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AROUND THE CORPS

SSG Louis T. Sullivan, paralegal noncommissioned officer, 21st Theater Sustainment Command, paints another Soldier's face during the 21st Theater Sustainment Command's Best Squad Competition at U.S. Army Garrison Bavaria in Grafenwoehr, Germany. (Credit: PVT Kadence Connors)

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RANDY A. GEORGE
General, United States Army
Chief of Staff

Official:

MARK F. AVERILL
Administrative Assistant
to the Secretary of the Army
2522702

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Cover: MAJ Cory Maggio (right), 3/82 brigade judge advocate, assists MAJ Chelsea Kim (left), 82d Airborne Division Chief of Military Justice, don a T-11 parachute in preparation for the Law Day jump at Fort Bragg, NC. (Photo Courtesy of LTC Brian D. Lohnes)

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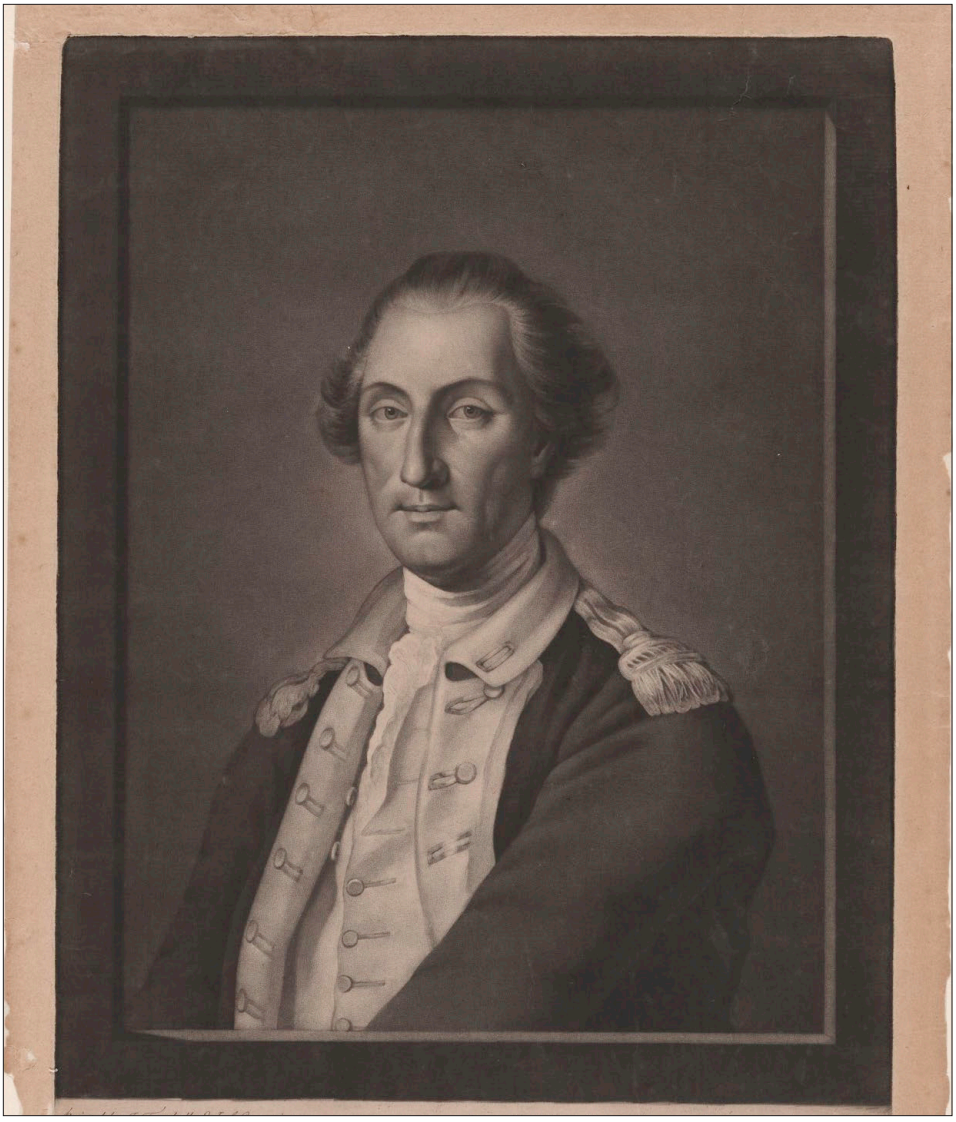

General George Washington, father of the JAG Corps. (Credit: National Portrait Gallery, Smithsonian Institution).

Court Is Assembled

The U.S. Army JAG Corps
A Legacy of Legal Excellence Since 1775

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

The U.S. Army Judge Advocate General's (JAG) Corps traces its establishment to 29 July 1775, when the Second Continental Congress appointed William Tudor as "Judge Advocate of the Army." Over the next 250 years, the path to the modern JAG Corps saw vast changes in military justice, in the composition and training of the Army's legal professionals, and in the Army's legal missions. As one of the Army's oldest branches, the JAG Corps's story reflects many broader currents that have shaped our Army and our Nation's history.

Founding

Upon the outbreak of the American Revolution in 1775 and his designation to lead the new Continental Army, George Washington found himself in charge of a motley assemblage of militiamen. Washington recognized that his troops required the discipline to train and fight like a professional European force to be effective and gain legitimacy. An essential aspect of this project was a military justice system modeled after the British Army's, which had a judge advocate general since 1666.

As he organized his forces, Washington corresponded with John Hancock, President of the Continental Congress, on establishing key military staff positions. "I would humbly propose that some Provision should be made for a Judge Advocate [(JA)]," Washington wrote on 21 July 1775.[1] Congress followed Washington's recommendation and established William Tudor's position on 29 July. Tudor's title was changed to Judge Advocate General in 1776.[2]

The Evolution of Military Justice

In keeping with Washington's original priorities for his judge advocate general, military justice remained the *raison d'etre* for the JAG Corps and its antecedents into the latter half of the twentieth century. For much of American history, the court-martial was considered a purely military function unrelated to the Federal courts established under Article III of the U.S. Constitution.[3] Under the Articles of War,[4] which Congress passed in 1806, protections for the accused were minimal, and sentences, with a few exceptions, were handed down at the discretion of courts-martial panels. The Articles of War remained in effect (with revisions) until 1951.

First Lieutenant Victor A. DeFiori (later a military judge and brigadier general) acting as trial counsel in an early court-martial under the UCMJ in Korea, 22 September 1954. (Credit: JAG Corps Regimental Archives)

Perhaps the nineteenth century's best-known innovation in military law was the 1863 promulgation of General Orders No. 100 as an addendum to the Articles of War.[5] Authored by legal scholar Francis Lieber, the "Lieber Code" incorporated common law crimes under the Articles of War for the first time and defined what is today known as the law of armed conflict. The Lieber Code directly influenced the body of international law born from the Hague Conventions of 1899 and 1907.

The United States' entry into World War I sowed the seeds for dramatic changes to military justice. A public disagreement erupted between Major General Enoch Crowder, the Judge Advocate General, and his number two, Brigadier General Samuel T. Ansell, over Ansell's proposed Articles of War revisions. Ansell, reacting to the Houston Riot cases and other instances of harsh punishment with minimal due process in the American Expeditionary Forces, wanted to increase accuseds' rights and make courts-martial more closely resemble civilian trials. Crowder publicly disagreed with most of Ansell's proposals and argued that the military justice system existed purely to enforce a commander's disciplinary prerogative. In the aftermath, Congress adopted only incremental reforms.

World War II spurred a renewed push for military justice reform. During the war, the Armed Forces carried out approximately 1.7 million courts-martial. Veterans complained to Congress of defects in the Articles of War and the military justice system: undue command influence, wildly varying sentences for similar offenses, seeming favoritism toward officers, and more.

In response, Congress significantly changed the Articles of War in the Selective Service Act of 1948[6] by, among other reforms, including enlisted Soldiers and warrant officers on court-martial panels and prohibiting unlawful command influence. It also transformed the JAG Department into the JAG Corps. However, the legislation only reformed the Army's Articles of War.

In 1950, Congress passed the Uniform Code of Military Justice (UCMJ),[7]

abolishing Service-specific military justice codes. Among other significant reforms, it required "a thorough and impartial" pretrial investigation; provided the right to legally qualified counsel for the accused at general and special courts-martial; created a quasi-judicial "law officer" position; and created a three-member civilian Court of Military Appeals atop the military appellate structure.[8] Foreshadowing an important trend, UCMJ Article 36 stated that courts-martial should "apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the [U.S.] district courts."[9]

The Vietnam era saw another wave of far-reaching military justice changes. The first major UCMJ overhaul came with the Military Justice Act (MJA) of 1968.[10] The most important changes in the act were the creation of a military judiciary and the right to representation by a JA at special courts-martial. New Army judges would be selected in a manner that removed the possibility of local conflicts of interest. Army judges would also assume some powers that the court-martial panel previously held. Individuals facing a court-martial could now request a judge-only trial, the redesignated Courts of Review were composed of Army judges, and avenues to appeal convictions increased.

Since then, military justice has continued to increasingly align with the practices of Federal courts. Following the 1968 MJA, significant developments included the implementation of the Military Rules of Evidence (modeled after the Federal Rules of Evidence) in 1980 and the passage of the 1983 MJA,[11] which allowed for appeals directly from the Court of Military Appeals to the U.S. Supreme Court. In 1994, the Court of Military Appeals was renamed the U.S. Court of Appeals for the Armed Forces.

Post-9/11-era military justice reform focused on sexual harassment, sexual assault, and other serious crimes. A series of reforms in the National Defense Authorization Acts between 2016 and 2022 changed the UCMJ and culminated in the 2023 establishment of the Office of Special Trial Counsel. The new organization features specially trained military prosecutors with the sole authority to prosecute sexual assault and thirteen other crimes.

Personnel assigned to the Office of the Staff Judge Advocate, XVIII Airborne Corps, Operation Desert Shield, 1990. (Credit: JAG Corps Regimental Archives)

Composition and Training Over Time

In the antebellum period, the Army typically only maintained a single full-time Army lawyer—the Judge Advocate General (or a similar title)—while line officers served as JAs at courts-martial as an additional duty. Army lawyers gained an institutional toehold in 1862 when Congress established the Judge Advocate General position as a brigadier generalship. The subsequent creation of the Bureau of Military Justice in 1864 and its conversion into the JAG Department in 1884 saw a small cadre of officers serving as full-time Army lawyers.

From the American Revolution to the adoption of the UCMJ, full-time JAs were customarily formally trained lawyers, but no law or regulation defined their qualifications. Even after the JAG Department's establishment, line officers were sometimes selected for a commission in the department before attending law school and passing a bar exam. Mirroring the trend toward professionalization in the civilian practice of law, most JAs in the twentieth-century JAG Department were law school graduates. Finally, the 1950 UCMJ required JAs to be law school graduates and state bar members.

Training in military law was on-the-job until World War II, when a JAG School was established at the University of Michigan. The school was restarted in 1950 at Fort Myer, Virginia, and relocated to the University of Virginia the following year. With added capabilities and missions, such as the Noncommissioned Officer Academy established in 2004, The Judge Advocate General's Legal Center and School remains in Charlottesville today.

Furthermore, until World War I, the JAG Department and its antecedents did not include enlisted Soldiers. The temporary assignment of legal clerks to the JAG Department during the Great War was imitated again in World War II. With the adoption of the 1968 MJA and its requirement that a JA be provided as counsel at special courts-martial, and with nearly 60,000 special courts-martial in 1969 alone, demand for JA services sharply increased. This heavier caseload made enlisted and warrant officer support more critical than ever. In response, the JAG Corps established the legal clerk (presently paralegal specialist) Military Occupational Specialty (MOS) and established formal training programs for legal administrator warrant officers and enlisted legal clerks in 1969 and 1972, respectively.

In the twenty-first century, JAs, legal administrators, and paralegals are found in all components of the Army. In fact, like the rest of the Army's branches, the bulk of the JAG Corps's force structure is found in the

Army Reserve and National Guard. Reserve Component legal professionals were instrumental in the mobilizations for both World Wars and have played a major role in Army operations since September 11, 2001.

Changing Roles and Missions

While military justice remained at the forefront for most of the JAG Corps's history, times of war invariably involved Army legal personnel in other areas of law to support the Army's operations. The vast scope of World War II, for instance, saw the expansion of the JAG Department into fields such as claims, contracts, patents, and real estate. In 1943, the Army also began providing legal aid to Soldiers for the first time—the beginning of the Legal Assistance program.

Perhaps most notably, the war's aftermath saw Army legal personnel directly involved in prosecuting war crimes. At trials in Germany, Italy, and the Philippines between 1945 and 1948, Army lawyers and legal personnel helped prosecute and defend thousands of former enemy officials, military personnel, and civilians charged with violating the laws of war. The JAG Department therefore played a key role in establishing a precedent of accountability for those who violate international humanitarian law.

The courts-martial that followed the 1968 My Lai massacre marked another defining moment for the JAG Corps in the Vietnam era. Of the thirteen Soldiers charged with murdering civilians in South Vietnam, only a platoon leader, First Lieutenant William L. Calley, was convicted. The famous trial prompted Army reforms in law of war training and led to a new Department of Defense training program in 1974. Crucially, the reform also required legal review of operational plans.

Direct legal support to operations planning and execution did not come to fruition until the early 1980s. During Operation URGENT FURY in 1983, JAs provided on-the-spot legal advice to commanders on rules of engagement, detainee operations, damage claims, a new status of forces agreement between the United States and Grenada, and more. In the operation's aftermath, the JAG Corps had reached a watershed moment in redefining expectations for legal support to the Army. By 1987, operational law (OPLAW) was a core component of the JAG Corps mission, and the JAG School developed an OPLAW curriculum to train Army lawyers in its application. Army lawyers were fully integrated into Army operational planning and execution by Operations JUST CAUSE (Panama, 1989) and DESERT SHIELD/DESERT STORM (Persian Gulf, 1990–1991). Operational law is now part of the larger field of national security law, a core component of JAG Corps legal support to the Army.

Since the advent of the Cold War and a permanently enlarged defense establishment, the JAG Corps has taken on a multitude of roles to support the Army. Besides national security law and military justice, legal support to the twenty-first-century Army also includes administrative and civil law and contract, fiscal, and acquisition law. Developments in Federal law have frequently required the Army's legal engagement. For instance, Federal environmental law growth and resulting litigation led to the Corps's Environmental Law Division in 1988. Legal support to Soldiers and Families consists of Trial Defense Service (established 1980) and Soldier and Family legal services, which encompasses claims by Soldiers and Army civilians, medical evaluation and disability law, Soldier and Family legal assistance, and, as of 2014, special victims' counsel services. The JAG Corps will continue to meet evolving demands and support the Army in emerging fields such as cyberspace law, artificial intelligence, and autonomous weapons systems.

Conclusion

Since 1775, the Army's legal profession has grown and changed significantly. Several trends characterize our history: the evolution of our organization, composition, and training to meet military justice reforms, an expanded scope of practice, and the integration of legal support into Army operations at every level. In an increasingly complex and legally dynamic world, the JAG Corps will continue to honor its rich 250-year legacy by proudly providing our Army with premier legal services. **TAL**

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

Notes

1. Letter from George Washington to John Hancock (July 21, 1775), *reprinted by* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Washington/03-01-02-0085 [https://perma.cc/38TA-JZRB].

2. The Judge Advoc. Gen.'s Corps, The Army Lawyer: A History of The Judge Advocate General's Corps 1775-1975 at 11 (1976).

3. U.S. Const. art. III.

4. Articles of War of 1806, *reprinted in* 2 William Winthrop, Military Law and Precedents 1509 (1886).

5. Headquarters, U.S. War Department, Gen. Orders No. 100 (24 Apr. 1863).

6. Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604

7. An Act to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

8. *Id.*

9. *Id.* art. 36, 64 Stat. at 120.

10. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

11. Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

Members of the 82d Airborne Division Office of the Staff Judge Advocate and North Carolina A&T ROTC pose at the General Greene Monument at the Guilford Courthouse National Military Park. (Photo courtesy of author)

News & Notes

82d Airborne Division Pairs with North Carolina A&T State University for Historic Staff Ride

By Captain Parker C. Holstein

In a unique blend of history and career exploration, the 82d Airborne Division's Office of the Staff Judge Advocate (OSJA) embarked on a meaningful joint staff ride with North Carolina Agricultural & Technical State University's (NCA&T) Reserve Officers' Training Corps (ROTC) cadets last spring. Participants visited the Revolutionary War's Guilford Courthouse battlegrounds. This staff ride served as more than just a historical excursion; it was a strategic effort to connect judge advocates (JAs) with potential future members of the Judge Advocate General's (JAG) Corps.

"The staff ride was a great opportunity for us to simply get known. Many cadets, as they progress through ROTC, are unaware of the fact that the JAG Corps exists or the fact that there are opportunities for them to serve in the JAG Corps," remarked Major (MAJ) Andrew Nist, then-3d Brigade Combat Team brigade judge advocate and officer-in-charge for the event.

The staff ride began at the Battle of Guilford Courthouse in present-day Greensboro, North Carolina. Fought on 15 March

1781, this battle was a significant encounter during the American Revolutionary War that saw Major General Nathanael Greene's Continental Army clash with Lieutenant General Charles Cornwallis's British forces. Although the British emerged tactically victorious, they suffered substantial losses that contributed to their eventual surrender at Yorktown. The battlegrounds today serve as a poignant reminder of the complexities and sacrifices of war.

For the ROTC cadets and JAs, the visit to Guilford Courthouse was an opportunity to stand where historic figures once stood and to reflect on the enduring principles of military leadership and strategy. Mr. Harold Allen Skinner Jr., the U.S. Army Soldier Support Institute command historian at Fort Jackson, South Carolina, led the group through the hallowed grounds while providing unparalleled institutional knowledge. He is the foremost expert on the Guilford Courthouse Campaign and author of *A Game of Hare & Hounds: An Operational-level Command Study of the Guilford Courthouse Campaign, 18 January-15 March 1781*.[1] First Sergeant Raymond Bavry, senior military science instructor at NCA&T ROTC, emphasized the educational value of this hands-on experience: "The cadets enjoyed the staff ride and were able to learn about a battle that pertains to our local history. Walking the battlefield and understanding the terrain also allows attendees to better understand the complexity of command and highlights the human dimension of battle."

Before the tour, ROTC cadets were paired up with junior JAs to brief portions of the battlefield once they arrived. This added tremendous value to the experience by fostering a collaborative environment between the cadets and JAs. It provided the opportunity to discuss historical lessons and reflect on their applications to contemporary military practices.[2]

Captain (CPT) Shelby Brown, military justice advisor at the 3rd Brigade Combat Team, 82d Airborne Division, noted, "The event was a great intersection between our organizations. It was a valuable opportunity to engage with NCA&T cadets to learn about their experiences and interests in the Army." MAJ Nist highlighted the recruitment potential of these engagements: "Our staff ride allowed us to establish contact with commissioning cadets and spread awareness about the JAG Corps." CPT Cal Burton, then-chief of legal assistance for the 82d Airborne Division, stated, "Being paired with several cadets from the local ROTC program allowed me to expand my knowledge of the ROTC program and network with potential future JAs."

CPT Cal Burton (second from left) presents a brief on a pivotal stage in the battle at Guilford Courthouse. (Credit: CPT Parker Holstein)

MAJ Nist added, "The cadet I had lunch with, a criminal justice major, was very interested in the program when I discussed it with him. By building awareness, we will hopefully get more FLEP applicants as these cadets commission and tell their battle buddies about the program." CPT Burton corroborated by stating, "Many cadets asked us about our careers as JAs, and several were interested in applying to the JAG Corps."

This blend of historical education and career mentorship proved to be a fruitful endeavor that other units and institutions should consider replicating. Engagements like these are vital for cultivating informed, motivated, and connected future officers, and they underscore the importance of innovative recruitment strategies that leverage both historical insight and personal interaction. **TAL**

CPT Holstein is a National Security Law Attorney for V Corps at Fort Knox, Kentucky.

Notes

1. Harold Allen Skinner Jr., A Game of Hare & Hounds: An Operational-Level Command Study of the Guilford Courthouse Campaign, 18 January–15 March 1781 (2021).

2. To learn more about the Guilford County Courthouse campaign, visit *Guilford Courthouse*, Nat'l Park Serv., https://www.nps.gov/guco/learn/photosmultimedia/multimedia.htm [https://perma.cc/UP2K-GU28] (last visited June 30, 2025).

News & Notes

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Photo 1
Members of the Office of The Judge Advocate General and their Families participate in a 250th JAG Corps Birthday Heritage Hike on the National Mall, where they learned about 250 years of JAG Corps history as they passed corresponding monuments on their route. (Source: OTJAG)

Photo 2
CPT Nicholas Flowerday prepares to max out his deadlift on the last Army Combat Fitness Test while serving as an administrative law attorney with the V Corps Office of the Staff Judge Advocate, Fort Knox, KY. (Photo courtesy of the V Corps OSJA)

Photo 3
228th Judge Advocate Officer Basic Course. (Credit: Billie Suttles, TJAGLCS)


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Photo 4
Summer interns from the 101st Airborne Division (Air Assault) and Fort Campbell, Kentucky, explored a day in the life of a SOF legal professional with the 160th Special Operations Aviation Regiment (Airborne) Legal Team. (Source: OTJAG)

Photo 5
CPT Laura J. Eckstein, operational law attorney, Oregon National Guard, discusses her role as a judge advocate assigned to Area Support Group Balkans and Regional Command-East of the NATO-led Kosovo Force mission during a presentation to students attending International Business College Mitrovica in Mitrovica, Kosovo. (Credit: SGT Cheryl Madolev)

Photo 6
COL William Smoot (left), then-staff judge advocate, 11th Airborne Division (Airborne), greets a Soldier assigned to 1st Battalion, 501st Parachute Infantry Regiment, 2d Infantry Brigade Combat Team, 11th Airborne Division (Airborne) during Joint Pacific Multinational Readiness Center 25-02, near Fort Greely, AK. (Credit: SGT Salvador Castro)

Photo 7
Members of the 32d Judge Advocate Warrant Officer Basic Course smile as CW3 Norman Mininger is dunked behind them at The Judge Advocate General's Legal Center & School Org Day. (Credit: CPT Lyndsey Andray)

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Photo 8
Paralegal Specialists and NCOs from V Corps's rotationally aligned and direct reporting units competed against their peers at the first inaugural Eastern European Paralegal of the Year Competition at Camp Kościuszko, Poland. Competitors were required to demonstrate their physical fitness, competency in their common tasks and warrior skills, and their knowledge of the legal profession. SGT Jonah James (1-3ID) and SPC Kyle Strouse (V Corps) were awarded a plaque and earned the prestigious title of being the first ever Eastern European Paralegal NCO and Paralegal of the Year. From left to right: SGT Jonah James (1-3ID), SPC Kyle Strouse (V Corps), SGT Isaac Daodu (1AD), PFC Alyssa Petrovich (1AD), and PFC Brandon Ortiz (41FAB). (Source: V Corps)

Photo 9
82d Airborne Division paratroopers, including LTC Brian D. Lohnes, Staff Judge Advocate, 82d Airborne Divsion, departed Fort Bragg and jumped north of the Arctic Circle in Norway in support of Swift Response 25 to demonstrate rapid deployment capabilities, joint interoperability, and operational readiness alongside NATO allies. (Credit: LTC Brian D. Lohnes)

Photo 10
An audience member asks Professor David Schlueter a question after he delivered the Eighteenth George S. Prugh Lecture on Military Legal History, "The Uniform Code of Military Justice at 75," at The Judge Advocate General's Legal Center and School in Charlottesville, VA (Source: TJAGLCS)

(Source: The Judge Advocate General's Legal Center & School, Charlottesville, VA)

What's It Like?

SVC: The Third Lawyer

By Captain John F. Kirk

Who's This Guy?

The air in the courtroom is thin. After sitting in the same confined space for the past several days, spectators and litigants alike are achy and ready for the trial to end. The panel members, seated in all their regalia, maintain a stoic and serious expression, even though it appears their energy may be waning. The mood remains tense, both in front of and behind the bar. The accused, whom the panel has just found guilty of an Article 120 offense, is facing a potentially significant punishment for his crime. Though tired and sweaty, the Government and Defense are prepared and ready to plunge into the sentencing hearing that has just begun, hoping to obtain their desired outcome.

The military judge begins to read from *The Benchbook*.[1] She asks, "Is there a crime victim present who desires to be heard?"[2] and looks out to the gallery of spectators. An awkward pause occurs. Then, from one of the benches behind the Government's side, a captain clad in their Army Service Uniform (ASU) stands up amid the crowd and says in a voice loud enough for the judge to hear, "Yes, Your Honor." All heads turn, and for one brief moment, 90 percent of the people in the room, including the panel members, are all wondering the same thing: "Who's this guy?"

Now is the time for me to introduce myself . . . I am the special victims' counsel (SVC), or as I like to call it, the third lawyer.

As I walk from the gallery and enter the lion's den where the Government and Defense have been fighting it out, a strange sensation falls over me. Throughout this trial, I have remained a silent observer; now, I am on my feet, and instead of feeling nervous or hesitant, I feel excited. I feel that I am a part of these proceedings. I'm wearing my spiffy ASUs, I'm reading from prepared remarks, and, most importantly, I am acting on behalf of a client with an enormous stake in this game, and that is all pretty amazing.

The SVC Program

With over a decade behind it, the SVC Program is not a new concept to anyone practicing military justice. Since 2012, legislation related to a judge advocate's (JA) authority to provide client services "expanded [that] authority and directed the [armed] services to begin providing legal assistance services to sexual assault victims."[3]

The U.S. Air Force was the first branch to create and launch a JA position dedicated to representing victims of sexual assault.[4] In 2013, a trial judge denied one of the first Airmen SVC's attempts to preserve his client's rights to make legal arguments regarding certain evidentiary rules. That SVC sought a writ of mandamus, which ultimately led to the well-known *Kastenberg* case.[5] In that case, the U.S. Court of Appeals for the Armed Forces, without issuing the writ, returned the case to the trial court to allow the SVC to present argument on Military Rules of Evidence 412 and 513 issues.[6] At that point, the message was clear: the SVC is here to stay. Then, on 14 August 2013, the Secretary of Defense directed that all military branches establish their own SVC programs, each to be tailored to that branch's specific mission, and to be

MAJ Cathy H. Hartsfield, playing the role of an SVC, objects to the admission of evidence during an SVC training about Military Rule of Evidence 412 while serving as an associate professor in the Criminal Law Department at The Judge Advocate General's Legal Center & School, Charlottesville, VA. (Source: The Judge Advocate General's Legal Center & School, Charlottesville, VA)

operational by 1 January 2014.[7] The SVC position was thus off and running.

Since that time, the program has seen several changes and tweaks. Most recently, Rule for Court-Martial 1001(c)(1) permits a crime victim to ask for a specific sentence in a non-capital case.[8] A crime victim may also discuss the impact of an offense on other parties, such as family members.[9] Additionally, the rule codifies the SVC's ability to read an unsworn victim impact statement on behalf of the client, and it removes the requirement that both the Government and defense review the statement before it is read.[10] "The purpose of [this] amendment is to streamline the process, allowing victims to express crime impacts and allowing defense counsel to object or rebut as necessary."[11]

Practice Points from the Field

Bottom line: the victim's role, as facilitated by the SVC, is an indelible, black-and-white fixture of the military justice process as we know it. Nonetheless, the SVC role itself remains somewhat enigmatic. As has been stated by prior SVCs, "[l]eaders who understand what a typical SVC practice looks like will be in a better position to make personnel management decisions and identify when additional support is needed."[12] This includes understanding the SVC's workload, the training they can provide to fellow military justice practitioners, and the travel requirements that come with the job.[13] This also includes the friction points that may arise between the SVC, whose sole duty is to represent the interests of the client, and other parties to the case.[14]

Another SVC has stressed the fundamental principle that the SVC serves the express interests of the client.[15] An SVC is there to educate and inform, but the ultimate course of action rests solely with the client.[16] It is not the SVC's role to push a client down one particular path.[17] "Success as an SVC is not determined by how many clients go through the court-martial process or how many see their offenders convicted."[18] Rather, success is when a client—after receiving sage counsel from their attorney—makes a fully informed decision, whatever that decision may be.[19]

The Victim's Attorney and the "Real" World

While anyone who has practiced in the JAG Corps within the last ten years will know what an SVC is, they may be less familiar with the role's impact. This unfamiliarity may be partly due to the role's unique place in the military justice system and its absence in civilian justice systems. Despite not having an explicit "real-world" parallel, the SVC role *does* have real-world equivalence and applicability.

First, there is such a thing as a civilian SVC—an attorney, with no connection to the military, whom the victim retains in a military prosecution to serve as either the sole or co-SVC in a court-martial. While it is, literally, the civilian version of the SVC role, it is quite a niche practice, and it is not one

with which many people, even seasoned military justice practitioners, are familiar. But, akin to a civilian defense counsel appearing in a court-martial on behalf of the accused, a civilian SVC can do the same on behalf of the victim.

Outside this narrow field, a much more common SVC-like role exists in the civilian justice system. One day, I was watching a news story about the 2022 quadruple homicide in Idaho, in which Bryan Kohberger killed four University of Idaho students in their shared house off-campus. I became an SVC around the same time the murders took place, and that story was constantly in the news cycle for much of 2023. It is a tragic and fascinating story for anyone interested in true crime or criminal justice. However, what caught my attention that day was that the person being interviewed was not a police officer, prosecutor, or defense attorney. Rather, it was an attorney representing one of *the victim's* families.

How interesting, I thought as I listened to the attorney speak about the family's position on how the case against Kohberger was proceeding. As the attorney spoke on behalf of his clients, another thought popped into my head: he does what I do! He speaks on behalf of the victims. And, as far as I could tell, he has no military affiliation at all.[20]

As the Kohberger example demonstrates, having a victim's attorney as a part of the criminal justice process has "real-world" applicability outside of the military. One of the most well-known, if not the most well-known, examples of successful practice in this field is Gloria Allred's career. Ms. Allred has represented myriad victims and victims' families in high-profile cases, including those involving O.J. Simpson and Harvey Weinstein. She was also involved in the famous Scott Peterson case. From 2002 to 2004, Peterson was investigated, accused, and ultimately convicted of killing his wife, Laci, and their unborn child, Conner. While Laci was alive, Scott led a duplicitous life with Laci on the one hand, and his mistress, Amber Frey, on the other. Amber had no idea of Laci's existence until Scott became a suspect in her disappearance, and as the media storm surrounding the case began to pick up steam, Amber sought legal representation for herself. Enter Ms. Allred, who sat through the trial, gave media interviews, and represented Amber's interests throughout the process. In the documentary series *American Murder: Laci Peterson*, Ms. Allred speaks to the importance of victims' rights in the criminal justice process.[21]

Talk about your third lawyer! The prosecutors and defense attorneys in the Peterson trial did their jobs and worked for their respective interests, but who was one of the main legal voices that captured much of the attention and focus? It was the victim's (or, more accurately, the non-party's) lawyer, that's who!

SVC Skills Applied to Other Jobs

In addition to these parallel civilian roles, the SVC role can also serve JAs well when they are no longer in the role but still practicing military justice. I currently serve as a Trial Defense Service (TDS) attorney, and as such, I can attest that my time as an SVC has proven invaluable in my current position.

As a defense counsel, when I receive a new preferral containing an enumerated offense, my first question is, "Who's the SVC?" Perhaps my time as an SVC has trained my brain to focus on the stance of the AV ("alleged victim" in defense parlance).[22] Regardless of which counsel table I sit at, I have found this to be an incredible asset to my practice. Developing a holistic view of the facts and parties involved has enabled me to provide more comprehensive and zealous counsel to my client. This asset is one that every military justice practitioner should hope to attain.

Serving as an SVC, or the third lawyer, is a fantastic and fulfilling assignment. Beyond the immediate purpose and satisfaction of helping a traditionally underserved party in one of the darkest times of their life, the knowledge and skillset attained have far-reaching applicability beyond the position itself. It is a great position for any JA, and one that I highly recommend. For those who are, or are about to become, the third lawyer, enjoy the experience and rest assured, it will benefit you in the long run. **TAL**

CPT Kirk is a Defense Counsel with Trial Defense Service at U.S. Army Garrison Bavaria, Germany.

Notes

1. U.S. Dep't of Army, Electronic Military Judges' Benchbook, https://www.jagcnet.army.mil/EBB (on file with The Army Lawyer) (31 July 2024).

2. *Id.* sec. 2-6-5.

3. Colonel Louis P. Yob, *The Special Victim at Five Years, An Overview of Its Origins and Development*, Army Law., no. 1, 2019, at 66.

4. *Id.*

5. LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013).

6. Yob, *supra* note 3, at 66 (citing *Kastenberg*, 72 M.J. at 366–67, 368–69).

7. *Id.* at 67.

8. Manual for Court-Martial, United States, R.C.M. 1001 analysis, at A15-24 (2024).

9. *Id.*

10. *Id.*

11. *Id.*

12. Captain Nicholas K. Leslie & Captain Aaron R. Matthes, *A Roadmap for Leaders of SVCs*, Army Law., no. 4, 2019, at 41, 41.

13. *Id.* at 42.

14. *Id.* at 42–43.

15. Captain Chrissy L. Schwennsen, *A Voice for the Victim: A Day in the Life of an SVC*, Army Law., no. 3, 2020, at 22.

16. *Id.*

17. *Id.*

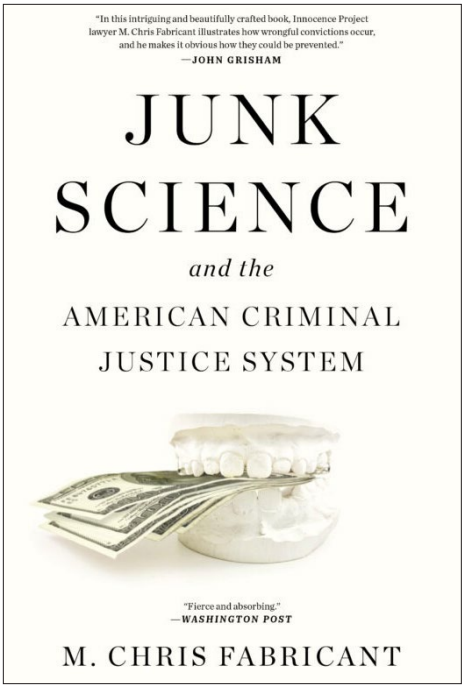
18. *Id.*

19. *Id.*

20. On 2 July 2025, Bryan Kohberger pled guilty in Idaho state court to four counts of murder and one count of burglary in exchange for the prosecution's agreement not to seek the death penalty. Chris Spargo, *Bryan Kohberger Pleads Guilty, Confessing to Murders of 4 Idaho Students to Avoid Possible Execution*, People (July 2, 2025), https://people.com/bryan-kohberger-pleads-guilty-to-murders-of-4-students-11765363 [https://perma.cc/W2QH-JWBA]. These pleas came as the result of an agreement between Kohberger's attorney and the state prosecutors. *Id.* Oddly, the victims' families were informed of this agreement only two days before Kohberger appeared in court to enter it, and only by letter. *Id.* Their reactions to the news were mixed, with one outraged father writing online to the judge that he should reject the deal. *Id.* With Kohberger's sentencing set for later in the summer, it is certain that a victim's attorney could have a major role in that proceeding.

21. American Murder: Laci Peterson (Nexflix, accessed July 2, 2025).

22. Yes, coming from SVC to TDS, it did take some time for me to train myself to add "alleged" before victim.



Book Review

Junk Science from Our Courts and Elsewhere

A Review of *Junk Science and the American Criminal Justice System*

Reviewed by Lieutenant Commander J.C. Lundberg

She blinded me with science . . . and hit me with technology.[1]

Junk Science and the American Criminal Justice System[2] (*Junk Science*) outlines the history of pseudoscience's beguiling of our courts. The book's principal focus is "bite mark analysis, but it just as easily could have been shaken baby syndrome, arson investigation, hair microscopy, bullet lead analysis, polygraphs, voice spectrometry, handwriting, [or] bloodstain pattern analysis."[3] M. Chris Fabricant lays out a compelling case for why these techniques have been sufficiently discredited that they have no place in our justice system. At first blush, the bite mark analysis focus seems to limit his ability to speak more broadly to the book's titular issue. The opposite is true. That focus allows Fabricant to guide his audience through a confrontation with the reality of what is being done in our collective name.[4]

The still-growing consensus is that many forensic "sciences" are science in name only.[5] Despite that fact, countless guilty verdicts underlying ongoing prison sentences—and more than one execution[6]—were built on the foundations of these junk sciences.[7] Fabricant's recounting of this troubling history provides important background on a likely gap in most attorneys' knowledge. This is especially so not only because remediating the consequences of courts' adoption of junk science remains a live issue in appellate courts but also because the principles undergirding the efforts to undo those harms have a substantially broader application than the narrow criminal justice context.

Three Decades of Harm

Junk Science opens with a graphic description of a Sailor's 1982 murder of Jessee Perron and the "hours of sexual torture" he then inflicted on Teresa Perron.[8] Keith Allen Harward, a junior Sailor from the USS *Carl Vinson* (CVN-70), was wrongfully convicted of these offenses.[9] This was one of the early major cases involving bite mark evidence, a "science" that exploded into the public consciousness during the 1979 trial of Ted Bundy.[10] Fabricant recounts Harward's efforts to fight his wrongful conviction, which finally succeeded in 2016 when the Virginia Supreme Court declared him innocent based on DNA testing.[11] *Junk Science* probes the decades between Harward's conviction—as well as the convictions in several other anchor cases—and his exoneration, including the discrediting of bite mark identification as a discipline.[12] It does so admirably and relies on two lines of argument. The first is the stories of those who were wrongfully convicted and then often—but not uniformly—formally exonerated. The second is formal proceedings to determine which disciplines constitute the kinds of science on which our courts should rely; this is largely, but not exclusively, a look inside the National Research Council of the National Academies' Committee on Identifying the Needs of the Forensic Science Community (NACINFSC).[13]

These two threads repeatedly diverge and re-twine throughout the text, which can make following the particulars of a given case or committee difficult. For example, Harward's case is discussed at some length three separate times.[14] Further, all "accompanying" photographs are relegated to a section in the middle of the book rather than being published alongside the text they should amplify.[15] This allows the text to follow a linear chronology, but reorienting to the case's particulars can prove difficult.[16] Fabricant's decision to limit the scope to civilian courts, which handle the overwhelming majority of criminal allegations, is understandable but may make a military reader feel an unwarranted sense of remove from these issues.[17]

Junk Science in the Military Justice System

Harward was convicted by a civilian jury empaneled by the Commonwealth of Virginia rather than a general court-martial (GCM) convened by the Carrier Strike Group commander. However, the same result likely would have been obtained at a GCM. The military justice system has not miraculously avoided conviction and incarceration rooted in junk science. Our case law is sparce on bite mark identification;[18] however, Fabricant asserts that "[a]nother entire book could be devoted to wrongful convictions involving [shaken baby syndrome (SBS), a] largely discredited forensic diagnosis, which is responsible for at least as many miscarriages of justice as bite mark evidence."[19] Military case law for shaken baby syndrome is much

more robust, and convictions rooted in this pseudoscience continue to be upheld.[20]

While military courts continue to rely on junk science like SBS, there is at least one area in which we are ahead of civilian courts in handling junk science. Military Rules of Evidence (MRE) 707 expressly prohibits the admission of "the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination."[21] The question of "lie detector" evidence's admissibility goes back over 100 years and led to the creation of the *Frye* test.[22] In civilian courts, it remains somewhat permissible—at least in some limited circumstances—to admit polygraph results.[23] Military courts' original handling of polygraphy offers a good way ahead when handling the junk sciences that Fabricant flagged. Before MRE 707 was promulgated, the then-Court of Military Appeals grappled with a defendant's effort to admit the exculpatory results of a polygraph.[24] The court articulated three tiers of scientific evidence: (1) those which "are so judicially recognized that it is unnecessary to reestablish those principles in each and every case" such as "fingerprint, ballistics, or x-ray evidence"; (2) "that range of scientific and technical endeavor that can neither be accepted nor rejected out of hand"; and (3) "[a]t the bottom lies a junk pile of contraptions, practices, techniques, etc., that have been so universally discredited that a trial judge may safely decline even to consider them, as a matter of law. To that level have been relegated such enterprises as phrenology, astrology, and voodoo."[25] The *Gipson* court failed to articulate what *Junk Science* does at some length: the contents of these three tiers are not and cannot be seen as fixed. Since 1987, bite mark identification has—or at least should have—fallen to the junk science pile while DNA analysis has risen into the category of universal recognition. The consequences of this continual filtering remain areas of ongoing litigation in America's highest courts.

Junk Science is a worthwhile read. This is especially true for military justice practitioners at the trial and appellate level, so they can see the likely path ahead for concepts like SBS. It is also true for judge advocates who advise commanders on military justice and those willing to look beyond the four corners of the text and apply its principles more broadly.

The Supreme Court Recently Flagged Junk Science as an Issue

Fabricant, a twelve-year veteran of the Innocence Project, anchors his text in the history of individual cases, including those where his own clients sought exoneration. This reckoning with the true human cost of junk science—both for those wrongfully convicted as well as for victims and their loved ones who were robbed of the opportunity to see actual justice—is a large part of the apparent purpose of *Junk Science*. In the same spirit, I offer the following background. In 1985, Charles McCrory was convicted of murdering his wife, Julie Bonds, and sentenced to life in confinement.[26] In July 2024—two years after *Junk Science* was released—the Supreme Court of the United States declined to review Alabama's decision to uphold McCrory's conviction even though the expert proponent of the sole physical evidence tying him to her corpse—a bite mark on her arm[27]—not only recanted his testimony but also stated he "no longer believe[s] individualized teeth marks comparison testimony" (the kind of testimony he provided at McCrory's trial) is either "reliable or proper."[28]

Dr. Richard Souviron, a forensic odontologist (i.e., a forensic dentist), originally testified about two small wounds found on Bonds's arm, stating an "expert opinion" that McCrory was the source of the bite marks.[29] Despite Souviron's recantation at the 2019 post-conviction proceeding, and the testimony of two other forensic odontologists, Alabama upheld McCrory's conviction on the grounds that a jury, composed of people without any special knowledge of, training in, or exposure to the relevant science, "had the ability to compare the physical evidence of the photographs of the injury to the victim's arm and the mold of the defendant's teeth for themselves and thus conclude that the defendant's teeth matched the marks of the injury."[30] Put more simply, even though there was no true basis in fact for the panel to match a bite mark to any particular defendant's teeth, McCrory's jury might have believed there was *and* also believed that his teeth matched the bite mark on Bonds's body. He will remain in confinement indefinitely.

Although the Court denied his petition, Justice Sonia Sotomayor took the opportunity to speak about the plight of "innocent people convicted based on forensic science that the scientific community has now largely repudiated."[31] She noted that "[a] court has a variety of tools to test the reliability of forensic evidence introduced in criminal trials today. Yet when a court must look backward, to convictions resting on forensic evidence later repudiated by the scientific community, those tools may fail."[32] Justice Sotomayor ends her statement by noting that the questions McCrory raises have "not yet percolated sufficiently in the lower courts to merit this Court's review. There is no reason, however, for state legislatures or Congress to wait for this Court before addressing wrongful convictions that rest on repudiated forensic testimony."[33] This mirrors Fabricant's implicit thesis: more action is needed to undo the damage done by our courts' reliance on junk science. He stops his argument there, but the underlying reasoning has a much broader scope. There is no reason to limit the application of junk science in our courts but to allow it free rein elsewhere.[34]

Applying the Text's Conclusions Outside the Courtroom

Junk Science's scope is limited to America's criminal justice system, but the principles it raises do not. First and foremost is the recognition that not all science is junk science. Fabricant has a few brief moments where that counterpoint is presented, like his discussion of "dentists' legitimate forensic work: identification of human remains through dental records"[35] or "the potential of DNA evidence to upend the criminal justice system."[36] Devoting a few pages to both identify some of the best examples of good science and articulate the principles that distinguish good science from junk science would have improved the book.[37] As it stands, even most positive examples seem problematic for Fabricant; forensic dental identification offers a "Trojan horse" for bite mark identification.[38] Only DNA evidence, the bread-and-butter of the Innocence Project, appears above his reproach.[39] Perhaps part of the reason for this—aside from the facial problems with junk science's wrongful convictions—is that forensic science seems to be assuming a growing place in criminal justice. Popular conceptions of the justice system focus on forensic techniques in part because they make for engaging television. While many commentators opine that the "CSI effect"—named for *CSI: Crime Scene Investigation* and its four spin-off series—has "twisted society's perception in what should be present at a trial to prove someone guilty."[40] Ironically, the data do not support the CSI effect, and judicial efforts meant to remedy it instead exacerbate the issue.[41] Fabricant puts it more succinctly: "faith in the forensics depicted in [the] popular TV series [CSI] . . . [has] been misplaced. CSI is fiction."[42] So too is the faith we place in junk science more broadly.

Removing that misplaced faith must be an ongoing effort and will require a shift in the public understanding of science. "Science is more than a body of knowledge. It is a way of thinking; a way of skeptically interrogating the universe with a fine understanding of human fallibility."[43] The history outlined in *Junk Science* does not reflect courts' growing understanding of this distinction so much as it reflects courts' recognition that the body of scientific knowledge does not, in fact, include certain things.[44] Much like expanding the idea of literacy to encompass media literacy,[45] science education has shifted to trying to instill a sense of science literacy.[46] For those whose primary and secondary education has ended, those pedagogical changes will not reshape their understanding of science. Instead, an affirmative effort to reframe one's philosophy of science is necessary on both individual and organizational levels.

The military—and the Federal Government more broadly—continues to spend time, money, and energy on junk science.[47] While MRE 707 protects military courts from polygraph pseudoscience, it remains in the security clearance process.[48] Polygraphy was already beyond the pale when NACINFSC published their 2009 report on the forensic sciences; it had been covered at length in a 2003 report on its uses in and out of court.[49] That report found that a polygraph's "accuracy in distinguishing actual or potential security violators from innocent test takers is insufficient to justify reliance on its use in employee security screening in Federal agencies."[50] *Junk Science* offers a call to the Department of Defense—and the rest of our Government—to better align practices and policies with these data.

Conclusion

Extricating junk science from not only our courts but also our society generally is a daunting and continual process. Fabricant effectively highlights a narrow sliver of that project and the harrowing, decades-long effort for some people to vindicate their ongoing assertions of innocence. His personal involvement in some of those cases provides a valuable human-scale look at the realities of those efforts (e.g., a recess of more than a year during an evidentiary hearing after a case was remanded for a third time).[51] That proximity cuts both ways. It seems to color his appraisal of some scientific techniques and reflects a less-than-objective approach to the subject.[52] Despite these shortcomings, *Junk Science* is a worthwhile read. This is especially true for military justice practitioners at the trial and appellate level, so they can see the likely path ahead for concepts like SBS. It is also true for judge advocates who advise commanders on military justice and those willing to look beyond the four corners of the text and apply its principles more broadly. **TAL**

LCDR Lundberg is an Action Officer for the Assistant Judge Advocate General of the Navy for Training, Education and Professional Development in Newport, Rhode Island.

Notes

1. Thomas Dolby, *She Blinded Me with Science*, *on* The Golden Age of Wireless (CD, EMI Records Ltd. 1983).

2. M. Chris Fabricant, Junk Science and the American Criminal Justice System (2022).

3. *Id.* at 26.

4. This is especially true in jurisdictions like California, Illinois, Michigan, and New York, where the official caption of a criminal case is "The People of [Jurisdiction] v. Defendant." For further discussion of this approach to titling criminal cases, see Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 Colum. L. Rev. 249 (2019).

5. *See generally* Nat'l Rsch. Council of Nat'l Acads., Strengthening Forensic Science in the United States: A Path Forward (2009).

6. *See, e.g.*, Paul Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J. L. & Liberty 221 (2013); Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics: Fire that Killed His 3 Children Could Have Been Accidental*, Chi. Trib., Dec. 9, 2004, at C1; Texas Forensic Sci. Comm'n, Final Report on Complaint No. 09.01, The Innocence Project for Cameron Todd Willingham & Ernest Ray Willis (Texas State Fire Marshall's Office; Fire Debris/Arson) (2011).

7. Fabricant, *supra* note 2, at 287. Please note that throughout this review, the phrase "junk science" is intended to convey not only the specific discredited techniques listed above but unfounded methods or assertions that may be presented in the language of science but do not in fact constitute "true" science because their methods do not comply with the scientific method. Both in the junk sciences listed above and more generally, the two largest issues that are liable to make something a junk science are replicability and bias. *See generally* Karl Popper, The Logic of Scientific Discovery 18 (2d ed. 2005) ("I shall certainly admit a system as empirical or scientific only if it is capable of being tested by experience. These considerations suggest that not the verifiability but the falsifiability of a system is to be taken as a criterion of demarcation [between science and non-science.]").

8. Fabricant, *supra* note 2, at 12–21. Perron's three children, all of whom were under the age of four, were asleep in the next room and the assailant threatened similar sexual violence against her children if she resisted. She was able to identify her assailant as a Sailor—because he was wearing a uniform—and give a rough description including the fact that he was clean shaven. *Id.*

9. *Id.* at 24–25. The ship's commanding officer provided Newport News law enforcement 1,300 dental records to compare bite marks the assailant made on Perron's thighs. Haward's indictment came after congressional pressure to identify a perpetrator and despite the facts that (1) Perron did not pick him from a line-up, (2) he wore a moustache, and (3) the original dental records review did not identify him as a match. *Id*. at 16–17.

10. *Id.* at 43–53.

11. Louis Llovio & Frank Green, *After 33 Years, Keith Allen Harward Walks Out of a Va. Prison a Free Man*, Richmond Times-Dispatch (Apr. 8, 2016), https://richmond.com/news/local/crime/article_4c8094e7-a230-54ba-b912-901de1e03a45.html [https://perma.cc/M96P-6HN6].

12. *See* Fabricant, *supra* note 2, *passim*. This is somewhat of a misstatement of his scope since some cases discussed (like Ted Bundy's first Florida trial or People v. Marx, 54 Cal. App. 3d 101 (1975), the first case in which bite mark evidence was admitted) predate Harward's conviction, but the overwhelming majority of his analysis is focused on the early '80s through the mid- to late-2010s.

13. *See* Fabricant, *supra* note 2, *passim*. This second line of argument also covers proceedings at the Texas Commission on Forensic Sciences, which had a narrower scope than NACINFSC and looked at the results of specific cases rather than at the purported sciences without a tie to a specific individual.

14. Fabricant, *supra* note 2, at 11–25, 241–46 and 272–79.

15. *See id.* at 195 *et seq.* (the photo pages are unnumbered but follow the text ending at page 194).

16. *See* Christopher Chan, *Book Review*: Junk Science and the American Criminal Justice System, Strand Magazine (Feb. 2, 2023) (book review), https://strandmag.com/book-review-junk-science-and-the-american-criminal-justice-system [https://perma.cc/U9LW-MESK].

17. The sole mention of "court-martial prosecutions" comes in the testimonial history of putative expert in forensic odontology, Lowell Levine, who had "been qualified as an expert in nine states, the District of Columbia, and several court-martial prosecutions." Fabricant, *supra* note 2, at 21.

18. In the sole military case concerning bite mark identification, the Court of Military Appeals concluded "from the testimony hat [sic] the tests employed by the expert were sufficiently established to have gained general acceptance in the field." United States v. Martin, 13 M.J. 66, 67–68 (C.M.A. 1982). Corporal Martin was sentenced to reduction to E-1, a dishonorable discharge and thirty years of confinement at hard labor. *Id.* at 66.

19. Fabricant, *supra* note 2, at 234; *see also* Niels Lynøe et al., *Insufficient Evidence for 'Shaken Baby Syndrome' – A Systematic Review*, 106 Acta Pædiatrica 1021 (2017) ("The systematic review indicates that there is insufficient scientific evidence on which to assess the diagnostic accuracy of the triad in identifying traumatic shaking (very low-quality evidence)," and "there is limited scientific evidence that the triad and therefore its components can be associated with traumatic shaking (low-quality evidence)."). For reasons of length, this discussion is limited to SBS but surveying junk sciences and their acceptance in the military justice system is an area that merits further exploration.

20. *See, e.g.*, United States v. Albarda, No. ACM 39734, 2021 CCA LEXIS 75 (A.F. Ct. Crim. App. July 7, 2021) (finding that the defendant's conviction for assault consummated by a battery was legally and factually sufficient without analysis or discussion); United States v. Rodriguez, No. 201500247, 2017 CCA LEXIS 42, at *2 (N-M. Ct. Crim. App. Jan. 30, 2017) (finding no merit in an assertion that "the evidence is legally and factually insufficient to support a conviction for aggravated assault with means or force likely to produce death or grievous bodily harm").

21. Manual for Courts-Martial, United States, M.R.E. 707(a) (2024).

22. Frye v. United States, 293 F. 1013, 1013–14 (D.C. Cir. 1923) (finding that the results of a "systolic blood pressure deception test" had not yet "gained general acceptance in the particular field in which it belongs" and were therefore inadmissible). As an interesting aside, William Moulton Marston—the creator of Wonder Woman—and Elizabeth Holloway Marston—his wife and the inspiration for Wonder Woman—developed the systolic blood pressure measurement device and deception test protocol. *See generally*, Andrew H. Malcolm, *She's Behind the Match For That Man of Steel*, N.Y. Times, Feb. 18, 1992, at B6.

23. *See, e.g.*, *Criminal Resource Manual,: 262. Polygraphs—Introduction at Trial*, U.S. Dep't of Just., https://www.justice.gov/archives/jm/criminal-resource-manual-262-polygraphs-introduction-trial [https://perma.cc/2DKQ-QJS3] (last visited July 3, 2025); *When Are Polygraph (Lie Detectors) Results Admissible?*, Greg Hill & Assocs., https://www.greghillassociates.com/when-are-polygraph-lie-detectors-results-admissible.html [https://perma.cc/C87L-A7DT] (last visited July 3, 2025).

24. United States v. Gipson, 24 M.J. 246, 249 (C.M.A. 1987).

25. *Id.* at 249.

26. Associated Press, *Supreme Court Refuses to Hear Bite Mark Case Involving Alabama Inmate*, CBS 42 (July 2, 2024 1:23 PM), https://www.cbs42.com/alabama-news/supreme-court-refuses-to-hear-bite-mark-case-involving-alabama-inmate (on file with The Army Lawyer).

27. Petition for Writ of Certiorari for Defendant at 1, 10, McCrory v. Alabama, 144 S. Ct. 2483 (2024) (No. 23-6232).

28. *Id.* at 12.

29. *Id.* at 10.

30. *Id.* at 23 (quoting Alabama v. McCrory, No. CC-1985-164.61 (Al. Covington Cty. Cir. Ct. Feb. 14, 2022)).

31. *McCrory*, 144 S. Ct. at 2483 (Sotomayor, J., concurring).

32. *Id*.

33. *Id.* at 2489.

34. Of course, the stakes are incredibly high in the justice system, so our standards should be high as well. But there are high stakes elsewhere and even when an issue is not so weighty as execution or incarceration, junk science remains a poison that taints the decision that relied on it.

35. Fabricant, *supra* note 2, at 34.

36. *Id*. at 96.

37. *See* Chan, *supra* note 16.

38. Fabricant, *supra* note 2, at 34.

39. *Research Resources*, Innocence Project, https://innocenceproject.org/research-resources [https://perma.cc/586S-XW2N] (last visited July 3, 2025) ("Much of the Innocence Project's work focuses on cases where DNA evidence . . . is central to the case . . . .").

40. Natalie Downie, *Opinion: How the "CSI Effect" Is Ruining the Justice System*, Exponent: Univ. of Wisconsin-Platteville (Nov. 29, 2023), https://uwpexponent.com/opinions/2023/11/29/opinion-how-the-CSI-effect-is-ruining-the-justice-system [https://perma.cc/A5M4-KCLY]; *see also* Arun Rath, *Is The 'CSI Effect' Influencing Courtrooms?*, NPR (Feb. 5, 2011, 7:30 PM), https://www.npr.org/2011/02/06/133497696/is-the--effect-influencing-courtrooms.

41. Jason Chin & Larysa Workewych, *The CSI Effect*, *in* Oxford Handbooks Online (Markus Dubber, ed. 2021).

42. Fabricant, *supra* note 2, at 160–61 (internal quotation marks omitted).

43. Charlie Rose: *Geoffrey Rush; Dwight Yoakam; Remembering Carl Sagan* (PBS television broadcast, aired Dec. 20, 1996).

44. Or, indeed, that it intentionally excludes them.

45. *See e.g.*, Päivi Rasi et al., *Media Literacy Education for All Ages*, 11 J. Media Literacy Educ. 1 (2019); Aytac Gogus et al., *General Approaches of Adults on New Media Literacy: A National Survey Study*, 29 Educ. & Info. Tech. 9937 (2024).

46. Doughlas Allchin, *From Science Studies to Scientific Literacy: A View from the Classroom*, 23 Sci. & Educ. 1911 (2014).

47. This is not meant as an indictment of any failed or fruitless primary research or attempts at novel technology or cutting-edge engineering. Those failures are part and parcel to advancement.

48. *See, e.g.*, National Reconnaissance Office, *Security Clearance Process*, U.S. Intelligence Community Careers, https://www.intelligencecareers.gov/nro/security-clearance-process [https://perma.cc/3BLE-PXBF] (last visited July 3, 2025).

49. Nat'l Rsch. Council of Nat'l Acads., The Polygraph and Lie Detection (2003).

50. *Id.* at 6.

51. Fabricant, *supra* note 2, at 308.

52. As an example, he discounts case studies as merely "weaving" "what audiences find memorable and persuasive . . . into a good story with strong visuals and descriptive detail is key." *Id.* at 223. A double-blinded study will always be the gold standard in science; that simply isn't always possible and documenting what was found in a unique case is also a way of moving the field forward. *See, e.g.*, Tineke A. Abma & Robert E. Stake, *Science of the Particular: An Advocacy of Naturalistic Case Study in Health Research*, 24 Qualitative Health Rsch. 1150 (2014) ("[T]he naturalistic case study can have extraordinary value in health research, and is useful from a variety of perspectives."); *see also* D. A. Verkuyl, *Oral Conception. Impregnation via the Proximal Gastrointestinal Tract in a Patient With an Aplastic Distal Vagina. Case Report*, 95 British J. of Obstetrics & Gynaecology 933 (1988).

AROUND THE CORPS

CPT Trevor Brink, deputy brigade judge advocate, and MSG Robert Sanchez, senior paralegal noncommissioned officer, provide operational claims support to a Civil Affairs Task Force during a rotation at the National Training Center and Fort Irwin, CA. (Credit: MAJ Derek J. Carlson)

The 1781 Mutiny of the Pennsylvania Line by Edmund A. Winham and James E. Taylor (1881). (Source: New York Public Library Digital Collections)

Lore of the Corps

The Articles of War and the American Revolution

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

We have it in our power to begin the world over again. A situation, similar to the present, hath not happened since the days of Noah until now. The birthday of a new world is at hand . . . .[1]

The American Revolution has often been noted for its incongruities. The product of a highly ideological cause, the American republic was also "born in an act of violence," in the words of one commentator.[2] In other words, to secure the "new world" that Thomas Paine and other revolutionaries envisioned, the United States would have to man, train, and equip a military force capable of winning a bloody land conflict with the British Empire. The oftentimes countervailing forces of philosophical ideals and military necessity thus constituted one of the central tensions in the American War of Independence. The administration of military justice in the Continental Army is a prime example of this tension.

The Colonial View on Military Justice

The administration of military justice was a relatively common experience in colonial America. The militia system meant widespread periodic military service for adult men. Multiple wars with indigenous and imperial opponents in the seventeenth and eighteenth centuries saw the extensive use of provincial militia, and their concomitant exposure to courts-martial and military discipline.

The French and Indian War, or Seven Years War, was an important point of departure between Great Britain and her American colonies. The war caused the deployment of large numbers of British regular troops to North America for the first time and, in 1756, the subjection of provincial troops to the British Articles of War.[3] At the time, the purpose of military justice was to enforce a rigid system of discipline, and aristocratic British military leadership pursued their prerogative with gusto.

The British Articles of War contained sixteen offenses that merited capital punishment and placed no limits on corporal punishment.[4] This reflected the eighteenth-century British justice system as a whole, which relied largely upon terror to maintain order.[5] Between 1757 and 1763, more than 24 percent of general courts-martial in the British Army resulted

Edwin Austin Abbey's painting depicts Baron Friedrich Wilhelm von Steuben drilling recruits at Valley Forge in 1778 (Source: Army.mil)

in capital convictions. Extreme forms of corporal punishment were often substituted for executions of convicted soldiers, with general courts-martial sentences to flogging averaging 742 lashes during the same period. This average would rise during the American Revolution to 791 lashes.[6] While not common, deaths from flogging were certainly not unheard of in the British Army.

Provincial troops in the Seven Years War routinely sought to evade ironhanded British military discipline. Historian Fred Anderson documents that provincial officers often chose to handle disciplinary matters within the confines of their regiments rather than expose their men to a British court-martial. Instead of brutal corporal punishment, "consistency, solidarity, entreaty, and instruction" were heavily relied upon to convince militiamen to do their duty. Punishments imposed by lower-level regimental courts were ridiculously light in comparison to those commonly meted out by the regulars.[7]

Until they were superseded by British military law, colonial militia codes also reflected the distinctive moral and political tone of the colonies. For example, the Massachusetts Mutiny Act of 1754 did not specifically mention flogging, but the colony's law was understood to impose a maximum of thirty-nine lashes. This reflected the Biblical limit in Deuteronomy 25:3, and was a fraction of the number of lashes commonly imposed among the regulars.[8] The Massachusetts military code also required that the colonial governor approve any sentence of capital punishment prior to its execution. The British code required no such civilian oversight.

Colonial resistance to the British Army's brutal system of discipline helped to mark a growing divide between colonists and their British cousins. Moreover, the British Army's approach to disciplining its soldiers drew a sharp distinction in the minds of colonists between freeholding militiamen and the apparently servile "Lobsters" who took the King's shilling.[9] Seen through the lens of the republican political ideology prominent in the colonies, a standing army manned by troops from the lower classes who served for life and were driven by the lash—something akin to an army of slaves—was a mortal threat to liberty.[10] In at least a small way, exposure to British military justice helped push the colonists toward rebellion and independence in the 1770s.

Enlightenment ideas also had a major impact on colonial thinking. With the outbreak of the American Revolution, America's patriot leadership believed they had an opportunity to "begin the world over again."[11] The establishment of republican governments and the application of Enlightenment ideals would create a rational, humane New World that would break from the benighted, ancient ways of Europe. As historian Gordon Woods notes, "nearly every piece of writing about the future was filled with extraordinarily visionary hopes for the transformation of America."[12]

This humanistic attitude is reflected in revolutionary notions about criminal justice. Cesare Beccaria's *On Crimes and Punishments* (1767) was a particularly influential text for patriot thought leaders like Thomas Jefferson. Beccaria denounced torture, disproportionate punishments, and the death penalty. His ideas would later see their expression in the Eighth Amendment to the U.S. Constitution, reforms to state penal

codes, and the establishment of penitentiaries.[13]

An idealistic "policy of humanity" would carry over into an approach toward both the administration of the American army and its conduct of the war. As historian David Hackett Fischer notes, "American leaders believed that it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause."[14] The Second Continental Congress would attempt to implement this vision in the summer of 1775.

The First American Articles of War

The opening battles of the American Revolution were fought on 19 April 1775 at Lexington and Concord, Massachusetts, near Boston. After the initial fighting, thousands of New England militiamen laid siege to the British garrison within Boston. Each colony's militia operated under its respective provincial code of regulations, and operations were undertaken on the basis of consensus between the leaders of each colonial contingent. The American defeat at Bunker Hill on 17 June, while inflicting heavy losses on the attacking British, exposed deficiencies in the organization and discipline of the militia army.

Meanwhile, in Philadelphia, Congress was taking action to raise military forces under its jurisdiction. The creation of a regiment of riflemen on 14 June marks the founding of what would become the U.S. Army, predating independence by more than a year. The following day, Congress appointed George Washington to serve as the new Continental Army's commanding general, charging him with "causing strict discipline and order to be observed in the army" according to "the rules and discipline of war (as herewith given you)."[15]

The "rules and discipline of war" mentioned in Washington's commission referred to a military code that Congress had yet to establish. One day earlier, Congress had appointed Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes as members of a committee to prepare rules and regulations for the new Continental Army. Washington apparently met with the committee at least once.[16]

The committee reported to Congress on 28 June. While no record of the debate seems to exist, Congress discussed the proposed regulations on the next two days before passing the first American Articles of War on 30 June.[17] Its sixty-nine articles generally followed the Articles of War passed by the Massachusetts Provincial Congress in April 1775.[18]

The Massachusetts articles themselves were largely a carryover from the older acts passed during the French and Indian War. In a preamble stating the necessity for establishing a provincial army, Massachusetts's Provincial Congress conveyed the revolutionaries' hopeful views on military justice:

> [H]aving great confidence in the honour and public virtue of the inhabitants of this Colony that they will readily obey the Officers chosen by themselves, and will cheerfully do their duty when known, without any such severe Articles and Rules, (except in capital cases,) and cruel punishments as are usually practised in Standing Armies, and will submit to all such Rules and Regulations as are founded in reason, honour, and virtue.[19]

The Articles of War as passed by Congress were similar to those of their British opponents in enumerating various military offenses and describing the composition and conduct of various courts-martial. A stark difference, however, existed in the authorization of punishment for violations of the army's rules and regulations. Only three offenses carried the death penalty, while sentences to flogging were limited to thirty-nine lashes.[20]

Following precedent in establishing a new military's justice system makes a great deal of sense given the exigencies of a war already begun. Yet the Articles of War of 1775 also reflected distinctly American attitudes and experiences with military justice, and the American Founders' vision of an enlightened, virtuous republic defended by citizen-soldiers. Rather than simply copy their opponents, as in many things, America's leaders in the Second Continental Congress tried to chart a new, more humane course in the history of Western military justice.

Revolutionary Idealism Versus Military Necessity

In contrast to Congress, General George Washington's own views on military justice were more akin to those of his British counterparts. Nonetheless, in obedience to his charge "punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress," Washington adhered to the initial Articles of War in 1775–1776.[21] A revision passed in November 1775 added sixteen offenses, four with capital punishments authorized.[22] Over time, however, Washington advocated for more punitive articles and harsher punishments to maintain good order and discipline as he struggled to forge "a respectable army."[23]

Washington's concerns about discipline were paired with his desire to create an army of adequate size and permanence to defeat the British. By the winter of 1775–1776, the militia who had initially answered the call at Boston had largely gone home. The American war effort in the campaigns of 1776 would rely upon a small Continental Army augmented with local militia called up for temporary service. This approach proved disastrous in the New York campaign of 1776, resulting in the loss of New York City and the near destruction of Washington's army. Washington summarized his thoughts on the issue on 2 September, when he wrote to John Hancock, President of Congress, "I am persuaded . . . that our Liberties must of necessity be greatly hazarded, If not entirely lost, If their defence is left to any but a permanent standing Army, I mean one to exist during the War."[24]

Along with his advocacy for a larger Continental Army, Washington began agitating for revisions to the Articles of War. William Tudor, the first Judge Advocate General and a confidant of John Adams, played a key role in conveying Washington's wishes for stricter discipline to Congress. Adams and other members of Congress had heard complaints about the leniency of the American Articles of War since at least April 1776.[25] On 7 July, Tudor informed Adams that Washington favored the wholesale adoption of the British military code, "with

a very few Alterations, such as making fewer Crimes punishable capitally and limiting the Number of Lashes to 1 or 200." In Tudor's estimation, "If You would ever have an Army to depend upon it must be by a Severity of Discipline."[26]

Taken together, Washington was arguing for the necessity of a disciplined, professional military force. This was a rejection of the idealism that had fueled the revolution in its early stage and still held sway among many in Congress. Signifying its growing recognition that the war could not be won with overreliance on patriotic militiamen, in the summer of 1776, Congress charged the Committee on Spies with revising the Articles of War and began considering a plan to expand the Continental Army.[27]

William Tudor visited the Committee on Spies that summer to present Washington's views and his own experiences with military justice in the first year of the war. John Adams seems to have been a key ally and driving force behind both of Washington's initiatives. "Discipline had become my constant topick of discourse and even declamation in and out of Congress and especially in the Board of War," Adams would later recall. He became "convinced that nothing short of the Roman and British Discipline could possibly save Us."[28]

The committee reported a revised Articles of War to Congress on 7 August 1776. Congress then debated the new code on several days in August and September. Having first gained the concurrence of fellow committee member Thomas Jefferson, John Adams later recalled:

> [A]ll the labour of the debate on these Articles, Paragraph by Paragraph, was thrown upon me, and such was the Opposition, and so indigested were the notions of Liberty prevalent among the Majority of the Members most zealously attached to the public Cause, that to this day I scarcely know how it was possible, that these Articles could be carried.[29]

Finally, Congress passed the revised Articles of War on 20 September 1776. "Discipline I hope will be introduced at last," wrote Adams a few days later.[30]

The revised Articles of War added thirty-three articles to the preexisting code and for the first time referred to "the respective armies of the United States." Largely following Washington's and Tudor's wishes, the 1776 revision saw the nearly verbatim copying of the language and arrangement of the British articles. The changes in 1776 fell into three main categories: increased severity of punishment, greater protection for civilians from plunder and destruction of property, and more regulation of the court-martial process. The fine for profanity was increased, while new offenses appeared, such as desertion from the service of the United States.

Most importantly, articles bearing capital punishment increased by nine, while the limit on lashes was raised from thirty-nine to 100. A new punishment for fraud in mustering was denial of any future office or employment under the United States. The articles also resolved an ongoing issue with the militia by making them subject to the Continental Army rules and regulations when in U.S. service. The holding of courts-martial was more carefully regulated, and the Judge Advocate General "or some person deputed by him" was enjoined to "prosecute in the name of the United States."[31] Additional legislation advanced the rank of the Judge Advocate General to lieutenant colonel and established deputy judge advocate positions.[32]

A few days earlier, Congress had passed legislation known as the Eighty-Eight Battalion Resolve. It authorized the creation of eighty-eight battalions for the Continental Army, apportioned among the states according to population. The legislation also called for enlistments for the duration of the war, provided for a yearly clothing issue to soldiers, and established bonuses and land bounties for military service. Additional legislation in October increased pay for officers and authorized a clothing allowance. While the large army that Congress envisioned would never come to pass, and enlistments were later set at three years, the civilian leadership of the new United States had committed to raising and maintaining a regular army at least through the war's conclusion.[33]

A Respectable Army

Congress's actions in September 1776 set the stage for the army that would emerge in 1777 and beyond. While large numbers of militia would continue to be called up for periodic service, the core of the war effort now rested largely on the shoulders of men who did not fit the mold of the republican citizen-soldier. The search for recruits willing to join under long-term enlistments would prove to be a significant effort for the remainder of the war. As historians James Kirby Martin and Mark Edward Lender note, "Indeed, the majority of recruits who fought with Washington after 1776 represented the very poorest and most desperate persons in society, including ne'er do wells, drifters, unemployed laborers, captured British soldiers and Hessians, indentured servants, and slaves."[34] Officers, on the other hand, overwhelmingly came from the upper strata of American society.[35]

The Continental Army, therefore, had come to resemble its British opponent demographically, and now had a roughly approximate system of military justice. Washington's quest to forge "a respectable army" would rely upon the administration of military justice just as much as on the exertions of drillmaster Friedrich Wilhelm von Steuben and other key leaders.[36] One study of courts-martial at Valley Forge documents a surge in cases as new recruits entered in 1777, and another in the winter encampment in 1777–1778. Officers were not immune from Washington's insistence on strict discipline—nearly one in twenty were prosecuted by Judge Advocate General John Laurance in the first quarter of 1778.[37] Even so, Washington paired rigid discipline with mercy, and advised his subordinate commanders to follow suit. "By making Executions too common," he wrote, "they lose their intended force and rather bear the appearance of cruelty than justice."[38]

The efforts of Laurance and deputy judge advocates like John Marshall, paired with the tactical discipline and training implemented by von Steuben, had paid off by the 1778 campaign. At the battle of Monmouth on 28 June 1778, Washington's Main Army fought the British Army under Sir Henry Clinton to a tactical draw. Although the battle was inconclusive, the performance of Washington's "new model"

army in a set-piece battle against the British demonstrated its improved tactical prowess and professionalism.[39] Ironically, the Main Army under Washington would not face the British in open battle again. Yet the Continental Army's resilience presented a difficult problem for Great Britain. With the aid of France beginning in 1778, the Continentals would later begin to find success in the Carolinas and ultimately achieve victory in the siege at Yorktown.

Conclusion

While the image of the patriotic minuteman answering the call to arms has remained an icon of the American Revolution, the historical record shows that after sixteen months of war, the Continental Congress largely compromised on its ideological investment in the primacy of the virtuous citizen-soldier. The Articles of War of 1776 did not adopt the brutality of the British code, but they represented a sterner approach toward military justice and would remain in effect with slight alteration for the next decade.[40] The revised Articles of War and the Eighty-Eight Battalion Resolve were key components in the creation of a professionalized Continental Army that would serve until the war's victorious conclusion. In later years, John Adams would reflect that the 1776 Articles of War "laid the foundation of a discipline, which in time brought our Troops to a Capacity of contending with British Veterans, and a rivalry with the best Troops of France."[41]

Yet even as the American Army became trained and disciplined like a European military, the American Founders carefully navigated the vicissitudes of war to balance the principles of republican liberty and military necessity. Congress balked at Washington's requests to remove the limit on lashes for deserters, for instance, while Washington himself enforced civilian control of the military, squelching the Newburgh Conspiracy in March 1783.[42] Washington was always careful to distinguish between military necessity, foremost in a time of war, and the principles of civilian control, humanity, and forbearance that he believed ought to undergird military service.

As the war neared an end, Washington considered changes to the Army's administration for a future "Peace Establishment."

Washington inspects the flags captured from the British during the battle of Trenton in 1776, by Percy Moran. (Source: Library of Congress)

One of the primary considerations of the board of general officers that Washington appointed to inquire into the subject was better protection for the accused in a court-martial and reforms to the role of judge advocate, "precisely delineating his duties as well with relation to the Court as with respect to the Accuser and accused."[43] General Henry Knox suggested a duty description for the judge advocate that was revolutionary for 1782:

> He ought impartially to bring the whole truth before the court, whether it should support the prosecution or acquit the accused. He should assist the prisoner in his defense, and in every instance govern himself by the principles of equal justice. The judge advocate is said to be the prosecutor in [sic] behalf of the United States. But if his business ends with the prosecution, the institution is unequal and unjust. An office employed on one side only, without any counterbalance, is too absurd to be tolerated.[44]

Congress did not pursue substantive protections for the accused in courts-martial until the twentieth century, and military justice during much of the U.S. Army's history appears crude from the perspective of the twenty-first century. But the legacy of the American Revolution's policy of humanity continued to manifest itself in incremental reforms to military justice over time. Congress abolished flogging in the Army in 1812; it was reinstated for the crime of desertion in 1833 after the death penalty for the same offense was banned in 1830.[45] Congress subsequently abolished flogging in the U.S. Navy in 1850, and the practice was finally completely outlawed for the Army by Congress in 1861.[46] In contrast, while the United Kingdom imposed progressively greater restrictions on flogging over the course of the nineteenth century, the British Army did not forbid it until 1881; it was also administratively suspended in 1881 but not

formally banned in the British Navy until 1949.[47]

Continued reforms to the military justice system throughout our history reflect an abiding American interest in balancing a desire for humanity and justice and the demands of good order and discipline. Washington, Adams, Tudor, Laurance, and other American Founders strove to create a system that charted a new path for our Nation. As the Judge Advocate General's Corps celebrates its founding and reflects on a legacy of legal excellence over the past 250 years, we should appreciate that Army legal professionals are carrying on a work that was critical from our Army's very beginning. **TAL**

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

Notes

1. Thomas Paine, Common Sense app. (W. & T. Bradford, 1776). This quote appears not in the first edition of *Common Sense*, but in an appendix in an enlarged version published later the same year. This edition followed a controversy between Paine and Philadelphia publisher Robert Bell over the rights to print a second edition. *See* Richard Gimbel, Thomas Paine: A Bibliographical Check List of Common Sense, With an Account of Its Publication 16–17, 21–23 (1956).

2. Walter Millis, Arms and Men: A Study in American Military History 13 (1950).

3. Fred Anderson, A People's Army: Massachusetts Soldiers and Society in the Seven Years' War 120 (1984).

4. William Winthrop, Military Law and Precedents, 931–46 (2d ed. 1920).

5. Anderson, *supra* note 3, at 121.

6. Arthur N. Gilbert, *The Changing Face of British Military Justice, 1757–1783*, Mil. Affs., Apr. 1985, at 81.

7. Anderson, *supra* note 3, at 125.

8. "Forty stripes he may give him, and not exceed: lest, if he should exceed, and beat him above these with many stripes, then thy brother should seem vile unto thee." *Deuteronomy* 25:3 (King James).

9. Anderson, *supra* note 3, at 111, 120, 140–41.

10. Jennine Hurl-Eamon, *Enslaved by the Uniform: Contemporary Descriptions of Eighteenth-Century Soldiering*, 30 War in Hist. 3 (2023); James Kirby Martin & Mark Edward Lender, A Respectable Army: The Military Origins of the Republic, 1763–1789, at 6–9 (1982).

11. *See supra* note 1 any accompanying text.

12. Gordon S. Wood, The American Revolution: A History 91 (2002).

13. *See* Erin E. Braatz, *The Eight Amendment's Milieu: Penal Reforms in the Late Eighteenth Century*, 106 J. Crim. L. & Criminology 427 (2017).

14. David Hackett Fischer, Washington's Crossing 375 (2004).

15. Commission from the Continental Congress, 19 June 1775, *reprinted by* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Washington/03-01-02-0004 [https://perma.cc/L5CF-UZ8K].

16. Judge Advoc. Gen.'s Corps, U.S. Army, The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 7 (1975); 1 The Papers of George Washington: Revolutionary War Series 46 n.3 (1985).

17. 2 Journals of the Continental Congress, 1774–1789, at 110–11 (Worthington Chauncey Ford ed., 1906).

18. William Winthrop, Military Law and Precedents 22 (2d ed. 1920).

19. *Id.* at 947 (original style retained).

20. Winthrop, *supra* note 18, at 953–59.

21. Commission from the Continental Congress, *supra* note 15.

22. Winthrop, *supra* note 18, at 959–60.

23. Martin & Lender, *supra* note 10, at 47.

24. 6 The Papers of George Washington: Revolutionary War Series 199–200 (Philander D. Chase & Frank E. Grizzard, Jr., eds., 1994).

25. Samuel Chase to John Adams, 18 April 1776, *reprinted by* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/06-04-02-0047 [https://perma.cc/7G4K-F4YU]; *see also* Colonel Reed to President of Congress, *reprinted in* 1 Peter Force, American Archives: 1776, at 576 (1848).

26. William Tudor to John Adams, 7 July 1776, *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/06-04-02-0152 [https://perma.cc/J75K-YZDV].

27. 5 Journals of the Continental Congress, 1774–1789, at 442 (Worthington C. Ford ed., 1906).

28. [Thursday September 19. 1776.], *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/01-03-02-0016-0195 [https://perma.cc/VL63-BRWL].

29. [Fryday September 20th. 1776.], *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/01-03-02-0016-0196 [https://perma.cc/T3HP-EVT8].

30. From John Adams to James Warren, 25 September 1776, *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/06-05-02-0020 [https://perma.cc/2ZRZ-TEPP].

31. Arts. of War sec. XIV, art. 3, *reprinted in* 5 Journals of the Continental congress 1774–1789, at 801 (J. Fitzpatrick ed., 1933).

32. Winthrop, *supra* note 18, at 961–71; Robert K. Wright Jr., The Continental Army 92 (1983).

33. Wright, *supra* note 32, at 92–93.

34. Martin & Lender, *supra* note 10, at 90.

35. *Id.* at 106–07.

36. *Id.* at 47.

37. Keith Marshall Jones III, *John Laurance and the Role of Military Justice at Valley Forge*, Pa. Mag. Hist. & Biography, Jan. 2017, at 7, 18–19.

38. George Washington to Brigadier General George Clinton, 5 May 1777, *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Washington/03-09-02-0333 [https://perma.cc/RL34-64WW]; *see also* Richard Willing, *Congress's 'Committee on Spies' and the Court-Martial Policies of General Washington*, J. Am. Revolution, (Jan. 12, 2021), https://allthingsliberty.com/2021/01/congresss-committee-on-spies-and-the-court-martial-policies-of-general-washington [https://perma.cc/XVN4-8JN4].

39. Martin & Lender, *supra* note 10, at 122–23; Wright, *supra* note 32, at 152.

40. Winthrop, *supra* note 18, at 22–23.

41. [Monday August 19. 1776.], *reprinted in* Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Adams/01-03-02-0016-0172 [https://perma.cc/FWN8-TTV3].

42. Jones, *supra* note 37, at 24.

43. Harry M. Ward, George Washington's Enforcers: Policing the Continental Army 42 (2006) (quoting General Henry Knox).

44. *Id.* at 43 (quoting General Henry Knox).

45. Unfortunately, illegal punishments continued to be used in the antebellum Army. Mark A. Vargas, *The Military Justice System and the Use of Illegal Punishments as Causes of Desertion in the U.S. Army, 1821–1835*, J. Mil. Hist., Jan. 1991, at 1, 16–18.

46. Rodney K. Watterson, Whips to Walls: Naval Discipline from Flogging to Progressive-Era Reform at Portsmouth Prison 30–33 (2014); *The United States Army Abolishes Flogging as a Punishment*, House Divided: Civil War Rsch. Engine at Dickinson Coll., https://hd.housedivided.dickinson.edu/node/37870 [https://perma.cc/R449-CMBV] (last visited July 29, 2025).

47. Authority to order flogging was held at the level of the Admiralty beginning in 1881, effectively a ban. An Order in Council in 1949 formally ended corporal punishment, except for the use of caning on boy seamen and military cadets, which continued in the twentieth century. *See* Peter Burroughs, *Crime and Punishment in the British Army, 1815–1870*, 100 Eng. Hist. Rev. 545, 562–564 (1985); Scott Claver, Under the Lash: A History of Corporal Punishment in the British Armed Forces 267 (1954).

AROUND THE CORPS

MAJ Earl Wilson, deputy staff judge advocate, 82d Airborne Division, performs a Jumpmaster Personnel Inspection prior to an airborne operation. (Photo courtesy of LTC Brian D. Lohnes)

President Trump signing executive orders in April 2025. (Photo courtesy of the White House)

Practice Notes

A Brief Overview of Other Transactions Authority

By Major Thomas J. Darmofal

On 9 April 2025, President Donald J. Trump published an executive order directing the Department of Defense (DoD) to submit a plan to reform the DoD acquisition process.[1] The order directed the DoD to employ, among other mechanisms, "existing authorities to expedite acquisitions through the [DoD], including . . . a general preference for Other Transactions Authority [(OTA)]."[2] On 30 April 2025, Secretary of Defense Pete Hegseth published a memorandum, titled *Army Transformation and Acquisition Reform*, directing the "[e]xpan[sion] [of] the use of [OTA] agreements to enable faster prototyping and fielding of critical technologies; this includes software and software-defined hardware."[3]

Outside of the contract acquisition realm, many Army professionals and practitioners may not have encountered OTAs. However, OTAs are important for all practitioners to understand as

they represent a powerful and streamlined acquisition tool.

What Is an OTA?

An OTA—"Other Transaction Agreement" or "Other Transactions Authority"—is a term of art used in the Government contracting realm to define a transaction between the Government and a private entity under the statutory authority of OTAs.[4] OTAs "refer to the statutory authorities that permit a Federal agency to enter into transactions *other than contracts*, grants, or cooperative agreements."[5] In other words, the term OTA refers to a transaction between the Government and a private party that occurs outside the traditional contracting process. OTAs are not subject to the Federal Acquisition Regulation (FAR) or other acquisition requirements outside of the relevant statutory authority currently codified under 10 U.S.C. §§ 4021–22.[6] The OTA under 10 U.S.C. § 4021 is titled "Research Projects: transactions other than contracts and grants,"[7] and the OTA under 10 U.S.C. § 4022 is titled "Authority of the [DoD] to carry out certain prototype projects."[8]

The OTA statutory authority allows Service Secretaries of the military departments and other authorized officials to "carry out prototype projects that are directly relevant to enhancing the mission effectiveness of personnel of the [DoD] or improving platforms, systems, components, or materials proposed to be acquired or developed [or in use] by the [DoD]."[9] The statute is detailed and extensive, and expressly provides guidance in the event of follow-on production contracts or transactions.[10] The detail extends to the applicability of procurement ethics requirements. The statute specifically characterizes and states that "an agreement entered under the authority of this section shall be treated as a Federal agency procurement for the purposes of chapter 21 of title 41 [restrictions on obtaining and disclosing certain information]."[11] The statute also explicitly references where competition requirements and other rules should apply.[12] Notable for contracts practitioners, the detailed nature of the statute does not extend to the jurisdiction of any adjudicative entity.[13] As the Government argued and the Court of Federal Claims noted in the *Hydraulics* case, "Both sections 4021 and 4022 are silent on the Tucker Act, bid protests, judicial review, and the Court of Federal Claims."[14]

Soldiers use a Small Multipurpose Equiment Transport (SMET) to move equipment during Exercise Combined Resolve 25-1 at the Joint Multinational Readiness Center in Hohenfels, Germany. The U.S. Army has and continues to use OTAs to acquire SMETs. (Credit: SGT Donovon Lynch)

The History and Purpose of OTAs

The need for OTAs emerged during the infamous "Space Race" in 1957 between the Soviet Union and the United States.[15] On 4 October 1957, the Soviet Union successfully launched the first orbital space satellite.[16] The Soviet Union's success in beating the United States into space took the country by surprise.[17] Losing the race to be the first nation to launch a space satellite—especially to a near-peer—made the U.S. Government realize it needed a faster, more efficient process to acquire competitive technology.[18]

Congress determined that the United States could not develop the critical technology quickly enough to compete with the Soviet Union through the traditional Government procurement process.[19] Traditional Government contracting methods reflect the red tape inherent in the bureaucracy that created them.[20] The loss spurred the U.S. Government to create the National Aeronautics and Space Administration (NASA), and equipped the new agency with the authority to enter into "other transactions."[21] The OTAs "allow[ed] NASA to move quickly and avoid the bureaucratic torpor of Federal acquisition processes, the agency was given broad authority 'to enter into and perform such contracts, leases, cooperative

The Dolley Madison House, NASA's Headquarters in Washington, D.C., from 1958 to 1961. (Source: NASA)

agreements or other transactions as may be necessary' to carry out its mission."[22] NASA's successful utilization of OTAs "prompt[ed] many other agencies to seek congressional approval for OTA[s],"[23] including the DoD.

The DoD's Use of OTAs

The popularity of OTAs within the DoD has continued to rise since Congress bestowed the authority on the agency in 1989.[24] In particular, this popularity spiked after Congress expanded the authorities in the National Defense Authorization Acts of 2015 and 2016.[25] According to industry experts and Congress, the expansion occurred to:

> 'support [DoD] efforts to access new sources of technological innovation' by making OTAs 'attractive to firms and organizations that do not usually participate in Government contracting due to the typical overhead burden and one size fits all rules.' Congress's expansion of OTA powers coincided with increased DoD interest in utilizing more flexible contracting vehicles to speed acquisition, as well as with a push to carry out the development of major weapons systems outside the traditional weapons systems acquisition pipeline and the policy regime this entails.[26]

Speed, flexibility, and efficiency set OTAs apart from traditional contracting vehicles. These qualities are appealing to both Government and industry, especially commercial entities, which are non-traditional customers.[27] OTAs are a powerful tool the DoD can leverage in accordance with President Trump's order to achieve the intent of "accelerat[ing] defense procurement and revitalize[ing] the defense industrial base."[28] **TAL**

MAJ Darmofal is the Brigade Judge Advocate for 3d Brigade Combat Team, 82d Airborne Division, at Fort Bragg, North Carolina.

Notes

1. Exec. Order 14265, 90 Fed. Reg. 15621 (Apr. 9, 2025).
2. *Id.* at 15621.
3. Memorandum from Sec'y of Def. to Sr. Pentagon Leadership, subject: Army Transformation and Acquisition Reform (30 Apr. 2025).
4. *See* Off. of Under Sec'y of Def. for Acquisition & Sustainment, Other Transactions Guide 4–7 (July 2023).
5. *Id.* at 4 (emphasis added).
6. *See* Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 175–76 (2022).
7. 10 U.S.C. § 4021.
8. 10 U.S.C. § 4022.
9. 10 U.S.C. § 4022(a)(1).
10. *See* 10 U.S.C. § 4022(f).
11. 10 U.S.C. § 4022(h).
12. *See* 10 U.S.C. § 4022(f).
13. *See* 10 U.S.C. § 4022(a)(1).
14. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 176 (2022).
15. *See id.* at 175.
16. Michelle Bradley, *Sputnik and the Space Race: 1957 and Beyond*, Rsch. Guides: Lib. of Cong. (July 10, 2019), https://guides.loc.gov/sputnik-and-the-space-race [https://perma.cc/GB9E-XVE7].
17. *See Hydraulics Int'l Inc.,* 161 Fed. Cl. at 175.
18. *See id.*
19. *See* John Dobransky & Patrick O'Farrell, *Other Transaction Authority: Acquisition Innovation for Mission-Critical Force Readiness*, Cont. Mgmt., July 2018, at 50 (stressing the importance of OTAs in the development of technology to compete with near-peers throughout history).
20. *See* Darrell M. West, *Reforming Federal Procurement and Acquisition Policies*, Brookings Inst. (Apr. 3, 2023), https://www.brookings.edu/articles/reforming-federal-procurement-and-acquisitions-policies [https://perma.cc/56X2-DJMU] (highlighting the burdens of the red tape associated with entering into contracts with the U.S. Government).
21. Surya Gablin Gunasekara, *"Other Transaction" Authority: NASA's Dynamic Acquisition Instrument for the Commercialization of Manned Spaceflight or Cold War Relic?*, 40 Pub. Cont. L.J. 893, 894 (2011).
22. *Hydraulics Int'l Inc.,* 161 Fed. Cl. at 175.
23. Gunasekara, *supra* note 21, at 894.
24. Rhys McCormick & Gregory Sanders, Ctr. for Strategic & Int'l Studs., Trends in Department of Defense Other Transaction Authority Usage 5–6 (2022).
25. Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, sec. 812, 128 Stat. 3292, 3429 (2014); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, sec. 814, 129 Stat. 726, 893 (2015).
26. McCormick & Sanders, *supra* note 24, at 6.
27. *See Other Transaction Agreements*, ATI: Advanced Tech. Int'l, http://www.ati.org/ota [https://perma.cc/JYB8-J22C] (last visited July 16, 2025) (consortium management firms and other non-traditional Government contractors using research and prototype OTAs).
28. Exec. Order 14265, sec. 2, 90 Fed. Reg. 15621, 15621 (Apr. 9, 2025).

Army mariners from 8th Theater Sustainment Command discharge vehicles via the causeway ferry as part of a Joint Logistics Over-the-Shore operation in Bowen, Australia. (Credit: MAJ Jonathon Daniell)

Practice Notes

Sustainment Is the New Black:

Contested Logistics and the Provision of Legal Advice in an Era of Constant Competition

By Colonel Christofer T. Franca, Lieutenant Colonel Matthew J. Textor, Captain Isaac R. Serna, and Staff Sergeant Dawson Tan

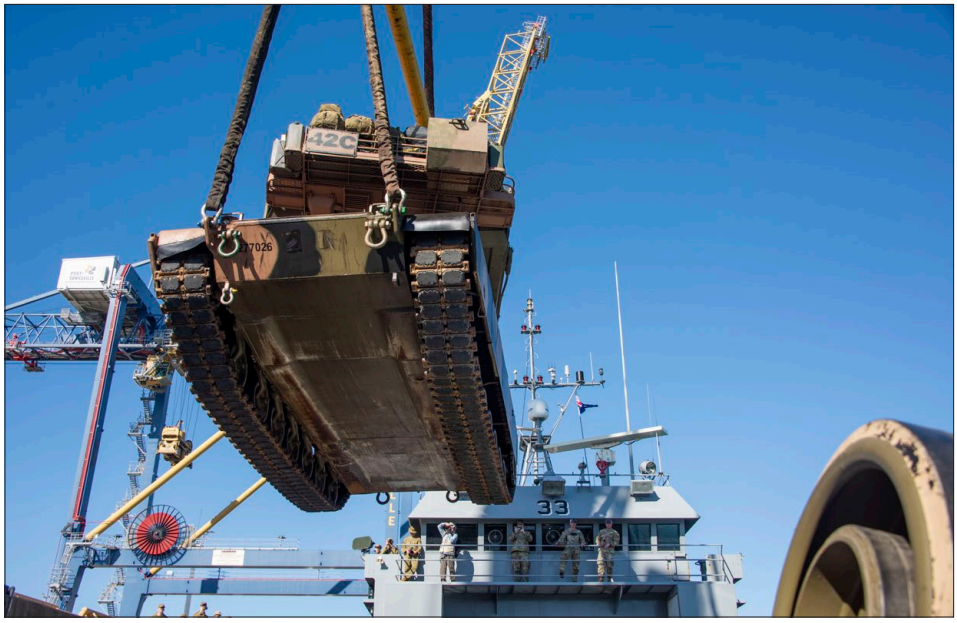
You will not find it difficult to prove that battles, campaigns, and even wars have been won or lost primarily because of logistics. – General Dwight D. Eisenhower[1]

Logisticians have been variously described as individuals who are much in demand during war and operations, but who fade into obscurity during peacetime.[2] In our era of constant competition, this peacetime view of logistics is rapidly eroding; theater sustainment is increasingly under the strategic spotlight, working through, understanding, and strengthening interior lines to successfully set any given theater.[3] Specifically, in the Indo-Pacific Command (USINDOPACOM) theater of operations where the U.S. military rehearses and prepares for navigating an all-domain contested environment, the premiere theater logistics provider, the U.S. Army's 8th Theater Sustainment Command (8TSC), takes center stage in aligning U.S. efforts with allies[4] to sustain and strengthen deterrence with the U.S. Department of Defense's pacing challenge.[5]

Discussions considering U.S. Army structure and the military approach to future warfare have identified perceived gaps in the U.S. ability to rapidly respond to large-scale combat operations (LSCO) after decades of fighting focused on counterinsurgency and counterterrorism.[6] A central tenet of this ongoing conversation is the development of interior lines to extend operational endurance, provide options, and sustain LSCO.[7] In the Indo-Pacific theater, the U.S. Army Pacific Command reinforces this conversation by rehearsing our ability to provide joint theater logistics to enable mission command, normalize activity, strengthen relations, and sustain operations.[8] This emphasis has placed 8TSC front and center in major theater exercises throughout recent years, and it is expected to remain into the future. Theater sustainment supports strategic deterrence and directly manifests our preparedness to fight, our agility, and the strength of our partnerships.[9] Legal advisors play a key role in this main effort and must be prepared to support at echelon.

Despite legal support to operations' doctrinal alignment to the sustainment warfighting function (WfF),[10] a national security law (NSL) attorney would be forgiven if their NSL practice naturally focused on enabling five of the six WfFs[11]—which relate to the four basic principles of the law of armed conflict[12]—without giving much consideration to how sustainment introduces nuanced legal considerations *at echelon* during operations. After all, in 1,254 pages, the *Department of Defense Law of War Manual* mentions "sustainment" only once.[13] By extension, this same document mentions "logistic" a mere twenty-six times, where many such references relate to identifying lawful military objectives.[14] This reality may leave the legal advisor to logistics organizations to ponder their operational value in the organization.

At first glance, many NSL-oriented legal issues involved in theater sustainment appear to be of a strategic nature: strengthening a forward posture via strengthening international agreements between governments. This work is normally reserved for the U.S. Department of State.[15] It is a field of practice rarely addressed by the organic unit legal advisor, which potentially leaves theater logistics legal advisors at a loss. However, legal support to theater sustainment is not exclusively reserved for formally advising at the strategic level. It is, likewise, not reserved for matters exclusively focused on military justice and administrative law.



5th Transportation Company, 8th Theater Sustainment Command, lowers an Australian tank onto a transportation ship during the Talisman Sabre 2025 exercise in Queensland, Australia. (Credit: SGT Sean McCallon)

As it pertains to strengthening relationships, military commanders at all echelons are often asked to meet with and host foreign dignitaries, participate in and host myriad ceremonies, identify gaps among extant agreements and plan around them, and expand U.S. military presence within the parameters of existing agreements, among many other examples. But working with and strengthening agreements through engagement is only a start. Legal advisors at all levels might be involved in all manner of issues that may have been previously unforeseen, or emergent in their uniqueness as the changing character of war evolves.[16] This brief article starts with a broad overview of the sustainment WfF, explores some of the legal issues involved at echelon, provides commentary on lessons learned, and contemplates how legal advisors can position themselves to enable sustainment through a contested environment in the short term and beyond.

Sustainment is the enabler for all other WfFs.[17] Sustainment carries oxygen to the other muscles of the warfighting effort through its four elements: logistics, financial management, personnel services, and health service support.[18] These elements further employ the principles of sustainment to maintain open avenues toward operational reach, freedom of action, and prolonged endurance.[19] Improvisation, survivability, and anticipation are paramount in the future operating environment; a peer or near-peer threat will have more opportunities than previous opposition to disrupt and eliminate our sustainment efforts. As the battle space evolves, our lines of communication (LOCs) must be rigid enough to endure adversity, but flexible enough to bend with the flow of conflict. LOC redundancy is critical. Should protection efforts fail along one avenue of approach, a sustainment network must be resilient enough to maintain operational tempo and momentum. Anticipation is not limited to the expenditures of resources, however. It is directly tied to the hypothetical loss of assets and follow-on actions to continue the mission.

During the high-intensity all-domain battle space, sustainment will be the most important frontier of our fighting force and will drive critical and necessary adaptations.[20] Contested logistics requires commanders to not only be comfortable accepting increased risk in a highly dynamic environment with shifting operational needs but also versed in matters of area protection and offensive operations to protect and defend LOCs. See Figure 1 below.

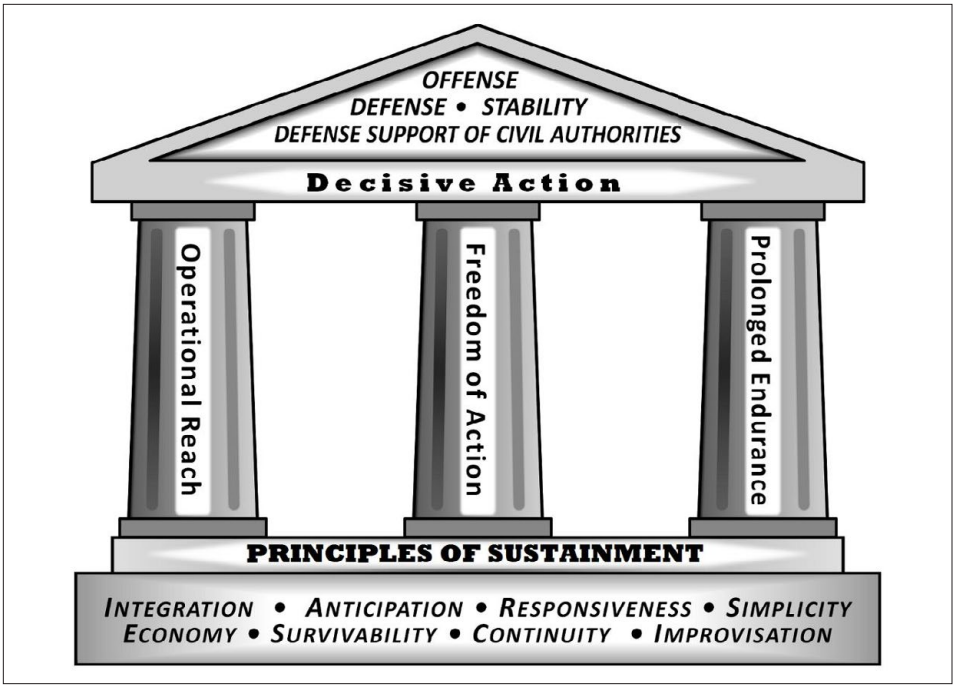


Figure 1. Principles of Sustainment. U.S. Dep't of Army, Doctrine Pub. 4-0, Sustainment fig. 1-1 (31 July 2019).

Considering the above, legal advisors to logistics organizations must be ready to respond to myriad legal issues promptly and accurately, at echelon, to enable operational endurance and support emerging operational needs. Legal subjects in the sustainment realm range dramatically, to include, for example, understanding and advising on the following: Navy-specific administrative messages (NAVADMIN) related to sovereign immunity (yes, the Army has boats); units on the ground executing funds for meal enhancements; Acquisition and Cross-Servicing Agreement (ACSA) authorities leveraged to provision needed materiel and maintain operational tempo;[21] use of Official Representational Funds (ORF) to strengthen relations;[22] biosecurity requirements to reduce friction in off-loading equipment and personnel during Reception, Staging, Onward Movement and Integration (RSOI) and Joint Logistics Over-the-Shore (JLOTS); and command structure to understand commander authorities in a combined and joint environment. Beginning to end, embedded legal personnel support the warfighting effort by enabling good order and discipline through military justice, ensuring readiness through legal services, advising commanders on potential claims issues, and even working with industry contacts to gain every advantage possible.

Successfully sustaining the force in "battlefield next"[23] requires working with industry to identify and adopt emerging technologies that have the potential to strengthen operational endurance.[24] This objective poses a host of legal issues where lawyers are encouraged to be included far in advance of the decision-making process (i.e., during the development, testing, and implementation phases of the capability). Nevertheless, it is incumbent upon the lawyer on the ground to understand the legal consequences of either an overreliance on a capability or a disregard of them. In other words, although emerging technology and capabilities may make decision-making faster and thereby maximize momentum, one must ask: what is the legal effect of a "bad" decision or decisions with unintended adverse consequences?

Identifying and adopting emerging technology begins with discovery. Whether discovery occurs at an Association of the United States Army (AUSA) conference or a presentation in the command suite, our leaders need opportunities to determine what technology can meet the Army's sustainment needs. The command's servicing legal advisor should be one of the first touchpoints for these exchanges.

DoD policy states personnel can and should engage in communication with industry.[25] As Secretary of Defense Pete Hegseth recently emphasized, "Industrial base integration can improve military systems and the production of platforms and materiel, enabling us to bring in allied technology and expertise as well as allied production capacity."[26] DoD policy also states such communications should take into consideration applicable ethics and procurement laws and regulations.[27] The legal advisor's objective is to ensure leaders are empowered to engage with industry and maximize the intent of the engagement within the bounds of ethical standards.

Engaging with industry is not limited to meetings, however. If a product appears useful, it is in the command's interest to *test* the product. From a fiscal standpoint, one significant distinction is whether a test is a *demonstration* or a *service*. There is a fine difference between demonstration and service; this is the territory through which the servicing legal advisor must wade.

Colloquially, a demonstration is the action of presenting a product or service to a potential customer, while services are value-added activities a company provides to its customers. In practice, parsing the two can be difficult. For example, is there a difference between a Raytheon contractor inputting simulated exercise data into their predictive logistics technology and Martin Defense Group providing instruction on operating unmanned amphibious vehicles to unit personnel? After all, both activities are an opportunity for the Army to test emerging technology. The distinction matters because while demonstrations are not prohibited by law or regulation, accepting volunteer services is a per se Anti-Deficiency Act (ADA) violation.[28]

If the activity received is a service, it is ripe for dispute. The imminent issue is ensuring no party makes a claim against the Government for pay or benefits.[29] The future issue is establishing the terms and conditions related to modernizing logistics systems with industry. The solution is developing an agreement. Agreements may be as minimal as a gratuitous agreement or an exception to the ADA prohibition on volunteer services,[30] or as involved as the Army Futures Command's holistic focus on contested logistics

A warrant officer inspects his vehicle during an offload for the Talisman Sabre 25 exercise at Port Darwin, Australia. (Credit: SGT Devin Davis)

through a Contested Logistics Cross-Functional Team.[31] By the agreement's adoption stage, much of the unit legal advisors' roles conclude, as terms between the Government and industry develop through the U.S. Department of State. Nonetheless, whether these agreements lead to Federal Acquisition Regulation (FAR)-based contracts or Other Transaction Authority (OTA) agreements, a legal advisor's general familiarity with the stages of adopting emerging technology assists leaders' understanding of how engaging with industry supports contested logistics.[32]

The above is but one example where legal advisors at the tactical level enable sustainment operations throughout the theater. Demonstrating proficiency in supporting rapidly evolving operational contracting requirements is another critical capability legal advisors must possess. Understanding ACSA authorities,[33] contracting authority and organizational dynamics, and fiscal law restrictions on a range of appropriated funds across Operation and Maintenance, Army (OMA) funds; Military Personnel, Army (MPA) funds; and ORF enables the legal advisor to quickly react to tactical operational needs and support unit-level OPTEMPO.[34] Legal advisors, unfortunately, are not an unlimited commodity and, therefore, cannot be everywhere all the time. Unauthorized commitments (UACs) may happen, but preparing for UACs and potential ADA violations should not disrupt operational momentum.[35] In these instances, the legal advisor is a force multiplier in the effort to ratify UACs and correct ADA violations through a firm understanding of contract authority and fiscal law principles. Having developed critical relationships with the supporting contracting organizations, such legal advisors can extend their support well beyond their chain of command.[36]

Likewise, advising on the meaning and authorities of extant agreements is a prerequisite for sustainment legal advisors and allows them to enable tactical momentum and avoid friction. This understanding comes up in many ways. For example, working through the rule of sovereign immunity while supporting a foreign nation's ability to impose biosecurity requirements allows the unit to download equipment efficiently and effectively support mission success. Additionally, understanding ACSAs and how they are leveraged to transfer logistics, support, supplies, and services (LSSS) enables rapid tactical resupply, reimbursement, and maintenance, which thereby facilitates freedom of movement and maximizes the commander's options.[37]

Moreover, with an ever-increasing focus on dispersed command and control (C2), where C2 nodes make every effort to mask their signature,[38] internal LOCs supporting operational endurance will be tested in new ways. Legal advisors to sustainment organizations will wrestle with this environment, where constantly contested internal LOCs risk exposing critical command nodes. In such an environment, matters of distinction and U.S. policy move to the forefront as the United States mitigates risk to civilian infrastructure and population centers.

Moving up echelons, sustainment legal advisors at the operational level must have a firm grasp of broader, theater-wide, sustainment challenges to effectively support the mission and the commander's requirements, which, in turn, extend operational endurance and reach. Advising on command structure and authorities informs and frames operational requirements.[39] These requirements drive sustainment, supported by the Joint Logistics Enterprise (JLENT). In other words, sustainment is critical to unified action, and it is achieved by closely coordinating and collaborating with other Services, allies, host nation forces, and other governmental organizations.[40]

As part of joint interdependence, the Army plays a crucial role in opening and setting the theater, whereas naval forces provide critical capabilities to support JLOTS.[41] Ideally, the unit, and by extension the Army, will have achieved integration to enable unified action.[42] This operational legal competence informs how the Army contributes to the joint logistics structure to sustain the mission, especially where logistics is increasingly viewed through a joint and combined lens. Understanding matters of legal interoperability becomes critical in supporting operational momentum through mission-essential tasks such as JLOTS, and where the JLENT underwrites theater distribution and internal LOC development.[43]

Overlaid upon theater sustainment and logistics distribution are matters of theater protection, such as defining military objectives;[44] taking precautions in the attack; countering theater anti-access/area denial to build and strengthen interior LOCs; providing sustainment support to detention operations; providing "non-lethal" protection such as information operations; and conducting cyber operations.[45] Operational legal advisors regularly consider these matters, which likely comprise more comfortable

territory as they relate to the mainstay wheelhouse of the four basic principles of the law of war. Although this article does not dive into these specific matters *per se*, it is nevertheless critical for future sustainers to understand that these matters are very much alive and must be handled effectively and competently while advising theater sustainment organizations.

Strategically, sustainment lawyers must be placed to help develop and strengthen international agreements that build upon a forward sustainment presence. A stronger forward sustainment presence sets the theater and demonstrates national resolve, enabling rapid reaction should competition prove ineffective. Increased access, basing, and overflight authorities potentially allow for Army pre-positioned stock expansion to demonstrate strategic theater commitment; put simply, sustainment *is* deterrence.[46] As Edmond Morris so astutely points out, "It is the *availability* of raw power, not the use of it, that makes for effective diplomacy."[47]

Additionally, maximizing integration via interagency, combined, and joint synchronization creates the best environment for posture development. Policy must inform authorities, which must enable interoperability. Legal interoperability is a sub-component of holistic interoperability. Failing to achieve integration damages the Army's ability to organize and employ capabilities and methods across domains, environments, and functions to contest adversaries in competition below armed conflict.[48] Indo-Pacific sustainment is, by necessity, joint and ever increasingly combined. Sustainment lawyers, therefore, operate regularly in the strategic space to play a key role in enabling the Army's ability to integrate by influencing policy on behalf of joint and combined integration.

As the former 8TSC Commander, Lieutenant General Jered Helwig, would regularly brief his staff, "In the Army, we're either training or fighting; that's our job." The authors' experience while training with the 8TSC has demonstrated that sustainment as a WfF must be a strategic focal point as the Army adapts to battlefield next. Put simply, LSCO requires redundancy and resiliency through sustainment. General George S. Patton famously said, "[T]he officer who doesn't know his communications and supply as well as his tactics is totally useless."[49] As strategic focus is placed upon sustainment—where the legal issues are myriad, nuanced, and complex—competent and effective legal personnel must be actively and regularly positioned and resourced at echelon to enable mission success and avoid becoming General Patton's "useless" officer. **TAL**

COL Franca is the Deputy Chief of the National Security Law Division, Office of The Judge Advocate General, at the Pentagon.

LTC Textor is the Chief of the Intellectual Property Team in the Contract Litigation & Intellectual Property Division at Fort Belvoir, Virginia.

CPT Serna is an Administrative Law Attorney for the U.S. Army Medical Center of Excellence at Fort Sam Houston, Texas.

SSG Tan previously served as the 8th Theater Sustainment Command National Security Law Noncommissioned Officer-in-Charge at Fort Shafter, Hawaii. He is currently a Police Officer in the City of Meridian, Ohio.

The authors deployed forward to Australia as part of the Combined Joint Theater Sustainment Component in support of Talisman Sabre 2023.

Notes

1. 1 Air Force Logistics Mgmt. Agency, Quotes for the Air Force Logistician 23 (James C. Rainey et al. eds., 2006).

2. *See id.* at 28. Rear Admiral Isaac Campbell Kidd famously said, "Logisticians are a sad, embittered race of people, very much in demand in war, who sink resentfully into obscurity in peace. They deal only with facts but must work for men who traffic in theories. They emerge during war because war is very much fact. They disappear in peace, because in peace, war is mostly theory. The people who trade in theories and who employ logisticians in war and ignore them in peace are generals." *Id.*

3. *See* Joint Chiefs of Staff, Joint Concept for Integrated Campaigning 2, 7–11 (2018) (explaining the concept of the competition continuum); *see also* Tom Harper & Jim Armstrong, *The Era of Constant Competition—Purposes and Principles*, War Room (July 29, 2021), https://warroom.armywarcollege.edu/articles/purpose-principles [https://perma.cc/LAB8-FPM2] (discussing the Competition Continuum).

4. *See* White House, National Security Strategy of the United States of America 20 (2022) (explaining the national defense strategy regarding strengthening U.S. partnerships with their allies in the Indo-Pacific region to sustain a free and open regional order and deter attempts to resolve disputes by force); U.S. Dep't of Def., 2022 National Defense Strategy of the United States of America 14–15 (2022).

5. *See* White House, *supra* note 4, at 23–25 (explaining why China presents the most consequential and systemic challenge to U.S. national security due to China's coercive and increasingly aggressive endeavor to refashion the Indo-Pacific region and the international system to suit its interests).

6. *See, e.g.*, Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* Mil. Rev., no. 2, 2021, at 6, 6–7.

7. *See* General Charles Flynn & Lieutenant Colonel Sharah Starr, *Interior Lines Will Make Land Power the Asymmetric Advantage in the Indo-Pacific*, Def. One (Mar. 15, 2023), https://www.defenseone.com/ideas/2023/03/interior-lines-will-make-land-power-asymmetric-advantage-indo-pacific/384002 [https://perma.cc/G6AZ-SFCZ].

8. *Id.*

9. *See* U.S. Army Pac. Command, America's Theater Army for the Indo-Pacific 6–10 (Sept. 2021).

10. U.S. Dep't of Army, Doctrine Pub. 4-0, Sustainment para. 1-71 (31 July 2019) [hereinafter ADP 4-0]. For the Army, sustainment is "[t]he provision of logistics, financial management, personnel services, and health service support necessary to maintain operations until successful mission completion." *Id.* at Glossary-5. Legal support has a doctrinal role in each of these categories outlined in ADP 4-0. *Id.* paras. 1-71 to -73.

11. U.S. Dep't of Army, Doctrine Pub. 3-0, Operations paras. 5-11 to -18, 5-25 to -26 (31 July 2019) (describing the command and control, movement and maneuver, intelligence, fires, and protection warfighting functions).

12. Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual § 2.1.2.3 (12 June 2015) (C1, 31 July 2023) [hereinafter Law of War Manual] (describing military necessity, distinction, proportionality, and humanity).

13. *Id.* § 4.1.1.1.

14. *See, e.g.*, *id.* §§ 5.6.8.3, 5.8.3 (mentioning logistics in the context of determining whether civilians are taking a direct part in hostilities; or whether certain equipment, locations, or lines of communication are targetable.

15. *See* 11 U.S. Dep't of State, Foreign Affairs Manual Legal and Political Affairs § 724 (2006).

16. *See* Christopher Mewett, *Understanding War's Enduring Nature Alongside Its Changing Character*, War on the Rocks (Jan. 21, 2014), https://warontherocks.com/2014/01/understanding-wars-enduring-nature-alongside-its-changing-character [https://perma.cc/L8YU-24RY]; Zachery Tyson Brown, *Unmasking War's Changing Character*, Mod. War Inst. (Mar. 12, 2019), https://mwi.westpoint.edu/unmasking-wars-changing-character [https://perma.cc/C4SN-XAYD].

17. *See* ADP 4-0, *supra* note 10, para. 1-6.

18. *See id.* paras. 1-1 to -5.

19. *See id.* para. 3-4.

20. *See* Operations Grp., Nat'l Training Ctr., No. 22-657, Sustainment in Support of Large Scale Combat Operations, at ii–iii (2022).

21. *See* 10 U.S.C. §§ 2341–2350; *see also* Chairman, Joint Chiefs of Staff, Instr. 2120.01D01E, Acquisition and Cross-Servicing Agreements encl. A, para. 4.a (19 July 2024); *see also* U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation, vol. 11A, ch. 08 (July 2022) [hereinafter DoD FMR].

22. *See* U.S. Dep't of Def., Instr. 7250.13, Use of Appropriated Funds for Official Representation Purposes para. 1.2(a) (22 May 2023) [hereinafter DoDI 7250.13]; *see also* U.S. Dep't of Army, Regul. 37-47, Official Representation Funds of the Secretary of the Army para. 1-6 (17 Nov. 2023).

23. *See* Pede & Hayden, *supra* note 6, at 6–7 (describing "Battlefield Next" as the LSCO battlefield after years of sustained counterinsurgency and counterterrorism warfighting in Afghanistan and Iraq).

24. *See* Becca Wasser & Philip Sheers, *From Production Lines to Front Lines: Revitalizing the U.S. Defense Industrial Base for Future Great Power Conflict*, Ctr. for New Amer. Sec. (Apr. 2025), https://www.cnas.org/publications/reports/from-production-lines-to-front-lines [https://perma.cc/TN9B-XWJC].

25. *See* U.S. Dep't of Def., National Defense Science and Technology Strategy 8–9 (2023); U.S. Dep't of Def., National Defense Industrial Strategy (2023).

26. U.S. Senate Armed Servs. Comm., Advance Policy Questions for Peter "Pete" B. Hegseth: Nominee to Serve as Secretary of Defense 13 (Jan. 6, 2025).

27. FAR 1.102-2(a)(4) (2025) ("Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry . . . so long as those exchanges are consistent with existing laws and regulations, and do not promote an unfair competitive advantage to particular firms."); *see also* Memorandum from Deputy Sec'y of Def. to Secretaries of the Military Departments et. al, subject: Engaging with Industry (2 Mar. 2018).

28. 31 U.S.C. § 1342 ("An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property . . . . As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.").

29. *See* U.S. Dep't of Def., Instr. 1100.21, Voluntary Services in the Department of Defense (27 Mar. 2019) [hereinafter DoDI 1100.21]; U.S. Dep't of Army, Regul. 608-1, Army Community Service para. 5-2 (19 Oct. 2017) [hereinafter AR 608-1]. The Army may only accept voluntary services for programs identified in 10 U.S.C. § 1588 and 5 U.S.C. § 3111, as implemented in DoDI 1100.21 and Section II of Chapter 5 of AR 608-1. Under limited circumstances, Army activities may accept "gratuitous" services from individuals provided they agree in writing to waive claims against the Government that may arise from the performance of their services. *See* AR 608-1, *supra*, para. 5-13.

30. *See* AR 608-1, *supra* note 29, para. 5-13.

31. *See* Amy Jones, *Army Futures Command's Contested Logistics Cross-Functional Team: Transforming for Future Sustainment*, U.S. Army (Apr. 18, 2025), https://www.army.mil/article/284116/army_futures_commands_contested_logistics_cross_functional_team_transforming_for_future_sustainment [https://perma.cc/7NV2-6VJU].

32. *See, e.g.*, Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (1978) (establishing the framework for how Federal agencies engage with other entities, including industry, when it comes to funding and resource allocation).

33. *See* 10 U.S.C. §§ 2341–2350; *see also* Dep't of Def., Dir. 2010.09, Acquisition of Cross-Servicing Agreements para. 4.1 (28 Apr. 2003) (C2, 31 Aug. 2018); DoD FMR 7000.14-R, *supra* note 21, vol. 11A, ch. 08 (July 2022).

34. *See* 10 U.S.C. § 2341; *see also* 31 U.S.C. § 1301(a). As a matter of law, use of ACSA authority requires that appropriations must be properly available as to purpose, time, and amount.

35. *See, e.g.*, 31 U.S.C. §§ 1341–1342, 1517; *see also* DoD 7000.14-R, *supra* note 21, vol. 14, ch. 03 (Dec. 2024); FAR 1.602-3 (2025); AFARS 5101.602-3 (Mar. 17, 2025).

36. *See* U.S. Dep't of Army, Techs. Pub. 4-71, Contracting Support Brigade para. 1-7 (3 Oct. 2024). For example, 8TSC coordinates theater support contracting actions with the 413th Contracting Support Brigade (CSB). As a theater asset, a CSB executes theater support contracting actions primarily in support of Army forces, and joint forces when directed, and coordinates other contracting actions as directed by the supported commander. *See* Jack Lingle, *413th CSB Supports Operation Pathways*, U.S. Army (Mar. 22, 2024), https://www.army.mil/article/274760/413th_csb_supports_operation_pathways [https://perma.cc/K4CD-GQZ6].

37. *See* 10 U.S.C. § 2350 (defining "logistic support, supplies, and services"). Legal practitioners must review the country-specific ACSA to determine how this statutory definition is implemented within the agreement affecting the operation.

38. *See* Kimberly Underwood, *The Tipping Point for Army Distributed Command and Control*, The Cyber Edge: AFCEA (Aug. 1, 2023), https://www.afcea.org/signal-media/cyber-edge/tipping-point-army-distributed-command-and-control [https://perma.cc/6V9P-X7HW].

39. *See* U.S. Dep't of Army, Field Manual 6-0, Commander and Staff Organization and Operations para. 2-144 (16 May 2022). For example, the staff judge advocate prepares Appendix 11 (Rules of Engagement) of Annex C (Operations). *Id.*

40. *See* ADP 4-0, *supra* note 10, para. 2-81.

41. *See* ADP 4-0, *supra* note 10, para. 2-17 (discussing how Naval forces provide logistical support capabilities for Army over-the-shore operations).

42. *See* U.S. Dep't of Army, Regul. 34-1, Interoperability para. 1-9 (9 Apr. 2020) [hereinafter AR 34-1] (discussing the Army requirement for interoperability). To achieve this objective, the regulation introduced standardized interoperability planning: Level 0 (Not Interoperable), Level 1 (Deconflicted), Level 2 (Compatible), Level 3 (Integrated). *Id.*

43. *See* Ctr. for L. & Mil. Operations, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, Best Practices of Multinational Legal Interoperability Smartbook 3-30 to -33 (2024).

44. Law of War Manual, *supra* note 12, § 5.6.6.2 ("[T]he object's effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as 'war-fighting,' 'war-supporting,' and 'war sustaining' are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.").

45. Law of War Manual, *supra* note 12, § 16.3.1 ("[C]yber operations that cripple a military's logistics systems, and thus its ability to conduct and sustain military operations, might also be considered a use of force under *jus ad bellum*.").

46. Major General Jared Helwig, Commanding Gen., 8th Theater Sustainment Command, Command Address on Fort Shafter, Hawaii (Dec. 15, 2023) (speaking to 8TSC staff on the importance of the 8TSC mission and vision).

47. *See* Edmund Morris, The Rise of Theodore Roosevelt, at xvi (Mod. Libr. 2001) (1979). The author introduces Roosevelt's famous aphorism "Speak Softly and Carry a Big Stick" in the context of describing the President's diplomatic approach to avoiding armed conflict. *Id.*

48. AR 34-1, *supra* note 42, para. 1-10 (discussing how to achieve interoperability, including the Army's ability to integrate).

49. *See* Joint Chiefs of Staff, Joint Pub. 4-0, Joint Logistics at II-I (20 July 2023) (C1, 22 May 2025) (acknowledging the importance of an officer's understanding of fundamental elements of logistics is incorporated in military doctrine).

AROUND THE CORPS

RCSM Michael J. Bostic, 14th Regimental Command Sergeant Major of the Judge Advocate General's Corps, gives remarks during the State of the Corps 2025 symposium on Sembach Kaserne, Germany. (Credit: SPC Elijah Campbell)

(Credit: A1C Jordan Lazaro)

Practice Notes

Even Tom Brady and Peyton Manning Had a Quarterback Coach

How to Observe, Coach, and Train (OC/T) Anyone, Including Those Senior to You

By Lieutenant Colonel Cesar B. Casal

American Football fan or not, you have likely heard of Tom Brady and Peyton Manning. I will wager, however, that you have never heard of Clyde Christensen. At the time of his retirement in 2023, Coach Christensen had forty-four years of football coaching under his belt—twenty-seven of those in the National Football League (NFL).[1] In that span, he was the quarterback coach for both Peyton Manning and Tom Brady—two of the greatest ever to play the position. Manning entered the NFL Hall of Fame in 2021 as a "first-ballot" select;[2] that is, he was elected on his first attempt, which is an honor only eighty-nine of the 371 NFL Hall of Famers can claim.[3] Brady will presumptively do the same upon his first eligibility in 2028.[4] Having become a coach shortly after his time as a college quarterback, Clyde Christensen is not himself a Hall of Fame quarterback, and he never played in the NFL.[5] Nonetheless, he effectively coached two legends of that position at the highest echelon of play, including Brady, who already had multiple NFL championships under his belt at the time.[6]

Judge advocates (JAs) from captain to colonel are frequently assigned as "coaches" in the official role as exercise evaluators or guest observer-coach/trainers (OC/Ts). In many, if not most, cases, the guest JA

Then-SFC Robert W. Love (left) and then-CPT Julia Flores (right), provide advice to Soldiers while serving as the legal NCO OC/T and JA OC/T, respectively, at the Joint Multinational Readiness Center in Hohenfels, Germany. (Credit: CPL Tomarius Roberts)

OC/T is junior in rank to the leaders and even the branch leads of the organizations they are tasked to observe, coach, and evaluate. Many do not even hold operational positions at the time of tasking. So, what can a less-experienced captain JA with no brigade time provide to a much more experienced brigade combat team JA? Or, what coaching can a junior major or lieutenant colonel offer to a seasoned division or corps staff judge advocate (SJA)?

As it turns out: plenty. If you believe Coach Christensen's experience and the Army's own OC/T philosophy,[7] one does not have to exceed the talents, knowledge, or experience of the training audience to provide real-time observations, feedback, self-reflection, and potential improvement to the trainee. The aim of this practice note is to provide a basic, self-directed framework to turn oneself into a value-added coach with minimal investment. As the Army continues to contend with and prepare for an increasingly challenging and resource-constrained operational environment, the ability to provide potentially transformative observations, feedback, and coaching (whether in a formal or informal coaching role or just as a chance passer-by) creates fertile ground for continual improvement of our formations.

Step 1: Begin with Foundational Principles

Effective coaching begins with fundamental principles.[8] For example, as the laws of physics apply to both great and mediocre quarterbacks, basic throwing mechanics and offensive formations apply nearly universally.[9] Therefore, an effective coach need not be an artist themselves, but rather, a master of foundations. Similarly, Army and Judge Advocate General's (JAG) Corps doctrine applies to its formations universally, so a JA-coach must know relevant doctrine to build their coaching credibility. As this article is written for augmentee or informal JA OC/Ts with a full-time job in another discipline, it assumes limited knowledge and experience in national security law or as a staff planner. The following offers a list of key doctrine such personnel should review to add value to the training process.

Army Doctrine "Crash Course" (7-8 hours)

1. Army Doctrine Publication (ADP) 3-0, *Operations*[10] (read or skim, 1-2 hours). This ADP is only 100 pages and is the best overview of how the Army conducts operations.
2. ADP 5-0, *The Operations Process*[11] (1 hour) (read chapters 1 and 2, and skim the remaining)
3. Field Manual (FM) 3-60, *Army Targeting*[12] (1 hour) (skim, read chapters 1 and 2, and 3, 4, or 5 depending on the organization you are evaluating).
4. FM 3-84, *Legal Support to Operations*[13] (2 hours) (read).
5. Army Techniques Publication (ATP) 6-0.5, *Command Post Organizations and Operations*[14] (1 hour) (skim, with attention to Appendix A, Battle Rhythm and Meetings).
6. Echelon doctrine (1 hour) (skim, depending on the organization you are evaluating):
   - Corps: ATP 3-92, *Corps Operations*[15]
   - Division: ATP 3-91, *Division Operations*[16]
   - Brigade Combat Team: FM 3-96, *Brigade Combat Team*,[17] etc. for MEBs, fires, and sustainment brigades)

These resources assume a U.S. Army Forces Command unit-centric exercise. Other doctrinal publications will apply to non-combat operations such as Defense Support of Civil Authorities, humanitarian, Noncombatant Evacuation Operations, etc. Note, too, that these resources are Army-centric. Those working in a joint/combined environment should look to joint publications. The CAC-required JEL+ library,[18] hosted by the Joint Chiefs of Staff, is a useful resource. In addition, the Focus Paper series published by the Joint Chiefs provides practice-oriented, user-friendly breakdowns of an array of potentially useful topics.[19] See

A temporary encampment at the National Training Center, Fort Irwin, CA. (Credit: SGT Terrance Salinas)

especially Joint Headquarters Organization and Authorities.

As long as users comply with and are mindful of changes to future policy guidance on the left and right limits of artificial intelligence (AI) use, approved AI tools can provide a helpful starting point.[20] The following prompts offer suggestions for how to elicit relevant and meaningful responses:

- Division direct action exercise: "Generate a four-hour study plan for a corps-level exercise for a legal advisor/judge advocate, with an emphasis on integration of legal advice into operational planning and targeting. Provide doctrinal references for each content block."
- Defense Support to Civil Authorities (DSCA) exercise: "Generate a four-hour study plan for a division-level exercise for a legal advisor/judge advocate, with an emphasis on DSCA from a DoD perspective. Provide doctrinal references for each content block."

Step 2: Learn Exercise Specifics (4 hours)

After developing a basic doctrinal foundation, the next step is to delve into exercise-specific materials. Exercises may have slightly different terminology to refer to their precursor documents, but generally, they are referred to as "Road to War" documents. Ensure you understand, at minimum:

1. Type of operation (large-scale combat operations, direct action, joint force entry, humanitarian operation, Defense Support to Civil Authorities, Noncombatant Evacuation Operations, etc.)
2. Legal basis for the operation (e.g., United Nations Security Council Resolution, Authorization for the Use of Military Force, North Atlantic Treaty Organization, other treaty or agreement, defense pact, etc.)
3. Task organization (how the forces are arrayed in the theatre and what lines of authority or coordination connect them to one another)
4. Higher echelon or exercise-developed legal materials: rules of engagement (ROE), authorities, no-strike lists, reporting requirements, process formats (e.g., ROE requests), etc.
5. Training audience-generated material: commanding general (or commander's) training objectives and the SJA/brigade judge advocate (BJA) training objectives (if you are unfamiliar with any of the objectives, locate the doctrine related to it and skim it); operations orders, ROE, office of the staff judge advocate (OSJA)/national security law (NSL)/brigade personnel roster, battle rhythm and seating charts, and running estimates.

Step 3: Observe, Ask, Classify

Though applying "OC/T art" at the highest levels requires significant experience and doctrinal familiarity, a junior JA can replicate the coaching interaction to a helpful extent via the following steps: intense observation, asking questions, and then classifying them

into doctrinal categories to create after-action review (AAR) lessons.

Intense Observation

The Mayo Clinic defines mindfulness as being "intensely aware of what you're sensing and feeling at the moment, without interpretation or judgment."[21] Apply a similar mindfulness to your exercise observations: *intensely* notice (and record) everything about every aspect of the OSJA/brigade without judgment or interpretation, for now. For example:

- What personnel were tasked to participate in the exercise? What are their experience levels and backgrounds? Did OSJA/brigade legal personnel appear to work well with the staff? Did they work well together?
- What is the OSJA battle rhythm, and what meetings do they attend? Which meetings do they not attend? Which personnel attended which meetings? Did you hear the words "where's the JAG?" during the exercise? Conversely, did exercise participants seem to understand how to incorporate their legal adviser or, worst yet, avoid consulting the JA altogether?
- Did the SJA or deputy staff judge advocate (DSJA) participate in the exercise, and to what extent? What was the NSL chief's role?
- Did paralegals participate? Did everyone have enough computers? Did they have access to targeting systems and the correct software on those computers? If they had access, did they know how to use them?
- Did the team have analog or backup resources prepared so they could operate in a low-tech or communications-degraded/denied environment?

And so on. Record observations in exacting detail and attempt to notice as much as you can, regardless of whether they appear to be conscious decisions by the training audience.[22]

Ask Questions

The next and key step is to ask plenty of "why" or open-ended questions—particularly of the SJA, DSJA, BJA, chief/senior paralegal, or whoever made the decisions about the legal section's participation in the exercise. You can do this step in real time (making and recording observations, then asking why the Training Audience (TA) decided on that approach) and, of course, note the answers.

Categorize Observations and Compare with Doctrine

The final step is to then "bin" (i.e., classify) your observations/Q&As into the doctrinal categories referenced in Step 1 above (operations, the operations process, targeting, JAG-specific operations and processes, command post operations, or echelon-specific matters). More than one may apply. Select a few key observations that appeared to impact[23] the TA and compare the observation (i.e., what happened) with the doctrine (i.e., what should happen). This is an AAR point.[24]

The use of AI would also be helpful here. First, you can input your observations from the field, but with caution. Ensure they

are sufficiently generalized and do not include classified, controlled, or sensitive data.[25] Hypothetical or fictitious scenarios should also be properly scrubbed and redacted, even if they implicate no real, sensitive DoD operations or individual personally identifiable information.[26] With your observations, you can also include the applicable doctrine and prompt the AI tool to "assess the observations and link them with applicable portions of the enclosed doctrinal references. Rank most frequent and related observations first." The top few will be your most likely and impactful AAR points.

Here is an example AI prompt based on a hypothetical observation: "A paralegal attended a staff meeting and provided the notes afterward. Two attorneys in the legal office interpreted the notes differently and subsequently offered conflicting legal guidance to the staff." See Appendix 1 for the AI output. This prompt results in a starting point of doctrinal references to explore and incorporate into a discussion with the training audience.

For an experienced OC/T, real-time coaching is possible as their doctrinal familiarity would enable them to provide feedback and generate discussions as the exercise develops. This real-time coaching, however, will be limited if the OC/T is inexperienced. However, formal JA-specific AARs typically at the mid and endpoints of an exercise will provide an opportunity for junior or non-NSL postured OC/Ts to provide feedback and AAR points. A junior OC/T JA can provide one to three key observations and corresponding AAR points during the formal JA AARs, subject to the senior OC/T's guidance.

Conclusion

The goal of this article is to give any JA, regardless of career and operational experience, a time-effective roadmap to self-development as a value-added exercise observer and coach. A quality coach understands fundamentals and makes timely/relevant observations. This should be sufficient to promote the self-awareness and yield the positive training experiences our Corps needs to enjoy enduring improvement. In the arena in which our Army plays, that can make all the difference. **TAL**

LTC Casal is presently assigned as the U.S. Observer-Coach/Trainer and Legal Advisor, NATO Joint Warfare Center in Stavanger, Norway. He was previously assigned as the Deputy SJA, U.S. Army Southern European Task Force-Africa, Vicenza, Italy and Observer-Coach/Trainer at the Mission Command Training Program, Fort Leavenworth, Kansas.

Notes

1. *Clyde Christensen: North Carolina Football Staff Directory,* Univ. of N. Carolina, https://web.archive.org/web/20240503184201/https://goheels.com/staff-directory/clyde-christensen/3561 [https://perma.cc/76JF-NU29] (last visited July 16, 2025).

2. Aric DiLalla, *The Gold Standard: Peyton Manning Named a First-Ballot Pro Football Hall of Famer*, Denver Broncos (Feb. 6, 2021), https://www.denverbroncos.com/news/the-gold-standard-peyton-manning-named-a-first-ballot-pro-football-hall-of-famer [https://perma.cc/P3Y2-64EZ].

3. Darin Gantt, *Will Julius Peppers Become a First-Ballot Hall of Famer Tonight?*, Panthers (Feb. 08, 2024), https://www.panthers.com/news/will-julius-peppers-become-a-first-ballot-hall-of-famer-tonight [https://perma.cc/3MJQ-3UHD].

4. *G.O.A.T.*, Dictionary (June 28, 2018), https://www.dictionary.com/e/slang/g-o-a-t [https://perma.cc/G57J-Z46T].

5. *Clyde Christensen*, *supra* note 1.

6. *Id.*

7. Jean Dubiel, *Joint Readiness Training Center Academy Teaches Soldiers How to Coach, Facilitate Training*, Army (Apr. 14, 2017), https://www.army.mil/article/186103/joint_readiness_training_center_academy_teachers_soldiers_how_to_coach_facilitate_training [https://perma.cc/UAM6-TMKZ].

8. James Clear, *Vince Lombardi on the Hidden Power of Mastering the Fundamentals*, James Clear, https://jamesclear.com/vince-lombardi-fundamentals (last visited July 15, 2025).

9. Patrick Mahomes of the Kansas City Chiefs being one notable exception.

10. U.S. Dep't of Army, Doctrine Pub. 3-0, Operations (21 Mar. 2025).

11. U.S. Dep't of Army, Doctrine Pub. 5-0, The Operations Process (31 July 2019).

12. U.S. Dep't of Army, Field Manual 3-60, Army Targeting (11 Aug. 2023).

13. U.S. Dep't of Army, Field Manual 3-84, Legal Support to Operations (1 Sept. 2023).

14. U.S. Dep't of Army, Techs. Pub. 6-0.5, Command Post Organizations and Operations (1 Mar. 2017).

15. U.S. Dep't of Army, Techs. Pub. 3-92, Corps Operations (7 Apr. 2016).

16. U.S. Dep't of Army, Techs. Pub. 3-91, Division Operations (17 Oct. 2014).

17. U.S. Dep't of Army, Field Manual 3-96, Brigade Combat Team (19 Jan. 2021).

18. *Joint Electronic Library +*, Joint Doctrine, Educ. & Training Info. Sys., https://jdeis.js.mil/jdeis/generic.jsp [https://perma.cc/J78Y-TVFF] (last visited July 15, 2025).

19. *Insights and Best Practices*, Joint Chiefs of Staff, https://www.jcs.mil/Doctrine/focus_papers [https://perma.cc/3BHG-9X7B] (last visited July 15, 2025).

20. The Judge Advocate General's Legal Center and School offers training and resources on AI use, including restrictions on including any confidential, classified, or controlled information relating to individuals (including, for instance, personally identifiable information/protected health information in violation of The Privacy Act, HIPAA, and implementing Department of Defense instructions, manuals, Army Regulation 25-22, etc.), or confidential client information (regardless of whether the client is an individual or the U.S. Army). *See Standard Training Packages (STPs): Special Topics: Artificial Intelligence*, The Judge Advoc. Gen.'s Legal Ctr. & Sch. [hereinafter *TJAGLCS AI STPs*], https://tjaglcs.army.mil/en/resources/stp [https://perma.cc/JM3A-PAYE]; *see also Artificial Intelligence & Professional Responsibility – TJAGLCS Training Products Now Available!*, JAGCNet (July 16, 2025), https://www.jagcnet2.army.mil/Sites/JAGC.nsf/homeContent.xsp?open&doctype=announcement&documentId=9D537E11715C4E1285258CC9004D050A&refreshed=true (on file with The Army Lawyer).

21. *Mindfulness Exercises*, Mayo Clinic, https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/mindfulness-exercises/art-20046356 (last visited July 15, 2025).

22. This step is a workaround to compensate for lack of experience. As an OC/T develops experience, they will know where and when the most fruitful observations and areas of improvement will most likely occur, obviating the need for intense recording of observations.

23. Impactful events are where the OSJA/BDE had a particular success overcoming a problem, or where the section had an observable shortfall, difficulty, or gap in knowledge or expertise. Examples include: failing a mission due to lack of authority or lack of understanding as to such, an ROE violation or successful ROE change, no JA advice when the advice was requested or required on a time-sensitive issue, etc.

24. Note, a delta between occurrence/observation and doctrine does not necessarily mean that a mistake or wrong decision occurred. An AAR point may be a correction, a better/best practice, or a "best practice for our organization," i.e., a JA leader applying the art of leadership to their own formations. These are all equally valuable.

25. *See* sources cited *supra* note 20 and accompanying text.

26. The purpose behind this policy is twofold: (1) Users should "train as we fight"; if users are improperly handling fictitious information about people and operations, they are certainly more likely to do the same with real information, especially in high-stress and high-op-tempo environments. (2) Users should be mindful of the "Data Aggregation" or "Mosaic Theory," where adversaries are able to see and analyze otherwise harmless prompts in the aggregate to discover government secrets, operations, client information, etc. *See TJAGLCS AI STPs*, *supra* note 20.

Appendix 1: Sample AI Output[1]

LEGAL OBSERVATION SUMMARY CARD

Observation:

A paralegal attended a staff meeting and provided the notes afterward. Two attorneys in the legal office interpreted the notes differently and subsequently offered conflicting legal guidance to the staff.

Doctrinal Implications & References:

1. ATP 5-0.2-1: Staff Reference Guide to the MDMP

   - Highlights the importance of coordinated staff input.
   - JAs must ensure that legal advice is synchronized before it's presented to the commander or staff.
   - Legal contributions should be vetted as part of the MDMP to maintain unity of message.

2. AR 27-1: Legal Services

   - Establishes supervisory responsibility of the senior legal officer.
   - Conflicting guidance suggests inadequate oversight or coordination within the legal office.
   - Legal advice should reflect a consistent, office-wide position unless deliberately stated as a dissent or alternate view.

3. FM 6-0: Commander and Staff Organization and Operations

   - Requires cohesive, accurate legal input as part of operational planning.
   - Disparate advice from the legal team can disrupt decision-making and degrade commander trust.
   - Reinforces that legal support is a continuous and collaborative process.

4. AR 27-26: Rules of Professional Conduct for Lawyers

   - Rule 5.1–5.3: Supervisory and subordinate duties to ensure consistent, competent legal representation.
   - Legal advice must be the product of professional diligence and internal coordination.
   - Conflicting advice can erode command confidence and legal credibility.

Recommended Practices:

- Require a brief legal team huddle post-meeting to align on interpretation and legal output.
- Ensure the supervising attorney or SJA clears or consolidates all legal positions before staff distribution.
- Emphasize that legal opinions are issued on behalf of the office unless explicitly caveated.

1. Cesar Casal, ChatGPT, "Assess the observations and link them with applicable portions of the enclosed doctrinal references. Rank most frequent and related observations first. Observation: "A paralegal attended a staff meeting and provided the notes afterward. Two attorneys in the legal office interpreted the notes differently and subsequently offered conflicting legal guidance to the staff," (July 25, 2025) (on file with The Army Lawyer). This prompt was deliberately scrubbed of any sensitive, confidential, classified, or controlled information.

AROUND THE CORPS

82d Airborne Division paratroopers, including LTC Brian D. Lohnes, staff judge advocate, 82d Airborne Divsion (third jumper from the left), departed Fort Bragg and jumped north of the Arctic Circle in Norway in support of Swift Response 25 to demonstrate rapid deployment capabilities, joint interoperability, and operational readiness alongside NATO allies. (Photo Courtesy of LTC Brian D. Lohnes)


AIR FORCE
7184
AMC
CHARLESTON
7184
USAF

Commercial aquatic drones are staged in preparation for a demonstration for 2d Infantry Division Soldiers to showcase the capabilities of cutting-edge underwater vehicles. (Credit: SPC John Farmer)

Practice Notes

Cure Notices in Commercial Contract Terminations

By Major Kelly R. Snyder

From the infrastructure and systems that manage and support permanent changes of station[1] to our homeland's defense against the increasing threat of small unmanned aircraft systems,[2] commercial contracts play a critical role in supporting Department of Defense (DoD) missions. When nonconformance, delays, or other issues arise, the attorneys who advise contracting officers must be confidently ready to advise on the Government's options and the steps required to take certain actions.

If the Government has determined that it is necessary to terminate a commercial contract, the concepts and procedures for doing so vary from those for non-commercial contracts in subtle but important ways. The well-known mechanism for governing non-commercial contract terminations—Federal Acquisition Regulation (FAR) Part 49, Termination of Contracts[3]—does not primarily govern commercial contract terminations. Instead, contracting officers must follow the termination procedures found in the commercial products/services clause and FAR Part 12, Acquisition of Commercial Products and Commercial Services. They are, however, permitted to use FAR Part 49 "as guidance to the extent that Part 49 does not conflict with [Part 12] and the language of the termination paragraphs in 52.212-4."[4] These overlapping regulations have generated confusion about whether cure notices—warnings that the Government considers a contractor's work delinquent and a deadline for the contractor to "cure" the condition to prevent termination[5]—are required for commercial terminations for cause.[6] The express language of FAR 52.212-4(m) makes no mention of a cure notice requirement, while

FAR Parts 12 and 49, as well as the non-commercial default clauses for supplies and services, expressly provide for cure notices in certain situations.[7]

This article explores the overlapping frameworks surrounding cure notices for commercial contracts and explains when a cure notice is required. Drawing from FAR provisions, commercial contract norms, and key adjudications, it offers a path for judge advocates (JAs) to navigate this nuanced and important area of contract law while helping to prevent costly errors and delays in procurement actions.

Background

Commercial contract provisions "address, to the maximum extent practicable, commercial market practices."[8] They therefore differ from the sometimes lengthy and onerous provisions and clauses the Government uses for procuring non-commercial products and services. For example, a contract termination due to the contractor's failure to meet contractual requirements is called a "termination for default" for a non-commercial contract, while for a commercial contract, it is called a "termination for cause."[9] This distinction gets muddied, however, as the FAR's commercial termination clause seems to use the terms "cause" and "default" interchangeably.[10] FAR 52.212-4(m) provides the following regarding commercial contract terminations:

> *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.[11]

FAR 12.403(c) also applies to commercial contracts.[12] It states that contracting officers "shall send a cure notice prior to terminating a contract for a reason other than late delivery" and notes that the "excusable delays" provision (FAR 52.212-4(f)) should eliminate a need to send a show cause notice prior to termination because it requires contractors to notify the contracting officers "as soon as possible after commencement of any excusable delay."[13]

To further understand this landscape, it helps to consider commercial marketplace norms. The Uniform Commercial Code (UCC) typically governs private-sector commercial contracts.[14] While not binding, the Government looks to the UCC for guidance when regulations or the contract itself do not squarely cover a topic and to help practitioners understand how the commercial marketplace operates. Under the UCC, when a tender or delivery is rejected for nonconformance and the time for performance has not yet passed, sellers may notify the buyer of their intention to cure the failure and then make a proper delivery within the contract time period.[15] Even after the delivery time has elapsed, if a buyer rejects a nonconformance but the seller "had reasonable grounds to believe [it] would be acceptable," the seller may have reasonable time to cure the defect if they timely notify the buyer.[16]

Repudiation is another term of art relevant to cure notice requirements. It is synonymous with rejection, disclaimer, or renunciation, and it refers to the "refusal to perform a duty or obligation owed to the other party."[17] Repudiation can be evidenced through words or actions.[18] When done before the delivery or performance due date, repudiation is "an anticipatory breach of contract but does not constitute a breach unless the other party elects to treat it as such."[19]

Under the UCC, if "reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance."[20] This anticipatory repudiation is not limited to "cases of express and unequivocal repudiation."[21] Instead, it includes "cases in which reasonable grounds support the obligee's belief that the obligor will breach the contract."[22] The failure to provide adequate assurance of due performance within a reasonable time (not exceeding thirty days) constitutes repudiation of the contract.[23] Until the next performance due date, or until the aggrieved party has materially changed their position or elected and indicated they consider the repudiation final, the offending party may retract their repudiation "by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded."[24]

Application: When Cure Notices Are Required

While the FAR's commercial termination for cause provision does not explicitly require the Government to provide a cure notice and opportunity for the contractor to cure,[25] courts and boards will read this into the clause—at least for those situations either called for by FAR 12.403(c) or typically requiring such a notice under FAR Part 49.[26] This is important because "failure to give a cure notice, when required, will result in an improper termination" and will convert the termination into one for convenience, in which the Government incurs more liability and the contractor incurs much less.[27]

Some Terminations for Cause Require Cure Notices Despite FAR 52.212-4's Silence

In the 2005 General Services Administration Board of Contract Appeals (GSBCA) decision *Geo-Marine*, a Government contracting officer terminated a commercial task order without issuing a cure notice.[28] Highlighting confusion even within the Federal contracting profession, the contracting officer notified the contractor that they were being terminated for "default" under FAR 52.249-8—the termination for default provision—which the contract did not reference.[29] The contract did, however, contain the standard commercial items clause from FAR 52.212-4.[30] Because "the termination for default clause contained in [standard supply and service] contracts is similar to the termination for cause clause included in this commercial item contract," the GSBCA considered the "precedent which applies to standard supply and service contracts."[31] It noted that terminations for default do not

require a cure notice if the termination is based on failing to deliver or perform in a timely manner or on repudiating contractual duties before the performance deadline.[32] The board explained that "[a]lthough the commercial item contract termination for cause clause does not mention sending a cure notice, the regulations which apply to commercial item contracts require the Government to send a cure notice before terminating for any reason other than late delivery."[33]

Geo-Marine requested a summary judgment and that the termination be converted into a termination for convenience because a cure notice was not issued.[34] However, because they had not presented enough evidence to show that the termination was not based on non-performance or repudiation—which would not require a cure notice—the GSBCA denied the request.[35]

The Civilian Board of Contract Appeals (CBCA) has also read an implicit cure notice requirement into commercial contracts. In its 2016 *Brent Packer* decision, the CBCA found that "although the commercial termination provision, unlike the standard default clause, does not expressly reference the need for the contracting officer to issue a cure notice before terminating a contractor for failure to comply with contract provisions, FAR 12.403 imposes that requirement."[36] The board refused to "interpret the FAR in such a way as to render its requirement for issuance of a cure notice pointless" because a regulation's interpretation is "unreasonable if it would render portions of the regulation meaningless."[37]

In *Brent Packer*, the Social Security Administration (SSA) terminated for cause two calls of blanket purchase agreements (BPA) with two different contractors for medical consulting services.[38] The SSA terminated, without issuing a cure notice, each call and their underlying BPA because each contractor had accepted employment with a state agency, which violated the [organizational conflict of interest (OCI)] requirements of BPAs and call order[s]."[39] Although the CBCA said it was clear the SSA viewed the OCI provisions as a material requirement of the call orders, the board stated they "need not address the materiality issue here because, as the SSA acknowledges, it never issued a cure notice [to the contractors] before terminating their call orders for cause."[40]

While the SSA argued that issuing a cure notice would have been futile, and the CBCA agreed that cure notices are not required when they "would be futile (such as if, for example, a contractor expressly repudiates a contract)," the SSA had not explained why it would have been futile in that situation.[41] Because "it is well established that the . . . cure notice requirement is intended to allow an errant contractor a time certain within which to correct identified problems," and it was clear the contractors at issue would have corrected the identified problems to comply with the OCI provision, the termination was invalid.[42]

A Cure Notice Is Not Required When Terminating for Failed/Late Delivery/Performance

As the GSCBA did in *Geo-Marine*, the CBCA dealt with a challenge based on termination for cause without a cure notice in the 2007 *Bus. Mgmt. Rsch. Assoc., Inc. v. Government Services Agency* (GSA) case.[43] The CBCA noted that "a termination for cause is the equivalent of a termination for default, so we apply the same legal standards to both types of cases."[44] However, the contractor failed to provide two required training courses, and the board found that while "regulations governing commercial item contracts require the [GSA] to send a cure notice before terminating for any reason other than late delivery," when late delivery occurs, "no cure notice is required" prior to termination.[45]

The CBCA reinforced this ruling in 2012 when CDA, Inc. argued that the SSA was required to give it a cure notice before terminating for cause because the contracting officer stated in a deposition that "non-performance" was the basis for termination.[46] However, the board found that late delivery was the basis of the non-performance, and in accordance with the applicable regulations, "because CDA failed to deliver its services on time, SSA was not obligated to provide CDA with a cure notice."[47]

The Armed Services Board of Contract Appeals (ASBCA) has held the same in similar situations. *In re General Injectables & Vaccines, Inc.* involved the Defense Logistics Agency's termination for cause of a flu virus vaccine contract, without a cure notice, for failure to deliver without any excusable causes.[48] The notice of termination also explained, "As the contractor notified the contracting officer of its intent to not perform, the contracting officer will not send a cure notice or show cause letter to the contractor."[49] The ASBCA denied the contractor's appeal,[50] and the Court of Appeals for the Federal Circuit affirmed that decision.[51]

A Cure Notice Is Likely Required When Terminating for Anticipatory Repudiation

In *NCLN20, Inc. v. United States*, five days before performance was supposed to start on a facilities guard contract, the GSA issued a cure notice requiring the contractor, within twenty-four hours, to provide copies of permits and assurances that it could perform or be terminated for default.[52] The contractor was unable to comply, and two days later—three days prior to the performance due date—the GSA terminated for default.[53] The U.S. Court of Federal Claims noted that the doctrine of anticipatory repudiation has been incorporated into Government contract law, and it requires "that the contractor give reasonable assurances of performance but only in response to a validly issued cure notice."[54] Because the GSA failed to give a validly issued cure notice and only twenty-four hours to respond, the court barred the GSA from asserting anticipatory repudiation as a defense.[55]

In *Cross Petroleum, Inc. v. United States*, the contract required a ten-day cure notice, but the Forest Service did not issue one before terminating the fuel contract for default; it instead argued that a cure notice was not required because the contractor anticipatorily repudiated the contract.[56] The U.S. Court of Federal Claims once again rejected the Government's argument, and it noted that non-government contracts "requir[e] merely a vague 'demand' for adequate assurance, whereas the contract provision requires a formal cure notice that allows a ten-day period for cure."[57] Therefore, it appears that to terminate for anticipatory repudiation in the commercial contract setting, courts would require the Government to send a cure notice under FAR 12.403 because anticipatory repudiation is a "reason other

than late delivery" and all such bases for termination require a cure notice.[58]

Conclusion

Terminations for default/cause are considered "drastic sanction[s]" that should be utilized "only for good grounds and on solid evidence."[59] As such, JAs should review terminations for cause before the contracting officer issues them.[60] Legal counsel should get involved early in the process, as determining whether a cure notice is required can be a fact-intensive analysis. Even when a cure notice may not be legally necessary, it may be beneficial, such as when a contractor can still deliver soon or cure their failure. JAs should also advise contracting officers to issue cure notices to mitigate litigation risk—especially when the basis for termination is ambiguous or when it is unclear whether repudiation has actually occurred or is just anticipated. Given the high stakes of commercial terminations, this small procedural step can make a significant difference in ensuring that the Government's position will withstand scrutiny if challenged. **TAL**

Maj Snyder is a U.S. Air Force judge advocate and acquisition attorney within the Air Force Materiel Command Law Office at Wright-Patterson Air Force Base, Ohio. The views expressed in this article are solely those of the author and do not reflect the official policy or position of the U.S. Air Force, Department of Defense, or the U.S. Government.

Notes

1. *Statement by Chief Pentagon Spokesman Sean Parnell on Implementation Memorandum for Permanent Change of Station Joint Task Force*, U.S. Dep't of Def. (June 18, 2025), https://www.defense.gov/News/Releases/Release/Article/4221479/statement-by-chief-pentagon-spokesman-sean-parnell-on-implementation-memorandum [https://perma.cc/UED8-UPJA] ("Today the DoD terminated Home-Safe Alliance LLC (HSA), the DoD HHGs contractor, for cause due to HSA's demonstrated inability to fulfill their obligations and deliver high quality moves to Service members.").

2. *Anduril Awarded 10-Year $642M Program of Record to Deliver CUAS Systems for U.S. Marine Corps*, Anduril (Mar. 13, 2025), https://www.anduril.com/article/anduril-awarded-10-year-642m-program-of-record-to-deliver-cuas-systems-for-u-s-marine-corps [https://perma.cc/D5WX-2MYG].

3. FAR 12.403(a) (2025).

4. *Id.*

5. FAR 49.607(a) (2025).

6. *See* 1 Sec. 809 Panel, Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 43-45 (2018).

7. *See* FAR 12.403(c)(1), 49.402-3(d), 52.212-4(m), 52.249-8 (2025).

8. FAR 12.302 (2025).

9. *See* Paul J. Seidman et al., *Service Contracting in the New Millennium - Part II*, Briefing Papers 12 (West Group 2002).

10. FAR 52.212-4(m) (2025) ("The Government may terminate this contract, or any part hereof, for cause in the event of any *default* by the Contractor . . . . If it is determined that the Government improperly terminated this contract for *default*, such termination shall be deemed a termination for convenience.") (emphasis added); *see also* FAR 52.212-4(f) (2025) ("The Contractor shall be liable for *default* unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence . . . .") (emphasis added).

11. FAR 52.212-4(m) (2025).

12. FAR 12.403 (2025).

13. FAR 12.403(c)(1) (2025); *see also* FAR 52.212-4(f) (2025) ("[T]he Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.").

14. *See* Ralph C. Nash, Karen R. O'Brien-Debakey, & Steven L. Schooner, The Government Contracts Reference Book 520 (4th ed. 2013).

15. U.C.C. § 2-508(1) (A.L.I. & Unif. L. Comm'n 2023).

16. *Id.* § 2-508(2).

17. Nash et al., *supra* note 14, at 428.

18. *Id.*

19. *Id.*

20. U.C.C. § 2-609(1) (A.L.I. & Unif. L. Comm'n 2023); *see also* NCLN20, Inc. v. United States, 99 Fed. Cl. 734, 756 (2011), *aff'd*, 495 F. App'x 94 (Fed. Cir. 2012).

21. Danzig v. AEC Corp., 224 F.3d 1333, 1337 (Fed. Cir. 2000).

22. *Id.*

23. U.C.C. § 2-609(4) (A.L.I. & Unif. L. Comm'n 2023); *see also* Restatement (Second) of Contracts § 251 (A.L.I. 1981).

24. U.C.C. § 2-611 (A.L.I. & Unif. L. Comm'n 2023).

25. *See* FAR 52.212-4(m) (2025).

26. *See* Richard D. Lieberman, *Commercial Item Contracts Require Cure Notices Before Termination for Cause*, Pub. Contracting Inst., https://publiccontractinginstitute.com/commercial-item-contracts-require-cure-notices-before-termination-for-cause [https://perma.cc/Z3WF-NQRX] (last visited July 7, 2025).

27. Appeal of Bell, ENGBCA 5872, 92-3 BCA ¶ 25,076; Kisco Co. v. United States, 610 F.2d 742, 750-51 (Ct. Cl. 1979); FAR 52.212-4(m) (2025); *see also* John Cibinic, Ralph C. Nash & James F. Nagle, Administration of Government Contracts 964 (5th ed. 2016).

28. Geo-Marine, Inc. v. Gen. Servs Admin., GSBCA No. 16247, 05-2 BCA ¶ 33,048.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Brent Packer and Myrna Palasi v. Soc. Sec. Admin., 16-1 BCA ¶ 36,260.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Bus. Mgmt. Rsch. Assocs., Inc. v. Gen. Servs. Admin, CBCA 464, 07-1 BCA ¶ 33,486.

44. *Id.*

45. *Id.*

46. CDA, Inc. v. Soc. Sec. Admin,, CBC 1558, 12-1 B.C.A. ¶ 34,990.

47. *Id.*

48. In Re Gen. Injectables & Vaccines, Inc., ASBCA No. 54930, 06-2 B.C.A. ¶ 33,401.

49. *Id.*

50. *Id.*

51. Gen. Injectables & Vaccines, Inc. v. Gates, 519 F.3d 136 (Fed. Cir. 2008).

52. NCLN20, Inc. v. United States, 99 Fed. Cl. 734 (2011), *aff'd*, 495 F. App'x 94 (Fed. Cir. 2012).

53. *Id.* at 755.

54. *Id.* at 756 (quoting Danzig v. AEC Corp., 224 F.3d 1333, 1338 (Fed. Cir. 2000) (internal quotations omitted).

55. *Id.*

56. Cross Petroleum, Inc. v. United States, 54 Fed. Cl. 317, 325 (2002).

57. *Id.* at 326.

58. FAR 12.403(c)(1) (2023). *See also* Appeal of -- Bulova Techs. Ordnance Sys. LLC, ASBCA No. 59089, 18-1 BCA ¶ 37183 (Government sent what was "tantamount to a cure notice" seeking assurances including supporting documentation, contractor responded with inadequate conditional assurances, and ASBCA upheld termination for cause.).

59. *Cross Petroleum, Inc.*, 54 Fed. Cl. at 326.

60. *See, e.g.*, DAFFARS 5333.290(b) (Oct. 16, 2024).

(Credit: Keneth Abbate)

Feature

A View from the Bench

Not the Discovery You Wanted, but Maybe the Discovery You Deserve

By Lieutenant Colonel Robert E. Murdough

You can't always get what you want
But if you try sometimes
You just might find
You get what you need[1]

The Defense Perspective: Oh great! The case just got referred, now we can finally get into real discovery. Let's ask for all the things on our list. But we don't know what we don't know. What else might be out there? Let's use the standard discovery request to make sure we don't miss anything.

The Government Perspective: Oh great . . . Here's the same discovery request we get in every case, right down to the typos. How many ways can they ask for the same thing? Let's see if we can figure out what they really want, then we'll deny everything else as "vague and overbroad" and see if they put up a fight.

The Judge's Perspective: Oh great. A motion to compel. I'm probably going to have to grant a hearing just to get the Defense to explain in plain English what they're really requesting, and then let's see if the Government can really look me in the eye and explain why they shouldn't give it to them. Tell me we're going to have a continuance without telling me we're going to have a continuance.

Military discovery practice[2] is routinely described as "liberal" and "broad."[3] For decades, the *Manual for Courts-Martial* (*Manual*) has reminded practitioners that military discovery is "broader than is required in Federal practice" and is "quite liberal," because "broad discovery" is "essential to the administration of military justice."[4] In theory, this should seem very straightforward. And yet, discovery problems plague military justice practice, leading to delays,[5] mistrials,[6] outright dismissals of charges,[7] and appellate reversals.[8] Meanwhile, "the typical boilerplate request for discovery"[9] can confound defense efforts to obtain relevant evidence, obscuring the requester's true need and intent. The end result is that neither side gets the discovery they want, even though often they get the discovery (or the discovery problems) they deserve.

A review of the military's discovery caselaw shows that many and probably most discovery violations are not the result of practitioners' bad faith or malicious intent.[10] A dearth of unethical prosecutors in our midst should be reassuring, but not surprising. This then begs the question: why do problems persist? This article does not aim to answer this question so much as to reduce their recurrence. Nonetheless, I offer a couple of theories at the outset.

First, discovery in the military is "broader than required in Federal practice" in part because of the unique nature of military life. In the military, unlike in any civilian jurisdiction, "the Government" that investigates and prosecutes the accused is also the accused's employer and potentially their landlord, doctor, grocery store, insurance provider, child's school, fitness center, cafeteria, and more. And if that is not enough, the same is often true for the investigators, alleged victims, and trial witnesses. In each of these roles, the Government *writ large* generates records and data about Service members. This greatly broadens the possible scope of a prosecutor's "reasonable diligence" in searching for and identifying discoverable evidence. At the same time, it requires increased diligence and precision on the part of requesting defense counsel.

Another reason is the dearth of established standards and practices. The U.S. Department of Justice has a comprehensive (and public) policy for how its attorneys will meet their discovery and disclosure obligations,[11] including a step-by-step process for discovery in criminal cases,[12] and both mandatory training for all new Federal prosecutors and ongoing training for all prosecutors specifically on discovery obligations.[13] By contrast, most of the military Services appear to have few Service-level discovery policies; the Marine Corps and Air Force are notable exceptions.[14] This means, particularly in the Army, that policies (when they exist) are inconsistent across various installations and offices, training occurs at best on an *ad hoc* basis, and best practices and lessons learned across a Service (and among all Services) are not always identified, disseminated, codified, or preserved. This gap in policy and training means that some prosecutors may not fully grasp the breadth and significance of their discovery obligations, leading to the kinds of unnecessary "not in bad faith, but still a violation" outcomes described above.

This "view from the bench" is not meant to serve as a substitute for such policies and training, but perhaps to explain why such policies and training are useful for both prosecutors and defense attorneys and to assist in their creation or modification. From at least this judge's perspective, a great deal of friction, delay, inefficiency, frustration, and potential for error at the trial level could be resolved with more precision on the part of the defense and greater understanding on the part of prosecutors.

The next section—The Law of Discovery—reviews the statutory and regulatory structure of the military's discovery and production systems. The final section—Discovery Practice and Litigation—explores the relevant caselaw and the lessons practitioners can glean from it, alongside recommendations and best practices.

The Law of Discovery

The starting point for military discovery is Article 46(a) of the Uniform Code of Military Justice (UCMJ), which reads:

> In a case referred for trial by court-martial, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.[15]

This simple statutory mandate belies the complex procedural structure created by the remainder of Articles 46 and 47, as well as the "regulations as the President may prescribe" to which it refers—primarily (though, as described below, not entirely) Rules for Courts-Martial (RCM) 701 and 703.[16] Owing primarily to the traditionally command-centric nature of military justice, where the authority to issue orders and to obligate the necessary funds to effectuate them resides with commanders, the trial counsel, as the representative of the military authority, is in practice personally responsible for obtaining evidence on behalf of the defense counsel and the court-martial. This includes effectuating the accused's constitutional right to compulsory process to obtain witnesses and evidence in their favor.[17] Above this statutory and regulatory scheme, the constitutional doctrines of *Brady v. Maryland*,[18] including its progeny *Giglio v. United States*[19] and *Kyles v. Whitley*,[20] apply to courts-martial to the same degree as all Federal trials.

This means that military trial counsels' discovery duties include their duty as prosecutors and "representative[s] . . . of . . . [the] sovereignty"[21] to ensure a constitutionally fair trial, their duty as the face and representative of military authority, and their duty as the enabler and facilitator of the defense's rights to evidence and witnesses. Identifying the contours of these responsibilities, as discussed more below, requires attentive participation by both prosecutors and defense counsel, as well as military judges when necessary.[22] But first, this part reviews the regulatory framework that establishes the discovery process.

What the Government Must Do Without Being Asked

The *Manual* imposes certain discovery-like obligations between preferral and referral of charges. Once charges are preferred, subject to ordinary restrictions on privileged material, work product, contraband, and the like, the trial counsel must "as soon as practicable" provide the defense not only copies of the charges, but any materials that accompanied the charges when preferred.[23] Usually this includes the reports of the investigation(s) upon which the charges are based. Among other things, this allows the defense to explore the basis for the accuser's

knowledge and belief in the truth of the charges.[24]

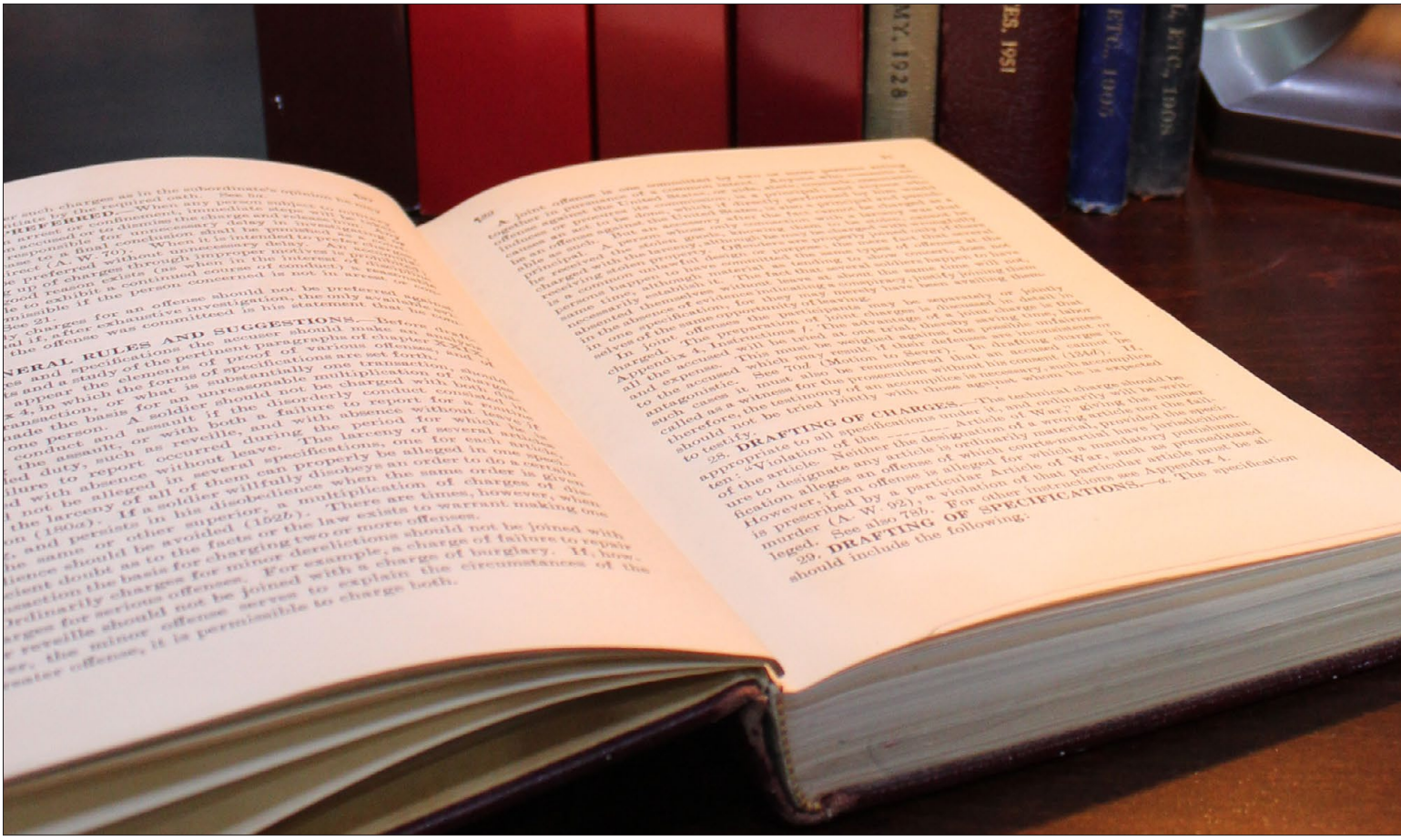
The Article 32 preliminary hearing, though explicitly "not intended to serve as a means of discovery,"[25] provides certain notice requirements for both parties. The trial counsel must inform the hearing officer and defense counsel of the name and contact information for all witnesses the Government intends to call, notice of any other evidence the Government intends to offer, as well as notice of any other supplemental information the Government intends to submit.[26] Once complete, it is the trial counsel's responsibility (though in practice the hearing officer will often do this themselves) to provide the accused with a copy of the report.[27]

And upon referral of charges, the trial counsel must provide[28] the defense with the papers that accompanied the charges at referral, the written determinations and recommendations by special trial counsel or commanders, papers associated with a rehearing or new trial, the convening order, and any sworn or signed statement relating to an offense charged in the case that is in the possession of the trial counsel.[29] Most likely, the first and last would have already been provided at an earlier step, but the requirement to provide written statements triggers an extra check for the prosecution.

From preferral to referral, the basic premise is that the trial counsel must provide whatever evidence supports the action being taken. But once charges are referred, RCM 701 applies in full, along with many other rules scattered throughout the *Manual*, triggering multiple discovery and notice requirements even in the absence of a defense request:

Lady Justice, pictured at the 68th Military Judges Course Graduation, The Judge Advocate General's Legal Center and School, Charlottesville, VA. (Credit: Billie Suttles, TJAGLCS)

- names and contact information of witnesses the trial counsel intends to call in the prosecution case in chief or to rebut one of the special defenses listed in RCM 701(b)[30]
- records of prior convictions of the accused of which the trial counsel is aware and *may* offer for any purpose on the merits[31]
- in a capital case, specific aggravating factors that the Government asserts warrant the death penalty[32]
- statements of the accused and derivative evidence[33]
- evidence seized from the person or property of the accused that the prosecution intends to offer at trial[34]
- evidence of a prior identification of the accused at a lineup or other identification process and derivative evidence that the prosecution intends to offer at trial[35]
- notice of evidence of prior crimes, wrongs, or acts the prosecution intends to offer under Military Rule of Evidence 404(b), including the permitted purpose and reasoning that supports the purpose[36]
- notices related to classified evidence[37]
- notice of intent to offer evidence under the residual hearsay exception[38]
- notice of intent to offer a record self-authenticated as a "certified domestic record of a regularly conducted activity"[39]
- notice of intent to offer a record self-authenticated as a "certified record generated by an electronic process or system"[40]
- notice of intent to offer a record self-authenticated as "certified data copied from an electronic device, storage medium, or file"[41]
- evidence favorable to the defense[42]



The *Manual for Courts-Martial* (Credit: LTC Mary E. Jones)

The last item on that list is probably the most litigated doctrine in discovery law, because—as described in the next section—while the obligation exists even in the absence of any defense request,[43] the scope of the obligation is extremely case-dependent and the stakes are exceptionally high.[44]

The duty to disclose favorable information stems from both *Brady* and RCM 701(a)(6). While RCM 701(a)(6) is sometimes analogized as the implementation of *Brady* within the military,[45] this description is imprecise. RCM 701(a)(6) differs from *Brady* in timing, scope, and remedy.

A prosecutor's constitutional *Brady* obligation requires disclosure of the evidence to the defense with sufficient time to make use of it at trial. *Brady* does not require the Government to point out evidence that the defense already knows or reasonably should know.[46] RCM 701(a)(6), on the other hand, requires disclosure "as soon as practicable" and does not expressly exclude evidence of which the defense may already be aware.[47]

A constitutional *Brady* violation occurs when evidence not disclosed is "material," which means "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[48] Thus, the scope of *Brady* is inherently retrospective; it requires a post-trial examination of what happened at trial. The scope of RCM 701(a)(6), on the other hand, is prospective—it requires disclosure of any evidence that "reasonably tends" to negate or reduce the degree of guilt, reduce the punishment, or adversely affect the credibility of any prosecution witness or evidence.[49] Because it is prospective, it is inherently broader and does not depend on a *post hoc* assessment of, for example, the strength of the Government's case or the materiality of the evidence at issue.[50] And while the remedy for a *Brady* violation is always reversal of the conviction,[51] a violation of RCM 701(a)(6) is treated the same as a violation of any other discovery rule.[52]

Thus, at trial, RCM 701(a)(6) rather than *Brady* better reflects the breadth of the prosecutor's obligations to disclose favorable evidence, and trial-level litigation focuses on whether the Government is obligated to provide certain evidence or categories of evidence. How the contours of this evidence change in each case is discussed more below.[53] Luckily for prosecutors, diligent compliance with RCM 701(a)(6) should also satisfy their *Brady* obligations.

What the Defense Must Request (If They Want It)

Certain provisions in the *Manual* require the Government to provide information or evidence only when asked to do so by the defense. These include, for example, information to be offered at sentencing,[54] written questionnaires to panel members,[55] and written materials considered by the convening authority when selecting panel members.[56] If the defense wants these, the defense needs to ask. Also, notwithstanding that it is not a

discovery vehicle, the procedures of Article 32 preliminary hearings allow the defense to request production of witnesses and evidence relevant to the limited scope and purpose of the hearing.[57]

But the bulk of defense discovery requests are based in RCM 701(a)(2) and RCM 703(f).[58] Generally, the former deals with material that is in the possession, custody, or control of military authorities, and the latter deals with material that is not.

RCM 701(a)(2) requires the trial counsel, upon the defense's request, to provide "books, papers, documents, data, photographs, tangible objects, buildings, or places, or copies of portions of these items"[59] and "results or reports of physical or mental examinations, and of any scientific tests or experiments, or copies thereof . . . the existence of which is known or by the exercise of due diligence may become known to the trial counsel"[60] if any of these items are "within the possession, custody or control of military authorities"[61] and:

(i) the item is relevant to defense preparation;
(ii) the Government intends to use the item in the case in-chief at trial;
(iii) the Government anticipates using the item in rebuttal; or
(iv) the item was obtained from or belongs to the accused.[62]

The latter three requirements are fairly straightforward and the scope of the Government's discovery responsibilities is easy to define. Most defense discovery requests, and most litigation resulting therefrom, arise from the first—defining what is "relevant to defense preparation" in each case, which is discussed further below.

As mentioned in the introduction, defense counsel in courts-martial have no independent ability to subpoena evidence or issue any form of compulsory process. Thus, for evidence outside of military possession, custody, or control, the defense must submit a request for evidence to the trial counsel under RCM 703(f). This request "shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence."[63]

All the above are usually combined into a single "discovery request" served on the trial counsel shortly after referral of charges. As discussed below, a well-thought-out, precise, and comprehensive discovery request is often the starting point to effective discovery practice.[64]

The Defense's Reciprocal Obligations

Though discovery is *mostly* one-directional, from the Government to the defense, the defense has limited obligations of notice and disclosure as well. The defense, like the trial counsel, is required to identify its witnesses and provide sworn or signed statements known by the defense to have been made by those witnesses in connection with the case.[65] And, upon request from the trial counsel, the defense must identify witnesses and evidence to be offered at sentencing.[66] If the defense requests discovery of books, papers, documents, data, photographs, tangible objects, buildings, or places under RCM 701(a)(2)(A), the defense must, upon request from the trial counsel, provide this category of evidence to the Government when the item is within the possession, custody, or control of the defense *and* the defense intends to use it in its case in chief at trial.[67] Similarly, if the defense requests discovery of examinations or scientific tests under RCM 701(a)(2)(B), the defense must, upon request from the trial counsel, provide this category of evidence to the Government if the defense intends to use the item itself, or it was prepared by a witness the defense intends to call, in its case in chief at trial.[68] Additionally, the defense is bound by the same notice requirements found in the Military Rules of Evidence, for example, those concerning self-authenticating documents or residual hearsay.[69]

Here, it is important to highlight RCM 914, which is the military implementation of the *Jenks* Act.[70] The rule states:

> After a witness other than the accused has testified on direct examination, the military judge, on motion of a party who did not call the witness, shall order the party who called the witness to produce, for examination and use by the moving party, any statement by the witness that relates to the subject matter concerning which the witness has testified . . . .[71]

For prosecution witnesses, the rule applies to any statement in the possession of "the United States."[72] For defense witnesses, the rule applies to any statement in the possession of the accused or defense counsel.[73]

For the Government, this rule is in most situations superfluous—it is difficult to conceive of such a statement that would not already be provided to the defense under RCM 701. Problems arise for the Government when the statement *once* was in the possession of the Government but is subsequently lost or destroyed.[74] But the rule applies equally to defense witnesses. Thus, when the defense calls a witness (other than the accused), any statements or documents prepared and any recorded communication from that witness to the defense counsel *about the subject matter of their testimony* now become subject to disclosure under this rule. This is especially significant when it comes to defense expert witnesses, who may prepare a number of statements or documents in preparation for their testimony.

As the discussion to the rule states, "counsel should anticipate legitimate demands for statements under this and similar rules;"[75] defense counsel must be alert to this requirement and prepared to respond to such requests from the Government if required, because they likely will happen mid-trial.

Role of the Military Judge

From the first session of the court-martial, the military judge controls the timing of discovery. The military judge may (and, at least in a contested trial, usually will) "specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just."[76] Frequently, a military judge will do so using a pretrial order or trial management order.

These orders are significant in a couple of aspects. First, they are a lawful exercise of the judge's ability to regulate discovery and, more broadly, "exercise reasonable control over the proceedings to promote the purposes of [the RCM and the *Manual*]" including the rules pertaining to discovery.[77] As the Army Court of Criminal Appeals recently reminded practitioners, "a court's deadlines are not frivolous, nor are the orders they issue."[78] Thus, even if a provision in the *Manual* requires a certain notice or disclosure to be made only "before trial begins," counsel disregard the earlier suspense at their peril.

Second, at the outset of trial, any motion to compel discovery or production of evidence is forfeited if it is not made before the accused enters a plea,[79] which normally occurs at the initial session of the court-martial,[80] unless the military judge finds good cause to allow such motion at a later point.[81] For a time, at least in the Army, defense counsel would routinely "defer entering a plea," presumably to extend this extremely short suspense.[82] After the Army Court of Criminal Appeals discouraged such a practice and the potential gamesmanship that could ensue,[83] today, few if any Army judges will permit the accused to defer entering a plea at arraignment. Instead, the issuance of the pretrial order, setting deadlines for discovery requests and follow-on motions to compel discovery and production, is itself good cause to defer filing such requests and motions, without needing to defer entering a plea until the motion is resolved.[84] But after *that* deadline has passed, the party must have good cause for failing to meet the suspense set in the order—and "good cause does not exist when 'the [moving party] knew or could have known about the evidence in question before the relevant deadlines.'"[85]

In addition to regulating the timeline, the military judge resolves discovery disputes once presented to them. As discussed above, the defense must first request evidence under RCM 701(a)(2) and 703(f) through the trial counsel. If the trial counsel denies the request, the matter is then ripe to put before the military judge in a motion for appropriate relief to compel the Government to either permit discovery or to produce the evidence.[86] Disputes about what is relevant to defense preparation under RCM 701(a)(2), where the Government must look under RCM 701(a)(6), or whether evidence should be produced under RCM 703(f), form the bulk of discovery litigation, which is the subject of the next part.

Discovery Practice and Litigation

The sections above discussed the law of discovery and the relevant procedural rules that govern it. This part talks about how to execute these procedures, both for the Government and defense.

Defense—Request What You Need, and Show Your Work

In practice, discovery begins in earnest when the defense submits a discovery request, which usually combines rote requests for panel questionnaires, sentencing material, and the like with requests for evidence in the possession, custody, or control of military authorities under RCM 701(a)(2) and requests for production under RCM 703(f). And after many years both as a litigator and judge, I have come to believe that the near-ubiquitous discovery template used throughout the Army inhibits more than facilitates useful discovery. These requests can be characterized by inconsistent levels of specificity and a lack of focus. They can also risk appearing as if the defense is throwing spaghetti at a wall to see whether the trial counsel or military judge will help make any of it stick. More streamlined, focused, and precise requests will almost certainly be of more use to defense counsel than the twelve-page miasma in current use.

Defense counsel who use the typical discovery request appear to approach discovery from the viewpoint of casting as wide a net as possible (the fishing metaphor is deliberate). Such requests are riddled with phrases like "any and all," "including but not limited to," "in whatever form and wherever located," and so on, even to the point of repetition. In writing this, I reached into the files of several dozen concluded cases and at random pulled a couple defense motions to compel discovery to which the counsel had appended their original discovery request.[87] Unsurprisingly, though each contained a few requests unique to that case, they were for the most part identical—including, for example, three different phrasings in three different paragraphs seeking medical records of any alleged victim, repeatedly asking for records of "Article 15s" and "nonjudicial punishment" (which are the same thing), and most were exceedingly broad in scope yet scant on detail.

Why does this matter? Why not just ask for everything that might exist and see what happens? When it comes to RCM 701(a)(2), there is a key distinction between a general request and a specific request, and the obligations of the trial counsel to follow up on them.

In *United States v. Ellis*, the Army Court of Criminal Appeals listed three necessary components of a "specific request" under this rule:

> First, the request must, on its face or by clear implication, identify the specific file, document, or evidence in question.
>
> Second, unless the request concerns evidence in the possession of the trial counsel, the request must reasonably identify the location of the evidence or its custodian.
>
> Third, the specific request should include a statement of expected [relevance] of the evidence to preparation of the defense's case unless the relevance is plain.[88]

A specific request does not just say "what," it includes "where" and "why." Caselaw gives several examples of the difference between general and specific:

General	Specific
"Any record of prior conviction, and/or nonjudicial punishment of any prosecution witness"[89]	Disciplinary record of the lead investigator, who the defense learned had previously been disciplined[90]
"Disclosure of all evidence affecting the credibility of any and all witnesses, potential witnesses, complainants, and persons deceased who were in any way involved with the instant case and/or any charged or unrelated offenses, including but not limited to . . . ."[91]	Agreement between a specific named witness and the Government to cooperate[92]
"All known evidence tending to diminish the credibility of witnesses or alleged victims or alleged co-actors, including, but not limited to . . . ."[93]	By-name request for clinical post-assault notes at an identified clinic[94]
"All relevant associated reports"[95]	Update to the Criminal Investigation Division (CID) case activity summary[96]
"Any results of scientific reports or experiments"[97]	"Any reports, memos for record, or other documentation relating to [q]uality [c]ontrol and/or inspections pertaining to quality control at [an identified laboratory] for the three quarters prior to [Appellant]'s sample being tested, and the available quarters since [Appellant]'s sample was tested.[98]

The difference between the two is significant both for the scope of the trial counsel's obligations to look for the evidence and the effect of an error on appellate review. When a defense request for discovery is a general request, the breadth of the trial counsel's obligation to search for the evidence is limited to whatever reasonable diligence requires in that case—"a request for information under RCM 701(a)(2) must be specific enough that the trial counsel, through the exercise of due diligence, knows where to look."[99] And "neither Article 46 [implemented through, *inter alia,* RCM 701] nor the *Brady* line of cases require the prosecution to review records that are not directly related to the investigation of the matter that is the subject of the prosecution, *absent a specific defense request* identifying the entity, the type of records and the type of information."[100]

When the defense makes a general request, the trial counsel does not need to rifle through unrelated personnel records, email archives, cloud file storage, etc., to see what might be there. After exercising reasonable diligence, the trial counsel may properly respond that there is no responsive information.[101] On the other hand, when the defense points the trial counsel to a specific item and tells them where to look, the trial counsel is expected to go there and "actually ask" if the evidence exists.[102] And, "[t]o the extent that relevant files are known to be under the control of another governmental entity, the prosecution must make that fact known to the defense and engage in 'good faith efforts' to obtain the material."[103]

In other words, a narrow request requires *more* from the prosecution than a broad request. The more narrow the request, the more the prosecution has "reasonable notice or prospect" that relevant (and possibly exculpatory) evidence may be found there.[104] And, on appeal, when the defense makes a specific request and the prosecution erroneously withholds evidence, the burden is on the Government to prove that the nondisclosure was harmless *beyond a reasonable doubt*, rather than the more deferential "reasonable probability of a different outcome" standard applied to a general request.[105] Finally, exhaustively repeating the prosecutor's "existing obligations under *Brady*"[106] without particularity or specificity is just meaningless extra volume; repeatedly asking for "any evidence affecting credibility" with different wording does not in any way broaden the scope of the prosecutor's responsibilities to search for that sort of material. RCM 701(a)(6) and *Brady* apply equally "whether there is a general request or no request at all."[107]

Rather than continuously and inefficiently submitting rote requests into the ether of discovery procedure, Larry Pozner and Roger Dodd suggest a much better approach:

> The discovery process works best and is most economically conducted when it is aimed at proving a defined theory of the case, or attacking the opponent's presumed or announced theory of the case. The lawyer cannot ask a corporation to produce all documents on all issues. Even if it were possible to do so, the result would be stacks of useless paper. Instead, the advocate first formulates a theory of the case before envisioning what types of documents might exist to support that theory . . . .[108]

Discovery, like every other aspect of trial preparation and practice, is best employed in service of the defense's theory of the case—"a cogent statement of an advocate's position that justifies the verdict he or she is seeking."[109] This of course requires the defense counsel to *have* a theory of the case and do some legwork themselves before and during the discovery process, so they can focus their time going after what really matters. The discovery process is not "a substitute for their own efforts to assemble and select relevant admissible evidence."[110]

To put it in plain, useful terms, it is counterproductive for defense counsel to demand that the trial counsel identify and then rifle through the medical records of every witness while pointedly yet needlessly reminding them that the military does not recognize a doctor-patient privilege by citing a twenty-year old case.[111] As the caselaw referenced above shows, it is far more beneficial to identify a specific record or location where records are expected to be, articulate the ex-

Absent a specific request, the trial counsel barely needs to lift a finger to go broader than what is likely already going to be provided anyway under other discovery rules. The broader requests are actually easier for the trial counsel to deny once they have looked where they are already expected to look anyway, and less likely to yield favorable results for the defense before the trial or appellate courts.

pected relevance to the defense preparation, and require the trial counsel to go look. Placing scare quotes around words like "titling" and "local file," in the midst of an exhaustive list of all possible types of personnel records ("including but not limited to") diminishes the efficacy of the request when these terms have official definitions in published policies, especially when these policies also indicate with specificity *where* such records are maintained.[112]

The trial counsel is not required to "search for the proverbial needle in a haystack. [They] need only exercise due diligence in searching [their] own files and those police files readily available to [them]."[113] Absent a specific request, the trial counsel barely needs to lift a finger to go broader than what is likely already going to be provided anyway under other discovery rules. The broader requests are actually *easier* for the trial counsel to deny once they have looked where they are already expected to look anyway, and less likely to yield favorable results for the defense before the trial or appellate courts.

Government's Responsibilities—How Far Do You Need to Go?

As described above, when the defense makes a specific request under RCM 701(a)(2) for records in the possession of military authorities, the trial counsel is expected to "actually ask" if those records exist.[114] In other words, they must go to the place the defense says to look and look there, if it is within the possession of military authorities. If the prosecution refuses, the defense can file a motion for appropriate relief.[115] When the defense makes a request for evidence outside of military possession, the defense request must comply with RCM 703(f), which includes "a statement of where it can be obtained" as well as "a description of each item sufficient to show its relevance and necessity."[116] If the trial counsel disputes the existence or relevance of the evidence, the defense can file a motion for appropriate relief.[117] Whether under RCM 701 or 703, as long as the request is specific enough and the relevance of the evidence at issue can be discerned, the trial counsel is likely required to "go look."

Much like precision and specificity can help the defense in crafting better requests, precision and specificity can help the trial counsel craft better responses—and possibly head off litigation by avoiding misunderstanding. One simple improvement is to respond in complete sentences. Instead of merely replying "granted" or "denied as irrelevant, vague, and/or overbroad" to each paragraph in the defense request, be specific. For example:

> The Government will produce A, B, and C. If the defense believes that there are other relevant records responsive to this request, the Government requests that the defense identify the location where they may be found or appropriate custodian of record.
>
> Or,
>
> The Government will produce CID file xxx-xxx-xxx and the AR 15-6 investigation dated yyy conducted by n into the conduct alleged in Specification 2 of Charge III. If the defense requests any additional records of investigations, the defense may supplement this request identifying the organization or custodian of record where these records exist.

In the face of only a general request or no request at all, *Brady* and RCM 701(a)(6) predominantly define the scope of the prosecution's duty to search for evidence. For the Government, the most frequent basis of dispute and litigation, both before and after trial, is identifying the contours of this obligatory search.

The prosecutor's duty to search for favorable or relevant evidence includes the "core files" that include both the prosecution itself as well as those acting on the Government's behalf *in that particular case*, to include law enforcement.[118] The outer limit of the search is those records that are in the "actual or constructive" possession or knowledge of the prosecution.[119] Defining the scope of this obligation is particularly challenging in the military, because—as discussed above—for Service members, "the Government" is not just investigators and prosecutors—it is also responsible for their and their families' employment, housing, food, clothing, medical care, and education. Thus, "the outer parameters must be ascertained on a case-by-case basis."[120]

Here, the distinction between RCM 701(a)(2) and 701(a)(6) is important. While RCM 701(a)(2) refers to any evidence in the possession, custody, or control of "military authorities," RCM 701(a)(6) refers specifically to the trial counsel. In this sense, using "Government" as a shorthand for the trial counsel or the prosecution is faulty; "for *Brady* purposes, information under the control of the 'prosecution' is not the same as information under the control of the entire [G]overnment."[121] In *United States v. Stellato,* the Court of Appeals provided some examples of items that are in the "constructive" possession of the prosecution:

1) the prosecution has both knowledge of and access to the object;
2) the prosecution has the legal right to obtain the evidence;
3) the evidence resides in another agency but was part of a joint investigation; and
4) the prosecution inherits a case from [local law enforcement] and the [evidence] remains in the . . . [local agency's possession].[122]

Most famously, *Stellato* stands for the seemingly obvious proposition that the Gov-

ernment may not remain willfully ignorant of exculpatory evidence.[123] But, beyond the core prosecutorial and investigatory files, how much broader must the conscientious prosecutor search, especially when the case-law disclaims the need to find any "needle in the haystack"[124] and decries the "impermissible general fishing expedition"?[125]

"[T]he parameters of the review that must be undertaken outside the prosecutor's own files will depend in any particular case on the relationship of the other governmental entity to the prosecution and the nature of the defense discovery request."[126] The trial counsel is expected to learn what agencies had a hand in that particular case and search their files accordingly.[127] Beyond that, the trial counsel is required to search files of "other governmental agencies . . . when there is some reasonable prospect or notice of finding exculpatory evidence."[128] For example, an administrative investigation involving a witness in another unit about an unrelated matter is not within the actual or constructive possession of the trial counsel unless the trial counsel has some reason to know about it—perhaps because it is mentioned in the CID file or the defense discovery request for the case currently being tried[129] (providing further incentive for defense counsel to be more precise in their discovery requests).

A major source of potential RCM 701(a)(6) and *Brady* violations is not the scope of the search beyond what the trial counsel knows, but the trial counsel's failure to recognize when something in front of them is exculpatory. Evidence subject to disclosure under RCM 701(a)(6) and *Brady* includes evidence that can impeach the credibility of a Government witness or evidence.[130] One of the most fertile grounds for impeachment is the classic "prior inconsistent statement."[131] This is an exceptionally broad category of potential *Brady* material, because inconsistency "is not limited to diametrically opposed answers but may be found as well in evasive answers, inability to recall, silence, or changes of position."[132] Moreover, omissions, or a "previous failure to state a fact in circumstances in which that fact naturally would have been asserted," are also fodder for impeachment.[133] As most investigators typically begin with very broad questions like "tell me what happened," potential impeachment material arises any time a witness adds or alters details in subsequent interviews.

In practical terms, this means that *any* time a witness provides inconsistent or new relevant information, whether orally, in writing, or via tangible evidence, to prosecutors or investigators, even if the new information is not itself exculpatory for the accused, it most likely "reasonably tends" to adversely affect that witness's credibility.[134] Thus, failure to disclose is a violation of RCM 701(a)(6), if not of *Brady*.[135] With these extraordinarily high stakes, prosecutors must be diligently attentive during pretrial preparation *and* have reliable systems to identify and disclose any possible inconsistencies or omissions. As discussed in the next section, the consequences of failure are severe.

When the Judge Gets Involved

When a party avers that their opponent has committed a discovery violation, it often perceptibly raises the tension, even more so as the trial date gets closer and eventually arrives. This is likely at least in part because the discovery rules are so closely tied with the standards of professional conduct concerning duty as a prosecutor, fairness to opposing parties, candor to the tribunal, and so forth.[136] Alleging a discovery violation often feels close to leveling an ethical violation, even if there is no assertion of bad faith by any party.[137] In this regard, the first role of the military judge is sometimes just lowering the temperature and trying to dispassionately and impartially distill the facts and their significance.

But when the trial judge[138] determines that a discovery violation has occurred—which includes a violation of the deadlines set for discovery—the question becomes what to do about it. RCM 701(g)(3) lists four possible options:

(A) Order the party to permit discovery;
(B) Grant a continuance;
(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and
(D) Enter such other order as is just under the circumstances.[139]

Option A is easiest well before trial. For example, on a motion to compel, when the judge determines certain evidence is within the scope of RCM 701(a)(2) and the Government has not provided it, the judge orders the Government to provide it to the defense or give the defense access to it.

Option B becomes more fraught the closer to trial you get. A continuance months before trial is not nearly as disruptive as a continuance on the eve of trial or even in the middle of trial. But when counsel are blindsided by new information just hours before the start of a trial for which they have prepared extensively, a continuance can be extremely frustrating—not just for the litigators, but the accused, alleged victims, the command, and others affected by the trial. At the same time, other available remedies may be more severe and unwarranted under the circumstances, so often a judge will eschew a harsher remedy and give both parties the time and space to collect themselves and reassess, even if that means a vexing delay.

Option C is more severe than the first two. It is normally reserved for situations where the violation was either significant or done in bad faith for a tactical reason. For example, a defense counsel who surprises the prosecution (and the judge) by offering an expert witness without declaring them as such before trial violates both RCM 701(b)(2) and 703(d)(3). If the judge determines that this delayed notice was deliberate to gain a tactical advantage, the defense may be prohibited from calling that witness.[140]

The final option gives the judge broad discretion to fashion a remedy appropriate for that case.[141] In deciding what is "just under the circumstances," the judge is not limited to "the least drastic remedy to cure the discovery violation."[142] Depending on the circumstances, this might include either dismissing the charges or declaring a mistrial. But at the same time, "dismissal with prejudice is a particularly severe remedy and should not be imposed lightly."[143] Likewise a mistrial is a "drastic remedy . . . granted only to prevent a manifest injustice."[144] Depending on the circumstances, lesser remedies might include an adverse inference instruction,[145] allowing a party to recall a witness for unchallenged examination,[146] or striking prior trial testimony.[147]

In other words, not every discovery violation—even a violation of RCM 701(a)(6) that might have become a *Brady* violation post-trial[148]—requires the judge to stop the

trial from going forward. Sometimes a just remedy might be "an extended weekend" to review the materials, allowing the opponent to admit complementary evidence that might otherwise be inadmissible, or a curative instruction.[149] On the other hand, cases like *Stellato* (dismissal with prejudice twice affirmed on appeal) serve as a cautionary tale that trial counsel who "take a hard stand on discovery . . . invite disaster at trial."[150]

It probably goes without saying, then, that the best way to avoid any of these consequences is for trial litigators to comply with their discovery obligations early, liberally, and in good faith.

Conclusion

To conclude, I offer a few general thoughts to make discovery smoother for everyone. First, both sides must comprehensively investigate their case early so they are not caught off-guard by major revelations weeks or even days before trial.[151] Second, discovery requests and the responses thereto are most productive when they are detailed and precise. Third, when new discoverable information comes to light, counsel liberally and rapidly disclose it as soon as possible. Fourth, and please forgive the pun, discovery should not be "discovery learning" during each court-martial; consistently meeting discovery obligations requires replicable systems and procedures, attentive supervision, and regular training for the lawyers and paralegals involved in the military justice system.

When counsel for both sides timely fulfill their obligations in good faith, the discovery and production processes usually unfold as they should, and the military judge is able to resolve whatever disputes remain with minimal disruption to the trial. Problems begin to arise when discovery is late, incomplete, or improperly withheld, even if not done so maliciously. And problems in discovery can interrupt or even invalidate all the work that goes into preparing a trial. All involved in the training, supervision, and execution of the military justice system must treat it with the significance it deserves. **TAL**

At the time of writing, LTC Murdough was a Military Judge in the 6th Judicial Circuit at Joint Base Lewis-McChord, Washington. He is now an Associate Judge on the Army Court of Criminal Appeals.

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Notes

1. The Rolling Stones, *You Can't Always Get What You Want,* on Let it Bleed (CD, London Records, Nov. 28, 1969).

2. Procedurally, the military divides the process by which the parties share information into "discovery" (generally, items within the possession, custody, and control of the parties or the larger "military authorities") and "production" (generally, items not in the possession, custody, or control of the military). *See* Manual for Courts-Martial, United States, R.C.M. 701, 703 (2024) [hereinafter MCM]. For the sake of brevity, this article combines both terms under the umbrella "discovery," which is how it is often referred both in practice and in applicable caselaw.

3. *See, e.g.*, United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004) (referring to military discovery practice as a "liberal mandate"); United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990) (adopting lower court's opinion that "discovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants").

4. MCM, *supra* note 2, R.C.M. 701 analysis, at A21-33.

5. *See, e.g.*, United States v. Dancy, 38 M.J. 1, 5 n.3 (C.A.A.F. 1993) ("Trial counsel's gamesmanship resulted in disruption and delay of the legal proceedings.").

6. *See, e.g.*, United States v. Collins, 41 M.J. 428, 429 (C.A.A.F. 1995) (referring to a prior trial at which a mistrial was declared for discovery violations).

7. *See, e.g.*, United States v. Stellato, 74 M.J. 473 (C.A.A.F. 2015).

8. *See, e.g.,* United States v. Eshalomi, 23 M.J. 12 (C.M.A. 1986); United States v. Simmons, 38 M.J. 376 (C.A.A.F. 1993); United States v. Adens, 56 M.J. 724 (A. Ct. Crim. App. 2002).

9. United States v. Lorance, ARMY 20130679, 2017 CCA Lexis 429 at *12 (A. Ct. Crim. App. June 27, 2017); *see also* United States v. Colbert, ARMY 20200259, 2023 CCA Lexis 536 (A. Ct. Crim. App. Dec. 13, 2023) ("[W]e reviewed the defense discovery request and conclude it contained only a generic request for laboratory reports. The defense discovery request did not specify the AFMES blood draw, its location, or its materiality.").

10. *See, e.g.*, United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990) ("[T]here was no intentional withholding of exculpatory evidence."); United States v. Terwilliger, No. 201900292, 2021 CCA Lexis 190 at *13 (N-M.C. Ct. Crim. App. Apr. 21, 2021) ("The Government . . . fail[ed] to provide the Defense all discovery necessary . . . . The military judge found that this was not intentional or part of any bad act by the Government."); United States v. Figueroa, 55 M.J. 525, 529 (A. F. Ct. Crim. App. 2001) ("We find no indication that the trial counsel acted in bad faith."); United States v. Seton, Misc. Dkt. No. 2013-27, 2014 CCA Lexis 103 at *18 (A. F. Ct. Crim. App. Feb. 24, 2014) ("[W]e recognize the military judge found no bad faith on the part of the Government."); *But see Stellato,* 74 M.J. at 489 n.18 (describing conduct of the trial counsel as "at a minimum . . . grossly negligent"); United States v. Coleman, 72 M.J. 184, 189 (C.A.A.F. 2013) ("The conduct of the prosecution . . . was, at a minimum, negligent, and certainly violated Brady [v. Maryland, 373 U.S. 83 (1963)], [UCMJ] Article 46, and R.C.M. 701-703.").

11. U.S. Dep't. of Just., Just. Manual, § 9-5.000 (2020) (Issues Related To Discovery, Trials, And Other Proceedings).

12. *Id.* § 9-5.002 (Criminal Discovery).

13. *Id.* § 9-5.001E.

14. The Army regulation for military justice only mentions discovery obliquely, in that "the trial counsel will support the special trial counsel in meeting the Government's discovery obligations," and does not mention discovery in the training provided by either the Trial Counsel Assistance Program or the Office of Special Trial Counsel. *See* U.S. Dep't of Army, Regul. 27-10, Military Justice para. 30-7(d) (8 Jan. 2025). At least as of this writing, the Army Judge Advocate General's (JAG) Corps does not appear to have a service-wide policy on discovery. In its chapter on "Regulations Implementing and Supplementing the Manual for Courts-Martial," the Navy's *Manual of the Judge Advocate General*, or "JAGMAN," does not mention discovery in criminal procedure. *See* U.S. Dep't of Navy, JAGINST 5800.7G, Manual of the Judge Advocate General (JAGMAN) ch. 1 (1 Dec. 2023). Neither does the Coast Guard's *Military Justice Manual*. U.S. Coast Guard, Commandant Instr. Manual 5810.1H, Military Justice Manual (9 July 2021). On the other hand, the Marine Corps policy cites to, and appears to model, the U.S. Deptpartment of Justice's *Justice Manual*. *See* U.S. Marine Corps, Order 5800.16, Legal Support and Administration Manual vol.16, ch. 11 (28 Aug. 2021). The attachment to the Air Force professional responsibility instruction contains a chapter on discovery, but it is mostly a restatement of the requirements of Article 46 and applicable Rules for Courts-Martial (RCM), with additional guidelines for timing and process. *See* U.S. Dep't of Air Force, Instr. 51-110, Professional Responsibility Program, ch. 5, attach. 7 (11 Dec. 2018).

15. UCMJ art. 46 (2016).

16. MCM, *supra* note 2, R.C.M. 701, 703.

17. *See* U.S. Const. amend. VI.

18. Brady v. Maryland, 373 U.S. 83 (1963).

19. Giglio v. United States, 405 U.S. 150 (1972).

20. Kyles v. Whitley, 514 U.S. 419 (1995).

21. Berger v. United States, 295 U.S. 78, 88 (1935).

22. *See supra* Section titled "Discovery Practice and Litigation."

23. MCM, *supra* note 2, R.C.M. 308(c).

24. *See id.* R.C.M. 307(b)(2).

25. *Id.* R.C.M. 405(a) discussion.

26. *Id.* R.C.M. 405(i)(1) (incorporating by reference R.C.M. 405(l)).

27. *Id.* R.C.M. 405(m)(4).

28. Most rules, including this one, refer to either "copies" or "opportunity to inspect" when a copy is impractical. Again for brevity, this article frequently uses "disclose" and "provide" as general terms to mean facilitating the defense's equal access to the evidence, whatever that may look like for the particular material involved.

29. MCM, *supra* note 2, R.C.M. 308(c).

30. *Id.* R.C.M. 701(a)(3); *see also infra* notes 76–78 and accompanying text, discussing timelines of discovery.

31. MCM, *supra* note 2, R.C.M. 701(a)(4) (emphasis added).

32. *Id.* R.C.M. 1004(b)(2) (incorporating by reference R.C.M. 1004(c)).

33. *Id.* M.R.E. 304(d). Note that the rule is limited in scope to those statements known to the trial counsel, relevant to the case, within the control of the Armed Forces, and which the prosecution intends to offer.

34. *Id.* M.R.E. 311(d)(1).

35. *Id.* M.R.E. 321(d)(1).

36. *Id.* M.R.E. 404(b)(3). This rule was amended by operation of law in 2021 and by executive order in 2022 to require the prosecution to provide such notice without a request from the defense. *See* Fed. R. Evid. 404(b) (eff. 1 Dec. 2020); MCM, *supra* note 2, M.R.E. 1102 (providing that amendments to the Federal Rules of Evidence will by operation of law amend parallel provisions of the Military Rules of Evidence eighteen months after the effective date absent contrary action by the President); Exec. Order 14,062, 87 Fed. Reg. 4763 (Jan. 31, 2022) (amending M.R.E. 404(b) to conform to the 2020 amendment of its Federal counterpart).

37. *See generally* MCM, *supra* note 2, M.R.E. 505. Classified evidence procedures are complex and to comprehensively cover them here would detract from the focus of this article.

38. *Id.* M.R.E. 807(b).

39. *Id.* M.R.E. 902(11).

40. *Id.* M.R.E. 902(13).

41. *Id.* M.R.E. 902(14).

42. *Id.* R.C.M. 701(a)(6).

43. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citations omitted).

44. *Id.* at 435 ("[O]nce a reviewing court applying [United States v. Bagley, 473 U.S. 667 (1985)] has found constitutional error there is no need for further harmless-error review.").

45. *See, e.g.,* United States v. Stellato, 74 M.J. 473, 482 n.7 (C.A.A.F. 2015).

46. *See* United States v. Lucas, 5 M.J. 167, 171 (C.M.A. 1978) ("There is no *Brady* violation when the accused or his counsel know before trial about the allegedly exculpatory information and makes no effort to obtain its production."); *see also* Rector v. Johnson, 120 F.3d 551, 558–59 (5th. Cir. 1997) ("The state has no obligation to point the defense toward potentially exculpatory evidence when that evidence is either in the possession of the defendant or can be discovered by exercising due diligence."); United States v. Wilson, 160 F.3d 732, 742 (D.C. Cir. 1998) ("[N]ew trial is rarely warranted based on a *Brady* claim where the defendants obtained the information in time to make use of it."); United States v. Kimoto, 588 F.3d 464, 474 (7th Cir. 2009) ("[A]s long as ultimate disclosure is made before it is too late for the defendants to make use of any benefits of evidence, due process is satisfied.").

47. MCM, *supra* note 2, R.C.M. 701(a)(6). This timeliness requirement is consistent with Rule 3.8 of the American Bar Association's Model Rules of Professional Conduct. *See* Model Rules of Pro. Conduct r. 3.8 (A.B.A. 2025) (requiring "timely disclosure" of exculpatory evidence).

48. United States v. Bagley, 473 U.S. 667, 682 (1985).

49. MCM, *supra* note 2, R.C.M. 701(a)(6).

50. *See Bagley,* 473 U.S. at 677 ("We do not . . . automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict." (citation omitted)).

51. *Id.* at 678.

52. *See infra* Section titled "When the Judge Gets Involved" (discussing remedies for violations).

53. *See supra* Section titled "Discovery Practice and Litigation."

54. MCM, *supra* note 2, R.C.M. 701(a)(5).

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

56. *Id.* R.C.M. 912(a)(2).

57. *See generally id.* R.C.M. 405(i), *as amended by* Exec. Order No. 14,130, 89 Fed. Red. 105343, 105348–52 (2024).

58. *Id.* R.C.M 701(a)(2), 703(f). Much of RCM 703 also deals with the production of witnesses and experts for both the Government and defense, which while related to discovery is outside the scope of this article.

59. *Id.* R.C.M 701(a)(2)(A).

60. *Id.* R.C.M. 701(a)(2)(B).

61. *Id.*

62. *Id.* R.C.M. 701(a)(2)(A). The requirement of RCM 701(a)(2)(A)(iv) to disclose, upon request, items obtained from or belonging to the accused is slightly broader than the automatic disclosure required by MRE 311, which is limited to evidence the prosecutor intends to use at trial. *See id.* M.R.E. 311.

63. *Id.* R.C.M. 703(f).

64. *See supra* Section titled "Discovery Practice and Litigation."

65. *Id.* R.C.M. 701(b)(1)(A).

66. *Id.* R.C.M. 701(b)(1)(B).

67. *Id.* R.C.M. 701(b)(3).

68. *Id.* R.C.M. 701(b)(4).

69. *See id.* M.R.E. 807, 902; *see also supra* notes 38–41 and accompanying text.

70. 18 U.S.C. § 3500 (2018).

71. MCM, *supra* note 2, R.C.M. 914(a).

72. *Id.* R.C.M. 914(a)(1).

73. *Id.* R.C.M. 914(a)(2).

74. *See, e.g.*, United States v. Muwwakkil, 74 M.J. 187 (C.A.A.F. 2015) (lost Article 32 recording amounted to RCM 914 violation); United States v. Sigrah, 82 M.J. 463 (C.A.A.F. 2022) (lost Criminal Investigation Division interview recording amounted to RCM 914 violation).

75. MCM, *supra* note 2, R.C.M. 701(a)(5).

76. *Id.* R.C.M. 701(g)(1).

77. *Id.* R.C.M. 801(a)(3).

78. United States v. Clark, ARMY 20220541, 2024 CCA Lexis 169 at *8 (A. Ct. Crim. App. Apr. 16, 2024).

79. MCM, *supra* note 2, R.C.M. 905(b)(4).

80. *See id.* R.C.M. 904.

81. *Id.* R.C.M. 905(e)(1).

82. *See* United States v. Criswell, ARMY 20150530, 2017 CCA Lexis 686 at *10 (A. Ct. Crim. App. Nov. 6, 2017) ("Our routine review of records for courts-martial reveals the practice of deferring the entry of pleas is a matter of course.").

83. *See id.* at *10–13.

84. United States v. Clark, ARMY 20220541, 2024 CCA Lexis 169 at *5–6 (A. Ct. Crim. App. Apr. 16, 2024) ("[T]he court's order, itself, is the good cause to file after pleas are entered. But should a party fail to meet the deadlines of a pretrial order after entering pleas, the party bears the burden to show good cause for the untimeliness.").

85. United States v. Givens, 82 M.J. 211, 216 (C.A.A.F. 2022) (quoting United States v. Jameson, 65 M.J. 160, 163 (C.A.A.F. 2007)).

86. *See* MCM, *supra* note 2, R.C.M. 906(b)(7); *see also id.* R.C.M. 701(g)(3)(a) (listing "ordering the party to permit discovery" as a remedy for failure to comply with the other provisions of that rule); *id.* R.C.M. 703(f), incorporating by reference R.C.M. 703(c)(2)(D) (stating that, if the trial counsel denies production, "the matter may be submitted to the military judge").

87. A useful practice, because a condition precedent to a motion to compel is to show the defense first requested the evidence from the trial counsel and was refused. *See supra* note 86 and accompanying text.

88. United States v. Ellis, 77 M.J. 671, 681 (A. Ct. Crim. App. 2018). Note that the court in *Ellis* referred to evidence that is "material" to defense preparation, using the then-existing language of RCM 701(a)(2), rather than evidence that is "relevant" to defense preparation. Though the *Ellis* opinion appears to use "material" and "relevant" interchangeably, a later opinion of the same court appears to read the change from "material" to "relevant" as broadening the scope of discoverable evidence under this rule. *See* United States v. Marin, ARMY 2021035, 2023 CCA Lexis 464 at *11–12 (A. Ct. Crim. App. Oct. 30, 2023). Regardless of the significance, if any, to that change, *Ellis* remains useful for defining the line between general and specific requests, a distinction that courts continue to recognize. *See, e.g.*, United States v. Colbert, ARMY 20200259, 2023 CCA Lexis 536 at *11 (A. Ct. Crim. App. Dec. 13, 2023) (applying the *Ellis* standard to determine whether the accused had specifically requested a particular laboratory report).

89. *Ellis*, 77 M.J. at 679–80 (quoting United States v. Green, 37 M.J. 88, 89 (C.A.A.F. 1993) (testing the nondisclosure under the *Brady* materiality standard, rather than the higher *Hart* standard for specific requests)).

90. United States v. Roberts, 59 M.J. 323, 324 (C.A.A.F. 2004)

91. *Ellis,* 77 M.J. at 681 (finding no error in failure to disclose an unrelated arrest report for a traffic collision based on this general request).

92. United States v. Coleman, 72 M.J. 184, 185 (C.A.A.F. 2013).

93. United States v. Leach, No. ACM 39563, 2020 CCA Lexis 230 at *80 n.18 (A.F. Ct. Crim. App. July 8, 2020).

94. United States v. Cano, 61 M.J. 74, 75–76 (C.A.A.F. 2005).

95. United States v. Alford, 8 M.J. 516, 517 (A. C. M. R. 1979).

96. United States v. Marin, ARMY 2021035, 2023 CCA Lexis 464 at *12 (A. Ct. Crim. App. Oct. 30, 2023).

97. United States v. Mann, ACM S30022, 2002 CCA Lexis 290 at *10 (A.F. Ct. Crim. App. Nov. 12, 2002).

98. United States v. Jackson, 59 M.J. 330, 331 (C.A.A.F. 2004).

99. United States v. Shorts, 76 M.J. 523, 535 (A. Ct. Crim. App. 2017) ("We cannot find the trial counsel erred under RC.M 701(a)(2) when he: 1) failed to produce something that was not requested; 2) had no knowledge whatsoever of its existence; and 3) exercised due diligence in responding to the defense request he did receive.").

100. United States v. Williams, 50 M.J. 436, 443 (C.A.A.F. 1999) (emphasis added).

101. *Shorts,* 76 M.J. at 531.

102. *See* United States v. Trigueros, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

103. *Williams,* 50 M.J. at 441 (quoting Crim. Just. Discovery Standards standard 11-2.1(a), cmt. at 14 n.9 (A.B.A. 3d ed. 1995).

104. *See infra* Section titled "Government's Responsibilities—How Far Do You Need to Go?"

105. United States v. Hart, 29 M.J. 407, 410 (C.M.A. 1990).

106. United States v. Leach, No. ACM 39563, 2020 CCA Lexis 230 at *85 (A.F. Ct. Crim. App. July 8, 2020).

107. United States v. Shorts, 76 M.J. 523, 531 (A. Ct. Crim. App. 2017) (citing United States v. Augurs, 427 U.S. 97, 107 (1976)).

108. Larry S. Pozner & Roger J. Dodd, Cross Examination: Science and Techniques 32 (2d ed. 2009).

109. *Id.* at 25.

110. United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962).

111. *C.f.* United States v. Clark, 62 M.J. 195, 198 (C.A.A.F. 2005).

112. *See, e.g.*, U.S. Dep't of Army, Regul. 190-45, Law Enforcement Reporting (27 Sep. 2016); U.S. Dep't of Army, Regul. 600-37, Unfavorable Information (2 Oct. 2020).

113. United States v. Simmons, 38 M.J. 376, 382 n.4 (C.A.A.F. 1993).

114. United States v. Trigueros, 69 M.J. 604, 611 (A. Ct. Crim. App. 2010).

115. *See* MCM, *supra* note 2, R.C.M. 701(g)(3)(A) (listing "order the party to permit discovery" as a remedy for failing to comply with R.C.M. 701).

116. *Id.* R.C.M.703(f).

117. *See id.* R.C.M. 703(c)(2)(D) (incorporated by reference in R.C.M. 703(f)).

118. United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999) (quoting *Simmons,* 38 M.J. at 382; Kyles v. Whitley, 514 U.S. 419, 437 (1995)).

119. United States v. Stellato, 74 M.J. 473, 487 (C.A.A.F. 2015); *accord* LK v. Acosta, 76 M.J. 611, 616 (A. Ct. Crim. App. 2017), *overruled on other grounds,* United States v. Tinsley, 81 M.J. 836 (A. Ct. Crim. App. 2021).

120. *Williams,* 50 M.J. at 441.

121. United States v. Shorts, 76 M.J. 523, 532 (A. Ct. Crim. App. 2017).

122. *Stellato,* 74 M.J. at 485. On the second of these four items, note that "legal right" is not the same as "legal process." Even though the Government may be able to obtain evidence via, for example a subpoena or warrant, that itself does not convert the evidence into possible *Brady* material (otherwise the scope of *Brady* would expand to anything subject to the compulsory process of the Federal Government). *See* United States v. Crump, No. ACM 39628, 2020 CCA Lexis 405 at *105–06 (A. F. Ct. Crim. App. Nov. 10, 2020).

123. *Stellato,* 74 M.J. at 487.

124. United States v. Simmons, 38 M.J. 376, 382 n.4 (C.A.A.F. 1993).

125. United States v. Franchia, 32 C.M.R. 315, 320 (C.M.A. 1962).

126. United States v. Williams, 50 M.J. 436, 441 (C.A.A.F. 1999).

127. *See* Kyles v. Whitley, 514 U.S. 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the [G]overnment's behalf *in the case* . . . .") (emphasis added); *see also supra* note 122 and accompanying text.

128. United States v. Shorts, 76 M.J. 523, 533 (A. Ct. Crim. App. 2017) (internal citation omitted).

129. *See id.*

130. MCM, *supra* note 2, R.C.M. 701(a)(6)(D); *accord* United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . falls within the *Brady* rule.").

131. *See generally* MCM, *supra* note 2, M.R.E. 613.

132. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993).

133. Jenkins v. Anderson, 447 U.S. 231, 239 (1980).

134. MCM, *supra* note 2, R.C.M. 701(a)(6). Whether the difference in prior statements actually reflects on the witness's credibility is for the trier of fact to decide—that is a matter of trial advocacy, not discovery.

135. *See, e.g.,* United States v. Eshalomi, 23 M.J. 12, 21 (C.M.A. 1986); United States v. Vargas, 83 M.J. 150, 152 (C.A.A.F. 2023).

136. *C.f.,* U.S. Dep't of Army, Regul. 27-26, Rules of Professional Conduct for Lawyers app. B, r. 3.3, 3.4, 3.8 (26 Mar. 2025).

137. As alluded to in the discovery, anecdotally it seems that most discovery litigation stems from (1) a lack of understanding by one or both parties as to what the rules require, and (2) a lack of communication, to include clarity in requests and responses. Rarely does either rise to the level of an ethical violation.

138. *See supra* Section titled "The Law of Discovery" for discussion about standards of review and appropriate remedies for discovery violations on appellate review.

139. MCM, *supra* note 2, R.C.M. 701(g)(3).

140. *See id.* R.C.M. 701(g)(3) discussion.

141. MRE 304(f)(2), 311(d)(2)(B), and 312(d)(3) provide similar discretion for late disclosures of statements of the accused, evidence derived from searches and seizures, and lineup identifications, respectively. *See id.* M.R.E. 304(f)(2), 311(d)(2)(B), 312(d)(3).

142. United States v. Vargas, 83 M.J. 150, 154 (C.A.A.F. 2023).

143. *Id.* at 155 (noting that the military judge must consider "whether lesser alternative remedies are available and determine that dismissal with prejudice is just under the circumstances").

144. United States v. Rushatz, 31 M.J. 450, 456 (C.M.A. 1990); *see also* MCM, *supra* note 2, R.C.M. 915 discussion ("The power to grant a mistrial should be used with great caution, under urgent circumstances, and for plain and obvious reasons.").

145. *See, e.g.*, United States v. Ellis, 57 M.J. 375, 380 (C.A.A.F. 2002) ("An adverse inference instruction is an appropriate curative measure for improper destruction of evidence.").

146. *See, e.g.*, United States v. Bozicevich, ARMY 20110683, 2017 CCA Lexis 403 (A. Ct. Crim. App. June 13, 2017).

147. *See, e.g.*, United States v. Dancy, 38 M.J. 1, 6 (C.A.A.F. 1993).

148. *See supra* note 49 and accompanying text.

149. *Dancy*, 38 M.J. at 6.

150. United States v. Stellato, 74 M.J. 473, 478 (C.A.A.F. 2015).

151. Investigation is an obvious necessity for the Government, which bears the burden of proof *and* the constitutional obligation to secure a fair trial, but the duty to investigate the case is also an ethical imperative for defense counsel. *See, e.g.*, United States v. Gibson, 51 M.J. 198 (C.A.A.F. 1999) (holding that failure to follow investigatory leads in law enforcement report amounted to ineffective assistance of counsel).

(Credit: SGT Christopher Neu)

Closing Argument

Trust Is the Mission

By Colonel Joseph M. Fairfield

I still remember what my commander said during the unit hail:

He stood up, looked around the room with an annoyed expression, glanced down at his index card, and said,

"I can't believe we have one lawyer, let alone two."

Then he sat down. No handshake. No welcome. Just a clear message: I was not trusted, and I was not needed.

I was the new deputy command judge advocate for a special operations unit. I had completed a successful first tour in the 82nd Airborne Division, but I was still new to the special operations community, and to them I was unproven.

It took a combat deployment, steady performance, and a lot of listening to earn my place in the room. But I did earn it. After the deployment, the same commander called me into his office.

"You did a great job downrange," he said. "I'd take you to combat with me tomorrow."

That trust was not automatic. It was earned the hard way. And sometimes, that is the only way.

What makes an effective legal advisor? After years advising senior leaders in Afghanistan, Iraq, on the Joint Staff, and now at a combatant command, I have seen one answer rise above the rest: trust.

Mastery of the law gets you through the door. Trust earns you a seat at the table, where your advice can enable the commander's decision.

Mastery of the law is expected. It is the foundation of our profession. But commanders do not rely on their staff judge advocates (SJAs) simply because they know the law. Legal expertise may get you the job, but it does not earn the trust needed to advise in moments that matter.

Commanders rely on the advisors they trust to deliver clear, honest, and mission-focused counsel when the pressure is on. No matter how technically sound your advice may be, it will not enable a decision unless the commander trusts you.

In *The Last King of Scotland*, Forest Whitaker plays Ugandan leader Idi Amin.[1] After a disastrous decision, Amin confronts his personal physician:

"Why didn't you advise me against this?"

"I did!"

"Yes," Amin replies, "but you did not persuade me!"[2]

That moment captures a truth many legal advisors learn too late: being right is not enough. To be effective, your advice must be heard. And to be heard, it must be trusted.

I have heard commanders ask that same question. The ones who trusted me listened. The others made decisions without the benefit of trusted legal counsel.

Purpose

Trust is not abstract. It can be built through deliberate action.

This article introduces two practical tools to help legal advisors build trust and enable decisions: the **Trust Equation**[3] and the **ALIGN Framework**.[4] Both are grounded in operational experience. They are designed to help you earn your place in the room, gain a seat at the table, and deliver mission-focused options when the stakes are highest.

Why Trust Matters

Legal advice has no value if it arrives late, is misunderstood, or goes unheard.

From battalion to combatant command, judge advocates (JAs) work in real time alongside commanders and staff facing lethal consequences. The environment moves fast. Artificial intelligence accelerates targeting. Disinformation clouds facts.

When legal input arrives too late or not at all, the result is more than friction. It increases risk and degrades the quality of the decision-making process.

There is no time to build trust during a crisis. That work must be done beforehand, in the quiet moments. Earned trust is what gets legal advisors in the room when it counts.

Trust matters just as much in garrison. Investigations, justice actions, contracting, and policy choices all depend on whether the SJA is seen as a problem solver or an obstacle. When commanders trust their SJA, they bring them in early, ask the hard questions, and listen to the answers.

Trust as Combat Power

Combat power is more than weapons. It is the combined effect of people, training, doctrine, and leadership. For legal advisors, trust functions as a multiplier. It grants access, accelerates the delivery of counsel, and ensures that legal advice enables decisions at "the speed of relevance."[5]

Trust is also one of the foundational principles of Mission Command. As stated in Army doctrine, "[M]utual trust is shared confidence between commanders, subordinates, and partners that they can be relied on and are competent in performing their assigned tasks."[6] Trust enables disciplined initiative and underpins decentralized execution. Legal advisors who earn it help create the conditions that allow mission command to function as designed.

Trust is not automatic. It is given and sustained over time through shared hardship, demonstrated competence, and principled action. Legal counsel must be part of that process. When the decisive moment comes, trust is what ensures the legal advisor is heard, and the advice delivered enables the commander's decision.

The Trust Equation: How Trusted Counsel Is Built

When I first read *The Trusted Advisor*, I was struck by how directly it applied to the work of an SJA. The book gave me language for what I had learned through experience: trust is not abstract. It can be built with intention. The Trust Equation helped me articulate how legal advisors earn trust with not only commanders, but also across the entire staff.

To build trust deliberately, it helps to use a model from the business world. This model maps directly to the realities that JAs face in operational settings. In *The Trusted Advisor*, authors David Maister, Charles Green, and Robert Galford present a formula for trust:

$$\text{Trust} = \frac{(\text{Credibility} + \text{Reliability} + \text{Intimacy})}{\text{Self-Orientation}}$$[7]

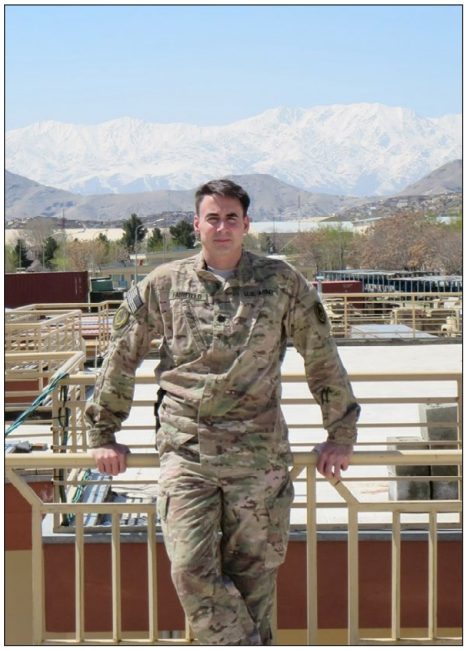
Each element plays a distinct role:

Credibility means legal expertise, sound judgment, and principled counsel grounded in both the law and the mission. It begins with mastering the law, but it grows through servant leadership and shared hardship. Credibility is built when leaders see that you carry the same burdens they do and that you are there to serve, not to sit on the sidelines.

Reliability is consistency and follow-through. Do you do what you say you will do? Can others count on you without reminders?

Intimacy reflects the strength of professional relationships. Do commanders and staff feel comfortable being candid with you? Intimacy shows up when a leader says, "Let me run something by you," and they mean it.

Self-Orientation is about focus. High self-orientation appears when legal advisors protect themselves more than the mission, talk more than listen, or give advice designed to avoid personal risk instead of enabling sound decisions.



COL Fairfield during a deployment to Afghanistan in 2014. (Photo courtesy of author)

Credibility, reliability, and intimacy all increase trust. Self-orientation decreases it. The more self-oriented you are, the less likely your advice will be trusted. Ask yourself:

- Am I showing up to serve or to protect myself?
- Am I listening more than I speak?
- Am I offering real options or just citing rules?

The Trust Equation is more than a theory. It is a practical tool to help legal advisors earn trust and deliver legal advice that commanders are willing to act on when the stakes are high.

The ALIGN Framework: Building Trust in the Fight

The Trust Equation shows what trust requires. But in fast-moving operational environments, JAs need more than a formula. They need clear habits that translate trust principles into action. The ALIGN Framework provides that. It distills five behaviors legal advisors can use to build trust and deliver impact when time is short and decisions are complex. They are:

A - Anticipate

Anticipate the commander's priorities and context.

Spot issues early and offer mission-focused recommendations.

- Self-Assessment: *Am I identifying legal issues before they become operational problems?*
- Trust Elements Supported: *Credibility and Reliability*

L - Listen

Listen beyond the surface question.

Focus on tone, urgency, and what is not being said.

- Self-Assessment: *Am I listening more than talking to understand the commander's intent?*
- Trust Elements Supported: *Intimacy (increased); Self-Orientation (decreased)*

I - Inform

Inform with timely, relevant input.

Deliver legal options before the decision is made.

- Self-Assessment: *Am I providing legal advice at the optimal moment?*
- Trust Elements Supported: *Reliability and Credibility*

G - Gain Trust

Gain Trust by maintaining consistency under pressure.

Follow through. Admit when you are wrong.

- Self-Assessment: *Do my actions align with my words, especially under difficult circumstances?*
- Trust Elements Supported: *Reliability (increased); Self-Orientation (decreased)*

N - Navigate

Navigate by tailoring your communication to match how the commander prefers to receive information and make decisions.

Some leaders want detailed analysis. Others want the bottom line up front. Your job is to adapt your delivery to match their decision-making rhythm, not the other way around.

- Self-Assessment: *Am I adapting my delivery to fit this leader's operational style?*
- Trust Elements Supported: *Intimacy (increased); Self-Orientation (decreased)*

To highlight the importance of tailoring your communication, one of my former 4-star commanders once told me, "Your legal advice needs to fit on the screen of my phone." He wasn't criticizing complexity. He was reminding me to be brief, mission-focused, and aligned with how senior leaders take in information. When you adapt your delivery to match your audience, your advice is more likely to be heard, understood, and used.

ALIGN is not a checklist. It is a mindset. It reinforces the behaviors that ensure your legal advice shapes decisions when time is short and the stakes are high.

Trust Across the Command: Commander and Staff

As a legal advisor, your most important client is the commander. But your responsibility extends to the entire staff. To be effective, you must earn trust from both.

Commanders rarely choose their SJAs, but they always choose who they trust. They remember who stepped up, flagged risk, and followed through when it mattered. Trust is built or lost through daily conduct, not rank or résumé.

Similarly, I've arrived in commands where parts of the staff had reservations about Legal and trust hadn't been established yet. I made it my mission to change that, one conversation at a time. I listened. I showed up with solutions, and I made sure Legal never slowed the mission. Over time, they saw we weren't there to say no. We were there to help get to yes, legally and fast.

Building Trust with the Commander

These six habits, drawn from the Trust Equation and ALIGN Framework, help build trust with commanders:

- **Be transparent.** Lay out legal constraints and options clearly. Surprises destroy trust and erode credibility. This habit supports *Inform* in the ALIGN Framework.
- **Be responsive.** Speed matters in crisis. Be fast, accurate, and dependable. Reliable legal support builds trust and reflects the *Gain Trust* element of the ALIGN Framework.
- **Set expectations.** Never overpromise. Frame legal risk honestly and let the commander decide. This reduces *Self-Orientation* and supports the *Navigate* element of the ALIGN Framework.
- **Advocate for the mission.** Understand operational goals. Show that Legal is a partner, not a brake. This builds *Intimacy* and aligns with both the *Anticipate* and *Gain Trust* elements of the ALIGN Framework.
- **Stay humble.** Admit what you don't know. Follow up with answers that move the mission. This reinforces trust and lowers *Self-Orientation*, a core component of the Trust Equation.
- **Listen closely.** Focus on tone, intent, and what's left unsaid. Listening earns more influence than speaking and supports the *Listen* and *Navigate* elements of the ALIGN Framework.

Trusted legal advisors do more than support the commander. They scale their influence by earning trust across the staff.

Building Trust Across the Staff

Staff officers in operations, intelligence, and planning must see Legal as a problem-solver. If they trust you, they bring Legal in early. If they do not, you get looped in too late to support anything that matters.

Here are five ways to earn trust across the staff:

- **Build relationships.** Sit in on updates. Walk the halls. Show up where they work. Trust is built in daily routines, not in scheduled briefs. The stronger your network, the more often your advice will be heard.
- **Learn their mission.** Understand how the J3, J5, and other sections think and operate. Ask smart questions. Shadow them. The more you understand their world, the more they will rely on your advice.
- **Be responsive.** Return calls quickly. Better yet, walk down the hall and talk in person. Deliver options that move the mission forward and stay within the law.
- **Train and advise early.** Offer short, relevant sessions on topics like targeting, declassification, or media engagement. Write information papers before anyone asks. Anticipate the need.
- **Get into planning cycles.** Coordinate with the chief of staff to embed your team

in the right meetings. Walk the process with the staff. Raise legal concerns before decisions are made.

When both the commander and the staff trust you, Legal becomes an operational enabler. You are no longer just reviewing products. You are helping shape the mission.

Lesson from the Field: Credibility Earns Trust

In Iraq, I was advising a special operations task force when the commander called me in after a complex mission brief. He was concerned about the law of armed conflict because the team would be in close proximity to the target at the moment of direct action.

I picked up a marker and drew a stick figure on the whiteboard.

"If this same target were hit from an aircraft," I asked, "would you be concerned?"

"No," he said. "We do that every night."

I reminded him of several similar missions he had already approved. Then I wrote one sentence on the board:

Proximity to the target does not change the law of war.

He stared at it for a moment. Then nodded.

"Okay," he said. "We'll do it."

Later, he told the staff, "It wasn't the law that convinced me. It was the lawyer."

That moment was not just about the law. It was about trust. The commander moved forward because he trusted the person delivering the advice, not just the advice itself.

When You Are Not in the Room

Not every story ends with a commander saying, "It was the lawyer who convinced me." Despite your best efforts, you may find youself brought into discussions later in the process than would be ideal. I have been there. If you find yourself on the outside looking in, start here:

- **Stay mission-focused.** Do your job. Show up with timely, accurate, and relevant legal advice, even when no one asks.
- **Build lateral trust across the staff.** If the chief of staff, J3, or J5 values your input, they will advocate for your inclusion. Trust is often built across the staff before it reaches the commander.
- **Avoid ego and confrontation.** Do not say, "You should have called me." Do not complain about being left out. Do not take it personally. Stay humble. Stay visible. Stay useful.
- **Assess how you show up.** Are you listening more than you speak? Are you offering solutions or just identifying the problems? Are you helping the mission or protecting yourself?
- **Some commanders are slow to trust.** Others test their advisors before bringing them in. Even if you are not in the room today, every interaction is a chance to build credibility.
- **Keep showing up.** Do the work. Earn your seat without asking for it.

Final Word: Trust Is the Mission

Your title does not grant trust. Rank does not guarantee it. Trust is earned through clarity, humility, competence, and consistency. It is built day by day, in how you show up, listen, follow through, and enable decisions.

Treat trust like a combat capability. Build it early. Protect it fiercely. Rely on it when the stakes are high.

Commanders will not remember your legal analysis. They will remember whether your advice helped them make the right call when it mattered most.

The Trust Equation shows how trust is earned. The ALIGN Framework shows how to apply it. Together, they lead to one outcome: legal advice that is not only correct but trusted enough to help shape decisions.

That is the standard. Trusted counsel does not just inform the mission; it drives it forward. **TAL**

COL Fairfield is the Staff Judge Advocate of U.S. Central Command at MacDill Air Force Base, Florida.

Notes

1. The Last King of Scotland (DNA films, 2006).

2. *Id.* at 1:29:51. The first quoted sentence is paraphrased above for clarity.

3. David H. Maister, Charles H. Green, & Robert M. Galford, The Trusted Advisor 94 (20th Anniversary ed., Simon & Schuster, 2021).

4. The ALIGN Framework is adapted by the author from a business leadership infographic titled *Master the ALIGN Framework: The Ultimate Cheat Sheet for Managing Up* (author and date unknown) (on file with author). This framework is used informally in corporate coaching and leadership training, and has been modified for military legal advisors based on operational experience.

5. James N. Mattis, *Remarks by Secretary Mattis on the National Defense Strategy*, U.S. Dep't of Def. (Jan. 19, 2018), https://www.defense.gov/News/Transcripts/Transcript/Article/1420042/remarks-by-secretary-mattis-on-the-national-defense-strategy [https://perma.cc/7LSV-DXBW] ("To keep pace with our times, the Department of Defense must improve performance and affordability at the speed of relevance."); *see also* U.S. Senate Armed Servs. Comm., Advance Policy Questions for Peter "Pete" B. Hegseth: Nominee to Serve as Secretary of Defense 5 (Jan. 6, 2025) (discussing delivering capabilities at the "speed of relevance").

6. U.S. Dep't of Army, Doctrine Pub. 6-0, Mission Command: Command and Control of Army Forces para. 1-30 (31 July 2019).

7. Maister, Green, & Galford, *supra* note 3, at 94.

AROUND THE CORPS

SSG Johnnie Luna, paralegal noncommissioned officer-in-charge, 2d Infantry Brigade Combat Team (Airborne), 11th Airborne Division, conducts a Primary Jumpmaster duty on a CH-47 Chinook on Chalk 101 at Malemute Drop Zone, Alaska. (Photo courtesy of SSG Johnnie Luna)

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