Doris Kearns Goodwin responds: Let me tell you a story.[1]

A perennial discussion for leaders is whether leaders are born or made.[2] *Leadership in Turbulent Times*[3] (*Leadership*) by Doris Kearns Goodwin is one of more than 12,000 books in the Library of Congress on leadership.[4] One could argue that from the sheer number of leadership publications available (Army Doctrine Publication 6-22[5] included), we have the answer: leaders are made, or at least we believe they can be.[6] Naturally, then—and rightly!—readers are on the lookout for formulas for successful leadership.

Leadership, like other books of its kind, offers practical guidance for outstanding leadership from the lives of four exceptional presidents: Abraham Lincoln, Theodore Roosevelt, Franklin D. Roosevelt (FDR), and Lyndon B. Johnson. But Goodwin's aim is much higher. She does not limit the question to what qualities (innate or learned) make a good leader; she focuses on the cause-and-effect relationship between the four men and the times in which they lived. She does so by employing the narrative method of instruction because the most effective way to develop young leaders is through story. Manuals or books that atomize leadership into discrete traits and strip them of context are helpful but insufficient to inspire future leaders. Goodwin takes the classic leadership traits, such as those offered in the Army's leadership requirements model,[7] and explores their application through the lives of these men. As a result, *Leadership* stands as a necessary supplement to the Army's leadership doctrine.

The Story: "No Single Path"[8]

Goodwin is a Pulitzer Prize winner[9] and author of individual biographies on each of these presidents. She is more than equipped to tease out the leadership lessons from their lives. As Theodore Roosevelt said of his literary heroes, Goodwin "has gone to bed at night and risen in the morning with these men," and she knows "their strengths and weaknesses."[10] Although *Leadership* is supported by fifty-eight pages of citations,[11] Goodwin shares her subjects' stories in a way that is accessible to lay readers. She presents these men as characters in their story, focusing on the human side of leadership. She follows the lead of Abraham Lincoln by taking a complex idea and giving concrete examples in story format.[12] It is not just instructional; it is enjoyable.

Great leadership is best understood in the nuance of story. Goodwin expertly aligns the subjects' stories parallel to each other to make visible what we might not see by viewing these men in isolation: context matters. Goodwin's approach prevents future leaders from concluding that there is a single path to leadership.[13] For example, if you thought that leaders are born after reading about Abraham Lincoln's natural empathy,[14] Goodwin presents you with the counterpoint of FDR conquering polio[15] to show that a man who had assumed such an outstanding level of responsibility[16] for his life was uniquely capable of leading us through the Great Depression and World War II.

We read of Theodore Roosevelt's inborn and unmatched willpower and energy[17] to find more support for leaders being born. But then Goodwin juxtaposes those ideas against the strongest example of a man being shaped by the times: Lyndon B. Johnson. Johnson was a legislative master,[18] but it was only when President John F. Kennedy's assassination forced him to carry out President Kennedy's vision that he became a great leader.[19]

That's what makes Goodwin's approach so effective: by presenting the information as a story, the reader has to actively participate and wrestle with the concept of cause-and-effect. At every turn, Goodwin offers future leaders the necessary context that brings leadership traits to life.

Goodwin had many options to choose from when writing about leadership, so why these four presidents? It is easy to understand why leaders like Lincoln and FDR made the list.[20] However, her less obvious choice of Johnson makes the reader wonder whether these four men were chosen out of convenience—she already had a wealth of source material after writing the biographies of each.[21] Is *Leadership* just a derivative of her earlier research?[22] Even Goodwin expresses concern that the reader has grounds to question her choices.[23] However, one of *Leadership*'s themes is that there is "no single path."[24] Future leaders have a trove of varied examples to explore. By selecting four presidents with different qualities, from different times, and with varying levels of success, Goodwin makes her point.

The Leaders: A Building of Four Stories

The subtext between the lines of almost every chapter[25] of *Leadership* is that storytelling is a vital skill for leaders. Not only is it her method of instruction as the author, but she also highlights the influence of storytelling in each of the presidents' lives. Vignettes describing each president's obsession with hearing and telling stories appear in over one hundred places throughout the book.[26] Not only were all four presidents influenced by stories, but they also used storytelling as a tool of influence as leaders.

The virtue of a list of leadership traits is limited by the imagination of the reader. By placing those traits in context, future leaders can see them in action and explore their limitations.

Lincoln was known from his youth as "the best storyteller in the house."[27] Despite extreme poverty, the loss of his mother, and discouragement from his father,[28] Lincoln quested after literature and learning. This was, in part, born out of the frustration he felt when others "talked to [him] in a way [he] could not understand," the only thing that made him truly angry.[29] He also avoided engendering that frustration in others. "With kindness, playfulness, wit, and wisdom," he would instruct those in his sphere of influence.[30] He would take complex concepts and present them in stories and maxims so that others "might instantly see the force and bearing of what he said."[31]

But it is not the hardship of childhood poverty that creates the ambition required for leadership. Theodore Roosevelt was born into privilege.[32] He had loving parents who gave him individualized care and education. In terms of worldly privilege, he was at the other end of the spectrum from Lincoln. The effect of placing Lincoln and Roosevelt's childhoods side-by-side shows just how opposite the set pieces surrounding these characters can be. Although Lincoln had "no wealthy or popular relations to recommend [him],"[33] he had physical strength and health.[34] Roosevelt had access to all the tools and resources a child could want except for a healthy body. He had bronchial asthma, which made him a sickly and timid child.[35] Like Lincoln, he also wanted to rise above his circumstances and found himself transported into the lives of the adventurous heroes he admired through books.[36] From his heroes, he learned the "gospel of will,"[37] and he transformed his body to keep up with his mind. "The story of Theodore Roosevelt is the story of a small boy who read about great men and decided he wanted to be like them."[38]

Like Theodore Roosevelt, FDR was born into worldly privilege. However, unlike Lincoln and Theodore Roosevelt, FDR had an idyllic upbringing with both privilege and health.[39] What separates FDR from Lincoln and Roosevelt is that his love of story did not come from reading literature but from listening to it. His mother would read to him regularly,[40] and "he would absorb great quantities of information by hearing people talk."[41] He would later tell his cabinet secretary that he much preferred to read aloud to someone than to read by himself.[42] He was warm and charming and would speak with everyone he encountered: in general stores, in village squares, and standing outside manufacturing plants.[43] He loved to talk and listened intently as others spoke about their work, their lives, and their family.[44] These experiences were the infrastructure for the storytelling that made his fireside chats so effective.

"Storytelling played a central role in young Lyndon's life," too.[45] He used it as an escape from his parents' fractured relationship and the tension in his childhood home.[46] The stories he read and heard became the scaffolding for his "heroic conception of leadership."[47] As a young adult, he would channel that heroic conception of leadership as the principal of a Mexican American elementary school in Cotulla, Texas.[48] He would devote all of his energy and his own personal funds to the betterment of his students.[49] Later, he would say, "I can still see the faces of the children who sat in my class."[50] His students were "poor . . . and they knew, even in their youth, the pain of prejudice."[51] These visions became his wellspring of motivation during the civil rights era. After the tragic death of President Kennedy, Johnson "harked back to his childhood . . . to the stories his grandfather told"[52] and "knew what had to be done."[53]

The Adversity: A Harbinger of Success

The next section of the book weaves another common thread through their development: a life-altering trauma that challenged their will, upended their ambition, and would have justified the end of their rise. Suppose a future leader was tempted to believe these men were destined for greatness based on their innate characteristics or upbringing alone. In that case, that leader is confronted with section II of *Leadership*, "Adversity and Growth,"[54] and is disabused of that notion.

Here, Goodwin tells the story of each man conquering his challenges, making a strong argument that leaders are developed because of their circumstances, not in spite of them. Goodwin leaves no room for fatalism here. There was nothing inevitable about Lincoln unburdening himself from the shackles of depression, which caused his friends to remove all the sharp objects from his room,[55] or Roosevelt channeling his grief from the loss of his wife and mother into something productive, just as he did with his childhood asthma.[56] Everyone would have understood if FDR had surrendered to his polio diagnosis and lived a quiet life of meaning at home,[57] and it was not a guarantee that Johnson would

rediscover his motivation after his heart attack.[58]

Their experiences would have understandably interfered with—or even halted—the rise of any person. One wonders what stories these men told themselves as they experienced their respective challenges. Each conquered the vicissitudes of life before taking on the mantle of the presidency. The resilience they displayed in their personal crises was a harbinger of the leadership they would display during national crises.[59] Their stories encourage future leaders facing their own turbulence that their experiences can play an essential role in their success.[60]

The Times: "For Leadership Does Not Exist in a Void"[61]

If future leaders are not already convinced that leadership is not merely a combination of ingredients from a recipe book, the final section of *Leadership* demonstrates that how leaders interact with the times in which they live is what truly reveals their greatness.[62] The virtue of a list of leadership traits is limited by the imagination of the reader. By placing those traits in context, future leaders can see them in action and explore their limitations.

One of many examples Goodwin offers is how Lincoln, with incredible foresight, mediated among factions and provided a moral purpose for the Civil War. The issue of slavery had been debated for years before the Emancipation Proclamation; the timing was not right.[63] Lincoln expertly found the right moment.[64] Another example is FDR's immediate recognition that the country demanded more involvement from its Government. The weekend after his inauguration, he worked tirelessly to find a legal path to support the banking system and stem the tide of lost savings in failed banks.[65] He also led an unprecedented expansion of Federal powers[66] in creating jobs for the quarter of the Nation that was unemployed, all the while comforting the country with his fireside chats.[67]

One limitation of *Leadership*, and any book aiming this high, is that it cannot tell the whole story. Not every aspect of these leaders' lives can be presented to the reader. To maintain balance and ensure that the reader continues to view these leaders as human, Goodwin reserved precious real estate in her book to show us their flaws; she acknowledges that there are limits to the examples they provide.

Roosevelt's resilience after the death of his wife and mother caused him to work harder and to serve in the military.[68] But he did so at the expense of his family: He essentially abandoned his infant daughter.[69] Further, his insubordination toward his leader while serving as Assistant Secretary of the Navy[70] is not an example for military leaders to follow. FDR was often duplicitous: "He would give the same assignment to different people in the same agency or allocate the same projects to different agencies"[71] to stimulate rivalry and competition, but it incurred the resentment of his subordinates who had to work under his "inherently disorderly nature."[72] Johnson's toxic behavior toward his staff, including belittling them[73] and forcing them to dictate letters while he was in the bathtub,[74] was so pervasive that it received a name: The Johnson Treatment.[75] Goodwin offers a balanced picture of these men to show that leaders can be great despite their shortcomings. Like their triumphs, their shortcomings and failures are part of the story.

Conclusion

You cannot read *Leadership* without wondering if the attributes and experiences of these men would be practical now. In *Leadership*, Goodwin uses the power of narrative to provoke the kind of critical thinking necessary for hopeful leaders. Like Theodore Roosevelt, we have read the stories of great men and want to be like them.[76] How would Lincoln handle the divisiveness in our day? Would Roosevelt's direct approach be effective in combating corruption now? How would the modern civil service respond to FDR's ingenuity? Would Johnson's forceful buttonholing keep modern politicians in line?

We are inextricably linked to our times, and our leadership must fit our times like a key to a lock.[77] As our future leaders see their reflection in the mirror[78] of *Leadership* and wonder whether they will shape the times or be shaped by them,[79] Army leadership should respond: Let me tell you a story. **TAL**

MAJ Coffin is a student at the Command and General Staff College at Fort Leavenworth, Kansas.

Notes

1. Doris Kearns Goodwin, Leadership in Turbulent Times, at xiii (2018) ("I found myself engaged in an unexpectedly personal and emotional kind of storytelling.").

2. Marjan Boerma et al., *Point/Counterpoint: Are Outstanding Leaders Born or Made?*, 81 Am. J. Pharm. Edu. 58, 58 (2017).

3. Goodwin, *supra* note 1.

4. Lib. of Cong., + Books Published in the United States with Leadership in the Title, < 12,000 results (Dec. 30, 2025) (on file with The Army Lawyer).

5. U.S. Dep't of Army, Doctrine, Pam. 6-22, Army Leadership and the Profession (31 July 2019) [hereinafter ADP 6-22].

6. *See, e.g.*, Lieutenant General Stuart W. Risch & Lieutenant Colonel John E. Swords, *Lawyers as Leaders: Servant Leadership and Our Dual Professions*, Army Law., no. 2, 2024, at 11 (stating the authors' firm belief that leaders are made). *But see* Goodwin, *supra* note 1, at xv (quoting *The Conditions of Success*, *in* 13 The Works of Theodore Roosevelt 575 (Hermann Hagedorn, ed. 1923-1926) ("If there is not the war, you don't get the great general; if there is not a great occasion, you don't get the great statesman; if Lincoln had lived in times of peace, no one would have known his name now.").

7. ADP 6-22, *supra* note 5, para. 22.

8. Goodwin, *supra* note 1, at 345.

9. *See Prize Winners*, Pulitzer Prizes, https://www.pulitzer.org/winners/doris-kearns-goodwin [https://perma.cc/83H8-7UCD] (last visited Dec. 30, 2025) (listing Goodwin as a winning author).

10. Goodwin, *supra* note 1, at 25.

11. *Id*. at 389–447.

12. *Id*. at 6.

13. *See id*. at 345.

14. *Id*. at 7.

15. *Id*. at 281.

16. *See id.* (describing FDR's willingness to assume responsibility and to do it with a smile).

17. *Id*. at 29.

18. *See* Robert A. Caro, Master of the Senate: The Years of Lyndon Johnson (2003).

19. Goodwin, *supra* note 1, at 337.

20. *Id.* at xvii.

21. Doris Kearns Goodwin, Lyndon Johnson and the American Dream (1991); Doris Kearns Goodwin, No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II (1994); Doris Kearns Goodwin, Team of Rivals: The Political Genius of Abraham Lincoln (2005); Doris Kearns Goodwin, The Bully Pulpit: Theodore Roosevelt, William Howard Taft, and the Golden Age of Journalism (2013).

22. *See* sources cited *supra* note 21; *see also* Doris Kearns Goodwin, The Leadership Journey: How Four Kids Become President (2024) (using the same four subjects but intended for eight- to twelve-year-old readers).

23. *See* Goodwin, *supra* note 1, at xvii, 187 (suggesting that stacking Johnson next to the other three presidents might be an "exercise in hyperbole").

24. *Id*. at xiv.

25. *See generally id*. (discussing storytelling in every chapter except chapter 6).

26. *See generally id*. (mentioning storytelling throughout the book).

27. *Id*. at 103 (quoting Michael Burlingame, Abraham Lincoln: A Life 750–51 (2008)).

28. *See id*. at 9 (explaining that when reading distracted Lincoln from his labors, his father would whip him and destroy his books).

29. *Id*. at 5 (quoting 1 Ida M. Tarbell, The Life of Abraham Lincoln 43–44 (1903)).

30. *See id*. at 6 (quoting Herndon's Informants: Letters, Interviews, and Statements about Abraham Lincoln 113 (Douglas L. Wilson & Rodney O. Davis eds., 1998)).

31. *Id*.

32. *Id*. at 27.

33. *Id*. at 4 (quoting Abraham Lincoln, Communication to the People of Sangamon County (Mar. 9, 1832), *in* 1 The Collected Works of Abraham Lincoln 9 (Roy P. Basler ed., 1953)).

34. *Id*. at 8.

35. *Id*. at 24.

36. *Id*.

37. *Id*.

38. *Id*. at 28 (quoting Hermann Hagedorn, The Boys' Life of Theodore Roosevelt 45 (1941)).

39. *Id*. at 44.

40. *Id*.

41. *Id*. at 47.

42. *Id*.

43. *Id*. at 42.

44. *Id*.

45. *Id*. at 72.

46. *Id*.

47. *Id*.

48. *Id*. at 75.

49. *Id*.

50. *Id*. at 76.

51. *Id*. at 75.

52. *Id*. at 307.

53. *Id*. at 75 (quoting Lyndon Baines Johnson, The Vantage Point: Perspectives of the Presidency, 1963-1969, at 172 (1971)).

54. *Id*. at 96.

55. *Id*. at 98.

56. *Id*. at 131.

57. I*d*. at 166.

58. *Id*. at 188.

59. *See i*d. at 97 (explaining the ability to sustain ambition in the face of frustration is at the heart of leadership development).

60. *See id*. at xviii ("It is my hope that these stories . . . will prove instructive and reassuring. These men set a standard and a bar for all of us. Just as they learned from one another, so we can learn from them.").

61. *Id*.

62. *See id*. at xvi (quoting Abigail Adams to John Quincy Adams, (Jan. 19, 1780), *in* 3 The Adams Papers, Adams Family Correspondence, April 1778-September 1780, at 268–69 (L.H. Butterfield & Marc Friedlaender eds., Harv. Univ. Press 1973) ("The habits of a vigorous mind are formed in contending with difficulties. Great necessities call out great virtues.")).

63. *Id*. at 14.

64. *See id*. at 233 (quoting Francis B. Carpenter, Six Months at the White House with Abraham Lincoln 77 (1995) (quoting Lincoln as saying that "[i]t is my conviction that, had the proclamation been issued even six months earlier than it was, public sentiment would not have sustained it").

65. *Id*. at 279.

66. *Id*. at 178–79.

67. *Id*. at 289.

68. *Id*. at 148.

69. *See id*. at 128 (quoting William Wingate Sewall, Bill Sewall's Story of Theodore Roosevelt 47 (1919) (stating that Roosevelt's daughter, Alice, was raised by his sister and Roosevelt "insist[ed] that she would be just as well off without me").

70. *See id*. at 147 (recounting Roosevelt's decision to launch a series of unauthorized peremptory orders at the height of tension with Spain in February 1898, before the outbreak of the Spanish-American war).

71. *Id*. at 296.

72. *Id.*

73. *Id*. at 71–72.

74. *Id*. at 192.

75. *Id*. at 319.

76. *See supra* note 37 and accompanying text.

77. *See* Goodwin, *supra* note 1, at 319 ("While there is neither a master key to leadership nor a common lock of historical circumstance, we can detect a certain family resemblance of leadership traits as we trace the alignment of leadership capacity within its historical context.").

78. *See id*. at xviii.

79. *See id*. at xv (seeking an answer to the question, "Do leaders shape the times, or do the times summon their leaders?").

Henry H. Bingham. (Source: National Archives)

Lore of the Corps

Henry H. Bingham
A Forgotten JAG Corps Medal of Honor Recipient

By Dr. Nicholas K. Roland, Ph.D.

The Army Judge Advocate General's (JAG) Corps has many examples of heroism in combat in its 250-year history. Our most highly decorated members served during the First World War, when, due to a shortage of line officers, then-Colonel Blanton Winship and then-Major J. Leslie Kincaid commanded infantry units in combat while serving as the judge advocate (JA) for First Army and the 27th Infantry Division, respectively. Winship received the Distinguished Service Cross for his actions, while Kincaid received the Distinguished Service Cross, Belgian Order of the Crown, and the British Distinguished Service Order.[1] Many other members of the JAG Corps have received awards for valor, either while serving in the Corps or in another assignment. For instance, for their actions in combat in Vietnam prior to joining the JAG Corps, Major General Michael J. Nardotti Jr. received the Silver Star, and Sergeant Major John M. Nolan received the Bronze Star Medal with Valor device.[2]

Given this record, one might wonder if any member of the JAG Corps has ever received the Medal of Honor. In the Corps's 1975 bicentennial history, one individual is acknowledged as the JAG Corps's "only known recipient" of the award: Wells Blodgett.[3] Blodgett received the Medal of Honor for capturing a group of enemy pickets while serving as an infantry officer in Missouri in 1862.[4] He later went on to serve as a JA under 1862 legislation that established additional positions for full-time Army lawyers below the office of Judge Advocate General.[5]

Yet this history overlooks another Civil War-era JA Medal of Honor recipient: Henry H. Bingham.[6] Born on 4 December 1841, Bingham was a native of Philadelphia who was attending Jefferson College in Canonsburg, Pennsylvania, when the Civil War began in 1861.[7] The following summer, the governor authorized the recruiting of twenty-one new regiments.[8] Having just graduated from college, Bingham played a key role in organizing what would become Company G, 140th Pennsylvania Volunteer Infantry Regiment, in August 1862.[9] Comprised largely of students, faculty, and alumni of the college, the company elected Bingham as its first lieutenant.[10] With the regiment's organization completed and entry into U.S. service in September, Bingham was promoted to captain and commander of Company G.[11]

The 140th Pennsylvania joined the II Corps of the Army of the Potomac in December 1862, shortly after the Battle of

The Friend-to-Friend Masonic Memorial at Gettysburg depicts CPT Bingham assisting Brigadier General Armistead. (Source: U.S. National Park Service)

Fredericksburg.[12] The unit saw its first major combat the following spring at the Battle of Chancellorsville, from 1–3 May 1863.[13] By this point, Bingham had been detailed as a JA on the staff of fellow Pennsylvanian Major General Winfield Scott Hancock, commanding the First Division of the II Corps.[14] Bingham and Hancock would maintain a close personal and professional relationship from that point forward.

Like most lawyers and JAs in the nineteenth century, Bingham did not have a law degree. However, he had begun studying the law after completing his undergraduate education.[15] His scant legal background seems to have been sufficient for the task ahead. Though he officially remained an officer in the 140th Pennsylvania until 1864, Bingham would serve as a staff officer for the rest of the war.[16]

While he was an acting JA, Bingham's duties also included those common to all Civil War staff officers, such as delivering orders and carrying out a wide variety of duties required by the commander. Bingham filed a report in the aftermath of the Chancellorsville campaign that detailed his actions in carrying messages to the division picket line, delivering ammunition, and communicating with Hancock and subordinate commanders during the fighting.[17] Hancock mentioned Bingham in his official report of the campaign as one of several staff officers who "performed their duties faithfully and well, behaving with great gallantry."[18]

In the weeks after the Union defeat at Chancellorsville, Confederate General Robert E. Lee began to move north, initiating the Gettysburg campaign. Hancock assumed command of the II Corps and brought Bingham along as a member of his staff. At the Battle of Gettysburg, 1–3 July 1863, Hancock's actions gained him the nickname "Hancock the Superb," while Henry H. Bingham would begin a journey of his own into Civil War lore.

After hard fighting on 2 July, the II Corps found itself anchoring the center of the Union line at Gettysburg along Cemetery Ridge. The Confederate assault on the afternoon of 3 July, known to history as Pickett's Charge, aimed directly at the corps's position. The attack was mostly repulsed without a breakthrough, but a small group of Confederate infantry penetrated the Union defenses along a section of stone wall that later became known as The Angle.

Leading these attackers was Brigadier General Lewis A. Armistead, the scion of a prominent military family from Virginia and Maryland and a prewar Army comrade of Hancock's. Armistead was shot twice in the vicinity of an artillery position and captured by counterattacking Union troops, while Hancock was wounded by Confederate fire about 200 yards to the south.[19] Armistead

"Battle of Gettysburg" painting of Pickett's Charge by Peter F. Rothermel, 1870. (Source: State Museum of Pennsylvania)

then encountered none other than Captain Henry H. Bingham, himself slightly wounded in the head, who spoke briefly with the Confederate leader and secured his personal belongings at his request. According to Bingham, Armistead also conveyed some kind of an apology to Hancock.[20]

This meeting was later dramatized in Michael Shaara's novel *The Killer Angels*[21] and in the 1993 film *Gettysburg*,[22] whose director replaced Bingham with Colonel Joshua L. Chamberlain's brother, Thomas. These and other fictional accounts exaggerated Armistead and Hancock's friendship, as well as Armistead's alleged recanting of his secessionism, and also highlighted Armistead and Bingham's status as fellow Masons.[23] To reinforce the latter aspect of the story, a monument erected in 1993 stands inside the entrance to the Gettysburg National Cemetery. Entitled the "Friend-to-Friend Masonic Memorial," it depicts Bingham assisting Armistead, his wounded Masonic brother.[24] Despite the factual issues with many depictions of the Armistead-Bingham encounter, JA Bingham was part of a famous incident in the most famous battle in American history.[25]

Bingham and other staff officers were cited by Hancock after Gettysburg for "great gallantry" and for sharing "all the dangers of the field."[26] At the Battle of Bristoe Station, Virginia, that fall, the II Corps's official history remembered Bingham and other staff officers galloping "up and down along the track, encouraging the men with cheers mingled with imprecations."[27] Bingham's reputation for bravery would continue in the 1864 Overland campaign, which saw Ulysses S. Grant and Robert E. Lee locked in a grinding campaign of nearly continuous combat beginning in May 1864.

Between 5 and 6 May 1864, Grant opened his offensive against Lee with a bloody and inconclusive battle in a thickly wooded area west of Fredericksburg,

Virginia, known as the Wilderness. On the second day of the battle, Confederate General James Longstreet launched a crushing counterattack that struck the II Corps's left flank, forcing many of Hancock's troops into a disorganized retreat.[28] At this critical moment of the battle, Henry Bingham "specially distinguished himself in rallying and leading into action a portion of the troops who had given way on the afternoon of the 6th."[29] Union resistance eventually stiffened, and Longstreet was severely wounded just as his assault threatened to place the entire Army of the Potomac in an untenable position. Grant held his position by nightfall.

Unlike Union generals before him who had been checked by Lee, Grant resolved to push onward. He again collided with Lee at Spotsylvania Courthouse on 12 May, where Hancock's corps played a role in some of the most savage combat of the Civil War. "In this battle the troops of the Second Corps were constantly under heavy musketry for about twenty hours," Hancock reported.[30] In the captured Confederate trenches the next morning were found "a most terrible spectacle of dead and wounded, who were, indeed, piled upon each other for several hundred yards; the result of one of the most brilliant and deadly battles of this great war."[31] In the same report, Hancock noted that his JA, "Harry Bingham," had been "badly wounded in the thigh."[32]

After several months of convalescent leave and a detached detail for courts-martial in Philadelphia, Bingham returned to the Army of the Potomac in the siege lines at Petersburg, Virginia.[33] Around the time that Bingham was preparing to return to his command, Hancock wrote to Judge Advocate General Joseph Holt on Bingham's behalf, requesting that he be commissioned in accordance with legislation authorizing a JA in the rank of major for corps commands. Holt concurred with Hancock's

recommendation.[34] On 25 September 1864, Bingham was discharged from the 140th Pennsylvania for promotion and was commissioned the following day as a JA and major in the United States Volunteers, one of thirty-three officers to serve as full-time JAs under the 1862 legislation.[35] He remained in that role for the II Corps until the end of the war.[36]

Despite his official designation as a JA, Bingham continued to serve under fire. At the Battle of Boydton Plank Road on 27 October 1864, he was captured by Confederate troops while carrying dispatches for Hancock, but he managed to escape the same night and rejoin his command.[37] On 7 April 1865, just two days prior to Lee's surrender at Appomattox, Bingham was wounded for a third and final time in fighting near Farmville, Virginia.[38]

Bingham remained in the Army until July 1866, continuing to serve under Hancock as a JA for much of this time.[39] On 22 August 1865, Bingham received a brevet promotion to lieutenant colonel "for highly meritorious services during the recent campaign terminating with the surrender of the insurgent Army under General Robert E. Lee," backdated to Lee's surrender on 9 April 1865.[40] In thanks for his wartime service and combat actions, and at the instigation of his old commander and friend, Winfield Hancock, he later received symbolic promotions to colonel and finally brigadier general in 1867 (all backdated to Lee's surrender on 9 April 1865).[41] With his military career at an end, he returned to his native Philadelphia, where he was appointed postmaster in March 1867.[42]

Bingham reentered the legal profession in 1872 after his election to the clerkship of the courts of oyer and terminer and quarter sessions of the peace in Philadelphia. In 1878, Bingham was elected to the House of Representatives for Pennsylvania's First District, a position he would hold from 1879 until his death. A lifelong Republican, Bingham took a special interest in issues involving the Post Office and the port of Philadelphia, and was an active leader in the Grand Army of the Republic, the primary Union veteran organization.[43] Despite their political differences (Hancock ran as the Democratic presidential nominee in 1880), Bingham maintained a friendship with his old commander until Hancock's death in 1886. A popular speaker, he was the featured orator at the dedication of the Winfield S. Hancock monument at Gettysburg in 1896.[44] Bingham's thirty-three-year tenure in Congress gained him the nickname "Father of the House" in his later years.[45] He died on 22 March 1912, and was buried in his native city.[46]

In August 1893, while a member of Congress, Bingham received the Medal of Honor for his actions at the Battle of the Wilderness three decades prior. This was not entirely unusual—between 1891 and 1897, more than 500 Medals of Honor were awarded for actions performed during the Civil War.[47] In some cases, veterans wrote on their own behalf and requested the award, which was then simply mailed to the successful requestor.[48] With no formal system of nomination for the Medal of Honor, the award was open to abuse by glory-seeking veterans during a period of intense interest in and commemoration of the Civil War.[49]

In Bingham's case, however, he was nominated in March 1893 by the Quartermaster General of the Army, Richard N. Batchelder. Batchelder was a fellow II Corps staff officer during the Civil War, serving as the corps's chief quartermaster, and apparently wrote to the Adjutant General of his own accord to recommend Bingham for the award. After citing Bingham's combat record, Batchelder concluded his application by arguing that "General Bingham's career since the War, whether in Congress or in private life, has been one of honor and usefulness to his country, and it is respectfully submitted that upon no one could a medal of honor be more worthily bestowed."[50]

Assistant Secretary of War Lewis A. Grant wrote back to Batchelder in August, reminding him that "medals of honor are awarded for *conspicuous gallantry in action*, and not for general good and gallant service."[51] Grant asked Batchelder to select a specific incident of "gallant acts for which a medal of honor should be issued."[52] Prompted by Grant, Batchelder selected Hancock's report of Bingham's actions at the Battle of the Wilderness as proof of "the battle which should be selected in connection with the bestowal of a medal of honor."[53] Grant acquiesced, and Hancock's 1864 after-action report became the exact language of Bingham's citation. Bingham's award was mailed to him in late August 1893.[54]

In 1897, the War Department began to tighten the standards of evidence for award of the medal, and self-nomination was later banned. Legislation in 1916 stipulated that the Medal of Honor was only to be awarded "for action involving actual conflict with the enemy, distinguished by conspicuous gallantry or intrepidity, at the risk of life, above and beyond the call of duty."[55] At the same time, the Army and Navy initiated a review of all of the more than 2,600 medals that had been awarded since the medal's creation, resulting in more than 900 awardees being stricken from the roll of recipients.[56]

Bingham's award survived the Army's scrutiny. None questioned his war record, and his citation noted his bravery during a critical portion of a major battle. The official history of the II Corps, written seven years before he received the Medal of Honor, described Bingham as "an officer rarely equalled [sic] in courage, energy, and intelligence."[57] Did Bingham's status as a deceased senior member of Congress impact the Army's decision? While it may have helped spur his receipt of the award in the first place, Bingham's actions were of equal or greater merit than those of many other Civil War-era recipients.

This leads to one final question about Henry H. Bingham—was he the only JA in our history to receive the Medal of Honor while serving in that capacity? Although Bingham was appointed to the II Corps staff as a JA, he was serving in an "acting" role, and was considered a member of his Pennsylvania infantry regiment on detached duty until September 1864. Bingham, therefore, was technically still an infantry officer at the Battle of the Wilderness. Although he was not commissioned as a full-time Army lawyer at the time of his Medal of Honor action, Bingham came as close as any member of the JAG Corps in our history. **TAL**

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Notes

1. Winship also received the Silver Star for his service in France. After a term as The Judge Advocate General (1931–1933), Winship became the governor of Puerto Rico. His attempts to suppress the Puerto Rican independence movement culminated in what became known as the Ponce massacre on 21 March 1937. President Franklin D. Roosevelt removed Winship from the governorship in 1939, but the Army recalled him to active duty during the Second World War. He retired again in 1944 at the age of seventy-five. He was the oldest Army officer on active duty at the time. Kincaid retired as a brigadier general. *See* Fred L. Borch III, Judge Advocates in the Great War, 1917–1922, at 55–57 (2021).

2. Nardotti served as the thirty-fourth The Judge Advocate General (1993–1997), while Nolan was the first JAG Corps senior noncommissioned officer (1980–1983), predecessor to the Regimental Command Sergeant Major position. *See* Michael J. Nardotti, *"As Soon As the Shooting Starts, They'll Look to You:" Leadership in Combat*, West Point Ctr. for Oral Hist., https://www.westpointcoh.org/interviews/as-soon-as-the-shooting-starts-they-ll-look-to-you-leadership-in-combat [https://perma.cc/AUM9-LBLF] (last visited Dec. 30, 2025); Fred L. Borch III, *From Legal Clerks to Paralegal Specialists: A Short History of Enlisted Soldiers in the Corps*, *in* Lore of the Corps: A Compilation from The Army Lawyer, 2017–2023, at 52 (The Judge Advocate General's Corps, U.S. Army, 2023) [hereinafter Lore Compilation 2017-2023]; Fred L. Borch III, *Oral History of Regimental Sergeant Major John Nolan*, *in* Lore Compilation 2017-2023, *supra*, at 6–11.

3. The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 55–56 (U.S. Gov't Printing Off. 1975).

4. *Wells Howard Blodgett*, Cong. Medal of Honor Soc'y, https://www.cmohs.org/recipients/wells-h-blodgett [https://perma.cc/RR6V-SXQE] (last visited Dec. 30, 2025).

5. Joshua E. Kastenberg, Law in War, War as Law: Brigadier General Joseph Holt and the Judge Advocate General's Department in the Civil War and Early Reconstruction, 1861–1865, at 146–47 (2011); An Act to Amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, approved February twenty-eight, seventeen hundred and ninety-five, and the Acts amendatory thereof, and for other Purposes, 12 Stat. 597 (1862).

6. Bingham's full name was William Henry Harrison Bingham, named for the ninth president. Harrison was a military hero and member of the Whig Party, many of whose Northern members joined the new Republican Party in the 1850s.

7. Henry Harrison Bingham (Late a Representative from Pennsylvania) Memorial Addresses Delivered in the House of Representatives and the Senate of the United States, H.R. Rep. No. 956, at 50–51 (1913) [hereinafter Bingham Memorial Address].

8. Robert Laird Stewart, History of the One Hundred and Fortieth Regiment, Pennsylvania Volunteers 2 (1912).

9. *Id.* at 7, 139.

10. *Id.* at 7, 139, 329–30, 367.

11. *Id.* at 386.

12. *Id.* at 25–26.

13. *Id.* at 52–53.

14. *Id.* at 386–87.

15. *See* 1 Merrill Edwards Gates, Men of Mark in America: Ideals of American Life Told in Biographies of Eminent Living Americans 157 (1905).

16. *See id.*; Stewart, *supra* note 8, at 386–87.

17. The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, ser. I, vol. XXV, pt. I, at 315–17 (Gov't Printing Off. 1889) [hereinafter OR].

18. *Id.*

19. Almira Russell Hancock, Reminiscences of Winfield S. Hancock 214 (1887); 1 John B. Bachelder, The Bachelder Papers 350 (David L. Ladd & Audrey J. Ladd eds. 1994).

20. Hancock, *supra* note 19, at 214; Bachelder, *supra* note 19, at 350.

21. Michael Shaara, The Killer Angels (1974).

22. Gettysburg (Turner Pictures 1993).

23. For an example of an exaggerated version of Armistead's alleged statements after his wounding, see Abner Doubleday, Chancellorsville and Gettysburg 195 (1882); Hancock, *supra* note 19, at 214–15; Gettysburg, *supra* note 22.

24. *See History of the Brother-to-Brother Masonic Monument*, Illinois Freemasonry, https://ilmason.org/our-blog/brother-to-brother-gettysburg-monument [https://perma.cc/8HYM-9ZWR] (last visited Dec. 30, 2025); *Friend to Friend Masonic Memorial at Gettysburg*, Stone Sentinels, https://gettysburg.stonesentinels.com/other-monuments/friend-to-friend-masonic-memorial [https://perma.cc/S3NX-8KKF] (last visited Dec. 30, 2025).

25. For a full examination of Armistead and Hancock's relationship, see Tom McMillan, Armistead and Hancock: Behind the Gettysburg Legend of Two Friends at the Turning Point of the Civil War (2021).

26. OR, *supra* note 17, ser. I, vol. XXVII, pt. I, at 376.

27. Francis A. Walker, History of the Second Army Corps in the Army of the Potomac 352 (1886).

28. Gordon C. Rhea, The Battle of the Wilderness, May 5–6, 1864, at 354–80 (1994).

29. OR, *supra* note 17, ser. I, sol. XXXVI, pt. I, at 327.

30. *Id.* at 360.

31. *Id.*

32. *Id.*

33. *See* Compiled Military Service Record, Henry H. Bingham, Co. G, 140th Pennsylvania Infantry, Records of the Adjutant General (on file with Nat'l Archives, Rec. Grp. 94) [hereinafter Henry H. Bingham CMSR].

34. In August 1864, Hancock recommended Bingham for a brevet promotion to major, which was also accepted. Bingham therefore held simultaneously the rank of major and brevet major by 1865. *See* Medal of Honor file # 9272-VS-1882, Henry H. Bingham, Volunteer Service Division, Records of the Adjutant General (on file with Nat'l Archives, Rec. Grp. 94) [hereinafter Medal of Honor file # 9272-VS-1882].

35. Stewart, *supra* note 8, at 150.

36. Walker, *supra* note 27, at 684. Bingham applied for a colonelcy in one of the newly created Veterans Reserve Corps regiments in December 1864. Despite recommendations from corps commander Andrew A. Humphreys and division commanders John Gibbon and Gershom Mott, for some reason Bingham remained in his position as a JA. *See* Medal of Honor file # 9272-VS-1882, *supra* note 34.

37. OR, *supra* note 17, ser. I, vol. XXXXII, pt. I, at 232, 239, 438, 441, 457.

38. Walker, *supra* note 27, at 684.

39. Medal of Honor file # 9272-VS-1882, *supra* note 34.

40. Henry H. Bingham CMSR, *supra* note 33.

41. Soldier's Certificate # 1397749, Henry H. Bingham, Captain, Co. G, 140th Pennsylvania Volunteers, Case Files of Approved Pension Applications, Civil War and Later Pension Files, Records of the Department of Veterans Affairs (on file with Nat'l Archives, Rec. Grp. 15); Henry H. Bingham CMSR, *supra* note 33; John H. Eicher & David J. Eicher, Civil War High Commands 740 (2001).

42. *Bingham, Henry Harrison*, The People of the People's House, https://history.house.gov/People/Detail/9383 [https://perma.cc/3NRC-T75A] (last visited Dec. 30, 2025).

43. *Id.*; Bingham Memorial Address, *supra* note 7, at 15, 42.

44. *See* Henry H. Bingham, An Oration by Brevet Brigadier-General Henry H. Bingham at the Unveiling of the Equestrian Statue of Major-General Winfield Scott Hancock on the Battlefield of Gettysburg, June 5, 1896 (1899).

45. Bingham Memorial Address, *supra* note 7, at 15.

46. *Bingham, Henry Harrison*, *supra* note 42.

47. Mark C. Mollan, *The Army Medal of Honor: The First Fifty-Five Years*, Prologue (Nov. 8, 2022), https://www.archives.gov/publications/prologue/2001/summer/medal-of-honor-1.html [https://perma.cc/88WP-WB2Q].

48. *See id.*

49. *See id.*

50. Medal of Honor file # 9272-VS-1882, *supra* note 34.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*; Walker, *supra* note 27, at 207, 209. Batchelder himself received a Medal of Honor in 1895 for actions in October 1863. *See Richard Napoleon Batchelder*, Cong. Medal of Honor Soc'y, https://www.cmohs.org/recipients/richard-n-batchelder [https://perma.cc/F8NG-H46S] (last visited Dec. 30, 2025).

55. Mollan, *supra* note 47.

56. *Id.*

57. Walker, *supra* note 27, at 478.

(Illustration generated by DALL-E 3)

Practice Notes

Vigilance in Practice

The Role of Judge Advocates in Counterintelligence Investigations

By Major Michelle K. Lukomski

Counterintelligence is, in effect, chasing ghosts.[1]

Imagine the following: in a barracks room on Fort Campbell, Kentucky, Sergeant (SGT) Shady, a young U.S. Army military intelligence Soldier, uses an encrypted messenger app to communicate with a foreign national in Hong Kong. He has been talking to the individual for a few weeks, and a standard practice has developed: SGT Shady sends the foreign national information about the U.S. military, including classified information, in exchange for money. The foreign national, aware of SGT Shady's access to U.S. intelligence, provides collection priorities regarding the type of information he is interested in. Despite knowing that his actions are unlawful, SGT Shady shares information regarding the operability of sensitive U.S. military systems and capabilities, including documents and manuals related to field artillery equipment, aircraft, and intercontinental ballistic missiles.

This fictional scenario is not far from recent reality; the above facts are based on the real-world actions and eventual prosecution of

SGT Korbein Schultz. Beginning in June 2022, and continuing for months after, Schultz willingly provided sensitive and classified material to a foreign national in exchange for money.[2] The investigation of SGT Schultz was conducted jointly by the Federal Bureau of Investigation (FBI) and the U.S. Army Counterintelligence Command (ACIC).[3] Schultz was charged with violations of the Espionage Act, the Arms Export Control Act, and the International Traffic in Arms Regulations.[4] He pled guilty to all charged offenses on 13 August 2024.[5] In April 2025, he was sentenced to eighty-four months in prison.[6]

Public fascination with stories of espionage is evidenced by the volume of movies, television shows, and books on the subject.[7] While real-world examples of espionage usually do not involve Tom Cruise-worthy stunts, the threat to national security is no less damaging. National security crimes within the military are investigated by counterintelligence (CI) agents trained and authorized to investigate such offenses. CI agents across all military departments are trained to "detect, identify, assess, exploit, penetrate, degrade, and counter or neutralize espionage, intelligence collection, sabotage, sedition, subversion, assassination, and terrorist activities . . . directed against U.S. national security interests or [Department of War (DoW)] and its personnel, information, materiel, facilities, and activities."[8]

CI investigations are conducted under both intelligence and criminal investigation authorities. The role of a judge advocate (JA) is similar to that in any other criminal investigation—to advise on the lawfulness of the agents' actions to preserve the integrity of the investigation. However, there are nuances to CI investigations, and JAs should be familiar with the unique legal challenges of a CI investigation.

Consider again SGT Shady: CI agents have reason to believe he printed classified documents and is storing them in a locker in his barracks room. They want to conduct a search to seize the evidence. The command is also aware that, since learning he is under investigation, SGT Shady has decided to flee. His commander is considering ordering him into pretrial confinement (PTC). The unit now has a need to access certain information about the ongoing CI investigation to meet the legal standard for PTC.[9] And because of the classified nature of the materials involved, much of the CI investigative details and documents are classified and highly compartmentalized.

As these additional hypothetical details suggest, while some aspects of a CI investigation mirror those of any other criminal investigation, there are unique challenges when national security crimes are involved. JAs must understand the legal obstacles CI agents will encounter as they address the emerging needs of their mission, and how to accurately advise.

This article serves as a resource to JAs charged with advising on these complex investigations. It explores the organizational structure and authorities of CI entities within the DoW, comparing how CI investigations are executed between the various Services. Understanding the similarities and differences of the various Service programs is critical to working alongside sister Services. It then discusses the role of the JA in the CI investigation process and provides recommendations for navigating search authorizations, PTC, and working with classified information. It also highlights new legislation impacting CI agents' authority, which will likely affect the role of Article II courts and judges in CI investigations.[10] Finally, it explores whether national security crimes should continue to be prosecuted by the Department of Justice (DoJ) rather than the DoW via courts-martial.

Counterintelligence Investigations Throughout the DoW

CI is "information gathered and activities conducted to identify, deceive, exploit, disrupt, or protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations, or persons or their agents, or international terrorist organizations or activities."[11] Put simply, CI is intended to thwart spying and other disruptive activity by the enemy. CI investigations are conducted across all military Services, but with some variation in process and structure depending on the Service. This section will focus on the CI structure and investigative authorities of the Army, Air Force, and Navy/Marine Corps.

Authorities Generally

As in all military operations, authority to conduct CI investigations begins with the U.S. Constitution. The President's Commander-in-Chief and foreign affairs powers under Article II, Section 2 are commonly understood to include an inherent authority to direct intelligence operations.[12] Pursuant to his constitutional authority, President Ronald Reagan issued Executive Order (EO) 12,333 in 1981.[13] EO 12,333 constitutes the foundational authority in intelligence activities and intelligence oversight, balancing national security interests with the privacy rights of U.S. persons.[14]

EO 12,333 designates the FBI as the lead agency for CI within the United States.[15] Authority to conduct CI activities is also granted to the DoW and intelligence and CI elements of the Army, Navy, Air Force, and Marine Corps.[16] Specifically, EO 12,333 directs the Secretary of War to "protect the security of [DoW] installations, activities, information, property, and employees by appropriate means, including such investigations of applicants, employees, contractors, and other persons with similar association with the [DoW] as are necessary."[17]

Those agencies with authority to conduct intelligence activities, including CI, are authorized to "collect, retain, or disseminate information concerning United States persons," subject to procedures established by the responsible agency.[18] Importantly, CI investigations are generally conducted under these intelligence authorities.[19] However, there are circumstances, such as with SGT Schultz, where the investigation, or at least a part of it, is conducted under law enforcement authorities.[20] The distinction in authorities lies in the purpose of the investigation: where there is an intent to collect and preserve evidence that will eventually be used in a criminal prosecution, law enforcement authorities are required.[21]

CI investigators are required to coordinate with the FBI on CI investigations.[22] Coordination includes initial notification to the FBI of "any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power."[23] After the initial report, where a determination is made that the investigation

will be jointly conducted by the CI entity and the FBI, there is extensive coordination and communication between the agencies.[24]

CI Structure Across the DoW

Although there is significant overlap in the missions and authorities of the military departments' respective CI elements, the structure of the CI elements varies across Services.

ACIC

ACIC is a functional command within the U.S. Army Intelligence and Security Command (INSCOM) with the sole CI mission within the Army.[25] INSCOM is commanded by a two-star general and serviced by an office of the staff judge advocate at Fort Belvoir.[26] As a subordinate unit commanded by a one-star general, ACIC also has dedicated attorneys and paralegals assigned to advise and assist them in their mission.[27] ACIC is the Army entity charged with all CI activities to "detect, identify, neutralize, and exploit foreign entities, international terrorists, insider threats, and other foreign adversaries."[28] CI investigations are a method by which ACIC achieves its mission.[29] While the Army CI mission has existed for some time, ACIC was only recently established, evolving in 2021 from the former 902nd Military Intelligence Group and the INSCOM G2X Counterintelligence and Human Intelligence Division.[30]

ACIC agents are not considered law enforcement agents, but rather intelligence agents.[31] Notwithstanding, CI investigators may be responsible for processing forensic and physical evidence, interviewing witnesses, and preparing for criminal prosecution.[32] Despite the apparent law enforcement functions inherent in their mission, CI agents are limited by the authorities of intelligence agents, namely with regard to search authorizations, as discussed below.

The National Defense Authorization Act (NDAA) for Fiscal Year 2025 included new legislation that provides Army CI agents with some law enforcement functions.[33] The law allows civilian Army CI agents to serve warrants, execute searches, and make arrests.[34] The goal of the legislation is to align authorities for civilian Army CI agents with those of Civilian Defense Criminal Investigative Service (DCIS) and Civilian Army Criminal Investigation Command (CID) agents.[35] Of note, *uniformed* agents of DCIS, CID, and ACIC derive authority to serve warrants and make arrests under the Uniform Code of Military Justice (UCMJ). Irrespective of the new NDAA provision, the UCMJ currently allows for execution of searches, though military judges historically have not granted search authorizations for uniformed CI agents.[36]

Air Force Office of Special Investigations

The Air Force Office of Special Investigations (AFOSI) employs over 2,000 military and Civilian credentialed special agents, serving within seven field investigation regions aligned with Air Force major commands.[37] Unlike ACIC, AFOSI is a consolidated investigative entity responsible for criminal investigations, CI, and threat detection.[38] AFOSI "performs as a Federal law enforcement agency, a defense criminal investigative organization, a military criminal investigative organization, and a military department CI organization."[39]

AFOSI has relatively broad discretion to conduct investigative activities within the scope of its mission. For example, AFOSI agents are authorized to execute civilian search warrants for both UCMJ and non-UCMJ matters, and to arrest individuals not subject to the UCMJ with or without an arrest warrant in matters related to the AFOSI mission.[40] Overall, AFOSI has more latitude in its authorities and, therefore, capability as compared to ACIC.

Naval Criminal Investigation Service

The Naval Criminal Investigative Service (NCIS) is comprised of approximately 1,000 special agents and, similar to AFOSI, is tasked with the mission of both criminal and CI investigations within the Navy and Marine Corps.[41] Notably, NCIS is a Civilian-run agency, headed by a Civilian law enforcement professional who reports directly to the Secretary of the Navy.[42]

NCIS is the only Department of the Navy entity authorized to conduct CI investigations.[43] Similar to AFOSI, NCIS CI agents have broad discretion to conduct CI investigations under the supervision and authority of the NCIS director. As law enforcement officers, they have authority to conduct a wider range of investigative activities, whether in criminal or CI investigations.

Building the Case: Investigations to Trial

Just as criminal investigations collect and prepare evidence for criminal prosecutions, CI investigations may form the basis for the prosecution of national security crimes. Commonly, national security crimes, even when allegedly perpetrated by military members involving military information and intelligence, are prosecuted by the DoJ.[44] Practically, this may be for resourcing reasons, as the DoJ maintains entire teams of attorneys dedicated to national security prosecutions, and because the FBI, the investigative arm of the DoJ, may already be jointly conducting the investigation. Regardless of the prosecuting entity, ACIC investigations may rely on the advice and guidance of Army JAs to maintain the legal integrity of the case as the investigation progresses.

Applicable Criminal Offenses

The crimes being investigated will often inform a legal advisor's approach to the conduct of investigations. Thus, it is important for JAs to develop a basic knowledge of the national security crimes that may ultimately be charged. Categorizing national security crimes can be difficult, as national security law will often intersect with international criminal law, transnational criminal law, and domestic criminal law.[45] The overlap between these broad categories is based not only on the legal theory of criminalization, but also the "criminological profiles (i.e., their causes and methods of prevention), as well as the way in which law enforcement officials investigate and detect them."[46]

Notwithstanding the difficulties of creating a tidy list of national security crimes, there are some crimes in the U.S. Code and the UCMJ that are clearly designed to criminalize what might traditionally be considered national security offenses. The discussion below is not inclusive of all national security crimes, but rather those most prosecuted in the modern era.[47]

The U.S. Code

Treason and treason-related offenses (such as rebellion and insurrection), espionage, including the disclosure of classified

The ACIC patch. (Credit: Adam Lowe)

information, and sabotage are all criminalized under Title 18 of the U.S. Code.[48] Espionage is commonly understood as the theft or exploitation of national defense information, and it is generally the most identifiable of national security offenses.[49] The Espionage Act, codified in sections 791–799 of Title 18, criminalizes, among other things, gathering, transmitting, or losing defense information; gathering or delivering defense information to aid a foreign government; disclosure of classified information; and violating regulations of the National Aeronautics and Space Administration.[50]

Title 22 of the U.S. Code, which generally includes provisions related to foreign relations, also includes criminal penalties for violations of the Arms Export Control Act (AECA).[51] The AECA "confers authority on the President to control the import and export of defense goods and services," and promulgates regulations to protect defense technologies.[52] It further permits the President to establish a U.S. Munitions List (USML), which identifies and defines the defense articles subject to those regulations and controls.[53] This law tends to arise in national security investigations and prosecutions because "defense articles" include technical data for weapons systems, aircraft, missiles, and other implements of war designated on the USML.[54] Section 2778 goes on to establish criminal penalties for any willful violation of AECA or any rule or regulation thereunder.[55]

The UCMJ

In the UCMJ, relevant punitive articles include mutiny or sedition, spying, espionage, aiding the enemy, selling or otherwise disposing of military property, and unauthorized distribution of classified information or unauthorized access to a Government computer.[56] Although national security crimes are less commonly prosecuted at court-martial, these offenses have remained, and have been largely unchanged in structure and text, through multiple editions of the *Manual for Courts-Martial*.[57]

Espionage under the UCMJ is effectively the same offense as espionage under Title 18.[58] In Article 103a of the UCMJ, espionage requires proof that an accused, "with intent or reason to believe that [such matter would] . . . be used to the injury of the United States or to the advantage of a foreign nation, communicate[d], deliver[ed], or transmit[ted]" any material relating to the national defense to any foreign government or faction, party, "or military or naval force

An ACIC Soldier analyzes a satellite image. (Source: ACIC)

within a foreign country."[59] 18 U.S.C. § 793 contains almost the exact same statutory language, but provides a more comprehensive, though still non-exhaustive, list of what may be considered material relating to the national defense.[60] Sections 793 and 794 of Title 18 also create two distinct crimes: one for gathering, transmitting, or losing defense information, and one for actually delivering the information to a foreign government.[61]

National security offenses in the UCMJ are rarely seen in Army courts-martial.[62] However, it is foreseeable that other military-specific offenses will become relevant during a CI investigation or national security prosecution. For example, desertion or absence without leave, failure to obey orders or regulations, false official statement, conduct unbecoming an officer, and general Article 134 offenses may all arise as collateral misconduct.[63]

The Road to Trial

Search Authorizations

Most JAs will be familiar with search authorizations in the context of criminal investigations. In general, where there is an expectation of privacy, unconsented searches of on-post locations will require authorization based on a finding of probable cause.[64] In criminal investigations, authorizations may come from a military magistrate or a military judge.[65] Searches pursuant to a search authorization may then be executed by "any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security forces, military police, . . . or person designated by proper authority to perform guard or police duties."[66]

Military Rule of Evidence (MRE) 315(f)(2) states that the probable cause determination must find that "there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched."[67] By the terms of the MRE, there is no restriction on the use of search authorizations by CI agents; there is no explicit language limiting search authorizations only to criminal investigations conducted by agents of CID, AFOSI, NCIS, military police investigators, or other military law enforcement agency. However, in practice, military judges and military magistrates do not issue search authorizations in CI investigations. The primary obstacle to CI search authorizations is the classification of CI agents as intelligence agents rather than law enforcement agents.[68] Because CI agents begin their investigation for a CI purpose, and thus under intelligence authorities, there is a hesitancy to recognize that a CI agent may perform some law enforcement functions, including requesting and executing a search authorization.[69]

However, the new authorities in the 2025 NDAA explicitly permit law enforcement activities, including searches, which allow military judges to grant search authorizations in the same way they are granted to law enforcement agents.[70] Indeed, the legislation's goal was to put ACIC agents on level footing with CID agents for purposes of search authorizations and other law enforcement processes.[71] Thus, the new legislation should allow ACIC agents to leverage their law enforcement authorities as needed to request and execute search authorizations.[72]

Consider again SGT Shady. ACIC agents have reason to believe that he is storing classified material in his barracks locker until he can share it with his contact in Hong Kong. The barracks room would ordinarily be an area that a commander, military magistrate, or military judge would be able to grant authority to search. Importantly, the search would be for non-intelligence purposes—the goal is to secure evidence for prosecution. Thus, if supported by a properly sworn affidavit from a trained agent that provides sufficient evidence to establish probable cause, under the 2025 NDAA, a military judge could issue the search authorization to a Civilian CI agent.[73]

Pretrial Confinement (PTC)

There is no presumption of PTC in the military; an accused will only be ordered into PTC upon a showing of probable cause that an offense triable by court-martial has been committed, the accused committed it, and confinement is required by the circumstances.[74] Confinement may be required where it is foreseeable that the accused will not appear at trial or other proceeding, or will engage in serious criminal misconduct, and less severe forms of restraint are inadequate.[75]

Within the context of CI investigations, the requirements for PTC may be met by the facts associated with the national security crime(s) being investigated. However, whether PTC is appropriate may arise because of collateral misconduct. Suppose SGT Shady tells his battle buddy that he will take his chances on the run and go absent without leave (AWOL). He even tells his battle buddy

The staircase over the INSCOM headquarters lobby displays the command's watch word: "Vigilance Always." (Source: INSCOM)

that he has a bag packed and he plans to leave his cell phone behind so he cannot be tracked. Upon learning this information, the commander asks his servicing JA whether he can order the Soldier into PTC.

The PTC analysis may not deviate at all from what JAs are accustomed to: SGT Shady has certainly expressed a plan to go AWOL, and it is foreseeable that the Soldier will not appear at trial. There is also likely enough evidence to find probable cause that he committed an offense under the UCMJ, for example, espionage. Thus, the commander can order SGT Shady into PTC. Notably, because FBI and DoJ involvement in CI cases is common, a PTC decision should be discussed and coordinated with all interested parties.[76]

For example, in cases where the investigation is conducted jointly with the FBI and the DoJ has already expressed an intention to prosecute, there may be interest in applying restrictions or conditions on the Soldier that are similar to Federal bail standards rather than PTC.[77] This may gain efficiency in the eventual prosecution in Federal court—a prosecutor is saved from explaining a military justice process that a Federal judge may be unfamiliar with. Similarly, using lawful orders to restrict allows for some early advocacy because the written order can elucidate the underlying criminal offense and rely on the U.S. Code sections that will ultimately appear on the indictment rather than the UCMJ.[78]

JAs should maintain a role of bridging the communication gap between CI investigators and commanders to ensure that sufficient information is available to support a legally defensible determination. JAs should view their role as one of dual purpose: enabling commanders to make legally permissible decisions while also protecting the legal integrity of the ongoing CI investigation.

Classified Information Sharing

Some initial obstacles for CI investigations may be related to information sharing, as many CI investigations will involve classified information. Much has been written on the issue of information sharing.[79] Truly understanding information sharing issues and solutions is a necessary part of a JA's role in advising CI investigations and commanders. When classified information is included in any investigation, whether criminal or CI, spillage can affect the eventual availability of evidence for prosecution.[80]

The mechanism for sharing information, including information that a command would need to take UCMJ or other administrative action, is known as a letterhead memorandum (LHM).[81] The LHM is used "to provide information about CI investigations to other Government agencies or organizations with a vested interest in the information or those that have preliminary jurisdiction and responsibility for responding to the incident."[82] Practically, the LHM will include administrative data and a summary of information obtained by ACIC agents, and it is recommended that LHMs be presented in-person to allow for further communication between the agents and the receiving unit or agency.[83] LHMs used by ACIC are generally identical to other Army memoranda, while other agencies, like the FBI, will use their own agency format.[84]

Returning once more to the investigation into SGT Shady, it is not difficult to see where information sharing issues would arise. Where the relevant offenses involve unauthorized access to and use of classified material under the Espionage Act, the investigative materials will necessarily include classified information. When the command contemplated PTC to prevent SGT Shady from going AWOL, the classified information may or may not be severable from the investigative details needed for a commander to make their determination. In either case, the LHM is a tailorable tool to share information that will promote efficiency in the overlapping processes of CI investigations and pretrial activities.

Whose Crime Is It Anyway?

Until very recently, the lack of law enforcement authorities for ACIC agents has contributed to a standard practice, at least with Army CI cases, of referring national security prosecutions of military members to the DoJ. Because of the limited law enforcement authorities, DoJ involvement is often required in the early phases of an investigation. Thus, referring the prosecution to the DoJ follows logically where the FBI and Federal judges have been involved in the case from the outset—and have ample resources—even though the military would have concurrent jurisdiction of national security cases involving Service members.

Concurrent jurisdiction between the DoJ and DoW is not a new phenomenon; indeed, a memorandum of understanding (MoU) between the two agencies regarding concurrent jurisdiction for investigations and prosecutions has existed since 1984.[85] The MoU recognizes the need for mutually reinforcing policies and procedures between the two agencies and explicitly states that "it is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the [DoW] and the [DoJ] as to each matter over which they may have concurrent interest."[86] Thus, although the MoU generally discusses certain crimes that the DoJ or DoW will have primary responsibility for, they are not strict mandates.

Notably, the MoU identifies "frauds against the [DoW] and theft and embezzlement of Government property" as crimes under the primary investigative authority of the DoW.[87] The DoW is required to confer with the DoJ and FBI on matters which, "if developed by investigation, would warrant Federal prosecution," but the DoJ is not specifically required to prosecute such cases.[88] SGT Shady's disclosure of classified materials to a foreign national could be considered fraud against the DoW or theft of Government property.[89] Therefore, after conferring with the DoJ and FBI, SGT Shady could be prosecuted by court-martial under the UCMJ.

Courts-martial for UCMJ national security offenses are a realistic possibility. The military would have personal jurisdiction over uniformed personnel accused of national security offenses.[90] A variety of national security offenses in the UCMJ closely mirror those in the U.S. Code, which can be brought to bear on a Service member. Some courtrooms throughout the Army are equipped to handle classified materials at court-martial, though more robust facilities would likely be required should these prosecutions become more frequent.[91] Perhaps the most important factor in the feasibility of retaining national security prosecutions is whether our military justice practitioners remain ready to execute these complex prosecutions if called upon to do so.[92]

With the enactment of legislation providing CI agents broader law enforcement authorities to execute searches and arrests, the military justice system is poised to take a more active role in pretrial procedures, namely, searches. With the potential increased involvement of military judges and JAs early on, justice may be more efficiently served by prosecution through courts-martial. Should there be such a shift, JAs will need to become comfortable with a more specific practice within military justice. National security prosecutions will almost certainly include classified materials. Therefore, while prosecutorial strategy may be similar to that of other criminal prosecutions, the technical presentation of evidence will be more nuanced.[93] By prioritizing the continued education and training of attorneys for national security prosecutions, the Judge Advocate General's (JAG) Corps can expand its impact and value, providing another level of efficiency and accountability in criminal procedure.

Conclusion

With the expansion of CI investigative authorities, practitioners within the military justice system will have the opportunity to broaden their practice. With dedicated training and resources, the JAG Corps can be prepared to prosecute national security crimes under the UCMJ. However, JAs must be prepared to advise CI investigations regardless of the eventual prosecuting agency. If CI investigations are, as Asha Rangappa said, like "chasing ghosts,"[94] CI agents will need to leverage all the tools and abilities available to them to achieve their mission; they will need competent and involved JAs to guide them in that pursuit. Cognizance of the unique nature of CI investigations is crucial for a JA to provide candid counsel for commanders and CI agents to enable the CI mission of a more secure force. **TAL**

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Notes

1. A quote from former FBI agent and Yale lecturer Asha Rangappa. Linda McKendrick, *What Is Counterintelligence Law and Why It Matters More than Ever in 2025*, Law. Monthly (Apr. 7, 2025), https://www.lawyer-monthly.com/2025/04/counterintelligence-law-2025 [https://perma.cc/V3QE-DUV4].

2. Indictment ¶¶ 18–19, United States v. Schultz, No. 3-24-00056 (M.D. Tenn. Mar. 6, 2024) [hereinafter Schultz Indictment].

3. *U.S. Army Intelligence Analyst Pleads Guilty to Charges of Conspiracy to Obtain and Disclose National*

Defense Information, Export Control Violations and Bribery, Off. of Pub. Affs., U.S. Dep't of Just. (Aug. 23, 2024) [hereinafter *Schultz Press Release*], https://www.justice.gov/opa/pr/us-army-intelligence-analyst-pleads-guilty-charges-conspiracy-obtain-and-disclose-national [https://perma.cc/NP9H-L9WY].

4. *See* Schultz Indictment, *supra* note 2; 18 U.S.C. § 93(g); 22 U.S.C. § 2778.

5. *Schultz Press Release*, *supra* note 3.

6. *Former U.S. Army Intelligence Analyst Sentenced for Selling Sensitive Military Information to Individual Tied to Chinese Government*, Off. of Pub. Affs., U.S. Dep't of Just. (Apr. 23, 2025), https://www.justice.gov/opa/pr/former-us-army-intelligence-analyst-sentenced-selling-sensitive-military-information [https://perma.cc/J62P-R2FV].

7. *See, e.g.*, Dr. No (Eon Productions 1962); No Time to Die (Eon Productions 2021); Hunt for Red October (Paramount Pictures 1990); The Americans (FX 2013–2018); The Blacklist (NBC 2013–2023); Bridge of Spies (MGM 2015); The Good Shepherd (Universal Pictures 2006); Mission Impossible (Paramount Pictures 1996–2025).

8. U.S. Dep't of Def., Dir. 5240.02, Counterintelligence para. 3 (17 Mar. 2015) (C1, 16 May 2018) [hereinafter DoDD 5240.02].

9. PTC is discussed more fully *infra* Section titled "Pretrial Confinement." To order a Soldier into PTC, a commander must determine that (1) an offense triable by court-martial has been committed; (2) the person being confined committed it; (3) confinement is necessary because it is foreseeable that the confinee will not appear at trial, pretrial hearing, or preliminary hearing, or the confinee will engage in serious criminal misconduct; and (4) less severe forms of restraint are inadequate. Manual for Courts-Martial, United States, R.C.M. 305(i)(2)(B) (2024) [hereinafter MCM 2024].

10. Article II courts and judges refer to courts and judges within the executive branch, thus organized and administered under Article II of the U.S. Constitution. They include administrative courts and military courts, and are created under authority delegated to the President by Congress. *See Article II Tribunal (Article II Court or Article Two Court)*, The Wolters Kluwer Bouvier Law Dictionary (Desk ed. 2012).

11. DoDD 5240.02, *supra* note 8, pt. II, at 12–13 (defining CI).

12. U.S. Const. art. II, § 2; *see also* Major Alexander Morningstar, *Distinguishing Between Operational and Intelligence Activities: A Legal Framework*, Army Law., no. 4, 2022, at 63, 65 (citing Joshua Kuyers, *"Operational Preparation of the Environment": "Intelligence Activity" or "Covert Action" by Any Other Name*?, 4 Nat'l Sec. L. Brief 21, 37 (2013)).

13. Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *amended by* Exec. Order Nos. 13,284, 13,355, and 13,470 (July 30, 2008) [hereinafter Exec. Order No. 12,333].

14. Morningstar, *supra* note 12, at 64.

15. Exec. Order 12,333, *supra* note 13, paras. 1.7(g), 1.13. The Central Intelligence Agency is responsible for CI outside the United States; the Defense Intelligence Agency also has authority within the United States "to support national and departmental missions." *Id*. para. 1.7(a)(2), (b)(1).

16. *Id.* para. 1.7(f).

17. *Id.* para. 1.10(h).

18. *Id.* para. 2.3. Collection of information is further guided and restricted by Department of Defense Manual 5240.01. U.S. Dep't of Def., Manual 5240.01, Procedures Governing the Conduct of DoD Intelligence Activities (8 Aug. 2016) [hereinafter DoDM 5240.01].

19. *See* Exec. Order 12,333, *supra* note 13, paras. 1.7, 1.13.

20. *See* Schultz Indictment, *supra* note 2; *Schultz Press Release*, *supra* note 3.

21. Generally, unconsented physical searches for intelligence in the United States are not authorized unless conducted by the FBI in accordance with applicable laws and procedures, which often include searches governed by the Foreign Intelligence Surveillance Act (FISA). 50 U.S.C. §§ 1801–29, 1841–46, 1861–62, 1871; *see also* Telephone Interviews with Carl Johnson, Senior Nat'l Sec. L. Att'y, Off. of the Judge Advoc. Gen. (Nov. 1, 2024; Dec. 18, 2024) [hereinafter Interviews with Mr. Johnson]. There are circumstances where an investigation might begin under intelligence authorities, and might include information obtained through a FISA warrant, but then subsequently the investigation becomes, at least partially, criminal in nature. Interviews with Mr. Johnson, *supra*. The information collected under intelligence authorities may then be used as a basis for additional investigation under law enforcement authorities. *Id.* For example, information collected through a FISA warrant may subsequently be used in an affidavit for a search authorization as part of the criminal investigation. *Id.*

22. Exec. Order 12,333, *supra* note 13, para. 1.14(a). Practically, notifications to the FBI may be done formally using a letterhead memorandum, as discussed more fully *infra* Section titled "Classified Information Sharing," or more informally through communications between CI agents and FBI agents in the applicable field office. Telephone Interviews with Caroline Pascal, Senior Civilian Legal Advisor, Army Counterintelligence Command (Sep. 27, 2024; Dec. 18, 2024) [hereinafter Interviews with Mrs. Pascal].

23. 50 U.S.C. § 3381(e)(1)(A).

24. *Id.*

25. U.S. Army Intel. & Sec. Command, https://www.usainscom.army.mil/MSCs [https://perma.cc/7QX3-V6SG] (last visited Dec. 29, 2025).

26. *Commanding General*, U.S. Army Intel. & Sec. Command, https://www.usainscom.army.mil/Organization/Commanding-General [https://perma.cc/8JXH-BS3F] (last visited Dec. 29, 2025) (identifying Major General Timothy J. Brown as the current INSCOM commanding general); The Judge Advoc. Gen.'s Corps, U.S. Army, JAGC Personnel Directory 270 (1 Oct. 2024) [hereinafter JAGC Directory] (identifying the INSCOM Office of the Staff Judge Advocate personnel).

27. U.S. Army Counterintelligence Command, https://www.usainscom.army.mil/MSCs/ACIC [https://perma.cc/2HR5-PABS] (last visited Dec. 29, 2025); JAGC Directory, *supra* note 26, at 273.

28. *Major Subordinate Commands*, U.S. Army Intel. & Sec. Command, https://www.usainscom.army.mil/MSCs [https://perma.cc/TB5N-YY7B] (last visited Dec. 29, 2025).

29. U.S. Army Counterintelligence Command, *supra* note 27.

30. *Id.*

31. U.S. Off. of Pers. Mgmt., Handbook of Occupational Groups and Families 27, 109 (Dec. 2018). ACIC agents are coded as 0132 positions, which are intelligence activities positions, not 1811, which are criminal investigation positions.

32. *See* U.S. Army Counterintelligence Command, *supra* note 27.

33. Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, sec. 1613, 138 Stat. 1773, 2173 (2024); *see also* Interviews with Mr. Johnson, *supra* note 21.

34. Sec. 1613, 138 Stat. at 2173.

35. 10 U.S.C. §§ 1585a, 7377, respectively; *see also* Interviews with Mr. Johnson, *supra* note 21.

36. MCM 2024, *supra* note 9, M.R.E. 315(e). As discussed *infra* Section titled "The Road to Trial," military judges hesitate to acknowledge that CI agents can switch between their intelligence mission and law enforcement functions. Thus, although MRE 315(e) would allow uniformed CI agents to conduct searches, military judges have treated requests for search authorizations from CI agents as for intelligence purposes. Once implemented, the legislation should provide the statutory support for a culture shift in which military judges are comfortable considering search authorizations for CI agents, both uniformed and Civilian.

37. *Lines of Effort*, U.S. Air Force Office of Special Investigations, https://www.osi.af.mil/About/Fact-Sheets/Display/Article/349945/office-of-special-investigations [https://perma.cc/ER4Y-JSDM] (last visited Dec. 29, 2025).

38. *See id.*

39. U.S. Dep't of Air Force, Pol'y Dir. 71-1, Criminal Investigations and Counterintelligence para. 3.2 (1 July 2019).

40. *Id.* para. 3.2.5.

41. *See About NCIS*, U.S. Naval Crim. Investigation Serv., https://www.ncis.navy.mil/About-NCIS [https://perma.cc/4MHZ-5Q59] (last visited Dec. 29, 2025).

42. *Id.*

43. U.S. Dep't of Navy, Sec'y of Navy Instr. 3850.2E, Department of the Navy Counterintelligence, para. 5.g (3 Jan. 2017).

44. *See generally National Security Division*, U.S. Dep't of Justice, https://www.justice.gov/nsd [https://perma.cc/W2YV-CSPV] (last visited Dec. 29, 2025) (stating the mission of the Department of Justice National Security Division); *see also* Schultz Indictment, *supra* note 2; *U.S. Army Soldier Sentenced to 14 Years in Prison For Attempting to Assist ISIS to Conduct Deadly Ambush on U.S. Troops*, U.S. Dep't of Just. (Oct. 11, 2024), https://www.justice.gov/opa/pr/us-army-soldier-sentenced-14-years-prison-attempting-assist-isis-conduct-deadly-ambush-us [https://perma.cc/NAK3-LWDT].

45. *See* Erin Creegan, *National Security Crime*, 3 Harv. Nat'l Sec. J. 373, 374–75 (defining international criminal law as "violations of international law perpetrated by state actors," and transnational criminal law as "cooperation between states to tackle threats posed by more 'ordinary' criminal activities," including terrorism,

human trafficking, and organized crime, and national security law as addressing "threats against the security of a state and its people as such, whether they come from another state or a transnational or even domestic group").

46. *Id.* at 375.

47. *See Press Releases*, Off. of Pub. Affs., U.S. Dep't of Just., https://www.justice.gov/news/press-releases [https://perma.cc/2RRU-7AVB] (last visited Dec. 29, 2025) (displaying most recent press releases from the DoJ, which routinely include information about national security prosecutions involving espionage, sabotage, and terrorism).

48. U.S. Const. art. III, § 3; 18 U.S.C. § 2381 *et seq.* (treason and treason-related offenses); 18 U.S.C. § 793 *et seq*. (espionage); 18 U.S.C. §§ 2152–56 (sabotage of defenses during a time of war); 18 U.S.C. §§ 1362–68 (malicious mischief related to communication lines, station or systems, buildings or property within special maritime and territorial jurisdiction, consumer products, energy facilities, satellite systems, and law enforcement animals). Terrorism crimes may also be considered within the broad category of national security crimes; however, the legal paradigm for criminal prosecutions in recent years is one focused on criminalizing the terrorist for being a terrorist, rather than the terrorist act. *See* Creegan, *supra* note 45, at 403–04 (discussing the predominant use by the DoJ of post-9/11 terrorism statutes that criminalize material support to terrorists or designated terrorist organizations and receipt of military-type training from a foreign terrorist organization). As such, the criminalized acts are generally subsumed by the other common national security offenses, though prosecuted under terrorism laws due to the status of the offender. *Id.* at 404.

49. *See* 18 U.S.C. § 793; Creegan, *supra* note 45, at 386.

50. 18 U.S.C. §§ 791–99.

51. 22 U.S.C. §§ 2751–2799aa-2.

52. Creegan, *supra* note 45, at 397.

53. 22 U.S.C. § 2778(a).

54. *Id.* § 2778(b)(2); *see also* Schultz Indictment, *supra* note 2, ¶ 13 (explaining that SGT Schultz's disclosure of technical data to a another person without the required license to do so constitutes a violation of the Arms Export Control Act).

55. 22 U.S.C. § 2778(c).

56. *See* UCMJ arts. 94 (2011), 103 (2016), 103a (2016), 103b (2016), 108 (2011), 123 (2016).

57. *See id.* Changes to arts. 103, 103a, 103b, and 123 in 2016 were solely renumbering; substantively, they have remained unchanged.

58. *See* UCMJ art. 103a (2016).

59. *Id.*

60. *See* 18 U.S.C. § 793(a).

61. *See* 18 U.S.C. §§ 793, 794. In the UCMJ, the former would likely be prosecuted as attempted espionage. *See* UCMJ art. 103a (2016).

62. *See* Off. of the Judge Advoc. Gen., U.S. Navy, U.S. Navy Report on Military Justice for Fiscal Year 2023 para. 4.h. (2023) [hereinafter U.S. Navy Report on MJ for FY23] (describing only three national security courts-martial prosecuted in fiscal year 2023 by the U.S. Navy).

63. UCMJ arts. 85 (2019), 86 (1956), 92 (1950), 107 (2016), 133 (2021), 134 (2016).

64. MCM 2024, *supra* note 9, M.R.E. 315. This discussion will focus on on-post locations; off-post locations would almost always require a warrant from an Article III judge and would require coordination with the FBI for execution. There are some searches that do not require prior authorizations or a determination of probable cause. *See id.* M.R.E. 314 (consent, border, Government property). Commanders may authorize searches of Government property, which generally includes on-post locations where there is no expectation of privacy. *See id.* M.R.E. 314(d). For example, an Army commander may authorize CID to search the supply cages within a unit area as part of an investigation into suspected theft of Government property.

65. *Id.* M.R.E. 315(b). While search authorizations are issued by appropriate military authority, "search warrants" are issued by "competent civilian authority" under R.C.M. 703A and similarly provides authority for a probable cause search.

66. *Id.* M.R.E. 315(e)(1).

67. *Id.* M.R.E. 315(f)(2).

68. Interviews with Mr. Johnson, *supra* note 21.

69. *Id.*

70. Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025, Pub. L. No. 118-159, sec. 1613, 138 Stat. 1773, 2173 (2024).

71. Interviews with Mr. Johnson, *supra* note 21.

72. Importantly, CI agents will need to ensure that they are wearing the correct "hat" at any given time during an investigation; searches for intelligence purposes will still be governed by intelligence authorities, specifically Procedure 7 of DoDM 5240.01. DoDM 5240.01, *supra* note 18, at 35.

73. It would be preferable for the CI agent(s) that are intimately involved in the case to be swearing out and submitting the affidavit in support of the request. Historically, CI agents might involve CID as a partner in the investigation and allow their agents sufficient access to evidence and information such that a CID agent can swear to the affidavit and request the search authorization. While it achieves the desired end state, it is less efficient and introduces unnecessary complexity that may detract from the presentation of evidence at trial. *See* Interviews with Mr. Johnson, *supra* note 21; Interviews with Mrs. Pascal, *supra* note 22.

74. MCM 2024, *supra* note 9, R.C.M. 305(d).

75. *Id.* R.C.M. 305(i)(2)(B).

76. Interviews with Mrs. Pascal, *supra* note 22.

77. *Id*. This would be accomplished through a lawful order by the commander that adopts specific language regarding bail restrictions to ensure consistency with Federal standards.

78. *Id*.

79. *See, e.g.*, Ashley Deeks, *Secrecy Surrogates*, 106 Va. L. Rev. 1395 (2020); Valerie J. Pelton, *The Enemy Among Us: The Insider Threat*, 82 J. Air L. & Com. 519 (2017); Ann Koppuzha, *Secrets and Security: Overclassification and Civil Liberty in Administrative National Security Decisions*, 80 Alb. L. Rev. 501 (2016); Oona A. Hathaway et al., *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 Wm. & Mary L. Rev. 137 (2021); Jamil N. Jaffer, *Carrots and Sticks in Cyberspace: Addressing Key Issues in the Cybersecurity Information Sharing Act of 2015*, 67 S.C. L. Rev. 585 (2016).

80. Major Michael Petrusic, *Navigating Government Information Protections and Privileges: Using Protected Government Information in Courts-Martial*, Army Law., July 2017, at 20.

81. *See* U.S. Dep't of Army, Pam. 381-20, Counterintelligence Investigative Procedures para. 2-45(g)(3) (15 Apr. 2020).

82. *Id.* para. 2-45(g)(1).

83. *See id.* Depending on the investigation and the information conveyed, LHMs may be classified or unclassified.

84. Interviews with Mrs. Pascal, *supra* note 22; Army Regulation 25-50 provides the formatting requirements for Army memoranda. *See* U.S. Dep't of Army, Regul. 25-50, Preparing and Managing Correspondence paras. 2–4 (10 Oct. 2020).

85. *See* U.S. Dep't of Def., Dir. 5525.07, Implementation of the Memorandum of Understanding between the Dep'ts of Just. and Def. Relating to the Investigation and Prosecution of Certain Crimes fig. 1 (5 Mar. 2020) (depicting the verbatim text of the original 1984 MoU).

86. *Id.* fig. 1, para. B.

87. *Id.* fig. 1, para. C(1)(b).

88. *Id.*

89. The MoU does not identify specific provisions of the U.S. Code as fraud or theft crimes. *See id.* SGT Schultz was charged with violations of the Arms Export Control Act, which could arguably be considered a fraud against the DoW and theft of Government property since the factual basis for the charge was the unlawful disclosure of defense articles to a foreign national. *See* Schultz Indictment, *supra* note 2, ¶¶ 20–29.

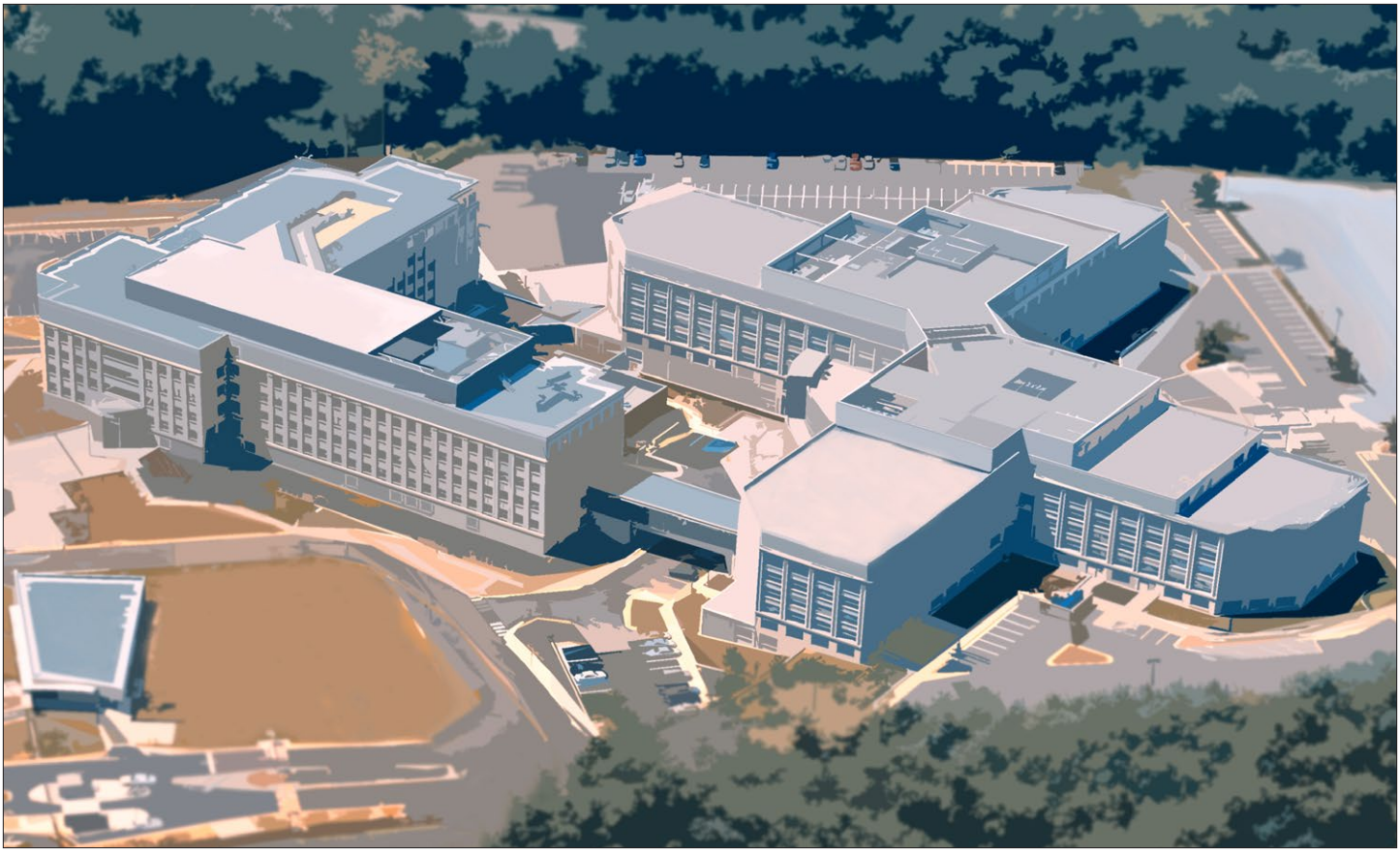
90. *See* MCM 2024, *supra* note 9, R.C.M. 202; UCMJ art. 2 (2023).

91. Interviews with Mr. Johnson, *supra* note 21.

92. *See* U.S. Navy Report on MJ for FY23, *supra* note 62, para. 4.h(3), at 10 (describing the U.S. Army Advocacy Center Classified Litigation Course designed to provide students with training in national security prosecutions).

93. MRE 505 will feature prominently in national security prosecutions. Generally, MRE 505 prohibits military judges from releasing classified information to any person not authorized to receive it. *See* MCM 2024, *supra* note 9, M.R.E. 505. It further provides procedures for the proper handling of classified information when it is relevant to a court-martial. *See id.* The interplay of classified material with privileges and discovery in general can lead to complex pretrial litigation. *See id.*

94. *See supra* note 1 and accompanying text.



A rendering of the Office of the Director of National Intelligence in McLean, VA. (Source: ODNI)

Practice Notes

Thirteen Tools for Legal Professionals from Intelligence Community Directive 203

By Major Benjamin M. Joslin and Master Sergeant Garry L. Murdock, Jr.

[A]nalytic products shall be . . . [o]bjective . . . [i]ndependent of political consideration . . . [t]imely . . . [b]ased on all available sources of . . . information . . . and exhibit[] Analytic Tradecraft Standards.[1]

Judge advocates (JAs) and paralegals must maintain a sharp set of analytical tools in their toolkit to be effective and relevant. Analytic rigor strengthens credibility by fostering trust with clients and colleagues through increased transparency and sound reasoning. But similar to muscles, if analytic skills are not practiced and exercised, they can atrophy over time. This article lists thirteen analytical tools relevant to the practice of military law derived from Intelligence Community Directive (ICD) 203, *Analytic Standards*.[2] While ICD 203 is not a direct analog for legal work, it lays out how the intelligence community (IC) ensures "excellence, integrity and rigor in [its] analytic thinking," because like the legal profession, the IC relies heavily on analytical skills.[3] ICD 203 promulgates five "core principles of intelligence analysis," the last of which is broken down into nine separate "Analytic Tradecraft Standards," resulting in a total of thirteen separate guidelines "to be applied across the IC."[4] Reviewing these guidelines will help military law practitioners apply greater "analytic rigor"[5] when providing legal advice on military justice, national security law, and all other practice areas.

1. Objective

ICD 203 requires intelligence analysts to "consider alternative perspectives and contrary information" to challenge "existing analytic positions or judgments."[6] Like analysts, legal advisors must be willing to reconsider "previous judgments when new developments indicate a modification is necessary."[7] For instance, when a Trial Defense Service (TDS) attorney submits matters in rebuttal to a Soldier's pending chapter packet highlighting relevant matters in defense and mitigation, analytically rigorous legal advisors must not ignore such perspective. Objectivity requires the legal advisor to advise decision authorities without concern that discussing alternative viewpoints or new developments would contradict or detract from current or previous legal advice. The directive emphasizes that objectively considering alternative viewpoints strengthens the quality and effectiveness of analysis, thus leading to better-informed decisions.

2. Independent of political consideration

"Analytic assessments must not be distorted by, nor shaped for, advocacy of a particular audience, agenda, or policy viewpoint."[8] While Army Regulation (AR) 27-26 acknowledges an attorney's advice to a client may be influenced by "political factors that may be relevant to the client's situation,"[9] legal advice should not be shaped by an attorney's own *personal* agenda or policy viewpoints.[10] Everyone has personal political beliefs, as we can and should,[11] but such beliefs should remain separate from the workplace. Likewise, legal advice should not be influenced by an attorney's perceptions of their client or commanders' political views or by assumptions about what the person they are advising may prefer to hear.[12]

3. Timely

Intelligence analysis "must be disseminated in time for it to be actionable by customers."[13] To a (perhaps) lesser but still important extent, legal advisors must also "provide useful analysis at the right time."[14] Timeliness means processing legal actions quickly—slow justice is no justice—and being prepared to advise on various scenarios before they occur. Soldiers of all branches regularly conduct battle drills, table-top exercises, rehearsal of concept drills, and other preparatory mechanisms to ensure they stand ready to react to contact. Legal advisors should consider incorporating similar drills/exercises to ensure readiness to advise on topics throughout all practice areas.

4. Based on all available sources of intelligence information

In the IC, "[a]nalysis should be informed by all relevant information available."[15] This is because excluding key context like counterpoints, extenuating factors, or information gaps can lead to faulty conclusions. Trusted legal advisors, like intelligence analysts, should avoid shaping a brief to fit a predetermined narrative. Rather, JAs should "identify and address" the nuances of a situation to ensure a well-rounded, complete factual picture is provided to relevant authorities.[16] That said, most decision authorities do not need to know every granular detail of a case. Information should only be included in a brief if it is relevant, necessary, and does not risk confusing the issues or wasting time.[17]

5, 6, 7. Properly describes the quality and credibility of underlying sources, data, and methodologies; expresses and explains uncertainties associated with major analytic judgments; and distinguishes between underlying intelligence information and assumptions and judgments

ICD 203 requires that intelligence analysts ask many detailed questions when evaluating information. While JAs and paralegals are well equipped to assist decision authorities in evaluating the credibility of information based on their training and experience, thinking like an intelligence analyst can help add significant depth to a legal professional's understanding of a case.

Is this information from a first-hand source? Does the witness have motives or bias? Is the information corroborated or contradicted by other evidence? Is this known to be true, or is it inferred to be true? Answering these and similar questions can enable authorities to make fully informed decisions, whether conducting an Article 15 hearing or ordering a strike on the enemy. Interestingly, the standards of proof applied by intelligence analysts differ from those well-known to JAs and paralegals. Legal professionals are familiar with "probable cause," "preponderance of the evidence," and "beyond a reasonable doubt," while ICD 203 calls for intelligence analysts to assess their level of certainty among seven categories ranging from "remote" to "nearly certain."[18] Nevertheless, an intelligence analyst and JA may assess the credibility of a hearsay statement or a witness' motive to fabricate through a similar analysis.

8. Incorporates analysis of alternatives

The IC is directed to conduct "systematic evaluation of differing hypotheses . . . to mitigate surprise and risk."[19] Like intelligence professionals, JAs help clients mitigate surprise and risk by acknowledging potential weaknesses in facts, law, or conclusions. Making promises or guarantees is seldom effective in the intelligence or legal communities. For instance, when JAs assess cases from both the prosecution *and* defense perspectives, discussions with decision authorities naturally flow to potential costs, benefits, and risks associated with each available course of action (COA). In turn, decision authorities will better understand the potential "surprise and risk" associated with their chosen COA.[20]

9. Demonstrates customer relevance and addresses implications

"Analytic products should provide information and insight on issues relevant to . . . customers."[21] Likewise, JAs must be prepared to render advice in terms that align with the client's priorities and concerns. Accordingly, a JA will often tie legal advice back to the Army's mission. The purposes of military law differ from those of civilian practice, as military law seeks to achieve justice while "promot[ing] efficiency and effectiveness in the military establishment."[22] Accordingly, military legal advice must often cover both relevant legal standards and the implications thereof for the military mission.[23]

10. Uses clear and logical argumentation

"Analytic products should present a clear main analytic message up front."[24] Whether advising a commander or client or arguing a case before a panel or military judge, the crux

ICD 203's guidance can sharpen the analytical tools needed for JAs to succeed as critical thinkers, advisors, and advocates.

of the JA's message should always be clear. A bottom line up front (BLUF) is helpful in almost all contexts. Moreover, "[l]anguage and syntax should convey meaning unambiguously."[25] JAs must ensure terms of art are used sparingly and the message is sent using plain language.

11. Explains change to or consistency of analytic judgement

ICD 203 emphasizes the importance of analytical consistency across specific topics, while also explaining any deviations.[26] As in the intelligence world, no two legal fact patterns are ever identical. Legal advisors should pay close attention to nuanced differences in cases, while bearing overall consistency in mind. For the military justice practitioner, this may entail advising commanders against "crushing" one Soldier for failing to report to a formation while simply counseling another for the same infraction. Likewise, a JA advising in a strike cell should strive to ensure their target engagement authority's strike analysis maintains logical consistency, in addition to consistency with the laws of armed conflict, rules of engagement, and other applicable authorities.

12. Makes accurate judgments and assessments

"[A]nalytic products should [be accurate but] . . . not avoid difficult judgments in order to minimize the risk of being wrong."[27] Military legal advisors rarely have extra time to conduct law-school-level research on an issue, build full concurrence up and down their technical chain, and give decision-makers a "100 percent right, zero risk" answer. Nevertheless, the directive's logic suggests JAs should provide evaluative judgments and assessments when beneficial and "useful to customers," after completion of a thorough and appropriately timed analytic process that ensures a sufficient level of confidence in the analysis.[28]

13. Incorporates effective visual information where appropriate

"Analytic products should incorporate visual information to clarify an analytic message."[29] Research has shown that visual aids can assist lawyers, like intelligence professionals, in "simplifying complex information, enhancing comprehension, and increasing persuasiveness."[30] Therefore, JAs across all practice areas should consider incorporating visual aids when needed to supplement legal advice or advocacy.

Analytic rigor may come naturally to many attorneys and paralegal teammates. That said, ICD 203 provides a great refresher course to ensure a JA's legal advice is objective, independent of political consideration, timely, based on all available sources of information, and meets other analytic standards. ICD 203's guidance can sharpen the analytical tools needed for JAs to succeed as critical thinkers, advisors, and advocates. **TAL**

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Notes

1. Off. of Dir. of Nat'l Intel., Intel. Comm. Dir. 203, Analytic Standards para. 6 (2 Jan. 2015) (C1, 12 June 2023) [ICD 203].

2. *Id*.

3. *Id*. para. B(1).

4. *Id*. para. D(1).

5. *Id*. para. D(4) (stating that ICD 203 promotes a "common ethic for achieving analytic rigor and excellence, and for personal integrity in analytic practice").

6. *Id*. para. D(6)(a).

7. *Id*.

8. *Id*. para. D(6)(b).

9. U.S. Dep't of Army, Regul. 27-26, Rules of Professional Conduct for Lawyers r. 2.1 (26 Mar. 2025) [hereinafter AR 27-26].

10. *Id*. r. 5.4, cmt. (3) ("Thus, when a judge advocate or civilian Army lawyer is assigned to represent an individual client, neither the lawyer's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client.").

11. U.S. Dep't of Def., Dir. 1344.10, Political Activities by Members of the Armed Forces para. 4 (19 Feb. 2008). Paragraph 4 encourages Soldiers to "carry out the obligations of citizenship." *Id.* In doing so, Soldiers may "[r]egister, vote, and express a personal opinion on political candidates and issues" in their personal capacity. *Id.* para. 4.1.1.

12. AR 27-26, *supra* note 9, r. 2.1, cmt. (1) ("A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.").

13. ICD 203, *supra* note 1, para. D(6)(c).

14. *Id*. para. D(6)(c).

15. *Id*. para. D(6)(d).

16. *Id*. para. D(6)(d).

17. Applying the logic from Military Rule of Evidence 403, which allows for relevant evidence to be excluded from a court-martial if it its probative value is outweighed by the risk that it will confuse the issues or waste time. Manual for Courts-Martial, United States, M.R.E. 403 (2024) [hereinafter MCM].

18. ICD 203, *supra* note 1, para D(6)(e)(2)(a).

19. *Id.* para D(6)(e)(4).

20. *See* U.S. Dep't of Army, Field Manual 3-84, Legal Support to Operations para. 2-15 (1 Sep. 2023) [hereinafer FM 3-84] ("JAG Corps personnel help assess risk and provide legal options to protect the mission and the force.").

21. ICD 203, *supra* note 1, para. D(6)(e)(5).

22. MCM, *supra* note 17, pmbl., para. 3.

23. *See*, *e.g.*, FM 3-84, *supra* note 20, para. 3-47 ("It is important that JAG Corps leaders view legal support through the lens of warfighting functions and not just legal functions. Understanding how the legal functions and tasks relate to the dynamic of combat power allows the JAG Corps personnel to . . . seamlessly integrate legal support with warfighting functions.").

24. ICD 203, *supra* note 1, para. D(6)(e)(6).

25. *Id*.

26. *Id*. para. D(6)(e)(7).

27. *Id*. para. D(6)(e)(8).

28. *Id*. The key word is "sufficient." Former Deputy Judge Advocate General, Major General Thomas Ayres used to say that "crap at the speed of light is still crap." Major General (Retired) William B. Dyer III with Brigadier General Michael J. Deegan, *What Army Commanders Need from Their Legal Advisors*, Army Law., no. 1, 2025, at 10, 11.

29. ICD 203, *supra* note 1, para. D(6)(e)(9).

30. Kato Nabirye, *The Use of Visual Aids in Legal Presentations*, 4 Rsch. Invention J. of Current Rsch. Human. & Soc. Scis. 49 (2025).

AROUND THE CORPS

SGM David C. Lyons, then-command paralegal NCO, 82nd Airborne Division, participates in the Law Day jump at Fort Bragg, NC. (Photo courtesy of LTC Brian D. Lohnes)

(Credit: Karola G - Pexels)

Practice Notes

Calling on Congress

Understanding the Limitations of Anti-Lobbying Provisions

By Mr. Michael D. Jones

Lobbyists have more offices in Washington than the President. You see, the President only tells Congress what they should do. Lobbyists tell'em what they will do. — Will Rogers[1]

It is another sweltering day in July at Fort Swampy. The chief of public affairs trudges across the baking asphalt parking lot to the entrance of the headquarters building. She attempts to unlock the door using her access card. Instead of a click of the lock, she is met with a flashing red light . . . access denied. Aggravated, she wades through the humid air to the other side of the building to gain entry at another door. As she moves down the hallway toward the elevator, she is greeted with a hastily constructed "out of order" sign. Six flights of stairs later, she finally reaches her office, only to discover that the air conditioning has decided to take the day off. In a fit of anger, she grabs her Government laptop, logs in to the Fort Swampy Public Affairs social media account, and posts to the 25,000 followers:

Conditions at Fort Swampy are abysmal!!! Contact your members of Congress and tell them to support the military and fund installations by passing the Fix Fort Swampy Act.

Despite her lack of proximity to Washington, D.C., the Fort Swampy public affairs officer may have just engaged in improper lobbying.

Within Government agencies, confusion often arises over the distinction between lobbying activities and routine communications about Government activities and programs, especially when such communications relate to pending legislation or other congressional actions. Legal advisors need to understand when communications or messaging efforts can violate anti-lobbying restrictions so that they can properly advise their clients, thereby avoiding potential violations without unduly restricting proper messaging and communications.

There are two basic provisions of law that legal advisors should be familiar with when advising clients on communications that could be construed as lobbying activities. The first provision is 18 U.S.C. § 1913, commonly referred to as the Anti-Lobbying Act.[2] The Anti-Lobbying Act imposes restrictions and limitations on Government officials lobbying Congress, especially with respect to grassroots activities designed to influence pending legislation.[3] Section 1913 was codified initially as a criminal statute, but it was later amended to remove the criminal penalties.[4] However, despite the removal of criminal penalties, violations of the act still carry civil penalties, including fines ranging from $10,000 to $100,000 per individual violation.[5] The text of section 1913 is as follows:

> **Lobbying with appropriated moneys**
> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counterintelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.[6]

The second anti-lobbying provision is the rider typically included in annual appropriations bills.[7] This rider also prohibits Government officials from engaging in certain types of lobbying activities with Federal funds.[8] For example, in the Further Consolidated Appropriations Act of 2024, section 715 provides that:

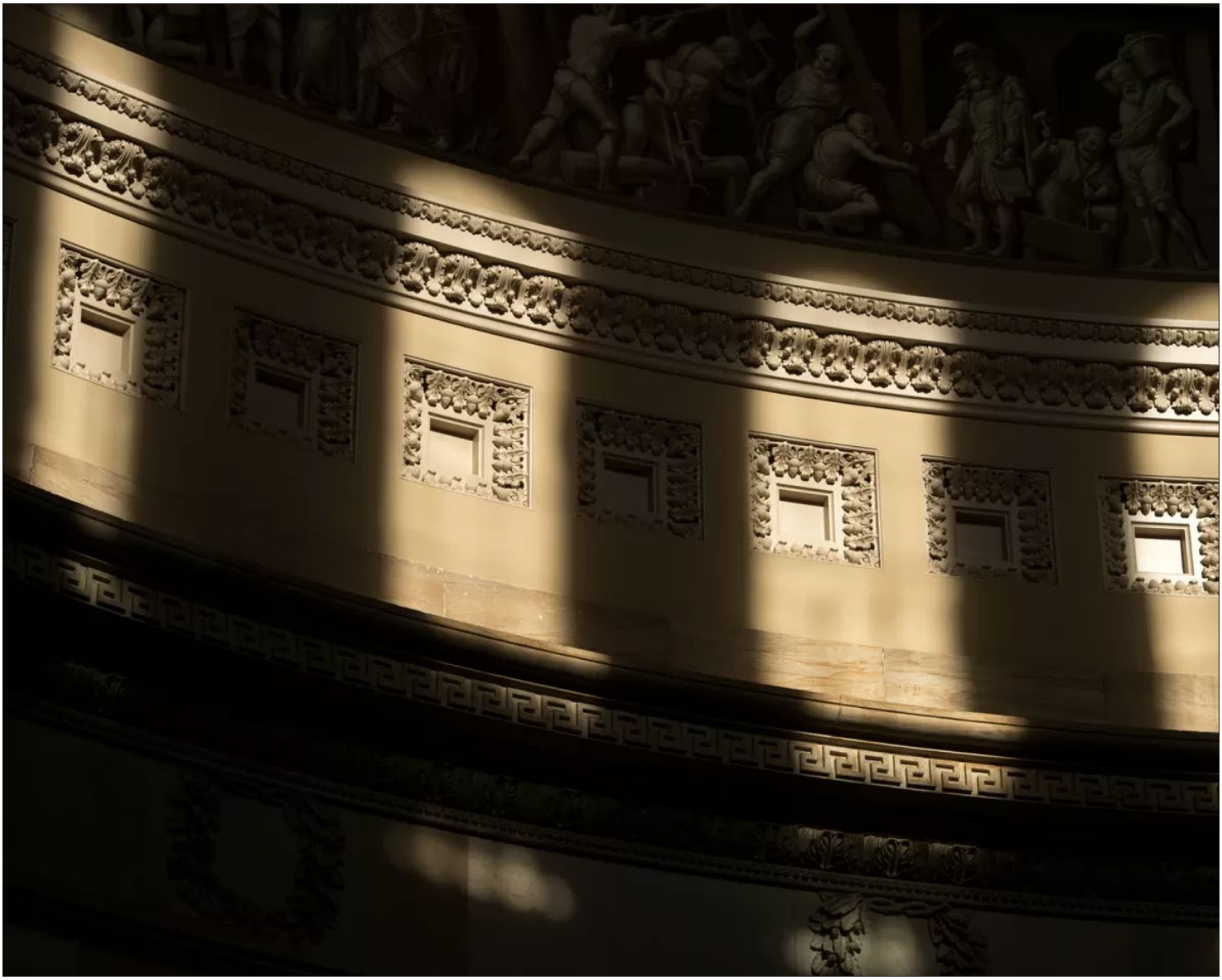
> No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself.[9]

These two provisions combine to form the primary restrictions on lobbying activities for Government officials.[10] Violations of 18 U.S.C. § 1913 typically fall under the purview of the Department of Justice for enforcement, while violations of the anti-lobbying riders in the appropriations bills, such as section 715 above, may be referred to the Government Accountability Office (GAO) to determine if a violation has occurred.[11]

On their face, both of these provisions are very expansive with respect to the scope of restricted conduct. However, the Office of Legal Counsel (OLC) in the Department of Justice has consistently construed the Anti-Lobbying Act narrowly, doing so across administrations of both parties.[12] This is because of concerns that a literal or broad reading of the restrictions could interfere with the President's performance of constitutionally assigned functions.[13] The OLC views the law as primarily focused on "grassroots" lobbying campaigns by executive branch officials that would involve spending a large amount of taxpayer money.[14] Grassroots lobbying typically involves the mass mobilization of the public around a legislative issue.[15] Grassroots lobbyists ask the general public to contact their legislators and other officials regarding an issue.[16]

The OLC has also stressed the following:

> The Anti-Lobbying Act does not prohibit (1) direct communications between Department of Justice officials and Members of Congress and their staffs; (2) public speeches, appearances, and writings; (3) private communications designed to inform the public about Administration positions or to promote those positions, as long as there is no significant expenditure of appropriated funds; (4) the traditional activities of Department components whose duties historically have included communicating the Department's views to Congress, the media, or the public; or (5) communications or activities unrelated to legislation or appropriations, such as lobbying Congress or the public to support Administration nominees.[17]



Shadowed portions of the Capitol Rotunda. (Source: Architect of the Capitol)

The GAO has taken a similar approach with respect to their analysis of the annual appropriations rider by expressing an interpretation that the restriction prohibits the use of appropriated funds for "indirect or grassroots lobbying, that involves a clear appeal to the public to contact Members of Congress in support of or in opposition to pending legislation."[18] In other words, to violate the anti-lobbying provision, "there must be a clear appeal by an agency to the public to contact Members of Congress, and that appeal must be in support of or in opposition to pending legislation."[19]

Language or communications that merely consist of statements that are likely to influence members of the public to contact their congressional representatives are unlikely to rise to the level of a violation[20] For example, GAO reviewed a case in which the Social Security Administration sent an annual letter to provide American workers with a report of their employment history and an estimate of their benefits.[21] The letter included language stating that benefits were based on current law and that Congress may change the law because payroll taxes collected were insufficient to fully cover benefits.[22] GAO determined that the inclusion of the language relating to possible changes to the law impacting benefits did not amount to a clear appeal to the public to contact congressional members in support of an agency position.[23]

Looking back to the Fort Swampy hypothetical at the beginning of this article, we should now be able to discern certain facts that, when taken together, may constitute a violation of the two anti-lobbying restrictions discussed above. Critical to our analysis are the following: (1) the public affairs officer used a Government computer in a Government facility and an official Government social media account for her post; (2) the social media account had a significant number of followers; (3) she made a direct appeal to the public to contact members of Congress; and (4) the appeal was to support a specific

piece of legislation (in this hypothetical, the Fix Fort Swampy Act).

Taken together, one might conclude that the public affairs officer violated the Anti-Lobbying Act. However, the small monetary cost associated with the social media post works in her favor. Although appropriated funds were likely used to pay the employee for her time and fund the computer, office, and internet connection she used for the social media post, the relative cost of making a single post is minuscule. Accordingly, the Department of Justice would likely conclude that a single post at essentially no cost to the taxpayers does not rise to the level of an Anti-Lobbying Act violation.[24] Even if no violation is found, such actions could still result in an investigation.

In contrast, this hypothetical is very similar to the facts in a GAO opinion concerning a founded violation by a Department of Transportation (DOT) official.[25] In that case, a DOT official "retweeted" and "liked" a tweet urging followers to "[t]ell Congress to pass" pending legislation using an official DOT social media account.[26] The GAO concluded that the DOT official violated the anti-lobbying provision of the applicable appropriations rider as a result of a retweet and a like of a tweet that urged the public to contact Congress in support of pending legislation using an official social media account.[27]

The GAO further determined that because the DOT "obligated and expended appropriated funds in violation of a statutory prohibition, the agency also violated the Antideficiency Act."[28] Accordingly, we can likely conclude that the actions of the public affairs officer would constitute a violation of the rider to the annual appropriations bills even if it does not rise to the level of a violation of the Anti-Lobbying Act.

It is important to note that "individual departments and agencies all maintain their own rules and restrictions on lobbying activities, as well as guidance on what is permitted."[29] It is the personal responsibility of every individual to be aware of and comprehend the particular rules and guidelines of their agency, which can be more stringent than current laws and regulations.[30] Additional restrictions may also apply to Government officials after they leave public service.[31] Such restrictions may limit or prohibit certain types of lobbying activity.[32]

Legal advisors will often be asked to review communications or engagement plans that include discussions of pending legislation or involve direct communications with congressional members and staff on official matters. Strategic-level communication about pending laws and policies is an important part of our professional discourse. Understanding the nuances of the relevant anti-lobbying provisions will ensure that our clients do not run afoul of the restrictions while also providing clear and consistent avenues of permissible communication on critical matters, such as legislative programs. **TAL**

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Notes

1. Bryan B. Sterling & Frances N. Sterling, Will Rogers Speaks: Over 1,000 Timeless Quotations for Public Speakers (and Writers, Politicians, Comedians, Browsers . . .) 186 (1995).

2. 18 U.S.C. § 1913; Kenneth Gold, *Changes to Both Hatch Act and Anti-Lobbying Act You Should Be Aware Of*, Gov't Affs. Inst. at Georgetown Univ. (May 31, 2012), https://gai.georgetown.edu/changes-to-both-hatch-act-and-anti-lobbying-act-you-should-be-aware-of [https://perma.cc/VEN8-4J69].

3. Gold, *supra* note 2.

4. *Id.*

5. *Id.*

6. 18 U.S.C. § 1913.

7. In the context of an appropriations bill, a rider is a provision that does not specifically provide for an appropriation but is often closely linked to an appropriation provision as a means to limit applicability or impose certain restrictions. *Appropriation Rider*, Budget Counsel Reference, https://budgetcounsel.com/cyclopedia-budgetica/cb-appropriation-rider [https://perma.cc/AZ6Z-JDVP] (last visited Oct. 23, 2025).

8. *See, e.g.*, Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, sec. 504, 123 Stat. 3034, 3310 ("No . . . part of any funds appropriated in this Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before Congress, except in presentation to Congress itself.").

9. Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, sec. 715, 138 Stat. 460, 576.

10. 31 U.S.C. § 1352 also includes lobbying restrictions concerning the use of Federal funds for recipients of Federal contracts, grants, loans, or cooperative agreements. These additional restrictions are beyond the scope of this article.

11. *See* The Honorable William F. Clinger, B-270875, 1996 WL 559651, at *2 (Comp. Gen. July 5, 1996) (referring to the Government Accountability Office by its previously held name, the General Accounting Office).

12. *Analysis: Anti-Lobbying Act & Dan Scavino*; Am. Oversight (Mar. 30, 2017), https://americanoversight.org/analysis-anti-lobbying-act-dan-scavino/#fn2 [https://perma.cc/R8F5-K43F].

13. Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts, 13 Op. O.L.C. 300, 306 n.12 (1989).

14. *Id*. at 304.

15. *Direct vs. Grassroots Lobbying*, Lobbyit.com, https://lobbyit.com/direct-vs-grassroots-lobbying/ [https://perma.cc/VH6C-ZNPX] (last visited Oct. 23, 2025).

16. *Id*.

17. 13 Op. O.L.C. at 300.

18. U.S. Department of Transportation-Violation of Governmentwide Anti-Lobbying Provision., B-329368, 2017 WL 6350825, at *3 (Comp. Gen. Dec. 13, 2017).

19. *Id*.

20. *See* Social Security Administration-Grassroots Lobbying Allegation, B-304715, 2005 WL 991729 (Comp. Gen. Apr. 27, 2005).

21. *See id*.

22. *Id*.

23. *Id*.

24. *See Analysis: Anti-Lobbying Act & Dan Scavino*, *supra* note 12.

25. U.S. Department of Transportation-Violation of Governmentwide Anti-Lobbying Provision., B-329368, 2017 WL 6350825 (Comp. Gen. Dec. 13, 2017).

26. *Id*. at *1.

27. *Id*. at *5.

28. *Id*. Use of obligated and expended appropriated funds in violation of a specific prohibition contained in an appropriations act likely constitutes a violation of the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A), as the appropriations are not available for such prohibited purposes. *See* Environmental Protection Agency-Application of Publicity or Propaganda and Anti-Lobbying Provisions, B-326944, 2015 WL 8618591 (Comp. Gen. Dec. 14, 2015).

29. Gold, *supra* note 2.

30. *Id*.

31. *See*, *e.g.*, U.S. Dep't of Def., Instr. 1000.32, Prohibition of Lobbying Activity by Former DoD Senior Officials (Mar. 26, 2020).

32. *See id*.

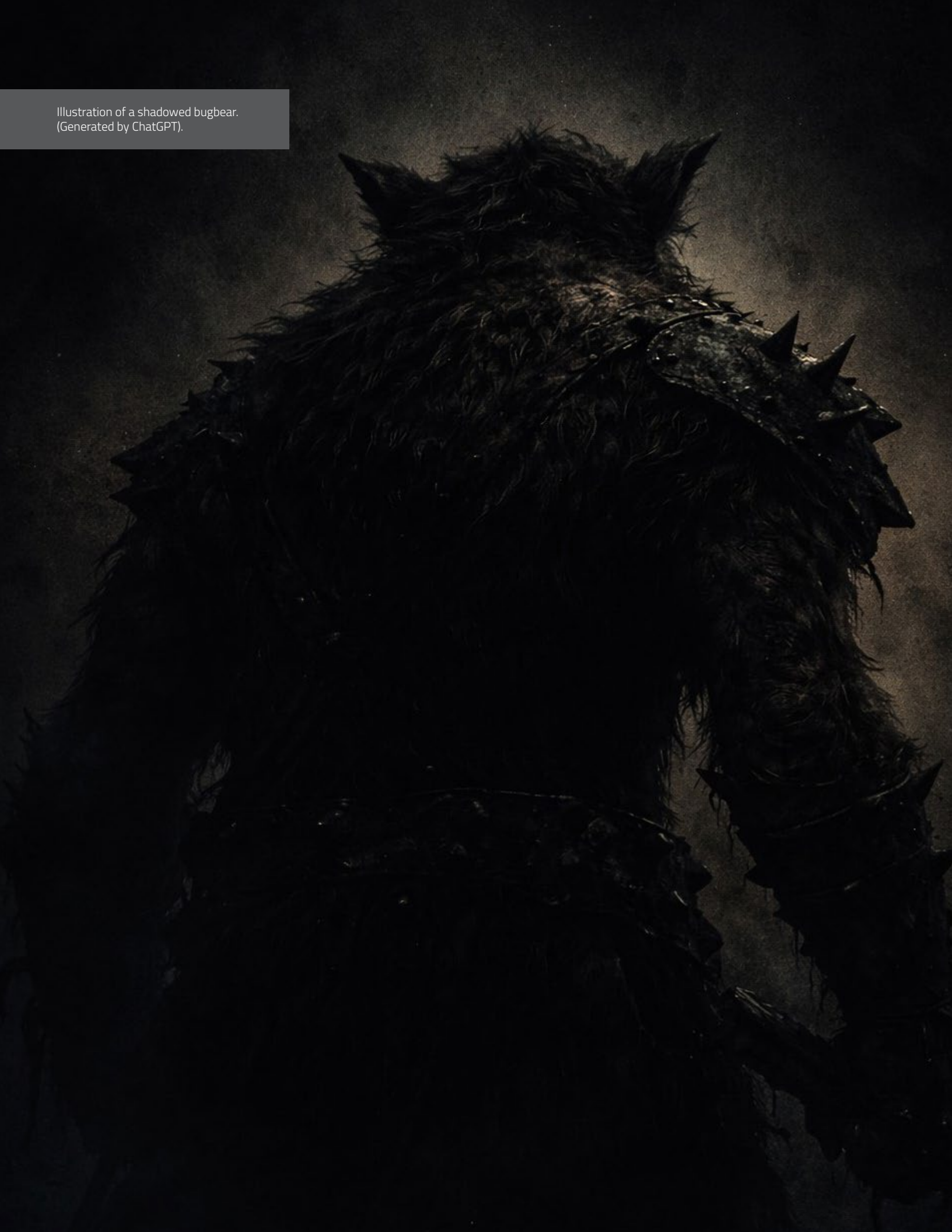


Illustration of a shadowed bugbear.
(Generated by ChatGPT).

Feature

The 2016 Amendment to Rule 801(d)(1)(B)

The Bugbear of the Military Rules of Evidence[1]

By Mr. Edward J. O'Brien

On 20 May 2016, the President signed Executive Order (EO) 13730, which modified Military Rule of Evidence (MRE) 801(d)(1)(B).[2] The amended rule reads:

> (d) A statement that meets the following conditions is not hearsay:
>
> (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> . . .
>
> (B) is consistent with the declarant's testimony and is offered:
>
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground . . . .[3]

In subsection (B)(ii) (hereafter referred to as "romanette (ii)"[4]), the amendment added a new category of prior consistent statements that is exempt from the definition of hearsay. Before the amendment of MRE 801(d)(1)(B), all prior consistent statements were admissible for the purpose of rehabilitating the credibility of a witness whose credibility was attacked. However, before the amendment, only the statements now described in subsection (B)(i) (hereafter referred to as "romanette (i)") were admissible for the truth of their contents. This amendment made prior consistent statements

admissible for the truth of the matter asserted, whereas the same statements were previously only admissible for the limited purpose of rehabilitation.[5]

The meaning of romanette (ii) has eluded military justice practitioners. "The military judge expressed some hesitancy about how to interpret (B)(ii) and what kind of evidence was admissible under this new provision."[6] This judge is not alone.[7] The judge's candid self-assessment perfectly describes military practice when it comes to the bugbear of the MRE. An unawareness of the common law of rehabilitation and the treatment of prior consistent statements before the 2016 amendment has led to excessively broad interpretations of the word "rehabilitate" in romanette (ii) or decisions made without explanation.[8] Rehabilitation is the "restoration of a witness's credibility after the witness has been impeached."[9] Too often, military judges admit statements that do not restore the witness's credibility based on the method of impeachment used. As the cases discussed in this article show, judges do not focus on the linkage between the method of impeachment and the prior statement, and, as a result, admit prior statements that have no rehabilitative effect beyond the fact that the witness said something before trial that matches their direct examination. According to the prevailing view in the Federal circuits, this is not enough.

> It can scarcely be satisfactory to any mind to say that if a witness testifies to a statement to day [sic] under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath . . . . [T]he idea that the mere repetition of a story gives it any force or proves its truth, is contrary to common observation and experience that a *falsehood* may be repeated as often as the *truth.*[10]

The Drafters' Analysis for the 2016 Amendment says that the amendment does not change the "traditional and well-accepted limits" on presenting prior consistent statements.[11] The Advisory Committee Note for the 2014 amendment to Federal Rule of Evidence (FRE) 801(d)(1)(B) makes the same point.[12] As the cases discussed in this article demonstrate, judges and practitioners proceed as if they are unaware of the traditional and well-accepted limits on prior consistent statements. The body of Federal case law discussing the traditional limits is persuasive authority for military courts because the 2014 amendment to FRE 801(d)(1)(B) and its advisory committee note are identical to the 2016 amendment to MRE 801(d)(1)(B) and its drafter's analysis.[13] Fortunately, one can learn all one needs to know about the traditional limits on rehabilitation with prior consistent statements by reading a single case, *United States v. Pierre*.[14]

Pierre surveys the messy history of the use of prior statements, distills the important common law principles of rehabilitation, and settles on a standard: a prior consistent statement must have "some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony"[15] (the *Pierre* standard). The *Pierre* standard is followed by nine Federal circuits, and the Court of Appeals for the Armed Forces (CAAF) should follow it as well. If CAAF does, the *Pierre* standard will cause judges to compare a proposed prior consistent statement with the direct testimony to ensure it is consistent, identifying the type of impeachment used, and determining if the prior statement repairs the damage done by the impeachment.

Military judges at the trial and appellate level have struggled to identify prior consistent statements that are admissible under romanette (ii) even after CAAF provided a framework to guide practitioners on the admissibility of prior statements under romanette (ii) in *United States v. Finch*.[16] In *Finch,* the court identified five foundational elements for a prior consistent statement to be admissible under romanette (ii).[17] The fifth foundational element is "the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked."[18]

This sounds very much like the *Pierre* standard, but CAAF's foundational element does not explicitly state that mere repetition is not enough. One can legitimately wonder if CAAF means to follow the traditional and well-accepted limits on prior consistent statements after reading its recent opinion in *United States v. Ruiz.*[19] In *Ruiz,* the trial judge admitted prior statements under romanette (ii).[20] Even though these statements had no actual rebutting force, CAAF found no abuse of discretion.[21] However, admission of these prior statements violated the *Pierre* standard because the prior statement admitted had no relationship to the method of impeachment employed.

While CAAF appears to be satisfied with this result, its reasoning invites reconsideration. CAAF should incorporate the *Pierre* standard into *Finch's* fifth foundational element. A failure to impose the traditional limits on the admission of prior consistent statements will lead to the absurd result like the one in *Ruiz*: any time a witness is impeached, any prior statement consistent with the witness's direct testimony will be admitted.

This article reviews CAAF's opinion in *Finch* and the Second Circuit Court of Appeals' opinion in *Pierre*. It then reviews *Ruiz* and *United States v. Brown*[22] to illustrate the difficulty many military trial and appellate judges have applying the 2016 amendment to MRE 801(d)(1)(B), often leading to incorrect rulings. *Ruiz* is CAAF's most recent opinion applying romanette (ii), and *Brown* is currently pending before CAAF. Finally, this article discusses other cases from CAAF and the Army Court of Criminal Appeals (ACCA) to illustrate how the *Pierre* standard provides an appropriate limiting principle.

The Traditional and Well-Accepted Limits on Prior Consistent Statements

Before the enactment of the FRE in 1975,[23] the rules of evidence were based on common law. Two guiding principles governed the rehabilitation of a witness at common law: First, a witness could not be rehabilitated until attacked, and second, the rehabilitation must undo the damage to the witness's credibility caused by the method of impeachment.[24] If the opponent of a witness expressly accused a witness of changing his testimony because he was bribed, the proponent of the witness could powerfully rehabilitate the witness by presenting testimony that the witness made statements that were consistent with his direct testimony and were made before he was allegedly bribed.[25] The prior statement repaired the damage done by the charge of improper motive by showing the witness said the same thing before the motive to fabricate arose. A prior statement made after the wit-

The U.S. Court of Appeals for the Armed Forces in Washington, D.C. (Credit: Ajay Suresh)

ness was bribed would not repair the damage done because the prior statement was made while under the improper motive of bribery. Before 1975, prior consistent statements were admissible only for rehabilitation of a witness's credibility.[26]

The common law of evidence is relevant as a source of guidance for interpreting the rules of evidence,[27] and it is reflected in the Drafters' Analysis of the 2016 amendment to MRE 801(d)(1)(B):

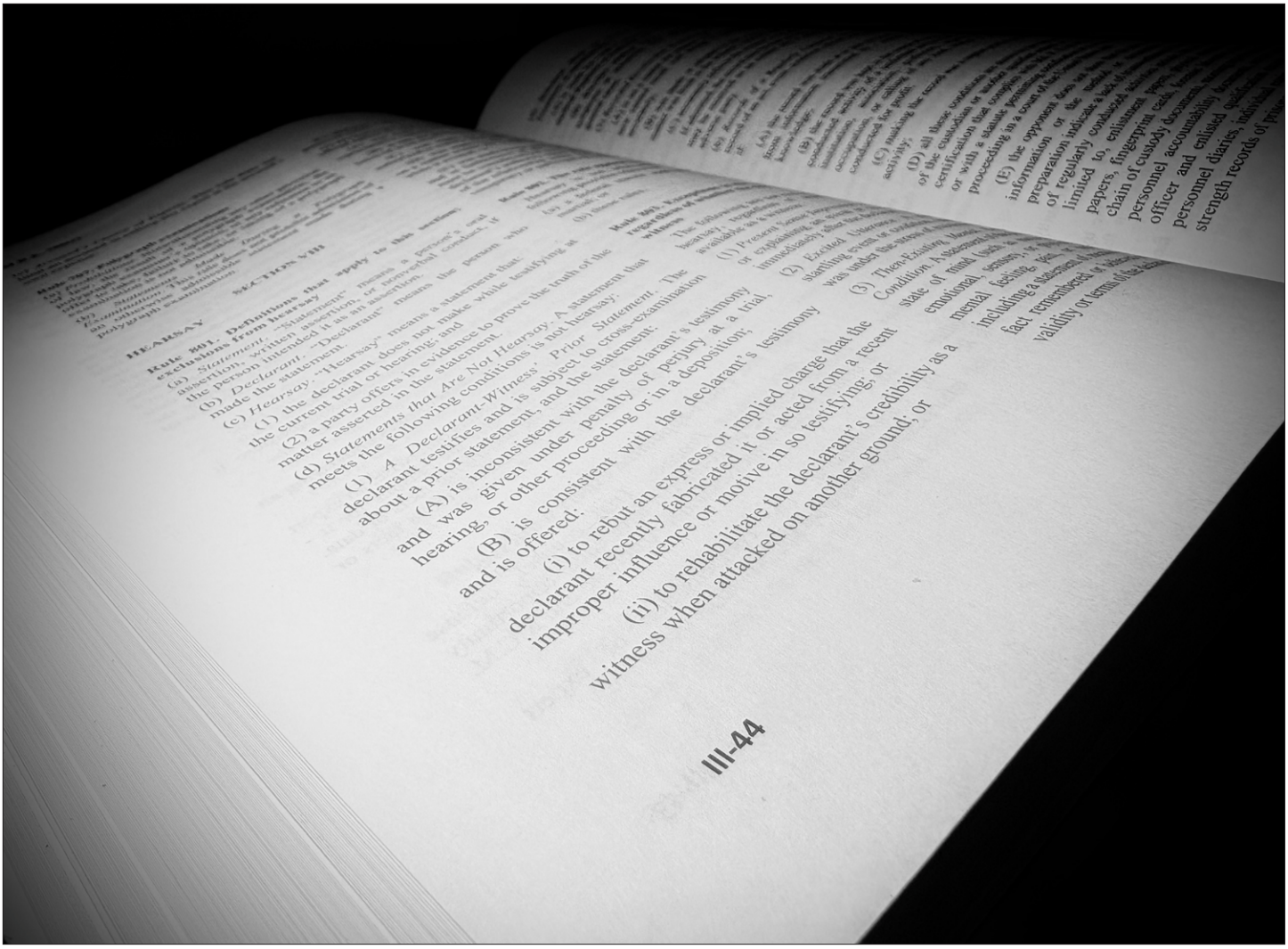
> The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked.[28]

Perhaps the most fundamental common law limitation on the use of prior consistent statements is that they cannot be introduced to rehabilitate a witness after *every* kind of impeaching attack.[29] The damage done by impeachment with a prior conviction, bad character for truthfulness, and defective perception (such as bad eyesight) is not rehabilitated by a prior consistent statement because the prior statement does not repair the damage done by these methods of impeachment.[30] Even if one considers the prior statement, the witness still has the same number of prior convictions, bad character, and poor eyesight. The damage done by impeachment with a prior inconsistent statement can be repaired by a prior consistent statement in limited circumstances.[31] *Pierre* discussed the traditional and well-accepted limits on the use of prior consistent statements in the context of impeachment with a prior inconsistent statement.

United States v. Pierre

In *United States v. Pierre,* the Second Circuit considered whether a prior consistent statement by a witness can be used to meet "the impeaching force of the witness's prior inconsistent statement" where the prior inconsistent statement was really impeachment by omission.[32] Mr. Michel Pierre was convicted of importing heroin and possession of heroin with intent to distribute.[33] Pierre was arrested at John F. Kennedy International Airport in New York and was immediately interviewed by a Drug Enforcement Administration (DEA) agent.[34] Pierre claimed that a friend gave him a suitcase to deliver to a bar in Philadelphia, and he did not know the heroin was in the suitcase.[35]

At trial, the DEA agent testified that Pierre refused to make a controlled delivery of the suitcase to the bar.[36] On cross-examination, the DEA agent admitted that his handwritten notes from the interview



Military Rule of Evidence 801 in the 2019 edition of the *Manual for Courts-Martial*. (Credit: Katherine Hernandez)

contained neither the offer to cooperate nor the refusal to make the controlled delivery.[37] On redirect examination, the judge allowed the DEA agent to testify that his formal written report mentioned Pierre's refusal to make the controlled delivery.[38] The written report was prepared three days after the interview.[39]

The court noted that "[t]he law of our Circuit concerning the permissible use of a prior consistent statement is not exactly a seamless web."[40] After reviewing many cases, the court distilled the important aspects of those cases and created a standard that many circuits follow today. The court said,

> Of course, not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.[41]

Applying the principles from the cases it reviewed, the court held the trial judge did not err in allowing the DEA agent to testify that his formal report referred to Pierre's refusal to make the controlled delivery.[42] The court explained the formal report's rebutting force:

> Here the defense sought to draw from the fact that the agent's notes omitted reference to the controlled delivery an inference that this proposal had not been mentioned in the post-arrest interview. It was obviously pertinent to the strength of that inference to show that the agent's formal report included the proposal for the controlled delivery. The issue for the jury was whether the omission from the notes meant that the topic had not been discussed or only that the agent had not included it among the fragmentary phrases he wrote down during the interview. The defense was entitled to argue the first possibility, but the prosecution was entitled to argue the second possibility and to support that argument with the fact that the controlled delivery proposal was mentioned in the agent's formal report.[43]

Omitting any reference to the controlled delivery in the handwritten notes raised an inference that the request to participate in

the controlled delivery was never made, contrary to the DEA agent's direct testimony. The formal report, prepared three days later, tended to rebut that inference by showing the request was made and the agent simply did not think he needed to make a note of the matter at the time of the initial interview.

The *Pierre* standard—that to be relevant to rehabilitate a witness's credibility, a prior consistent statement must have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony—has been adopted, followed or a copied with a similar rationale in the First Circuit,[44] Second Circuit,[45] Third Circuit,[46] Fourth Circuit,[47] Seventh Circuit,[48] Ninth Circuit,[49] Tenth Circuit,[50] Eleventh Circuit,[51] and DC Circuit.[52] CAAF should join this group.

In *United States v. Finch,*[53] Specialist (SPC) Finch was convicted of one specification of sexual abuse of a child under twelve, three specifications of rape of a child under twelve, and violation of a lawful general regulation by providing alcohol to a minor. SPC Finch was sentenced to a dishonorable discharge, confinement for six years, and reduction in rank to E-1.[54] ACCA set aside the finding for violating a regulation, affirmed the other findings, and affirmed the sentence.[55] CAAF reviewed the trial judge's admission of a prior consistent statement.[56]

At trial, the victim, AH, testified that SPC Finch, her stepfather,

> draped his arm around her stomach, moved his hands to her vagina and rubbed it on top of her clothing, put his hands inside her underwear, inserted his finger into her vagina, subsequently removed his finger from her vagina and inserted it into her mouth, pulled her pants down, and inserted his penis into her vagina.[57]

The defense launched a complex attack on AH's credibility. In addition to cross-examining AH about her motive to fabricate and calling family members to testify that AH was an untruthful person, the defense impeached AH with prior inconsistent statements to various people to whom she reported the abuse.[58] Most notably, AH was impeached by omission.[59] When she was interviewed by an agent from the Criminal Investigation Division (CID), she failed to tell the agent that her stepfather inserted his finger into her mouth between the digital penetration of her vagina and the penile penetration of her vagina.[60]

Following the cross-examination of AH, the trial counsel offered AH's video-recorded interview by CID as a prior consistent statement.[61] The defense objected. The trial judge admitted the entire statement without explanation and without reviewing the recording.[62] ACCA held that the trial judge did not commit an error and that the video was admissible under romanettes (i) and (ii),[63] but ACCA's reasoning is suspect.

ACCA found the statement was admissible under romanette (i) to rebut a motive to fabricate and an implied charge of recent fabrication.[64] The problem with ACCA's reasoning regarding the motive to fabricate is that ACCA artificially focused on the motive to fabricate (AH's desire not to live with her mother) on the day of trial when it should have determined when this motive arose, which was before AH spoke to CID.[65] Unless the prior statement was made before the improper motive arose, the prior statement does not rebut the improper motive.[66]

The problem with using the statement to law enforcement to rebut the implied charge of recent fabrication is that the statement to law enforcement did not contain the new fact revealed at trial—SPC Finch's insertion of his finger into AH's mouth. If AH had told someone, perhaps a friend, that SPC Finch inserted his finger into her mouth before she spoke to CID, the statement to that person would repair the damage done by the charge of recent fabrication, because it would show that the statement was not fabricated after the CID interview. However, it is impossible to rebut a charge of recent fabrication when the prior statement does not contain the omitted fact. In this case, the proposed prior consistent statement was the very statement the defense counsel used to impeach by omission because the declarant omitted the new fact disclosed at trial in the statement to CID.

ACCA also found the video was admissible under romanette (ii) to rehabilitate AH's credibility after she was impeached with prior inconsistent statements.[67] The problem with ACCA's analysis is that prior statements do not always rehabilitate a witness's credibility when they are impeached with a prior inconsistent statement. In fact, they rarely do because most prior statements have no rebutting force to repair the damage done by the impeachment. Stated another way, after consideration of the prior consistent statement, the prior inconsistent statement is no less inconsistent.

Decades of appellate opinions have discovered only two situations where prior statements rehabilitate the credibility of a witness impeached with a prior inconsistent statement. They are when the prior statement provides context to show the prior inconsistent statement was not made, or the statement was made but is not truly inconsistent.[68] Although ACCA cited *Pierre,* it failed to apply *Pierre*'s most critical part. *Pierre* instructs that

> [o]f course, not every prior consistent statement has much force in rebutting the effect of a prior inconsistent statement, and the issue ought to be whether the particular consistent statement sought to be used has some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.[69]

In *Finch,* the statement to law enforcement had no rebutting force, not even the minimal force created by mere repetition, because the alleged recently fabricated fact was not contained in the recorded statement to CID; there was no repetition. ACCA's tenuous reasoning would have been easy to expose using the *Pierre* standard, but CAAF decided to go another way.

CAAF held the trial judge erred in admitting the entire recorded statement, but the error was harmless.[70] CAAF focused on the trial judge's methodology rather than whether the interview contained prior consistent statements. There were good reasons to consider the judge's handling of the issue; the judge admitted the entire interview without reviewing it.[71] The trial judge should have reviewed the recorded interview sentence by sentence and only admitted those prior statements that were consistent with the witness's direct examination and were relevant to rehabilitation. "To remain relevant, however,

only those statements or portions of the consistent declaration which specifically address the challenged zone of inquiry—the inconsistent, or omitted details or the concocted account—should be admissible."[72]

CAAF found an abuse of discretion because the trial judge did not explain his decision to admit the statement; the trial judge did not review the statement before admitting it; and the trial judge did not parse the statement and exclude statements that were not prior consistent statements.[73] Although the court eschewed the opportunity to discuss the admissibility of any part of the recorded statement, it provided a template for the foundation of a prior consistent statement under romanette (ii). The court stated,

> Thus, in sum, for a prior consistent statement to be admissible under M.R.E. 801(d)(1)(B)(ii), it must satisfy the following: (1) the declarant of the out-of-court statement must testify, (2) the declarant must be subject to cross-examination about the prior statement, (3) the statement must be consistent with the declarant's testimony, (4) the declarant's credibility as a witness must have been "attacked on another ground" other than the ones listed in M.R.E. 801(d)(1)(B)(i), and (5) the prior consistent statement must actually be relevant to rehabilitate the witness's credibility on the basis on which he or she was attacked. The proponent of the evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred.[74]

This is helpful, but the court did not discuss what it means to "actually be relevant to rehabilitate" in the fifth foundational element. "The circuit courts that have applied [FRE] 801(d)(1)(B)(ii) have done so by ascertaining the type of impeachment that has been attempted, and then evaluating whether the prior consistent statements offered for admission would actually rehabilitate the declarant's credibility as a witness."[75] This is as far as CAAF's discussion went. CAAF's formulation falls short in that it does not emphasize that mere repetition is not enough and that the prior statement must repair the damage done by the type of impeachment used. *Pierre* fills this void: "Prior consistent statements [must have] 'some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'"[76] Had CAAF applied the *Pierre* standard to the statements in the interview, the court would have easily explained the trial judge's error in admitting the prior statements and established a limiting principle for future cases.

Ideally, CAAF would have applied the *Pierre* standard after comparing AH's direct testimony with her CID interview to identify consistent statements. AH was impeached by omission, which is a charge of recent fabrication, with a motive to fabricate (wanting not to live with her mother), and prior inconsistent statements. The statement to CID did not rebut the charge of recent fabrication because AH did not tell CID the omitted fact—that her stepfather penetrated her mouth with his finger. The statement would not rebut the motive to fabricate because the motive to fabricate arose before AH spoke to CID. The statements had no rebutting force to repair the damage done by the prior inconsistent statements because the prior statements were not offered to show the prior inconsistent statements were not made, to provide context to show the statements really were not inconsistent, or to provide any context that would repair the damage done by the impeachment. The statements to CID merely proved that the witness made statements before trial that were unrelated to the impeachment and were consistent with her direct testimony.

Instead of this analysis, CAAF found an abuse of discretion in the judge's mishandling of the evidence, which led to the improper admission of a prejudicial statement within the CID interview.[77] CAAF missed an opportunity to apply the *Pierre* standard. This discussion would have provided important guidance to the field.

Impeachment by Prior Inconsistent Statement

This section reviews recent decisions by CAAF and ACCA to illustrate the illogic and incoherence of military justice practice when it comes to the admission of prior consistent statements. Prior consistent statement issues get confusing when the proposed prior consistent statement is completely unrelated to the method of impeachment employed. This usually happens when a witness is impeached with a prior inconsistent statement. Unrelated statements do not rehabilitate the witness's credibility based on the attack with a prior inconsistent statement because they cannot show the inconsistent statement is any less inconsistent. This situation arose in *United States v. Ruiz*, a case in which the traditional limitations on prior consistent statements were not applied.

United States v. Ruiz

United States v. Ruiz[78] is CAAF's most recent opinion reviewing admission of a prior consistent statement. The opinion is confusing, and the trial judge appears to have misapplied the law. The trial judge admitted a prior consistent statement that did not satisfy the fifth foundational element from *Finch* or the *Pierre* standard.

Corporal Ruiz was on temporary duty at Camp Lejeune.[79] He contacted old friends at Camp Lejeune so they could meet and catch up while he was there.[80] Sierra was a friend of Ruiz, and she responded to Ruiz's invitation to hang out.[81] When they met, Sierra told Ruiz her husband could not join them because he was in the brig.[82] Ruiz and Sierra got some food and wine and returned to Sierra's house to eat dinner and talk.[83] Ruiz and Sierra drank the wine, some beer, and more.[84] Sierra became extremely intoxicated.[85]

Sierra testified that Ruiz helped her move to the kitchen table and sit down.[86] "The next thing she remembered was sitting on his lap on the couch, trying to pull away while he held on to her and 'shushed' her."[87] The next thing she remembered was "waking up in her bed with Appellant hovering over her and seeing him go into the bathroom. She believed they were both clothed at that time, although she did not remember clearly."[88] There was another gap in her memory. "Her next memory was of Appellant lying in bed with her, running his hand over her body."[89] She also testified that Ruiz rubbed his penis on her vaginal area.[90] She testified that she said, "No, stop" when Ruiz tried to kiss her.[91] Sierra blacked out.[92] Later, she came to and found

Volumes of *Court-Martial Reports* line the bookshelf in a courtroom. (Credit: A1C Daniel Blackwell)

Ruiz asleep in the bed next to her.[93] She left and reported the assault immediately.[94]

On cross-examination, Sierra acknowledged there were gaps in her memory.[95] She admitted it was possible that she had made statements to a law enforcement officer and the sexual assault forensic exam nurse, but she did not remember at trial what she told them.[96] The defense counsel was unsuccessful in impeaching Sierra with prior inconsistent statements during cross-examination because Sierra did not remember if she made the inconsistent statements.[97]

The Government called Deputy Frank, a sheriff's deputy who spoke to Sierra at the hospital immediately after the alleged assault.[98] The Government tried to admit the conversation as an excited utterance, but the judge sustained the defense's objection.[99] The defense cross-examined Deputy Frank to impeach Sierra extrinsically with prior inconsistent statements.[100] Deputy Frank testified that Sierra told him she sat on Ruiz's lap, drank two glasses of wine and shotgunned two beers, and she recalled Ruiz's pants coming off.[101] In response, the Government sought to admit additional statements Sierra made to Deputy Frank as prior consistent statements, including that Ruiz rubbed his genitals against her, that she had said no, and that she did not recall how she got to the bedroom.[102]

Initially, the trial judge would not admit these statements as prior consistent statements, "noting, 'I'm not seeing how there has been . . . a general attack on the [witness's] credibility. Period.'"[103] The judge later changed her mind, even though the consistent statement described what happened in the bedroom and the inconsistent statement addressed what Sierra said happened in the living room. "[The judge] ruled Ms. Sierra's statements 'that the accused was rubbing her genitals with his penis and that she said, "No" and that Ms. [Sierra] did not know how she got up the stairs' were admissible prior consistent statements because they 'add context to the inconsistent statements that were elicited on cross-examination . . . and . . . they demonstrate that Ms. [Sierra] has a memory of key events and details that have been consistent.'"[104] CAAF found no abuse of discretion.[105]

CAAF found that the prior statement to Deputy Frank was generally consistent with Sierra's in-court testimony.[106]

> Deputy Frank testified that Ms. Sierra told him Appellant rubbed his genitals against her, and she said "[n]o." Ms. Sierra's [direct] testimony described an ongoing interaction in

A gavel sits atop the judge's bench in the courtroom at Wright-Patterson Air Force Base, OH. (Credit: Jaima Fogg)

> which Appellant was "rubbing himself against me from my vaginal area to my buttocks"; he "kept trying to put his hand against my cheek and kept on trying to bring my face over to kiss him. And I said, 'No, stop.' And I pushed his face away"; and he continued to rub against her after she pushed his face away.[107]

Consistency is required by *Finch's* third foundational element.[108] Although the prior statement was unclear about what Sierra said "no" to, they were "generally consistent," and that is all that is required.[109]

CAAF was satisfied with the judge's reasoning.

> Here, the military judge placed her analysis on the record, finding the prior statement added "context" to inconsistent statements elicited on cross-examination and demonstrated that Ms. Sierra had consistent memories of significant facts and details. Additionally, the military judge found the prior statement was relevant and probative because it was made "during the same statement to the same agent on the night of the allegation."[110]

However, the prior statements do not "add context" to the inconsistent statements in a way that creates "rebutting force" or that repairs the damage done by the inconsistency. The prior statements were that the accused was rubbing her genitals with his penis, that she said "no," and that Sierra did not know how she got up the stairs.[111] The prior inconsistent statements were that she told Deputy Franks that she sat on Ruiz's lap, drank two glasses of wine and shotgunned two beers, and she recalled Ruiz's pants coming off. The prior statements do not tend to show the prior inconsistent statements were not made or were not inconsistent, which are the only contexts that might logically provide rebutting force.[112] The prior statements merely repeat unrelated parts of Sierra's direct testimony.

It appears the judge's logic was that, although Sierra made some prior inconsistent statements, she also made some prior consistent statements. The problem is the prior consistent statements do not make it less likely that she made the inconsistent statements. Because the prior statements do not provide context to show the prior inconsistent statements were not made or were not inconsistent, they had no rebutting force to rehabilitate the witness properly. The admitted prior consistent statements were merely repetition of unrelated parts of the witness's testimony, bolstering Sierra's credibility improperly.[113]

This violated *Finch*'s fifth foundational element requirement that the prior statement rehabilitate the witness's credibility based on the attack.[114] It also violated *Pierre*'s requirement that the prior statement have rebutting force beyond mere repetition. To the extent the prior statements demonstrated that Ms. Sierra had consistent memories of significant facts and details, the prior statements had no rebutting force beyond mere repetition.

The trial judge had an erroneous view of the law, and she should not have admitted these statements. CAAF should have found error.

To the extent the trial judge admitted the prior statements to rebut the attack on Sierra's memory, the trial judge erred. CAAF's discussion of this decision is confusing.

> Appellant argues that Ms. Sierra's statement to Deputy Frank could not rehabilitate her credibility because she was already suffering from alcohol-induced amnesia when she spoke to Deputy Frank. Appellant asserts that Ms. Sierra's statements to Deputy Frank therefore had the same credibility problem as her later testimony in the court-martial. Accordingly, Appellant contends that the consistency of her statements to Deputy Frank and her testimony in the court-martial was irrelevant. Although we understand the logic of this argument, we are unpersuaded that the military judge abused her discretion in viewing Appellant's challenge to Ms. Sierra's credibility and the Government efforts at rehabilitation in a different way.[115]

The court should have been persuaded by the appellate attorney's argument. The next sentence explains how the trial judge viewed the defense's challenge to Sierra's credibility. CAAF wrote,

> The record shows that trial defense counsel extensively attacked differences between Ms. Sierra's testimony at trial and the accounts of the assault that she gave to various law enforcement officials, prosecutors, and medical personnel, and that trial defense counsel did not solely focus on Ms. Sierra's inability to register memories.[116]

The defense apparently impeached the witness with several prior inconsistent statements. The court only discussed one, and the admitted prior consistent statement had no rebutting force to repair the witness's credibility, as discussed above. We cannot tell if the damage caused by the unreported prior inconsistent statements was repaired by the prior consistent statements. CAAF's dismissive line that the impeachments with prior inconsistent statements did not solely focus on the witness's inability to create memory because of intoxication conflates an attack with prior inconsistent statements with an attack on memory. They are different.

"[A] prior consistent declaration may rehabilitate a witness's account only if the consistent statement was made at a time when the cross-examination has expressly or impliedly charged that the witness's memory was more accurate."[117] In a typical case, a witness's memory may be attacked as faulty based on the passage of time. A prior consistent statement made at the time of the event would certainly rebut the charge that the witness's memory at trial a year later was faulty.

On the other hand, a prior consistent statement made two days before trial might not rebut the charge of forgetfulness.[118] In *Ruiz,* the defense did not attack Sierra's memory because it became worse with the passage of time. The defense attacked Sierra's memory as faulty at the time of the alleged assault because of the over-consumption of alcohol. This raises two issues. First, there was no charge that there was a time when the witness's memory was more accurate. Second, prior consistent statements are only admissible to repair an attack on the witness's memory at trial. "[A]dmission of a prior consistent statement is appropriate when recollection is attacked, but *only* when the cross-examiner raises the inference by challenging the *present* memory."[119] The prior consistent statements admitted in *Ruiz* have no rebutting force to repair the damage done because of a faulty memory caused by alcohol consumption at the time of the charged offenses.

The court's finding of no abuse of discretion is perplexing when one does the critical analysis to determine the prior statements' rebutting force. One could read *Ruiz* and conclude the fifth element of the *Finch* template is meaningless, because otherwise CAAF would have found an abuse of discretion. The prior statements did nothing to repair the damage done by the methods of impeachment employed by the defense counsel. The statements that were admitted improperly bolstered the witness through mere repetition.

United States v. Brown

In *United States v. Brown*,[120] ACCA issued an opinion with two rationales. The court held that the trial judge did not abuse his discretion in admitting two prior consistent statements, but in case ACCA was wrong about that, the court held Private First Class (PFC) Brown did not suffer any prejudice. The trial judge admitted prior consistent statements under both romanette (i) and romanette (ii).[121] ACCA affirmed the judge's decision to admit the statements under romanette (ii).[122] The destination of ACCA's romanette (i) analysis was clearly to find an abuse of discretion, but ACCA could not bring itself to conclude the judge erred.[123]

PFC Brown was convicted of domestic violence upon his wife and sentenced to a dishonorable discharge and confinement for forty months.[124] According to the victim, she had an argument in the bedroom with her husband.[125] She claims Brown stabbed her in the side and then in the left shoulder.[126] The couple struggled in the bedroom, moved into the hallway and then down the stairs.[127] The Government offered PFC Brown's statement to CID.[128] Brown told CID that he stabbed his wife in the side in self-defense and in the shoulder by accident when they tumbled down the stairs.[129] The victim's prior inconsistent statements related to Brown's claim of self-defense, specifically whether she pointed a gun at Brown in the bedroom.[130]

During cross-examination, the victim denied that she "pointed a gun at him intentionally during a heated argument."[131] However, two medical personnel who transported the victim to the hospital testified that the alleged victim said she pointed the gun at her husband's face.[132] After the cross-examination of the victim, the Government offered Prosecution Exhibit (PE) 26, which contained two brief segments from the victim's second CID interview (which was recorded), wherein she stated she did not point the gun at her husband.[133]

The Government offered these two segments under romanette (i) and romanette (ii).[134] "After reviewing the two snippets outside the presence of the panel in an Article 39(a) session, the military judge set forth the applicable standard, explained his analysis for the (B)(ii) prong, and admitted the statements as prior consistent statements under

both the (B)(i) and (B)(ii) hearsay exceptions [sic]."[135]

The trial judge admitted the two prior consistent statements under romanette (i) but did not explain his reasoning.[136] The obvious explanation is that the judge thought the two prior consistent statements rebutted the defense's expressed charge of improper motive. The improper motive was the alleged victim's desire to keep custody of her children. This motive to fabricate arose at the victim's first interview with law enforcement; the officer at the first interview told the victim her children were in protective custody.[137] The victim then said she never pointed the gun at her husband, contradicting what she said to the medical personnel.[138]

The defense's theory was that she changed her story because she was afraid she would not get her children back if it was established that she pointed her gun at her husband.[139] In the recorded CID interview several days later, the victim stated she never pointed the gun at her husband, but she said she flagged him with the gun.[140] This means she pointed the gun at him unintentionally.[141] At trial, the victim denied flagging her husband with the gun.[142]

Perhaps the trial judge did not explain his rationale because he recognized that the motive to fabricate arose before the victim made the prior consistent statements. As a result, the prior consistent statements did not rebut the motive to fabricate. The Government claimed that the defense made a second charge of improper motive: the alleged victim filing for divorce. The Government claimed this was a separate motive to fabricate that arose after the proposed prior consistent statements were made.[143] If this was true, the Government's proffered statements would have been admissible under romanette (i), because, when more than one improper motive is raised, a prior consistent statement only has to rebut one of the motives.[144] After ACCA concluded the "divorce with sole custody" motive was the same motive raised when the alleged victim learned her children were in protective custody, ACCA abruptly moved on to its analysis of romanette (ii).[145]

The trial judge admitted the prior consistent statements under romanette (ii) to rebut the "inconsistency attacks by the defense counsel,"[146] but it is not clear how the prior statements rebutted the inconsistency attacks. As one leading commentator has explained,

> [I]f relevant, the prior consistent account becomes so only when it refutes the cross-examiner's express charge or "intended inference." If, however, the cross-examiner impeaches with an inconsistent statement in a general attack on credibility without charging the witness with a specific motive to lie, . . . the admission of a consistent statement which either explains the admitted inconsistency or supports the witness' denial of making the inconsistent statement [would be permitted].[147]

A general inconsistency attack is impeachment by prior inconsistent statement where the cross-examiner does not charge improper motive, improper influence, or recent fabrication.[148] General inconsistency attacks are evaluated under romanette (ii), and prior statements are admissible to support a denial of making the inconsistent statement or to provide context to show the inconsistent statement is not inconsistent. Consistent statements do not repair the damage done by a general consistency attack, except in cases not relevant here.[149]

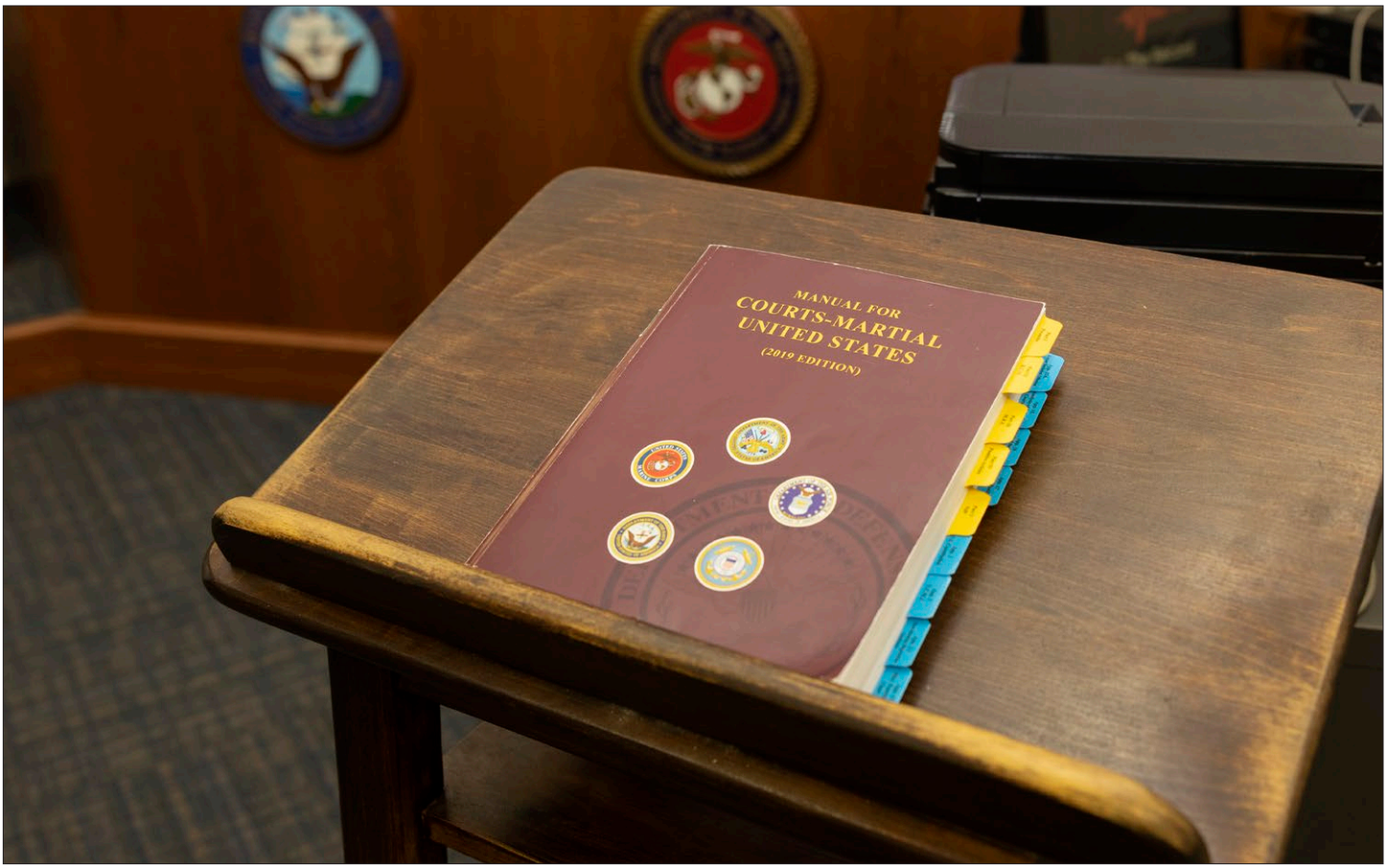
In *Brown,* the impeachment with a prior inconsistent statement was accompanied by an expressed charge of improper motive. In this situation, impeachment by prior inconsistent statement is a tool for the cross-examiner to explain why and when the witness has been induced or influenced to lie.[150] In *Brown,* the motive to fabricate arose before the prior statements were made, so the prior statements do not qualify for admission under romanette (i), as explained above. The proposed prior consistent statement should be evaluated under romanette (ii) and admitted only if the prior statement tends to show the inconsistent statement was not made or was not inconsistent.

ACCA pointed out that the trial judge considered the five foundational elements from *Finch,* but the opinion took a problematic turn when ACCA refuted arguments posed by Brown's appellate counsel.

> Citing *United States v. McCaskey* for the proposition that "mere repeated telling of the same story is not relevant," appellant further argues that it was error to admit the statements under the (B)(ii) exception [sic]. 30 M.J. 188, 192 (C.A.A.F. 1990). This argument, however, fails for several reasons. First, it ignores the fact that the victim did *not* merely retell the same story before trial and during her testimony. Second, appellant's "repeated telling" argument also ignores the fact trial defense counsel highlighted and attacked these inconsistencies from the outset when he asked the panel in his opening statement to pay close attention to whether the victim's testimony "in this courtroom [*is*] *consistent* with all of the other stories that she just told the EMT, the paramedic, medical professionals at [the hospital, and] CID."[151]

Here, the appellate counsel is making an argument that the statements failed a standard akin to the *Pierre* standard. ACCA responded with a naked assertion and a non sequitur. ACCA claims the victim did not simply retell the same story before trial that she told during trial without telling readers what she *did* in addition to retelling the same story. ACCA offered no facts or analysis to support that the victim did anything beyond simply retelling the story. Moreover, the court hand waives the MRE 403 analysis even though the military judge was due no deference given he did not articulate his reasoning on the record. Clearly, the statements were not offered to put the prior inconsistent statements in context to show they were not inconsistent or to show they were not made. ACCA's first response to the appellate counsel's argument is not persuasive.

ACCA does not explain how the defense counsel mentioning the inconsistent statements during opening statement qualified the two segments for admission. In its opening statement, the defense asked the court members to pay close attention to whether her testimony is consistent with all of her prior statements, but the defense did not state or imply that her testimony was not consistent with any of her prior statements. No one should be surprised that the defense counsel talked about the Government's main witness's prior inconsistent statements during his opening statement. The opening



The 2019 edition of the *Manual for Courts-Martial* rests on a podium in the courtroom at Marine Corps Air Station Yuma, AZ. (Credit: LCpl Jade Venegas)

statement may be helpful in determining the nature of the impeachment that follows,[152] but merely pointing out in the opening statement that a witness has made prior inconsistent statements is not a basis for admitting prior consistent statements. Be that as it may, the defense's opening statement, without more, does not explain the rebutting force of the Government's proffered prior consistent statements.

CAAF has granted review in *Brown*.[153] CAAF's analysis should begin with romanette (i) because the attack on credibility was not a general attack on credibility; it included an express charge of improper motive. The defense counsel made an explicit charge of improper motive and the impeachment by prior inconsistent statement was merely a tool to make that charge. When CAAF evaluates the trial judge's decision under romanette (ii), CAAF should incorporate the principles from the *Pierre* standard. The prior consistent statements admitted in this case fail under either romanette for the reasons explained above.

Brown will be a watershed opinion, one way or the other. CAAF will embrace the *Pierre* standard fully, or it will confirm what was implicit in *Ruiz*. The court arguably implicitly rejected part of the *Pierre* standard in *Ruiz* by holding the trial judge's view of the law was correct. If CAAF intended to imply this, then the court has rejected the *Pierre* standard and the traditional and well-accepted limitations on prior consistent statements. Rejection of the traditional limitations on the admission of prior consistent statements makes military justice practice an outlier among Federal jurisdictions. CAAF seemingly adopted part of the *Pierre* standard in *Finch's* fifth foundational element. "Based on the method of impeachment employed" reflects the "rebutting force" concept from *Pierre*. CAAF must go further and adopt the rest of the *Pierre* standard: that the probative value that comes from repetition is not enough to warrant admission of a prior statement.

It is impossible to overstate the importance of this choice. Impeachment by prior inconsistent statement may be the most common method of impeachment. Impeachment by prior inconsistent statement does not automatically trigger rehabilitation with prior consistent statements. Properly understood, a prior inconsistent statement will rarely trigger rehabilitation with a prior consistent statement. This is why embracing the *Pierre* standard fully is crucial when the method of impeachment employed is impeachment by prior inconsistent statement. If a witness testifies that A and B are true on direct examination and is impeached with a prior statement that is inconsistent with A, a prior statement consistent with B has no rebutting force beyond mere repetition; it merely bolsters the witness's credibility. The prior statement consistent with B does not make the prior inconsistent statement any less inconsistent.

The facts in *Ruiz* fit this pattern, and the trial judge admitted the prior consistent statement because it added "context." The judge did not specify the context provided or how the context created rebutting force. The

prior consistent statement did not provide context to show the prior inconsistent statement was not inconsistent or was not made. If anything, the prior consistent statement's only probative value is its repetition with the witness's direct testimony. If the trial judge in *Ruiz's* view of the law is correct, then any prior statement consistent with any part of a witness's direct testimony is a prior consistent statement under romanette (ii) any time the witness is impeached with a prior inconsistent statement. Such an absurd result allows improper bolstering and violates the traditional and well-accepted limits discussed in *Pierre.*

The facts in *Brown* do not fit the pattern in *Ruiz.* In *Brown,* the witness testified that A was true and was impeached with a prior statement inconsistent with A. The trial judge admitted prior statements consistent with A under both romanettes. The judge did not explain his rationale for admission under romanette (i), and ACCA correctly concluded the prior statement was made after the motive to fabricate arose. The judge admitted the prior statements under romanette (ii) to rebut an "inconsistency attack." This phrase is code for impeachment by prior inconsistent statement. The judge did not explain how the prior statements rebutted the inconsistency attack, and ACCA could not think of a clear explanation on behalf of the trial judge. ACCA affirmed the judge's decision anyway, despite the traditional and well-accepted limits on the admissibility of prior consistent statements. CAAF must reject ACCA's conclusory attempt to justify the trial judge's error and put an end to intellectually empty invocations of "context" as a rationale for admitting prior consistent statements. Like talismanic incantations of non-propensity purposes to justify admission of other acts evidence, a talismanic incantation of "context" is not sufficient to justify admission of prior consistent statements.[154]

Impeachment on Other Grounds

This section will discuss two cases involving methods of impeachment other than impeachment with a prior inconsistent statement. This discussion applies the *Pierre* standard to various methods of impeachment to show the proper analysis for improper influences, prior arrests, prior alcohol counseling, failure to communicate a lack of interest in the perpetrator, a general lack of credibility, and other theories that are offered by proponents based on a misapprehension of the law.

CAAF should explicitly incorporate the *Pierre* standard into its prior consistent statement rubric to bring military practice in line with Federal practice.

United States v. Ayala

Despite the foundational template in *Finch,* trial judges continued to struggle with the 2016 Amendment to MRE 801(d)(1)(B). *United States v. Ayala*[155] is a good example. Staff Sergeant (SSG) Ayala was convicted of two specifications of aggravated sexual contact and sentenced to a bad-conduct discharge and confinement for eight months.[156] During cross-examination of the victim, AN, the defense counsel asked about AN's preparation with the trial counsel before trial.[157] The questions asked how many times AN and the prosecutors went over her testimony and whether they reviewed text messages or her video-recorded interview.[158] In response, the trial counsel offered AN's text messages to her mother and her videotaped interview with the Naval Criminal Investigative Service (NCIS) as prior consistent statements.[159] The trial counsel argued the text messages and the interview were admissible to rebut the charge of improper influence by the prosecution.[160]

The trial judge's handling of the matter created significant confusion. The text messages were marked as PE 4, and the judge admitted them under romanette (i) to rebut the charge of improper influence during the witness's pretrial preparation.[161] Later, when considering the admission of the videotaped interview (PE 14), the judge reversed himself and ruled the interview could not be admitted under romanette (i) because the defense counsel's questions about AN's pretrial preparation did not imply an improper influence.[162]

So, the judge admitted the interview under romanette (ii).[163] However, the judge did not reconsider his admission of PE 4 under romanette (i) to rebut the implied charge of improper influence. The judge admitted he was confused about what was admissible under romanette (ii), nonetheless, he admitted PE 14 under romanette (ii) without identifying the "other ground" on which the witness's credibility was attacked.[164] Unlike the judge in *Finch,* the judge did not allow the entire interview to be admitted. He did not review the videotaped interview himself before ruling, but he required the parties to agree on which segments were relevant.[165]

Neither ACCA nor CAAF attempted to determine if the prior statements were admissible under romanette (i) or romanette (ii). ACCA affirmed the findings and sentence "[p]roviding 'belt-and-suspenders' rationales for its decision."[166] ACCA concluded that the military judge did not abuse his discretion in admitting the evidence, and, if he did, any possible error was harmless.[167] CAAF concluded that even if the judge erred, SSG Ayala was not prejudiced by the error.[168]

CAAF could have provided helpful guidance about when an influence on a witness becomes an improper influence. The trial judge struggled with this, admitted PE 4 under romanette (i) to rebut an improper influence, but did not admit PE 14 under romanette (i) because he later determined the impeachment did not imply an improper influence. CAAF seems to agree that there is a difference between an influence on a witness and an improper influence on a witness, but the court did not address the difference.[169] If it turned out PE 4 was properly admitted to rebut an improper influence, then PE 14 would have been admissible under romanette (i) also, and the court could have affirmed the admission of PE 14 on that basis.[170] If CAAF had ex-

panded its discussion of when an influence becomes an improper influence, it might have guided the Army court later in *United States v. Alsobrooks*.[171]

CAAF did not engage on the issue of admissibility under romanette (ii) at all. The trial counsel claimed PE 4 and PE 14 were admissible under romanette (ii) because the defense attacked AN's credibility with a prior civilian arrest, counseling for alcohol use, failure to communicate her lack of sexual interest in SSG Ayala, and motives to fabricate.[172] Of course, if the defense attacked AN with motives to fabricate, the exhibits would be admissible under romanette (i) to rebut the charge of improper motive unless the motives to fabricate arose before the text messages were sent or before the interview with NCIS.

CAAF did not discuss whether PE 4 or PE 14 was relevant to rehabilitate AN's credibility based on being attacked with a prior civilian arrest, counseling for alcohol use, and her failure to communicate her lack of sexual interest in SSG Ayala. PE 4 and PE 14 have no apparent rebutting force to repair the damage caused by AN's impeachment about her civilian arrest,[173] counseling for alcohol use, or her failure to tell SSG Ayala of her lack of interest in him because AN was no less arrested, counseled for alcohol abuse, or silent about her lack of interest. Application of the *Pierre* standard to the Government's theories of rehabilitation would expose the futility of a trial counsel claiming every way a witness was impeached was "another ground" to argue for the admissibility of a prior statement.[174]

In his concurring opinion, Judge Maggs gave voice to the field's frustration caused by a lack of clarity. Judge Maggs wrote that providing guidance to the field was more important than focusing on prejudice.

> In my view, addressing the issue of admissibility—which is properly before us—is a higher priority here than deciding the issue of possible prejudice because the issue of admissibility appears to have caused some confusion at trial and because cases involving allegations of coaching are not uncommon. *See, e.g.,* United States v. Norwood, 81 M.J. 12 (C.A.A.F. 2021). Explaining why the prior consistent statements were admissible in this case may aid counsel and military judges in the future more than assuming error and deciding the hypothetical question of prejudice.[175]

Judge Maggs would have affirmed the trial judge's admission of PE 4 and PE 14 under romanette (i) as rebuttal to the defense's charge of improper influence.[176]

The trial counsel in *Ayala* appeared to think there is no limitation on the admission of a prior consistent statement after any method of impeachment. The trial judge admitted his uncertainty. Both would have benefitted from the rigorous analysis required by the *Pierre* standard.

United States v. Thomas

In *United States v. Thomas*,[177] Sergeant (SGT) Thomas pled guilty to failure to obey a general regulation and adultery, and he was found guilty of two specifications of cruelty and maltreatment and two specifications of sexual assault of a child.[178] He was sentenced to a dishonorable discharge and confinement for eight years.[179]

The victim, Miss AR, testified that appellant had raped and sexually assaulted her.[180] The defense impeached her with prior inconsistent statements from various pretrial statements and interviews during the investigation.[181] In response, the Government moved to introduce Miss AR's forensic interview, which occurred the day after the alleged assault, as a prior consistent statement.[182] According to the trial counsel, the defense challenged AR's testimony based on her faulty memory or a general lack of credibility as a witness.[183]

The military judge helped the trial counsel by articulating another theory of how the forensic interview was relevant to rehabilitate the witness.[184] The judge admitted selected portions of the forensic interview to rebut a recent motive to fabricate and the grounds argued by the trial counsel.[185] The judge did not itemize which statements rebutted the motive to fabricate, the attack on memory, or the general lack of credibility.[186] ACCA found the military judge did not abuse her discretion in admitting these parts of the interview.[187]

The military judge admitted parts of the interview as prior consistent statements after finding the defense had suggested a motive to fabricate and "challenged the accuracy of Miss AR's memory and her credibility as a witness."[188] The only method of impeachment described in the opinion's recitation of facts is impeachment with a prior inconsistent statement, which is different from an attack on memory. She admitted the statements without identifying which prior consistent statements rebutted the motive to fabricate (romanette (i)) or which statements rebutted an attack on another ground (romanette (ii)).

Military judges should not skip this step because it drives the analysis.[189] As to romanette (i), the prior consistent statement must have been made prior to the rise of the motive to fabricate; the rebutting force is created by this temporal requirement from *Tome* and *McCaskey*.[190] Under romanette (ii), Federal and military cases recognize three scenarios in which a prior consistent statement has sufficient rebutting force to make it relevant for rehabilitation: (1) those prior statements that put a prior inconsistent statement in context to help clarify its meaning, (2) those that support the denial of making a prior inconsistent statement, and (3) those occurring close in time to the event that demonstrate the lapse in time has not resulted in a faulty memory.[191]

A "general attack on a witness's credibility" is not a method of impeachment and, therefore, not "another ground" under romanette (ii).[192] For the trial judge to admit parts of this interview under romanette (ii), the parts of the forensic interview must show that the prior inconsistent statements were not inconsistent, that a prior inconsistent statement was not made, or that the witness's memory was not faulty on the day of trial. Those are the situations in which the prior consistent statement has rebutting force beyond mere repetition.[193]

It is hard to evaluate this opinion because the recitation of the facts is opaque. The court tells us the Government "indicated how the prior consistent statement in the forensic interview were relevant to rehabilitate Miss AR's testimony,"[194] but the court does not include the Government's explanation in the opinion. Moreover, the court does not provide any details about the prior statements or defense counsel's impeachment of the witness, except for impeachment with

Maj Szonja Johnson, 341st Missile Wing JA, strikes a gavel against a block at Malmstrom Air Force Base, MT. (Credit: A1C Jack Rodriguez Escamilla)

prior inconsistent statements.[195] Nonetheless, if the prior statements rebutted the motive to fabricate or the claim of a faulty memory, the opinion is correct. To the extent the prior statements only rebutted a general attack on credibility, the opinion is vulnerable.[196] Presenting "a general attack on credibility" as "another ground" sends a dangerous signal to the field.[197]

If a "general attack on credibility" is "another ground," then any statement that is consistent with witness's direct testimony and not covered by romanette (i) is admissible under romanette (ii). The rule admits prior consistent statements offered "to rehabilitate the declarant's credibility when attacked on another ground."[198] Making two simple substitutions shows the absurdity of considering an "attack on credibility" as a ground of attack.

First, substitute "attack on credibility" for "another ground." This yields that prior consistent statements are admissible when offered to rehabilitate the declarant's credibility when his or her credibility has been attacked. To impeach means "to discredit the veracity of a witness."[199] Second, substitute "impeached" for "credibility has been attacked." This yields, "prior consistent statements are admissible when offered to rehabilitate the declarant's credibility when they are impeached." This is patently incorrect. "Prior consistent statements cannot be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited."[200] The required analysis is more focused.

An attack on general credibility is not a method of impeachment; it is composed of one or more types of impeachments.

> The methods of impeachment include character trait for untruthfulness [Rule 608(a)]; prior convictions [Rule 609]; instances of misconduct not resulting in a conviction [Rule 608(b)]; prior inconsistent statements [Rule 613]; prior inconsistent acts [Doyle v. Ohio, 426 U.S. 610 (1976)]; bias [Rule 608(c)]; and specific contradiction [United States v. Piren, 74 M.J. 24 (C.A.A.F. 2014)].[201]

This list is incomplete. For example, a witness can be impeached on their ability to observe, remember, and communicate.[202] The prior consistent statement analysis is driven by the type of attack, so considering a general attack on credibility as "another ground" dooms the analysis from the beginning. Romanette (ii) issues are analyzed by

considering the specific method of impeachment.

Aside from the detour into "general attacks on credibility," the failure to sort out which statement rebutted which ground of attack, and the failure to employ a standard to give meaning to "relevant to rebut," the court discussed some important principles. ACCA correctly identified that on cross-examination, the defense counsel impeached Miss AR with multiple prior inconsistent statements from multiple interviews and reports, challenged AR's memory, and raised a motive to fabricate.[203] These are the grounds that are generally recognized as grounds that can be rebutted with prior consistent statements.

The court also understood that a prior consistent statement must "actually be relevant to rehabilitate the witness's credibility *on the basis on which he or she was attacked.*"[204] ACCA distinguished this case from *Finch*, noting the trial judge did not admit the entire forensic interview.[205] The military judge parsed the interview sentence-by-sentence and only admitted three segments with a total of fifteen statements.[206] Focusing on the method of impeachment and the proposed prior consistent statement are steps in the direction of the *Pierre* standard.

Conclusion

CAAF should explicitly incorporate the *Pierre* standard into its prior consistent statement rubric to bring military practice in line with Federal practice. The *Pierre* standard would provide a limiting principle in an area desperately in need of guidance. Military courts would reach more consistent results with a clear standard for determining which statements are relevant to rehabilitate a witness's credibility under romanette (ii). Military judges will quickly become comfortable comparing a proposed prior consistent statement with the direct testimony to ensure it is consistent, identifying the type of impeachment used, and determining if the prior statement repairs the damage done by the impeachment.

A judge looking for a shortcut that captures the results of decades of appellate opinions could combine MRE 801(d)(1)(B) with *Adams.* This combination yields a rule rewritten as follows:

> (d) A statement that meets the following conditions is not hearsay:
>
> (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> (B) is consistent with the declarant's testimony and is offered:
>
> (i) to rebut an express or implied charge of recent fabrication, improper influence, improper motive, or faulty memory at the time of trial; or
>
> (ii) to provide context to show a prior inconsistent statement is not inconsistent or to show that the prior inconsistent statement was not made; or
>
> (iii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

Judges should recognize that it is unlikely statements will be admitted under romanette (iii) because romanettes (i) and (ii) contain all the circumstances recognized to date where a prior statement satisfies the *Pierre* standard. *Pierre* and the cases that follow it are persuasive authorities, and military judges can legitimately rely on them in the absence of guidance from CAAF or the President. As a result, trial judges would not have to confess confusion about what statements fall within romanette (ii). Once one combines the amended rule with the traditional and well-accepted limitations on admitting prior consistent statements, it all becomes clear. **TAL**

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Notes

1. This title is a play on the title of a leading article on prior consistent statements, Edward D. Ohlbaum, *The Hobgoblin of the Federal Rules of Evidence: An Analysis of Rule 801(d)(1)(B), Prior Consistent Statements and a New Proposal*, 1987 B.Y.U. L. Rev. 231 (1987) [hereinafter *Hobgoblin*]. Professor Ohlbaum's article was cited in Tome v. United States, 513 U.S. 150, 157 (1995) and contains an extensive history of the common law of prior consistent statements. A bugbear is a type of hobgoblin. In current usage, a bugbear is a constant source of irritation. *See Bugbear*, Merriam-Webster, https://www.merriam-webster.com/dictionary/bugbear [https://perma.cc/YJ5S-VXWF].

2. Exec. Order No. 13730, sec. 2, 81 Fed. Reg. 33331, 33355 (May 20, 2016). Federal Rule of Evidence 801(d)(1)(B) was amended identically on 1 December 2014. Fed. R. Evid. 801 advisory committee's note to 2014 amendment [hereinafter Advisory Committee's Note].

3. Manual for Courts-Martial, United States, M.R.E. 801(d) (2024) [hereinafter 2024 MCM].

4. A "romanette" is a lower-case Roman numeral.

5. The Drafters' Analysis of the 2016 Amendment to MRE 801(d)(1)(B) includes: "The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." Manual for Courts-Martial, United States, M.R.E. 801 analysis, at A22-61 (2016) [hereinafter Drafters' Analysis].

6. United States v. Ayala, 81 M.J. 25, 29 (C.A.A.F. 2021).

7. *See* United States v. Finch, 79 M.J. 389, 393 (C.A.A.F. 2020) (revealing the trial judge neither watched a videotaped interview of a witness offered as a prior consistent statement before admitting it nor explained how the videotape was admissible). "The military judge mishandled the issues surrounding the admissibility of the videotaped interview, and as such, his decision merits little deference." *Id.* at 396.

8. *See* Laird C. Kirkpatrick & Christopher B. Mueller, *Prior Consistent Statements: The Dangers of Misinterpreting Recently Amended Federal Rule of Evidence 801(d)(1)(B),* 84 Geo. Wash. L. Rev. Arguendo 192, 193 (2016).

> [A] significant danger remains that the amended rule will be misunderstood by lawyers and judges and applied in an overly-expansive fashion. This risk is not only because Advisory Committee Notes are sometimes overlooked or ignored in the heat of trial, but also because the amended rule does not itself specify when prior consistent statements may be used to rehabilitate witnesses. Instead, it adopts federal common law on the issue of when prior consistent statements are admissible for rehabilitation and merely provides that if a prior consistent statement is admissible for rehabilitation, it is also admissible for its truth. Thus, to apply the amendment properly, attorneys and courts must research and consider law *outside FRE 801(d)(1)(B).*

Id. (emphasis in original)(citation omitted).

9. *Rehabilitation,* Black's Law Dictionary 1476 (12th ed. 2024).

10. *Hobgoblin, supra* note 1, 231 n.2 (quoting State v. Parrish, 79 N.C. 610, 612–13 (1878) (emphasis in original)).

11. Drafters' Analysis, *supra* note 5, at A22-61.

12. Advisory Committee's Note, *supra* note 2.

13. *See also* 2024 MCM, *supra* note 3, M.R.E. 101(b) (stating courts-martial will follow the FRE and the cases

interpreting them when the MRE does not provide guidance).

14. 781 F.2d 329 (2d Cir. 1986). One should also read Tome v. United States, 513 U.S. 150 (1995). "Litigators and judges would be well advised to consult both common law rehabilitation principles, as well as *Tome,* when seeking to interpret and apply the recently-amended language of FRE 801(d)(1)B)." Kirkpatrick & Mueller, *supra* note 8, at 197.

15. *Pierre,* 781 F.2d at 331.

16. 79 M.J. 389 (C.A.A.F. 2020).

17. *See id.* at 396.

18. *Id.*

19. No. 24-0158, 2025 CAAF LEXIS 656 (C.A.A.F. 2025).

20. *Id.* at *12–14.

21. *See id.*

22. ARMY 20230168, 2025 CCA LEXIS 213 (A. Ct. Crim. App. May 8, 2025).

23. The FRE became effective in 1975. Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

24. Liesa L. Richter, *Seeking Consistency for Prior Consistent Statements: Amending Federal Rule of Evidence 801(d)(1)(B)*, 46 Conn. L. Rev. 937, 943–44 (2014).

25. *Id.* at 944.

26. *Id.* at 939.

27. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908, 915 (1978) ("In principle, under the Federal Rules no common law of evidence remains. . . . In reality, of course, the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers.").

28. Drafters' Analysis, *supra* note 5, at A22-61.

29. "The Supreme Court has made perfectly clear that 'prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited.'" United States v. Drury, 396 F.3d 1303, 1316–17 (11th Cir. 2005) (citing Tome v. United States, 513 U.S. 150, 157 (1995)).

30. Kirkpatrick & Mueller, *supra* note 8, at 195.

31. *See* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006).

32. United States v. Pierre, 781 F.2d 329, 330 (2d Cir. 1986).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 331.

42. *Id.* at 334.

43. *Id.*

44. United States v. Simonelli, 237 F.3d 19, 27 (1st Cir. 2001) ("Prior consistent statements still must meet at least the standard of having 'some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony.'" (quoting *Pierre*, 781 F.2d at 331)).

45. *Pierre*, 781 F. 2d 329.

46. United States v. Frazier, 469 F.3d 85, 89 (3d Cir. 2006) (discussing limiting principles of prior consistent statements and stating they may not be used "every time a witness's credibility or memory is challenged; otherwise, cross-examination would always transform the prior consistent statements into admissible evidence").

47. United States v. Ellis, 121 F.3d 908, 919–20 (4th Cir. 1997) (discussing multiple circuits' precedents, including *Pierre,* and that prior consistent statements must have some rebutting force beyond the mere fact that the witness has repeated on a prior occasion a statement consistent with his trial testimony).

48. United States v. Harris, 761 F.2d 394, 399–400 (7th Cir. 1985) ("Prior consistent statements which are used [to rehabilitate credibility] . . . are relevant to whether the impeaching statements really were inconsistent within the context of the interview, and if so, to what extent.").

49. United States v. Collicott, 92 F.3d 973, 980 (9th Cir. 1996) ("After a witness has been impeached with prior inconsistent statements, we have admitted the entire conversation or document from which the impeachment statements were drawn if it has 'significant probative force bearing on credibility apart from mere repetition' . . . by placing the inconsistencies . . . in a broader context, demonstrating that the inconsistencies were a minor part of an otherwise consistent account.'" (quoting United States v. Payne, 944 F.2d 1458, 1471 (9th Cir. 1991) (quoting United States v. Miller, 874 F.2d 1255, 1274 (9th Cir. 1989) (citing *Pierre*, 781 F.2d at 333)))).

50. United States v. Magnan, 756 F. App'x. 807, 818 (10th Cir. 2018) ("[Appellant] did not attempt to 'attack[] [the witness' credibility] on another ground'—that is, he did not extract inconsistent statements or accuse the victims of misremembering—so admitting the statements would not rehabilitate the declarant's credibility." (quoting United States v. Cox, 871 F.3d 479, 486 (6th Cir. 2017))).

51. United States v. Drury, 396 F.3d 1303, 1316 (11th Cir. 2007) (citing *Pierre* and noting that a prior consistent statement can be used in certain instances to rehabilitate if the statement has probative force beyond mere repetition).

52. United States v. Washington, 106 F.3d 983, 1001 (D.C. Cir. 1997) (citing the *Pierre* standard).

53. 79 M.J. 389 (C.A.A.F. 2020).

54. *Id.* at 391.

55. United States v. Finch, 78 M.J. 781 (A. Ct. Crim. App. 2019).

56. *Finch,* 79 M.J. at 391.

57. *Id.* at 392.

58. *See id.* at 393.

59. *See id.*

60. *Id.*

61. *Id.*

62. *Id.* at 394.

63. *Finch,* 78 M.J. at 789–92.

64. *See id.* at 790.

65. *Finch,* 79 M.J. at 393. On cross-examination, AH was asked, "At the time you were talking with CID you didn't want to live with your parents?" Her response was, "I still don't really want to now." *Id.*

66. *See* United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990); Tome v. United States, 513 U.S. 150 (1995).

67. *Finch*, 78 M.J. at 791–92.

68.

> Similarly, it has never been the rule that impeachment by prior inconsistent statement automatically opens the door to evidence of prior consistent statements. Proving prior consistent statements does not remove the sting of vacillation raised by the inconsistent statements because the inconstancy remains. Only in certain limited circumstances does a prior consistent statement rehabilitate a witness who has been impeached with a prior inconsistent statement. For example, a prior consistent statement may rehabilitate a witness by clarifying or giving context to the alleged prior inconsistent statement or by supporting a denial that the prior inconsistent statement was ever made.

Kirkpatrick & Mueller, *supra* note 8, at 195 (citations omitted). *See also* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (stating prior consistent statements are relevant to rehabilitate a witness's credibility when the prior statement places the inconsistent statement in context to show that it is not really inconsistent with the trial testimony and to support the denial of making an inconsistent statement). For an example of how a prior statement puts an inconsistent statement in context to show it is not truly inconsistent, *see* United States v. Castillo, 14 M.J. F.3d 802 (2d Cir. 1994).

69. United States v. Pierre, 781 F.2d 329, 331 (2d Cir. 1986).

70. *Finch,* 79 M.J. at 391.

71. *Id.* at 393.

72. *Hobgoblin, supra* note 1, at 280 (citing United States v. Blankinship, 784 F.2d 317, 320 (8th Cir. 1986)).

73. *Finch,* 79 M.J. at 398–99.

74. *Id.* at 396 (citing United States v. Palmer, 55 M.J. 205, 208 (C.A.A.F. 2001)).

75. *Id.* at 395 (citing United States v. Simonelli, 237 F.3d 19 (1st Cir. 2001)).

76. *Simonelli*, 237 F.3d at 27 (citing United States v. Pierre, 781 F.2d 329, 331 (2d Cir. 1986)).

77. *Finch,* 79 M.J. at 398–99.

78. No. 24-0158, 2025 CAAF LEXIS 656 (C.A.A.F. Aug. 8, 2025).

79. *Id.* at *1.

80. *Id.* at *2.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at *3.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at *4.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. CAAF mistakenly identified the impeachment as impeachment by contradiction. *See id.* at *5. "Impeachment by contradiction is a line of attack that 'involves showing the tribunal the contrary of a witness' asserted fact, so as to raise an inference of a general defective trustworthiness' or that the [witness] is capable of error." United States v. Piren, 74 M.J. 24, 27 (C.A.A.F. 2014). Impeachment with a prior inconsistent statement strives to show inconsistency by the witness, but the inconsistent statement rarely is admitted for the truth of the matter asserted. *See* 2024 MCM, *supra* note 3, M.R.E. 613, M.R.E. 801(d)(1)(A).

101. *Ruiz,* 2025 CAAF LEXIS 656 at *5.

102. *Id.*

103. *Id.* at *6. A general attack on credibility is not "another ground" under romanette (ii). *See infra* notes 199, 200 and accompanying text.

104. *Ruiz,* 2025 CAAF LEXIS 656 at *6.

105. *Id.* at *7.

> A military judge abuses his discretion when his findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law.

United States v. Finch, 79 M.J. 389, 394 (C.A.A.F. 2020).

106. *Ruiz,* 2025 CAAF LEXIS 656 at *14.

107. *Id.*

108. *See Finch,* 79 M.J. at 396.

109. *Ruiz,* 2025 CAAF LEXIS 656 at *13–14.

110. *Id.* at *18–19.

111. *Id.* at *6.

112. *See* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (stating prior consistent statements are relevant to rehabilitate a witness's credibility when the prior statement places the inconsistent statement in context to show that it is not really inconsistent with the trial testimony and to support the denial of making an inconsistent statement).

113. "The assertion that a witness has repeatedly offered inconsistent accounts or different versions of an episode also does not satisfy the preconditions for admission of other statements consistent with the courtroom version." *Hobgoblin, supra* note 1, at 266.

114. *Finch,* 79 M.J. at 396.

115. *Ruiz*, 2025 CAAF LEXIS 656 at *17–18.

116. *Id.* at *18.

117. *Hobgoblin*, *supra* note 1, at 259.

118. Richter, *supra* note 24, at 945.

119. *Hobgoblin, supra* note 1, at 260 (citing C. McCormick, McCormick on Evidence, sec. 49, at 118 (1984)) ("[I]f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember . . . the prior consistent statement has no relevancy to refute the charge unless [it came] before the source of the bias, interest, influence or incapacity originated.").

120. ARMY 20230168, 2025 CCA LEXIS 213 (A. Ct. Crim. App. May 8, 2025).

121. *Id.* at *13. While a statement cannot be admissible under both romanettes (i) and (ii) based on the same method of impeachment, the court correctly concluded these statements could potentially be admissible under both romanettes (i) and (ii) because the witness was impeached with a motive to fabricate and with prior inconsistent statements.

122. *See id.* at *22.

123. "Given our holding below that the military judge properly admitted the statements under the (B)(ii) exception [sic], however, we ultimately need not decide the propriety of his ruling admitting the same evidence under the (B)(i) exception [sic]." *Id.* at *19. MRE 801(d)(1)(B) is not a hearsay exception; prior consistent statements are exempt from the definition of hearsay. *See* 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B).

124. *Id.* at *1.

125. *Id.* at *2.

126. *Id.*

127. *Id.* at *2–3.

128. *See id.* at *3.

129. *Id*. at *3–4.

130. *Id.* at *12–13.

131. *Id.* at *3.

132. *Id.* at *12.

133. *Id.* at *13.

134. *Id.*

135. *Id.* Romanettes (i) and (ii) are not hearsay exceptions. Prior consistent statements falling within romanettes (i) and (ii) are exempted from the definition of hearsay. *See* 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B).

136. *See id.* at *18–19.

137. *Id.* at *17–18.

138. *See id.* at *12.

139. *Id.* at *17.

140. *Id.* at *12.

141. "Flagging" is the dangerous and unsafe act of unintentionally pointing the muzzle of a gun at a person or a forbidden direction. *Firearm Store Etiquette: How to Handle the "Handoff,"* Sonoran Desert Inst., https://sdi.edu/2023/03/23/firearm-store-etiquette-how-to-handle-the-handoff [https://perma.cc/5KSJ-UPRD] (last visited Dec. 3, 2025).

142. *Brown*, 2025 CCA LEXIS 213, at *12.

143. *Id.* at *18.

144. *See* United States v. Allison, 49 M.J. 54 (C.A.A.F. 1998).

145. *Id.* at *18–19.

146. *Id.* at *19. "Where, however, [impeachment by prior inconsistent statements] neither asserts nor implies that the in-court account is the product of an improper motive not present when the consistent statement was made, the consistent statement should not be admissible." *Hobgoblin, supra* note 1, at 269 (citing numerous Federal cases).

147. *Hobgoblin, supra* note 1, at 277–78 (citing Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal,* Hastings L.J. 575, 592–604 (1979)) (citations omitted).

148. *Id.* at 267–69. *See also* David H. Kaye et al., McCormick on Evidence sec. 34 (2025) (providing an overview of prior inconsistent statements).

149. *See* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (describing the two circumstances where prior consistent statements are relevant to rehabilitate a witness's credibility).

150. *See Hobgoblin, supra* note 1, at 271–72.

151. *Brown,* 2025 CCA LEXIS 213 at *21–22.

152. *See* United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019).

153. United States v. Brown, No. 25-0181/AR, 2025 CAAF LEXIS 691 (C.A.A.F. Aug. 20, 2025).

154. CAAF has repeatedly disapproved of broad talismanic incantations of words such as intent, plan, or modus operandi, to secure the admission of evidence of other crimes or acts by an accused at a court-martial under M.R.E. 404(b). *See* United States v. Brannan, 18 M.J. 181, 185 (C.M.A. 1984).

155. 81 M.J. 25 (C.A.A.F. 2021).

156. *Id.* at 26.

157. *Id.* at 27.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 29.

162. *Id.*

163. *Id.*

164. *See id.* "The trial judge must determine whether an impeaching attack occurred, what type of attack occurred, and whether the proffered rehabilitation is appropriately responsive." Richter, *supra* note 24, at 944 (citing Kenneth Broun et al., McCormick on Evidence sec. 47, at 307 (7th ed. 2013)).

165. *Ayala,* 81 M.J. at 30.

166. *Id.* at 31 (Maggs, J., concurring).

167. *Id.*

168. *Id.* at 26.

169. "Our statements in this opinion should in no way indicate that it is problematic for the prosecution to prepare a witness for court-martial *or that such preparation in and of itself constitutes an improper influence*." *Id.* at 29, n.4 (emphasis added).

170. *See id.* at 31 n.7.

171. ARMY 20200598, 2023 CCA LEXIS 47 (A. Ct. Crim. App. Jan. 30, 2023). In *Alsobrooks,* the trial judge

admitted a prior consistent statement by the alleged victim to her boyfriend under romanette (ii), finding the other ground was an attack on the alleged victim's memory. *Id.* at *16–17. ACCA held that the alleged victim's memory was not rehabilitated by the prior statement to her boyfriend, Sergeant (SGT) JK. *Id.* at *17. The alleged victim told her boyfriend that she had been sexually assaulted by SGT Alsobrooks. *Id.* at *6. However, ACCA, persuaded by its own theory of admissibility, validated the trial judge's decision to admit the statement under romanette (i) to rebut the implied charge that JK was an improper influence. *Id.* at *18. However, the facts recited by ACCA make it clear that JK's influence occurred before the alleged victim made the prior statement. "A few hours later, after encouragement from SGT JK, the victim became emotional, was physically shaking and sobbing and could barely get out the words when she disclosed to SGT JK that appellant had sexually assaulted her earlier that day." *Id.* at *6. So, JK's influence is described as encouragement, and it occurred before the alleged victim disclosed the sexual assault. Nonetheless, ACCA wrote:

> Given the additional thrust of the victim's cross-examination in which the defense attempted to have the factfinder infer that the allegation was false and resulted from pressure by SGT JK, the military judge should have analyzed the admissibility of the statement as to whether it rebutted a charge of recent fabrication or recent improper influence. We find that the victim's statement to SGT JK was admissible under this prong of [MRE] 801(d)(1)(B) given the defense's cross-examination of the victim and given that her statement to SGT JK that she was assaulted pre-dated his alleged improper influence to make a report.

Id. at *18–19. Perhaps ACCA is referring to the alleged victim's report to the authorities and not a report to JK. However, the facts recited in the opinion do not mention JK influencing her decision to report the incident to the authorities:

> While hesitant at first, the following morning the victim went to the hospital because she "wanted to go make a report." At the emergency room, the victim reported the assault but did not identify appellant and refused to file a police report or submit to a sexual assault forensic examination.

Id. at *6. So, since JK's "influence" occurred before the alleged victim disclosed to him that she had been sexually assaulted, the court should not have affirmed the trial judge's decision to admit the disclosure under romanette (i). Be that as it may, the larger issue is whether "encouraging" a girlfriend to disclose what is bothering her makes a boyfriend an improper influence. Footnote 4 of *Ayala* suggests an influence is not necessarily an improper influence. *See Ayala,* 81 M.J. at 29, n.4.

172. *Ayala,* 81 M.J. at 29.

173. *Cf.* Kirkpatrick & Mueller, *supra* note 8, at 194 ("The damage done by impeachment with a prior conviction, bad character for truthfulness, and failure of perception (such as bad eyesight) is not rehabilitated by a prior consistent statement because the statement does not repair the damage done by these methods of impeachment.").

174. *See* United States v. Adams, 63 M.J. 691–97 (A. Ct. Crim. App. 2006) (describing the few circumstances where prior consistent statements are relevant to rehabilitate a witness's credibility).

175. *Ayala,* 81 M.J. at 31 (Maggs, J., concurring). *See also* United States v. Norwood, 81 M.J. 12, 22 (C.A.A.F. 2021) (Ohlson, J., concurring) (stating the majority should clearly say the trial judge erred when admitting a prior consistent statement under romanette (ii) when it should have been analyzed under romanette (i)).

176. *Ayala,* 81 M.J. at 31.

177. ARMY 20210662, 2024 CCA LEXIS 154 (A. Ct. Crim. App. Mar. 29, 2024).

178. *Id.* at *1.

179. *Id.* at *2.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at *3.

184. *Id.* A trial judge must be careful not to depart from her neutral role. "The proponent of the evidence bears the burden of articulating the relevancy link between the prior consistent statement and how it will rehabilitate the witness with respect to the particular type of impeachment that has occurred." United States v. Finch, 79 M.J. 389, 396 (C.A.A.F. 2020). A trial judge reduces that burden when she suggests additional links to help the proponent. Appellate judges appear to have no scruples against helping the proponent. *See* United States v. Finch, 78 M.J. 781, 789 n.14 and accompanying text (citing United States v. Carista, 76 M.J. 511, 515 (A. Ct. Crim. App. 2017) for the proposition that an appellate court will affirm when a trial court reaches the correct result even if the analysis is wrong, calling this principle the "tipsy coachman" doctrine). As applied to prior statements under romanette (ii), the tipsy coachman doctrine conflicts with the idea that the burden is on the proponent. Moreover, this dubious doctrine is often applied on an incomplete record because the parties did not litigate the issue.

185. *Thomas,* 2024 CCA LEXIS 154 at *3. It is not clear why impeachment with prior inconsistent statements is not on this list. The facts recited in the opinion say AR's credibility was challenged by "a number of inconsistencies drawn from her initial reports to a social worker, a subsequent report to Army Criminal Investigation Command (CID), and more recent interviews conducted by government and defense counsel." *Id.* at *2. The opinion does not tell us how the defense challenged AR's memory or credibility. While impeachment with a prior inconsistent statement is an attack on credibility, the opinion appears mistakenly to conflate impeachment with prior inconsistent statements with an attack on memory.

186. *Id.*

187. *Id.* at *4.

188. *Id.* at *3.

189. "The trial judge must determine whether an impeaching attack occurred, what type of attack occurred, and whether the proffered rehabilitation is appropriately responsive." Richter, *supra* note 24, at 944 (citing C. McCormick, McCormick on Evidence, sec. 47, at 308 (1984)).

190. *See* Tome v. United States*,* 513 U.S. 150, 157 (1995); United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990).

191. *See* United States v. Adams, 63 M.J. 691, 696–97 (A. Ct. Crim. App. 2006) (describing the few circumstances where prior consistent statements are relevant to rehabilitate a witness's credibility).

192. *See infra* notes 199–200 and accompanying text.

193. *See Adams*, 63 M.J. at 696–97.

194. United States v. Thomas, ARMY 20210662, 2024 CCA LEXIS 154, at *3 (A. Ct. Crim. App. Mar. 29, 2024).

195. *See id.* at *3–5.

196. "[T]he district court did not abuse its substantial discretion in finding that the statement was inadmissible for rehabilitation purposes because the credibility of Harmon's testimony was subjected only to a 'generalized attack,' and more than this is required for admission [as a prior consistent statement]." United States v. Washington, 106 F.3d 983, 1001 (D.C. Cir. 1997).

197.

> In this respect, we instruct district courts to consider the warning from the Fifth Circuit that "Rule 801(d)(1)(B) cannot be construed to allow the admission of what would otherwise be hearsay every time a [witness's] credibility or memory is challenged; otherwise, cross-examination would always transform [the prior consistent statement] into admissible evidence."

United States v. Frazier, 469 F.3d 85, 89 (3d Cir. 2006) (quoting United States v. Bishop, 264 F.3d 535, 548 (5th Cir. 2001)).

198. 2024 MCM, *supra* note 3, M.R.E. 801(d)(1)(B)(ii).

199. *Impeach*, Black's Law Dictionary 870 (12th ed. 2024).

200. Tome v. United States*,* 513 U.S. 150, 157 (1995).

201. United States v. Toro*,* 37 M.J. 313, 315 (C.M.A. 1993).

202. *See* United States v. Sullivan, 70 M.J. 110 (C.A.A.F. 2011); United States v. Jones, 49 M.J. 85 (C.A.A.F. 1998); United States v. Williams, 40 M.J. 216 (C.M.A. 1994).

203. United States v. Thomas, ARMY 20210662, 2024 CCA LEXIS 154, at *3–4 (A. Ct. Crim. App. Mar. 29, 2024).

204. *Id.* at *4 (citing United States v. Finch, 79 M.J. 389, 396 (C.A.A.F. 2020)).

205. *Id.* at *4–5.

206. *Id.* at *5.

AROUND THE CORPS

SPC Dean S. Farraj, paralegal specialist, 65th Medical Brigade, Eighth Army, performs medical care during the Paralegal Warrior Competition on Camp Humphreys, South Korea. (Credit: PFC Ana Alrawi-Marquez)

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