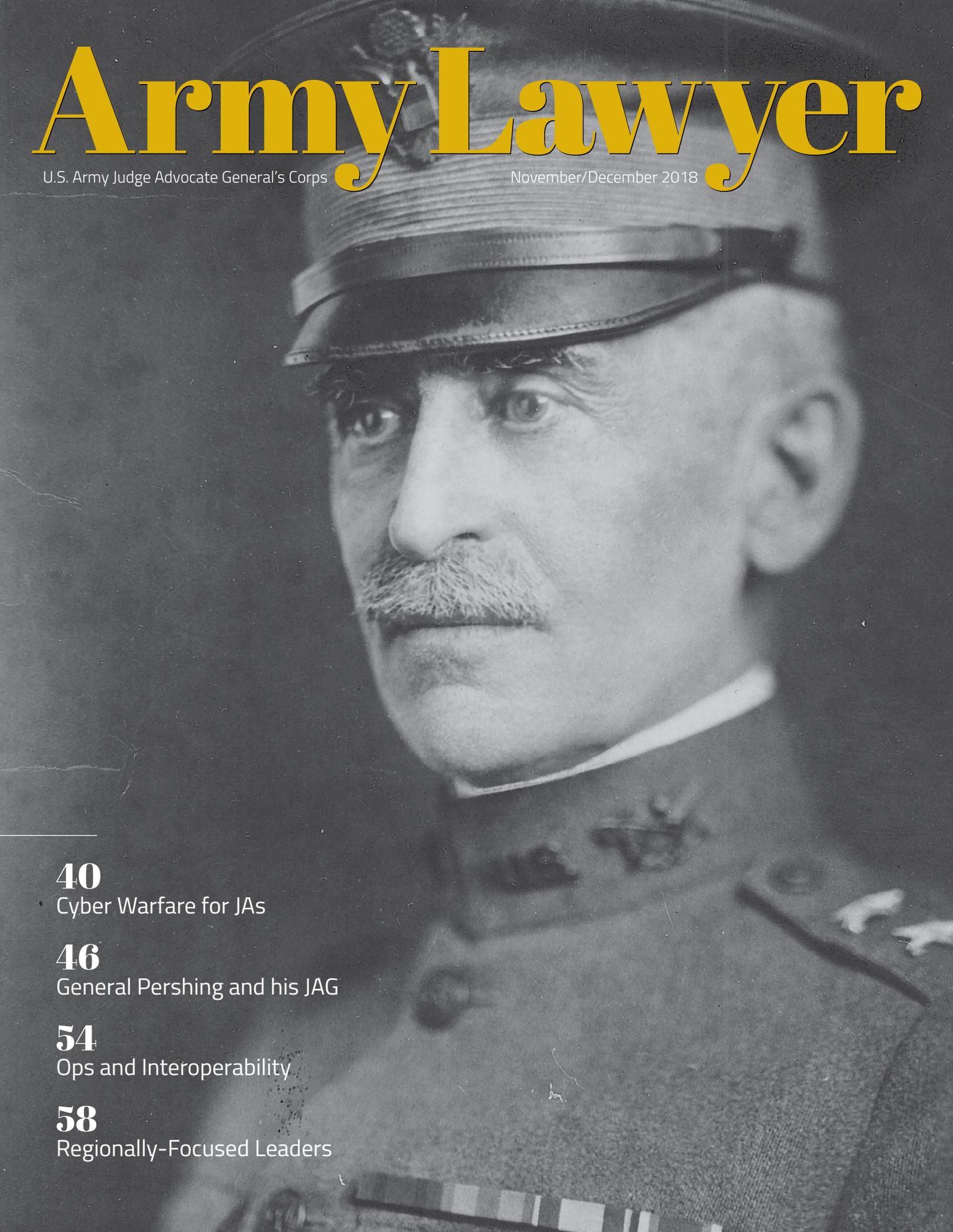


# Army Lawyer



U.S. Army Judge Advocate General's Corps

November/December 2018

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## AROUND THE CORPS

Captain Heather Martin, a defense appellate attorney, casts a skeptical view on an opposing counsel's argument during a recent moot court hearing at the United States Army Court of Criminal Appeals at Fort Belvoir, Virginia. (Credit: Chris Tyree)

# Army Lawyer

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November/December 2018

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On the cover: General Enoch Herbert Crowder, who served at The Judge Advocate General from 1911 until 1923. He was General Pershing's JAG during World War I.

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(Credit: Marco M.)

# Court is Assembled

## Readiness, Technology, and the Law

### Warfare's Evolution During WWI Provides a Roadmap for JAs Today

By Brigadier General Joseph B. Berger

*Gas! Gas! Quick, boys! – An ecstasy of fumbling,  
Fitting the clumsy helmets just in time...<sup>1</sup>*

*It feels like a ball of red-hot fire,  
Turned loose from hell's own door,  
There seems to be no relief for me,  
It's hurting more and more...<sup>2</sup>*

Owen's and McCollum's dark, poetic memories of World War I (WWI) captured the horror of new weapons that drove treaty law in the years that followed. But not all new technologies that

found their way onto WWI's battlefields required new laws. On today's battlefields, the continuous, relentless development of new technologies and weapons, and their employment to impose one's political will

on adversaries, remains the same. Today's judge advocates face new intellectual challenges in addressing threats in a new domain—cyberspace. And they do so against the loud echo of the historical refrain to create new laws to address them. While new threats and the accompanying clamor for new rules for their use are timeless, unchanged are the enduring Law of Armed Conflict (LOAC) principles that will guide us through these changes. Also unchanged is the reality that judge advocates must work closely with coalition partners to ensure a shared understanding of how established legal principles will apply to new weapons and to understand existing treaties in the context of issues never contemplated by their drafters.

Before WWI, leaders were aware of the potential for the use of poisonous gases in combat, but those leaders naively believed that discussions held during the 1899 Hague Conference about prohibiting their employment would prevent their use in future wars.<sup>3</sup> Their misplaced reliance on the durability of the agreements reached during the Conference reflected a failure to grasp both the emergence of new technologies and the changing character<sup>4</sup> of war. By June 1925, under the auspices of the League of Nations, the High Contracting Parties declared, "So far as they are not already Parties to Treaties prohibiting [the use in war of asphyxiating, poisonous, or other gases], [the High Contracting Parties] accept this prohibition, [and] agree to extend this prohibition to the use of bacteriological methods of warfare . . . ."<sup>5</sup> Thirty-eight countries signed on to the Protocol and it entered into force on 8 February 1928.<sup>6</sup>

But the Allies' hard lesson learned in WWI was the failure to foresee the changes in technology and the failure to timely understand the impacts of those impending changes. The Allies' pre-WWI failure to think about and develop doctrine and law that captured the future of warfare<sup>7</sup> was initially disastrous. The cost for the failure to plan for future combat and the subsequent collective delays in learning was millions in uniform dead. Sadly, the arc of history tells us it is usually only after significant failure that armies adapt.<sup>8</sup>

Not every change in the character of warfare requires changes to the law.

Although much hyped at the time of its first appearance in combat as *revolutionary*, airpower proved to simply be *evolutionary*; it required no new body of law as applied in combat. While the 1899 Hague Conference prohibited the launching of explosives from balloons “or other new methods of a similar nature”<sup>9</sup> (e.g., airplanes), it was merely a temporary prohibition driven by the enduring LOAC principle of discrimination. While no new body of law was required to address the evolution of airpower in combat, what was required were leaders—and lawyers—who could apply enduring principles to new technology. The original discrimination concerns regarding use of airpower were quickly overcome by technologically-driven improvements in aerial bombing accuracy.<sup>10</sup> While airplane bombing can be said to have “ultimately changed the whole character of war,” its misuse (e.g., German bombing of hospitals) was, even at the time, seen by military leaders as a violation of LOAC and not as something fundamentally different.<sup>11</sup>

For the U.S. and its allies, WWI was a lesson in interoperability. American forces simply were not ready for the new era of warfare, and were forced to lean on British and French officers to help train new recruits before they even left the U.S.<sup>12</sup> A lack of U.S. readiness—intellectually, doctrinally, and in training—made fighting as a coalition force during WWI an initial impossibility. The U.S. and its allies eventually overcame those shortfalls, but at a cost in human lives we can never directly measure. As the Chief of Staff of the Army (CSA) has noted, the last time warfare changed as radically as it is now changing was during the 1920s and 1930s.<sup>13</sup> Judge advocates must address these changes and be ready for what comes next. The CSA reminds us that staying on top of emerging technologies is what ensures our position of dominance in the next fight.<sup>14</sup> And in the fight after next.

Our readiness in the face of these ever changing challenges mandates deliberate thought about the future, particularly in the context of our broader military and legal histories. To do that, we must know our history. We must know how to use that history to help us answer questions like, “Why does use of chemical weapons require a new legal framework, but use of airpower does

not?” Only with that perspective can we adequately analyze new changes and challenges and provide commanders accurate advice. An understanding of history alone, however, is insufficient. We must also understand the evolving technology that is being applied in warfare, as well as the technology that may be applied in the future. We need not be engineers, code writers, or technical experts, nor need we be early adopters of every new technology that emerges. But refusal to actively contemplate the technologies, challenges, and changes looming just beyond the horizon will only ensure we fail our clients.

Perhaps most importantly, we must not contemplate these changes in a vacuum. We need to understand the positions of our enduring partners, as well as the legal and political strictures under which those partners operate. We must shape how all of our current and future partners, adversaries, and third parties (e.g., non-governmental organizations) think about the law’s application in warfare. To do that, we must not only be a part of the discussion—in blogs, at conferences, and everywhere it occurs—we must lead that discussion. We owe our commanders maximum lawful, moral, and ethical maneuver space on today’s and tomorrow’s battlefields. To that end, we must be knowledgeable about our technology, our clients, our partners, and our enemies. Ultimately, our success will depend on being well-read students of history and active architects of the law’s development in the face of emerging technology. **TAL**

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*BG Berger is the Commander of the United States Legal Services Agency and Chief Judge of the U.S. Army Court of Criminal Appeals.*

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## Notes

1. Wilfred Owen, *Dulce et Decorum Est*, THE WAR POETRY WEBSITE, <http://www.warpoetry.co.uk/owen1.html>.
2. LEE CHARLES “BUCK PRIVATE” MCCOLLUM, *Gassed*, in HISTORY AND RHYMES OF THE LOST BATTALION 16, 16 (1929).
3. General Pershing notes in his memoir those discussions “created a feeling of security” against the use of poisonous gases. See JOHN J. PERSHING, MY EXPERIENCES IN THE WORLD WAR 165 (1931).
4. The *nature* of war is violent and fundamentally political; it is, by nearly universal agreement,

unchanged since the dawn of time. War’s *character* describes “the changing way that war as a phenomenon manifests in the real world” as “influenced by technology, law, ethics, culture, methods of social, political, and military organization, and other factors that change across time and place.” 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/>. In short, the character of war gets at *how* we fight, while the nature at *why* we fight. See *id.*

5. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, JUN. 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65. [hereinafter Geneva Protocol].
6. The Geneva Protocol was later supplemented by the Biological Weapons Convention of 1972 and the Chemical Weapons Convention of 1993.
7. Pershing notes the Japanese use of machine gun units and heavier artillery “had not escaped the notice of German observers, and her experts were quick to take advantage of [those] lessons.” PERSHING, *supra* note 3, at 4.
8. The Allied Powers would soon, once again, fall behind their enemies. In WWII they failed at El Alamein to timely grasp the change in war’s nature manifest in Germany’s *Blitzkrieg* doctrine.
9. Declaration on the Launching of Projectiles and Explosives from Balloons, JUL. 29, 1899, [http://avalon.law.yale.edu/19th\\_century/dec99-01.asp](http://avalon.law.yale.edu/19th_century/dec99-01.asp).
10. *Id.*
11. FRANCIS A. MARCH, HISTORY OF THE WORLD WAR 226 (1919).
12. See Michael S. Neiberg & Harold K. Johnson, *Pershing’s Decision: How the United States Fought its First Modern Coalition War*, U.S. ARMY (Dec. 10, 2010), [https://www.army.mil/article/49291/pershings\\_decision\\_how\\_the\\_united\\_states\\_fought\\_its\\_first\\_modern\\_coalition\\_war](https://www.army.mil/article/49291/pershings_decision_how_the_united_states_fought_its_first_modern_coalition_war).
13. David Thornton, *Army Trying to Keep up with Changing Character of War*, FEDERALNEWSRADIO.COM, (Jun. 25, 2018, 6:00 PM), <https://federalnewsradio.com/army/2018/06/army-tries-to-keep-up-with-changing-character-of-war/> (quoting General Mark Milley at the 21 June 2018 Capitol Hill National Security Forum).
14. *Id.*



(Credit: SFC Joshua Mann, Ohio National Guard PAO)

LTG Charles N. Pede speaks during a World War I remembrance ceremony near Bony, France.

# News & Notes

## The Most Important Classroom

Remarks by Lieutenant General Charles N. Pede

**On 8 August 2018, Lieutenant General Charles N. Pede delivered the following remarks at Somme American Cemetery near Bony, France, during a remembrance ceremony which was part of the World War I Centennial Commemorations:**

*Take up our quarrel with the foe  
To you from failing hands we throw  
The torch, be yours to hold it high  
If ye break faith with us who die  
We shall not sleep though poppies grow  
In Flanders Field'*

The final words of Lieutenant Colonel John McCrae's famous poem echo to us from a different field of battle. But these words, charged with clear expectation, remind each of us of our enduring obligation—to remember, and to give their sacrifice meaning.

Good morning. Secretary Matz, Mayor Geeslank, fellow general officers, Commissioners of the Centennial WWI Commission, our French friends and neighbors, Mr. Craig—the superintendent of this inspiring cemetery—and officers and Soldiers of the United States Army, welcome

to this morning's formation with our fallen brothers and sisters. I am reminded of the old Army adage—that every formation is a family reunion, and that is indeed what we have this morning.

My name is Lieutenant General Chuck Pede and I serve as the 40th TJAG of the Army. On behalf of the senior leadership of the Army, Secretary of the Army Mark Esper, and our Chief of Staff, General Mark Milley, I am honored to participate in this ceremony today.

The stones that surround us this morning are filled with action, consequence, and yes, promise. Deceptively quiet and peaceful in pristine white marble, the years of careful tending of these stones have left them to us as a memory of a purpose-filled and consequential—albeit short—lived life. They were Soldiers of energy, faith, courage, fortitude, resilience, and devotion to their units and fellow Soldiers. And they were Soldiers whose lives ended too soon.

The parents of Sergeant Blisset, age 23, remind us on his headstone that “[y]outh had scarcely written his name on her page.”

No parent should have to bury their child. But nations will—we hope rarely—ask their citizens to bear such costs. When the summons comes, it is our task as professional Soldiers to do it well, and quickly, and to minimize the harm to both Soldiers and civilians. But it is the Soldier's lot to suffer the hardships of war, which brings us to this sacred ground.

We know standing here that the parents of Captain Ben Franklin Dixon, 29 Sep 1918, of Private Anthony Ploharski, 31 Oct 1918, of Constance Sinclair, Nurse, 22 Feb 1918, and the parents of the other 1,841 Soldiers buried here—for the rest of their lives struggled with their loss and prayed for meaning and consequence beyond the trenches and the dangers endured. Those buried here won the battle of St. Quentin Canal, and as part of the American II Corps pierced that which could not be pierced—the Hindenburg Line. We know that the three Medal of Honor recipients buried among us, in their humility, share their recognition with every Soldier—row upon row in this cemetery.

As an Army, we have reinvested in our fallen Soldiers this week. We have walked the ground they walked, reimagined the challenges and horrors they faced, and walked the rows of stones they inhabit. It is for us as Soldiers, who now carry their legacy, to remember their sacrifice, to carry the torch they have passed to us, and to bring them back to life in a way that only Soldiers can do.

I imagine as we look out upon these rows of stones, proud Soldiers standing to, and smiling because you have called out their name.

It has been said that when you remember a fallen Soldier by uttering their name, their unit—they live again.

When you walk these rows, read a Soldier's name; for the sound of their name may be the first time it has filled the air since they pushed out their last breath.

And so we should always remember first that each of these Soldiers represented promise, and that in their sacrifice of a long life, with a wife and children at their side, they gave us our futures—our lives with all the joys and sorrows that make for a full life. What they lost, we gained. Each cross represents an unpayable debt to them and their parents and families whose dinner table always held an empty chair.

Our first General-in-Chief of our American Armies, George Washington, once said “[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional to how they perceive veterans of earlier wars were treated and appreciated by our nation.”

Your presence here today tells each of these Soldiers that while you may not have known them personally, they matter, and you recognize it.

These men and women that stand silently with us today also represent our Nation's tribute—our payment on the altar of freedom. This is not melodrama. Armies and nations are sometimes criticized for fighting wars of aggression or conquest. These Soldiers truly fought for the purest of ideals—so that people may live in peace, speak their own language, and live free from aggression.

General Mark Clark said, “[i]f ever proof were needed that we fought for a

cause and not for conquest, it could be found in this cemetery. Here was our only conquest; all we asked . . . was enough . . . soil to bury our gallant dead.”

And like the Soldiers who crossed the icy waters and marched on Christmas morning in the snow to attack the Hessians in Trenton, New Jersey, in brutal conditions—so did the American Soldiers at the Somme. They fought under truly unimaginable conditions. Thomas Paine inspired George Washington's Soldiers by reminding them that they were neither *summer soldiers* nor *sunshine patriots*—they were indeed Soldiers who could be counted on when it was hard, and ugly, and cold. The American Soldiers of the Somme were not summer soldiers or sunshine patriots, either. The Soldiers of the Somme were the real thing. Tough, resilient, and determined.

So today, we remember that these men died for an idea as powerful as any on earth—the desire to be free and to determine one's own destiny. They served a cause greater than themselves when their country called.

And finally, I would ask each of us today to think about the challenges the Soldiers of 1918 faced. I imagine that each of the men standing in the shadow of their stone today want each of us to learn from their deaths. Professional Soldiers reflect on the past for many reasons: most importantly, to understand the past deeply, so that we might better defend our country; and to better equip ourselves to keep the man and woman to our left and right alive in the future. It is why, frankly, the Center of Military History exists, and why your commanders have brought you here—to learn from the Soldiers who came before you.

Whenever we are tempted to describe our modern world as more complicated than in the past, we need only think back to 1918. All of these Soldiers spent most of their lives among horses and candle flames to light their way, and paper and couriers, runners and dispatch riders to communicate on the battlefield.

Imagine the speed of change and the agility demanded of the common Soldier and officer who now faced motorized vehicles, tanks, air delivered gas weapons, machine guns, radio and telephone,

artillery on unimaginable scales, tunnels, mine shafts, and the inevitably challenging coalition operations, across languages and cultures, on a scale never before seen or again attempted. We talk today of multi domain operations. The Soldiers standing with their cross today breathe into us the wisdom of their day, so that we might learn from them and their experience. They adapted to a new battlefield that was clearly multi domain, fast evolving and ruthlessly lethal—just like ours today.

How they did this is our lesson. This cemetery is their classroom. We are their students. It is our task to take up the lessons and learn from them—and never allow ourselves to think that time lessens the importance of their teachings.

John Oxenham wrote of their sacrifice:

*Tread softly here! Go reverently and slow!  
Yea, let your soul go down upon its knees  
And with bowed head and heart abased,  
strive hard  
To grasp the future gain in this sore loss!  
For not one foot of this dank sod but  
drank  
Its surfeit of the blood of gallant men.  
Who, for their faith, their hope—for life  
and liberty.  
Here made the sacrifice—here gave their  
lives  
And gave right willingly—for you and me.  
God help us if we fail to pay our debt  
In fullest full and all unstintingly!*

To those fallen, we thank you for the example you have given us. We gratefully carry your legacy of determined victory on the battlefield, and we carry the torch proudly so that you may rest peacefully beneath the poppies. **TAL**

## Notes

1. John McCrae, *In Flanders Fields*, <https://www.poetryfoundation.org/poems/47380/in-flanders-fields>.



LTG Charles N. Pede speaks to attendees of the WWCLE at TJAGLCS before the group underwent a trial run of the Army's new physical fitness test (Credit: Jason Wilkerson, TJAGLCS).

## Thinking Hard, Recommitting, and Reconnecting—the 2018 World Wide CLE

By LTC Megan Wakefield, Strategic Initiatives Office

**It happens every year—staff judge advocates (SJAs), regional defense counsel, and senior JAG Corps leaders across components gather at The Judge Advocate General's Legal Center and School for a week of professional discourse and knowledge sharing.**

This year, after a warm welcome from the Commander of The Judge Advocate General's Legal Center and School, BG R. Patrick Huston, LTG Charles N. Pede challenged all of the participants to do three things during their five days in Charlottesville: think hard, recommit, and reconnect. An all-star cast of guest speakers joined JAG Corps leaders at the school to help the attendees meet the first part of the challenge: to think hard, particularly about the future of the Army and the future of the Corps. Few topics inspire bigger thoughts on the future than artificial intelligence and

autonomous weapons, and Paul Scharre—a Senior Fellow at the Center for New American Security and author of *An Army of None: Autonomous Weapons and the Future of War*—asked the attendees to consider the ethical and legal concerns created by autonomous weapons and artificial intelligence. Richard Kidd, the Deputy Assistant Secretary of the Army for Installations, Energy, and the Environment, gave a presentation on “installations of the future” and challenged attendees to change their perspective on military installations as safe havens and areas that are removed from the fight. In multi-domain operations, Army installations constitute our strategic support area, and as such, they are not immune from evolving threats in today's complex world. Changes to military installations are likely, and judge advocates will be on the front lines, anticipating legal and policy

considerations as part of multi-discipline teams as we reshape our home towns.

In furtherance of thinking hard about the future, COL Ian Iverson, Strategic Initiatives Officer, and COL Bill Smoot, Chief, Criminal Law Department at OTJAG, presented a panel on the strategic initiatives process as it relates to the Military Justice Redesign Pilot Program (MJRPP). Four SJAs whose offices are participating in the pilot program, discussed how they instituted the program in their offices and provided insight on how the program is working. The conversation sparked lively discussion from the audience, inspiring attendees to consider the benefits and challenges of MJRPP implementation in their own jurisdictions. Other dynamic, future-oriented presentations included a discussion of the myriad legal issues related to implementing future Army weapons, as well as a thought-provoking presentation by the Deputy Commanding General of Army Futures Command, LTG Eric Wesley. The audience was also privileged to hear from the Undersecretary of the Army, the Honorable Ryan D. McCarthy, on the Future of our Army. Undersecretary McCarthy challenged the attendees to maintain a global, cross-functional focus in order to achieve the mission. The week's capstone speaker, GEN Stephen Townsend, Commanding General, Training and Doctrine Command, challenged the audience even further. Using examples from his most recent deployment as the Commander, Combined Joint Task Force, Operation Inherent Resolve, he engaged in a dialogue with the attendees about commanders' compliance with the Law of Armed Conflict (LOAC) and posed the question of whether commanders have an imperative to reply to media articles alleging that LOAC has been violated. In addition to focusing on the future, the WWCLE provided ample opportunity for attendees to recommit by focusing on the top priority of the Chief of Staff of the Army and TJAG—readiness. One component of such readiness is our physical

training. First Sergeant Charlene Crisp—with help from Noncommissioned Officer Academy Soldiers, ALC students, and SLC students—set up a first-rate run-through of the new Army Combat Fitness Test (ACFT) for the WWCLE attendees on Tuesday morning. Attendees were given an opportunity to try each of the ACFT events while the NCOs provided constructive critique. Participants walked away with a greater appreciation of the challenges the ACFT's implementation will present and with some ideas on how to prepare themselves and their teams for ACFT success.

Understanding the current fight is an integral part of readiness. LTG Joseph Anderson, the Army's G-3, briefed the attendees on the National Defense Strategy and provided an Army Operations Update. Afterward, the audience heard from Army Service Component Command SJAs, National Guard SJAs, and Army Reserve SJAs. All of these presentations provided timely, thought-provoking information about the state of the Army and the Corps. In his presentation, TJAG shared with attendees that there is no better time than the present to recommit—recommit to the profession of soldiering and recommit to providing principled counsel. Toward that end, BG (Ret.) John Cooke—currently the Director of the Federal Judicial Center and formerly the Army's representative on the committee entrusted to write the 1984 Uniform Code of Military Justice—talked about principled counsel in times of change. Few people can impart more insight regarding principled counsel in times of change than an individual who has served in such positions. With all of that thinking and recommitting, it was time for the attendees to reconnect with each other and with JAG Corps alumni. Lieutenant General Pede, with help from our Regimental Historian and Archivist, Mr. Fred Borch, and from Honorary Colonel of the Regiment COL (Ret.) Dick Gordon, officially named the Regimental Library for COL William Winthrop, the judge advocate who published the seminal work on military justice, *Military Law and Precedents*, in 1880. The library, which boasts JAG Corps artifacts, shelves chock full of books—from legal tomes to works on leadership and history—and a war crimes archive, is the most comprehensive legal



Brigadier General R. Patrick Huston, Commanding General of The Judge Advocate General's Legal Center and School, addresses audience members in Decker Auditorium on the first day of the WWCLE (Credit: Jason Wilkerson/TJAGLCS).

library in the Department of Defense and a destination library for war crimes research.

On Tuesday evening, the WWCLE participants attended a formal reception. The event provided the attendees an opportunity to reconnect with each other, as well as to reconnect with JAG Corps alumni. Lieutenant General Pede had the honor of presenting the Distinguished Service Medal to COL James Pohl on the occasion of his retirement from his position as the Chief Trial Judge for the Military Commissions, after eight extensions on active duty. Lieutenant General Pede also recognized Mr. Aubrey Daniel—a former Army judge advocate and lead trial counsel in the prosecution of 1LT William Calley from the My Lai massacre—and MG Kenneth Gray—a former Deputy Judge Advocate General and the architect of the summer internship and minority recruiting

programs—as Distinguished Members of the Regiment. Throughout the week, there were also roundtable discussions with the Reserve and National Guard regarding their focus on AC/RC Integration “Next.” The Regimental Historian and Archivist addressed the attendees, inspiring them to look to history in order to shape the future. Major General Stuart Risch closed the week by delivering an inspiring speech on the importance of individual moments in our lives and making those moments count. He spent time remembering the teammates we have lost over the past year, and he bid a fond farewell to those JAG Corps members who are transitioning to retirement. Major General Risch reminded the audience, as LTG Pede did at the beginning of the week, that in the end, what makes the Corps great is every member of the team working together to accomplish the mission. **TAL**



### 1. Cain Earns German Proficiency Badge

CPT Cameron Cain, assigned to the Cyber Center of Excellence and Fort Gordon, Georgia, represented the Office of the Staff Judge Advocate in competing for the German Armed Forces Proficiency Badge. He finished first in many of the events and earned a Silver Badge for his efforts. He is pictured with his parents, Jerry and Cindy, and the Fort Gordon Staff Judge Advocate, COL John McCabe.

### 2. JAG Team Captures Bronze

JAG Team brought home the Bronze for USARPAC, out of 24 teams representing combat veterans from 3 countries (an Australian team won). In the attached photo, from L-R, SGT Robert Cuizon, CPT Michael Keoni Medici, COL George Smawley, LTC Treb Courie, and CW4 Anita Francis.

### 3. Strum Honor Grad

On 28 June 2018, the Noncommissioned Officer's Academy at The Judge Advocate General's Legal Center and School graduated its Advanced Leader Course (ALC) 501-18. The Distinguished Honor Graduate was SGT Nathan Sturm, pictured right.

### 4. The Future is in Austin

On 13 July 2018, the U.S. Army officially announced Austin, Texas as the location of its new Futures Command Headquarters. Members of the OSJA of Futures Command, currently housed in their temporary offices in Crystal City, Virginia, are, from left to right, is CPT (P) Charles Pino, CW4 Sarah Javins, COL Michael Wong, LTC Jeffrey Dietz, Susan Henry, MAJ John Dohn, and Deborah Muldoon.

### 5. 20th Coggins Anniversary

On 26 July 2018, the JAG Corps celebrated the 20th anniversary of the establishment of the SGT Eric L. Coggins Award. This award is given to the paralegal specialist who best exemplifies the attributes of competence, character, and commitment through exceptional leadership and technical service. This year's winner is SGT DeJamine Bryson, Schofield Barracks, Hawaii.

Pictured here, from left to right, is Mrs. Janice Waugh, mother of the late SGT Eric L. Coggins, LTG Charles N. Pede, SGT Bryson, and CSM Osvaldo Martinez, Jr.

### 6. An Oath Above

On 20 July 2018, SPC Crista Harvey, left, re-enlisted and took her Oath of Office while soaring over 3,000 feet above Fort Bragg in a Black Hawk Helicopter. Both SPC Harvey and MAJ George Lavine overcame their fear of heights for this out-standing occasion.

### 7. Marching for Proficiency

On 20 July 2018, SGT Logan White (right) and CPT Christopher Hartnett (left) were awarded the Kruis Voor Betoonde Marsvaardinheid (Cross for Marching Proficiency) for completing the 102nd Four Days Marches in Nijmegen, Netherlands. This grueling event requires participants to march over 160 kilometers (100 miles) with a minimum of 11 kilograms of weight in four days around Nijmegen, Netherlands. Five thousand eight hundred military members from twenty-eight nations participated in the marches alongside approximately 41,000 civilians. Sergeant White and CPT Hartnett are members of the Wiesbaden Legal Center attached to the U.S. Army Europe OSJA.

### 8. JAG Knowledge Management Course

The Judge Advocate Knowledge Management Course was held at Fort Belvoir, Virginia from 23–27 July 2018. Thirteen students participated in and graduated from the course. The student population consisted of one officer, eight warrant officers (active duty and reserve), one noncommissioned officer, and three Army Civilians. This course presents a collaborative environment to learn and understand the doctrine, techniques, and execution of the knowledge management process, all while designing solutions to issues facing the JAG Corps.

### 9. Omari Outstanding

On 26 July 2018, CPL Owen Omari, third from left, of the Task Force Spartan Administrative Law NCOIC, graduated from the Basic Leader Course on the Commandant's List. He also received two coins for his outstanding performance. Omari is pictured with, from left to right, MAJ William Dunn, MSG Stacey Arrigoni, and Task Force Spartan HHBN Commander LTC Erik Smith.



**10. Fort Gordon's Legal Assistance Gets Distinguished**

On 20 July 2018, the Commanding General and Command Sergeant Major of the U.S. Army Cyber Center of Excellence and Fort Gordon presented Fort Gordon's Legal Assistance Office with the American Bar Association's Standing Committee on Legal Assistance for Military Personnel's 2017 Distinguished Service Award. Pictured here, from left to right, is MG John B. Morrison, Ms. Mary Rae Dudley, Ms. Demetria Ellison, and CSM Carlos M. Simmons.





Major Victor E. Ruehl served as a Division Judge Advocate in the AEF. His official identity card—in both English and French—is shown here.

the first time, Reserve and temporary first lieutenants and captains were authorized in the JAGD. When the U.S. entered World War I, all uniformed lawyers were Regular Army officers. So, who were these military attorneys? What did they do? And where did they do it? Since November 2018 marks the 100th anniversary of the armistice that ended World War I, now is the time to tell the story of lawyers who served in our Regiment a century ago.

### The American Army in World War I

In April 1917, Secretary of War Newton D. Baker, aided by Army Chief of Staff Hugh L. Scott and Assistant Chief of Staff Tasker Bliss, began organizing massive efforts to raise, clothe, equip, train, and ship U.S. Soldiers for service in France. Secretary Baker selected Major General (MG) John J. Pershing to be the AEF commander and sent him to France the following month. In June 1917, four regular infantry regiments sailed for France; when they arrived, MG Pershing formed them into the 1st Division. The 2d Division, consisting of a Marine brigade and an Army brigade, was formed in France in early 1918. All other divisions were raised in the U.S. and shipped to France, but this went slowly; by the end of 1917, there were only four divisions in the AEF, none of which were prepared for full-scale combat.<sup>1</sup>

Organizing and managing a rapid expansion of what had always been a very small professional Army was incredibly challenging. What did the AEF need? What was possible? And did the War Department have the tools to raise and equip and supply a separate, independent American Army located thousands of miles away from the U.S.?

Ultimately, with manpower needs satisfied by conscription (Congress passed a Selective Service Act in May 1917), the Army organized volunteers and draftees into fifty-four divisions of 28,000 men each. Forty-two of these divisions deployed to France. Twenty-nine would see combat. The first U.S. offensive action, an attack by

# Lore of the Corps

## Judge Advocates in the Great War

By Fred L. Borch

**When the Congress declared war on Germany and the other Central Powers on 6 April 1917,** America's Army was ill-prepared to fight what would later be called the "Great War." After all, the entire Army consisted of 125,000 Regular Army Soldiers and 67,000 National Guardsmen along the Mexican border. Moreover, the Army was built around regiments; larger units such as divisions, corps, and armies existed only on paper. But, by the time what we now call World War I ended, on 11 November 1918—just nineteen months later—the

Army had grown to 3.7 million, with two million men serving in the American Expeditionary Force (AEF) in France.

As for the Judge Advocate General's Department (JAGD), as the Corps was then known, it underwent a similar transformation in size and organization: from seventeen officers, four of whom were working in Washington, D.C., to an unprecedented 426 judge advocates by December 1918. For the first time, the Judge Advocate General was given the rank and pay of a major general (he had worn a single star since the Civil War), and, for

the 1st Division on Cantigny, took place in May 1918. In June, U.S. troops fought at Chateau-Thierry and Belleau Wood. The following month, Americans were fighting along the Marne River and Soissons. The greatest AEF contributions to the Allied cause, however, came after August 1918 when the U.S. First Army reduced the Saint-Mihiel salient in two days and then, in September, launched massive attacks between the Argonne Forest and the Meuse River. When the armistice ended the fighting in November 1918, there were almost 53,000 dead in the AEF; another 202,000 had been wounded in action.<sup>2</sup>

### Who were the Judge Advocates? What did they do and where did they do it?

The unprecedented expansion of the U.S. Army after Congress declared war on the Central Powers required a complementary increase in uniformed attorneys to support the new division-based force. Initially, the JAGD decided that obtaining direct commissions for prominent civilian attorneys was the best way to support the Army. Consequently, on 17 June 1917, just two months after America entered the war, the War Department announced that it was commissioning twenty civilian attorneys to be judge advocates. These attorneys were to “be assigned to a division of the Army and . . . all of them would be Majors on the staff of the Judge Advocate General in the field.”<sup>3</sup> Since there were seventeen uniformed lawyers in the JAGD at the outbreak of World War I, adding twenty majors more than doubled the size of the department.<sup>4</sup>

According to the War Department, “a great many distinguished lawyers and legal professors, men of national standing,” applied to be Army lawyers. There were so many “highly qualified” applicants, said the Army, that it was “hard . . . to select a few from so much good material.”<sup>5</sup> That said, the Army’s Committee on Public Information announced that the following had been selected to be directly commissioned as majors:

- Henry L. Stimson, ex-Secretary of War;
- Professor Eugene Wambaugh, Harvard Law School;

- Professor Felix Frankfurter, Harvard Law School;
- Dr. James Brown Scott, leading authority on international law;
- Professor John H. Wigmore, Dean of Northwestern University;
- Gaspar G. Bacon, son of Robert Bacon, former U.S. ambassador to France;
- Frederick Gilbert Bauer of Boston;
- George S. Wallace of Huntington, West Virginia;
- Nathan W. MacChesney of Chicago;
- Lewis W. Call of Garrett, Maryland;
- Burnett M. Chipfield, ex-Congressman from Chicago;
- Joseph Wheless of St. Louis;
- George P. Whitsett of Kansas City;
- Victor Eugene Ruehl of New York;
- Thomas R. Hamer of St. Anthony, Idaho;
- Joshua Reuben Clark, Jr., of Washington;
- Charles B. Warren of Detroit;
- Edwin G. Davis of Boise, Idaho; and Hugh Bayne of New York.<sup>6</sup>

The Army insisted—and well may have intended—that these twenty new judge advocates would see action in France. As the Committee on Public Information explained:

It would be well to disabuse the public mind of any superstition to the effect that the applicants under the legal branch of the army are looking for a “snap” or for a “silk stocking” position far in the rear of the actual fighting. The officers acting on the staff of the Judge Advocate General will be members of the actual fighting force, and, in the pursuit of duty, will be brought into the danger zone just as often as other specialized commissioned men, medical officers, for instance. The large percentage of casualties among army doctors fighting in France will stand as a convincing argument that military surgeons are not spared when the general assault begins.<sup>7</sup>

Of the twenty attorneys identified in the War Department’s press release, all but one—Gaspar G. Bacon<sup>8</sup>—ultimately accepted direct commissions as majors in the JAGD Reserve. Additionally, while the Army had insisted that these new lawyers

in uniform would be part of the “actual fighting force,” only about half of the men chosen by the JAGD joined the AEF and deployed to Europe; the remainder did not leave U.S. soil. But their service in the JAGD was exemplary, and many went on to make even greater contributions in their lives after the Army.

Major General Crowder soon realized that, regardless of the quality of the twenty civilian attorneys given direct commissions as field grade officers, the JAGD needed more lawyers in uniform. As a result of this need, Congress passed legislation that authorized the appointment of Reserve and temporary captains and first lieutenants in the JAGD. By 2 December 1918, there were 426 judge advocates in the JAGD: thirty-five Regular Army Soldiers (one major general, four brigadier generals, thirteen colonels, and seventeen lieutenant colonels) and 391 in the Officers’ Reserve Corps and National Army (seven colonels, thirty-nine lieutenant colonels, 245 majors, sixty captains, and forty first lieutenants).<sup>9</sup>

Of the 426 attorneys who served in the JAGD between 1917 and 1919, the biographical details about the following nine individuals—ranging in rank from lieutenant to major general—are a representative sample of the larger group. What they did and where they did it also accurately reflects what it was like to serve as an Army lawyer during the war.

#### *Washington, D.C.*

A fairly large number of judge advocates never went overseas and never saw combat. In this regard, they were no different from other Soldiers like Dwight D. Eisenhower, the future five-star general and U.S. president, who also remained stateside while others sailed to France.

The most senior Army lawyers worked in Washington D.C. Major General Enoch Herbert Crowder who, as the Judge Advocate General (tJAG) from 1911 to 1923, was the top Army lawyer, also served as Provost Marshal General in addition to his duties as tJAG.<sup>10</sup>

Born in a log cabin in Missouri in 1859, “Bert” Crowder obtained an appointment to West Point in 1877. After graduation in 1881, then Second Lieutenant Crowder joined the 8th Cavalry in



During World War I, the AEF held some general courts-martial in Napoleon Bonaparte's old headquarters located in St. Maixent, Deux Sevres, France. This photograph of court personnel was taken on 24 December 1918.

Brownsville, Texas. During this tour, he studied law and was admitted to practice before the Texas bar in 1884.<sup>11</sup>

Crowder joined the JAGD as a captain in 1891, and was promoted to major four years later. At the end of the Spanish-American War in 1898, now Lieutenant Colonel (LTC) Crowder was in the Philippines. Over the next several years, he distinguished himself in a variety of assignments, including service on the Philippine Supreme Court. After a brief tour in Washington, D.C., LTC Crowder went to Japan, where he was the senior American observer with the Imperial Japanese Army during the Russo-Japanese War of 1904–1905.

In 1911, Crowder was promoted to major general and took the oath as tJAG. He initiated a number of new legal changes, including a revision of the Articles of War in 1916 and the publication of a new Manual for Courts-Martial. The outbreak of World War I, however, shifted MG Crowder's

focus away from military law and lawyers. In an unprecedented move, Secretary Baker appointed MG Crowder as the Army's Provost Marshal General and put MG Crowder in charge of implementing the newly passed Selective Service Act, the first draft since the Civil War. This meant that MG Crowder was in charge of the Army's transformation from a small professional all-volunteer force to a wartime Army consisting largely of civilian draftees. Starting in May 1917, MG Crowder supervised the registration, classification, and induction of over 2.8 million men. All male citizens between the ages of twenty-one and thirty years of age were required to register with local draft boards. These boards, administered by civilians, decided who would fill their quotas for the military and who would work in industry. Those drafted were required to serve for the duration of the war, with compulsory military service ending "four months after a proclamation of peace by the President."<sup>12</sup> Ultimately,

MG Crowder's efforts resulted in a dramatic metamorphosis in the Army: in April 1917, the Army consisted of two-thirds Regular Army Soldiers and one-third federalized National Guardsmen. When the fighting in Europe ended November 1918, the Army was seventy-seven percent National Army (draftees), ten percent National Guard, and thirteen percent Regular Army Soldiers. MG Crowder was so successful that he was offered a promotion to three-star rank in 1918. Uncomfortable with the idea of being a "swivel chair" lieutenant general, MG Crowder refused the promotion and instead—unsuccessfully—lobbied for a field command in France.

During the war, MG Crowder found himself, along with the entire military justice system, under attack for being "un-American." After the trial of sixty-three alleged mutineers at Fort Sam Houston in November 1917, thirteen of the convicted men were sentenced to death and hanged before their records were examined by

anybody, much less before the condemned men were given an opportunity to request clemency.<sup>13</sup> In the public uproar that followed, Brigadier General Samuel T. Ansell, who was serving as the Acting tJAG while MG Crowder focused on implementing the Selective Service Act, charged that courts-martial were “patently defective” and needed immediate reform by Congress.

The ensuing controversy, known today as the Ansell-Crowder Dispute, focused chiefly on the proper role of the commander in the court-martial system. Ansell and his allies insisted that because military justice was almost wholly in the control of line officers without legal education and training, results at trial were frequently harsh, arbitrary, and capricious. They also complained that there was no system of appellate review; there was no appeal from a convening authority’s approval of a court’s findings and sentence. Had there been some sort of appellate process, insisted Ansell, the injustice of hanging convicted men without any opportunity for clemency or a thorough review of the court-martial record could have been avoided. Moreover, reforms were needed immediately—not later—as the Army was trying more and more general courts-martial: 6,200 in 1917 to over 20,000 in 1918.<sup>14</sup>

While Crowder vigorously defended the system against attacks by Ansell and others, he nonetheless recommended certain reforms to Congress. Ultimately, revisions to the Articles of War enacted in 1920 included greater protections for the accused. For the first time, the law required a pretrial investigation where the accused could offer evidence and witnesses. Another new feature was that all general courts-martial would have a “law member” detailed to them. This law member was required to be a member of the JAGD and, while he did not have powers akin to a judge in federal or state court, the law member ruled on interlocutory questions and instructed the court on the presumption of innocence and burden of proof. He also ruled on the admissibility of evidence; in this regard, his decisions were final. Finally, Congress required tJAG to create a board of review (consisting of at least three officers) who would review the records of trial for all sentences requiring presidential

confirmation. These boards had previously been established by regulation; now they were required by statute.<sup>15</sup>

Another World War I Judge Advocate was Major (MAJ) Felix Frankfurter, the future Associate Justice of the U.S. Supreme Court. Born in Vienna, Austria, in 1882, Frankfurter came to America when he was twelve years old.

Although he spoke no English when his family arrived in New York, he was a brilliant student, and completed high school and college in a special program at the City College of New York in 1902. Frankfurter subsequently graduated first in his class at Harvard Law School in 1906.

Frankfurter worked as a civilian lawyer in the War Department before leaving Washington, D.C., to join Harvard’s law faculty in 1916. In early January 1917, with war on the horizon, then Professor Frankfurter accepted a direct commission to major in the Reserve Corps of the JAGD. After the U.S. entered World War I in April 1917, Frankfurter returned to Washington for duty in the Office of the Secretary of War where he served as Secretary of War Henry Stimson’s legal counsel.

He worked a variety of issues, including the legal status of conscientious objectors, and wartime relations with labor and industry. Major Frankfurter refused to wear a uniform while on active duty; he was close friends with tJAG Crowder and was apparently allowed to wear only civilian clothes during his time on active duty. In his memoirs, Frankfurter explained why:

The reason I didn’t want to go into uniform was because I knew enough about doings in the War Department to know that every pipsqueak Colonel would feel he was more important than a Major . . . As a civilian I would get into the presence of a General without saluting, clicking my heels, and having the Colonel outside say, “You wait. He’s got a Colonel in there.”<sup>16</sup>

After leaving active duty, Frankfurter continued a stellar career. He declined to be Solicitor General in 1933, but accepted President Roosevelt’s nomination to the U.S. Supreme Court in 1939. Frankfurter

served as an associate justice until retiring in 1962.

In addition to Crowder and Frankfurter, MAJ Hugh S. Johnson also served exclusively in Washington, D.C. Johnson, who served as General John J. Pershing’s judge advocate during the Punitive Expedition into Mexico, later headed President Roosevelt’s National Recovery Act (NRA) during the Great Depression. His bluntness and colorful use of language while at the NRA, soon familiar to most Americans through its “blue eagle” symbol, also earned him the nickname “Iron Pants.” Johnson popularized words like “bunk,” “crack-down,” and “chisler”—words that are still part of the American lexicon.<sup>17</sup>

Born in Kansas in 1882, Johnson graduated from West Point in 1903. After his service with Pershing in Mexico, Johnson returned to Washington, D.C., where, in May 1917, he was made Deputy Provost Marshal General and tasked with helping to draft the regulatory framework that would implement the Selective Service Act. By 1918, Johnson was a brigadier general and in charge of the Army’s Purchase and Supply Branch. According to the U.S. Army’s Center of Military History, Johnson was “brilliant, young, impatient, and abrasive” and soon in “hot water with many of his military colleagues, including the Chief of Staff.”<sup>18</sup> Johnson left the job “disgruntled,” but with a clear understanding of how government bureaucracy worked. He also had acquired a reputation as a problem-solver and became a successful businessman and was part-owner of a farm tractor manufacturing company in the 1920s.

### **England**

John Baker White never got to France—or Germany—but he did deploy to England as the “Judge Advocate, Base Section No. 3, American Troops in England” in January 1918. Born in Romney, West Virginia, in 1869, White’s formal education ended when he graduated from high school. But, as did many men of his day, White “studied law” with a law firm in Charleston, West Virginia, and, when he felt ready, took the Supreme Court of Appeals examination to be a lawyer and passed the Bar in 1897.<sup>19</sup>

According to the biographical questionnaire that White submitted to the



Major General Enoch Crowder, who served as the Judge Advocate General from 1911 to 1921, took a leave of absence from his duties as the Army's top uniformed lawyer to oversee the implementation of the Selective Service Act of 1917. In this photo, taken at the U.S. Senate Building on 27 July 1918, Crowder (second from left, front) poses with officers who assisted him at the second drawing of draft numbers.

JAGD in February 1919, he served in the West Virginia National Guard from 1888 to 1897, and in the 1st West Virginia Volunteers during the War with Spain.<sup>20</sup> After being appointed a judge advocate in the U.S. National Guard in December 1917, White travelled by rail to Hoboken, New Jersey, and by ship to Liverpool, England, on Christmas Eve. When he arrived on British soil, he took the train to London and took up residence at the Belgrave Mansion Hotel, Grosvenor Gardens. At fifty years of age, then MAJ White was certainly one of the most senior Army lawyers in England.

For the next year, White worked closely with British authorities in crafting legislation that would give the United States criminal jurisdiction over its own

troops. Ultimately, White was the principal author of the entire law, which was titled, "Discipline of Forces of Her Majesty's Allies in the United Kingdom."<sup>21</sup> It permitted "the naval and military authorities and courts of an Ally" on British soil to exercise "all such powers as are conferred on them by the law of that Ally."<sup>22</sup> In other words, if U.S. military law authorized the Army to prosecute Soldiers stationed in the United Kingdom (U.K.), the British authorities had no objection. In fact, the law directed British authorities to order any non-U.S. citizen (provided the U.S. government paid his or her travel expenses) to appear "as a witness and give evidence" at any U.S. military criminal proceeding. From the American perspective, this legislation was

key to maintaining good order and discipline over U.S. troops in England. Since, under international law, American soldiers were in England at the invitation of the British, the U.K. authorities could have insisted that they alone had jurisdiction over U.S. troops. It follows that White's legislation, which formalized a British willingness to give up this sovereign power and permit foreign military courts to hold proceedings was an important legal event. American commanders in the U.K. had the power to discipline law breakers, and White's work demonstrated how the law could be used to enhance mission success. Being able to exercise criminal jurisdiction over American uniformed personnel stationed overseas continues to be so important

that Army lawyers today—working closely with the State Department—continue to be involved in negotiating the Status of Forces Agreements containing provisions like those authored by MAJ White.<sup>23</sup>

### **France**

While Crowder, Frankfurter, and Johnson toiled on U.S. soil, and White worked in England, Army lawyers like Burnett M. Chipperfield, J. Leslie Kincaid, Adam E. Patterson, and Blanton Winship served with distinction in the AEF in France.

Burnett M. Chipperfield, like other judge advocates, was asked to fill out a one-page questionnaire on his service during World War I. Chipperfield, however, submitted a single-spaced, three and one-half page typed resume of his career despite thinking “that whatever I have done [during the war] was better known to the Judge Advocate General’s Department than even to myself.”<sup>24</sup>

Born in Dover, Illinois, in 1870, Chipperfield was educated at Hamline University in St. Paul, Minnesota. During the Spanish-American War, he served as a lieutenant in the First Illinois Cavalry. After the war, he remained in the Illinois National Guard and, as a lawyer, served as a judge advocate in the early years of the 20th century. Chipperfield retired as a Guard colonel in 1916 and transferred to the National Guard Reserve. The year before, he had been elected to serve in the House of Representatives and, as he did not run for reelection, ended his service as a congressman in March 1917.<sup>25</sup>

Two months later, having volunteered for active duty with the JAGD, Chipperfield was ordered to active duty as a major. He was sent to Springfield, Illinois, where he assisted in Illinois in the implementation of the new Selective Service Act in that state. According to Chipperfield, he “helped perfect the plans for the operations of the selective draft, assisted in the preparation of forms to be used, and wrote some of the literature for the use of the various draft boards.”<sup>26</sup>

Almost a year later, in April 1918, Chipperfield sailed to France as the judge advocate for the 33rd (Illinois) Division.<sup>27</sup> While a lawyer ordinarily would set up shop in a rear area far away from the dangers of the battlefield, Chipperfield did

not. On the contrary, he “was always with the division headquarters at the front,” and served as Division Liaison Officer between the 33rd and nearby British and French units.<sup>28</sup> In his own words, Chipperfield “was continuously with the active troops, and shared with them the common hazards of their position” at Hamel, Chipelly, Gressaire Woods, and on both banks for the Meuse River during the Meuse-Argonne offensive.<sup>29</sup>

Chipperfield was not boasting, as Brigadier General W. K. Naylor, the Chief of Staff of the 33rd Division, commended him for both his legal advice and work as a liaison officer. “Your desire for service ‘up at the front,’” wrote Naylor, “notwithstanding the fact that your legitimate duties did not require you to go there, was greatly appreciated by me.”<sup>30</sup> Naylor continued:

It adds greatly to the Chief of Staff’s feeling of security and peace of mind to know that he has dependable men as liaison agents. It precludes the possibility of losing touch, and it is one of the most important, and I might say, at times, one of the most dangerous duties.<sup>31</sup>

The Commanding General of the 33rd Division likewise praised Chipperfield when he wrote that his “conduct has been an inspiring example to other men.”<sup>32</sup> Given these accolades, it should come as no surprise that the War Department awarded the Distinguished Service Medal to MAJ Chipperfield for his exceptionally meritorious service while serving as Division Judge Advocate. According to the official citation, Chipperfield “performed duty of great responsibility beyond that required” of an Army lawyer. “Constantly under hostile artillery fire, he kept his Division Commander thoroughly informed for the situation . . . going voluntarily and frequently to the front line for information and on several occasions opening serious and extensive traffic blocks under shell fire.”<sup>33</sup>

Chipperfield remained in Europe after the armistice and served as the “Judge Advocate General” [sic] for the 3d Army Corps during its occupation of Cloblenz, Germany. In this assignment, Chipperfield

served as a one-man “Superior Provost Court” and “conducted the trial of all important cases . . . of German civilian offenders.”<sup>34</sup> He also “inaugurated the system of the management of Civil Affairs for that part of Germany occupied by the 3d Army Corps.”<sup>35</sup> This meant that he organized American military supervision of all cities and political units in the U.S. sector, including the administration of German civil law. Not only was Chipperfield successful in his civil affairs operations (“he received the thanks of the German civil officials”<sup>36</sup>), but the system that he created was applied and copied by other Army organizations.

Like Chipperfield, J. Leslie Kincaid showed that he could contribute more to the AEF than his skills as a lawyer. Born in New York in 1884, Kincaid grew up in Syracuse, where he attended high school and obtained his law degree from Syracuse University in 1906. He was admitted to the Bar of New York in 1907. Like many men of his era, Kincaid had joined the state’s National Guard while still in college; at age 19, he enlisted as a cavalry private. He continued to soldier, and, from June to December 1916, was serving on the Mexican border as the Judge Advocate for the 6th Division. Kincaid’s public service during these years also included being active in state politics; he served as a member of the New York Assembly from 1915 to 1916.

Kincaid sailed for France in 1918 and was assigned to the 27th “New York” Division as its judge advocate. In addition to providing legal advice, MAJ Kincaid also proved that he was a warrior. During operations near Ronsoy, France, from September 28, Kincaid volunteered to take command of a battalion of the 106th Infantry Regiment because of the shortage of line officers on duty. According to his military records, he led the battalion throughout the fighting, demonstrating “courage and forcefulness without regard to his personal safety, thereby setting a splendid example for all ranks.”<sup>37</sup> On one occasion, Kincaid spotted a force of sixty to eighty Germans counter-attacking on his left. Knowing that there was no reserve force to deploy against this German assault, Kincaid “promptly organized his Battalion headquarters runners, signalmen, and some

stragglers, and attacked [the Germans] and drove them back.”<sup>38</sup> Kincaid himself manned a machine gun during the fighting.<sup>39</sup>

For his bravery under fire and exemplary service in uniform, Kincaid was awarded the Army Distinguished Service Cross, the Belgian Order of the Crown, and the British Distinguished Service Order. No Army lawyer was more highly decorated in World War I.<sup>40</sup>

As an African-American lawyer, Adam E. Patterson was a rarity from the moment that he joined the Army in 1917. Born in Walthall, Mississippi, in 1876, he attended high school in Kansas City, Kansas, and Pueblo, Colorado. After graduating in 1897, Patterson began studying law at Kansas State University; he earned his LL.B. in 1900.

Patterson then practiced law in Cairo, Illinois, and Muskogee, Oklahoma, before moving to Chicago. According to his questionnaire on file in the National Archives, Patterson “tried an important case” with the famous lawyer, Clarence Darrow.<sup>41</sup>

Patterson was also involved in local, state, and national politics. In 1916, he “managed the national campaign for the Democratic Party among colored voters” and subsequently was president of the National Colored Democratic League.<sup>42</sup> Patterson was closely associated with Oscar DePriest, a prominent African-American alderman in Chicago.<sup>43</sup>

Patterson joined the Army shortly after America’s declaration of war in April 1917, and spent ten months as an Infantry captain at Camp Dodge, Iowa. After the 92nd “Buffalo” Division—an all-black unit consisting of draftees from across the U.S.—was organized in the AEF, General John J. Pershing appointed Patterson as the 92nd’s Division Judge Advocate.

After arriving in France and joining his unit, Patterson “personally handled all offenses committed by Soldiers, from absence without leave to murder.”<sup>44</sup> No doubt in recognition of his fine work, General Pershing approved Patterson’s promotion to major on 5 October 1918. Patterson made history as the first African-American lawyer to serve in the JAGD and one of only a handful of black officers to reach field-grade rank.

Colonel Blanton Winship was a career judge advocate who also proved his value as

a combat leader. Born in Georgia in 1869, Winship obtained his A.B. degree from Mercer in 1889. He was awarded a bachelor of laws degree from the University of Georgia in 1893 and subsequently practiced law in his home state. The surge of patriotism that accompanied the outbreak of the Spanish-American War prompted Winship to join the U.S. Volunteers as a captain of the 1st Georgia Infantry. After three years of fighting in the Philippines, he obtained a commission as an officer in the Regular Army and was soon an acting judge advocate. By 1904, Winship had transferred to the JAGD and held the rank of major.<sup>45</sup>

Winship served in legal positions of increasing responsibility until 1914, when he began teaching law at the Army Service School, Fort Leavenworth, Kansas. In December 1917, he sailed for France where American troops were belatedly joining the war that had been raging in Europe since 1914. Promoted to colonel while in the AEF, Winship apparently held three jobs simultaneously: Judge Advocate, First Army; Commander, 110th Infantry Regiment; and Commander, 118th Infantry Regiment. Both regiments were part of the 28th Division and fought in some of the war’s major operations, including Champagne-Marne, Aisne-Marne, and Saint-Mihiel.<sup>46</sup>

Winship received the Distinguished Service Cross—second only to the Medal of Honor—for his “extraordinary heroism in action near Lacheussee, France, on November 9, 1918,” just two days before the armistice that ended combat operations.<sup>47</sup> The official citation reads:

While commanding his regiment and observing from his outpost line the progress of a daylight raid on the enemy by a detachment of his officers and men, he discovered the enemy enveloping the right flank of the raiding party. Hastily collecting and organizing a small party from the few available men, he, regardless of his own safety, personally led them forward under heavy rifle, machine-gun, and shell fire, and covered the exposed flank, advancing over a deep tank obstruction and through enemy wire to their second line, destroying several machine guns

and killing many of the enemy. His prompt and fearless action enabled the main raiding party to accomplish its mission, and his personal conduct was a great inspiration to his officers and men and contributed largely to the success of the raid.<sup>48</sup>

Winship’s post-World War I legal achievements, including duty as TJAG from 1931 to 1933 were overshadowed by his subsequent assignments. After leaving active duty in 1933, Winship was appointed the governor of Puerto Rico in 1934, which was widely viewed as a move by President Franklin D. Roosevelt to quell militant sentiment for Puerto Rican independence. Ultimately, Winship’s tenure as governor (which lasted until 1939), was a sore point for many men and women on the island, especially when he ordered police to put down a Nationalist Party of Puerto Rico rally for independence in the city of Ponce on 21 March 1937. In what some call the Ponce Massacre, police fired on the crowd, killing between twenty and twenty-two people (according to differing accounts) and wounding about 120. While there are still Puerto Ricans who desire independence from the U.S., Congress granted U.S. citizenship to all inhabitants of the island in 1940.<sup>49</sup>

Winship was recalled to active duty during World War II. He served as one of the seven members of the military commission created by President Roosevelt in 1942 to try Nazi saboteurs arrested in the U.S. The event, and the Supreme Court decision of *In re Quirin*, are frequently cited as precedent for the on-going trials of alleged terrorists at Guantanamo Bay, Cuba. When he retired in 1944 at age seventy-five, Winship was the oldest Army officer on active duty. He died in Washington, D.C., in 1947.

### **Germany**

After the Armistice in November 1918, most judge advocates returned to civilian life and the civilian practice of law. A small number, however, like MAJ Matthew H. Allen, deployed to Germany to serve with the Army of Occupation. Born in Kenensville, North Carolina, in 1884, Allen graduated from the University of North

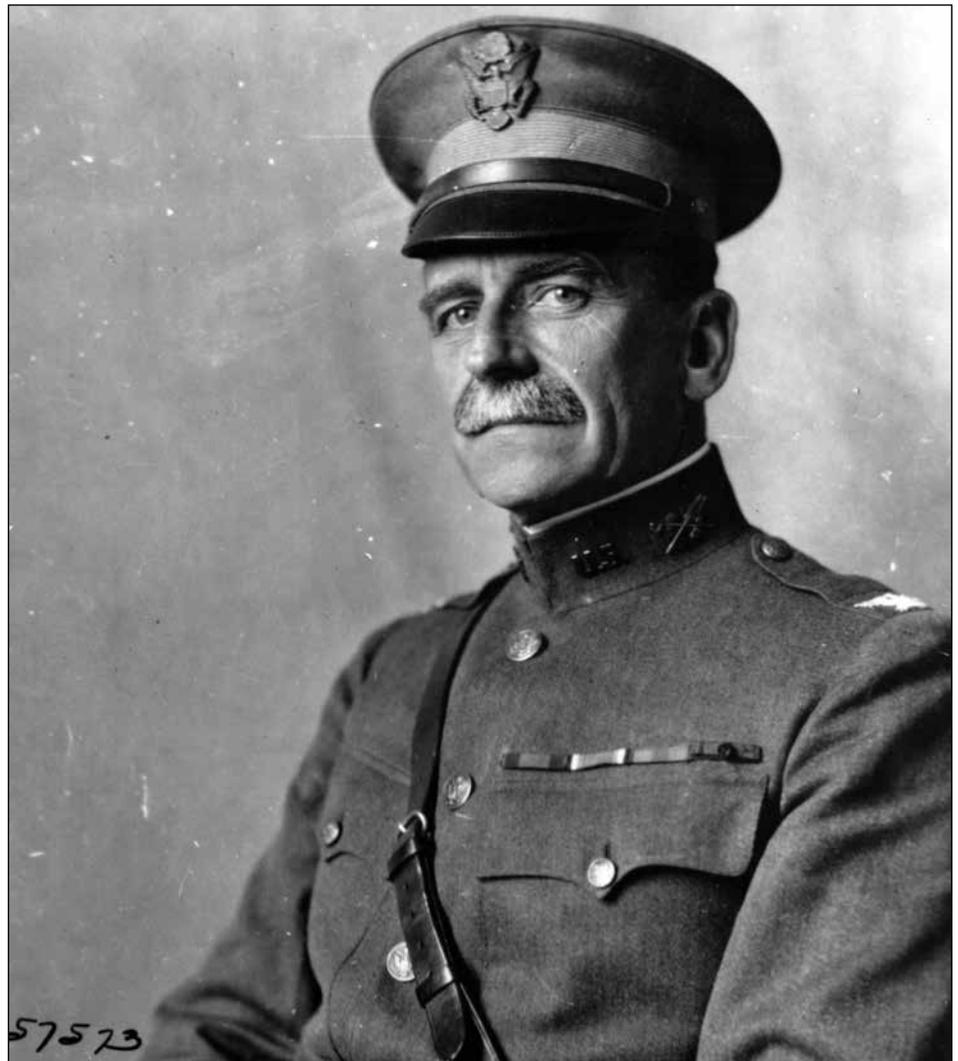
Carolina's law school in 1906 and was admitted to the North Carolina State Bar that same year. Over the next ten years, Allen practiced law in Goldsboro and New Bern, North Carolina. Then, after America entered the war on the Allied side, Allen joined the Officers' Reserve Corps in May 1917. After serving briefly as a captain in the 113th Field Artillery Regiment, Allen was commissioned as a major in the JAG Reserve Corps and was assigned as the Assistant Judge Advocate, 31st Division, located at Camp Wheeler, Georgia.

On 16 November 1918, MAJ Allen was ordered to report to the Army's 3rd Division, and he sailed for Europe. In January 1919, Allen was appointed "Superior Provost Court for the Kreis of Mayen," with duty in Andernach, Germany. According to official records, this made him a one-person supervisor for forty-four inferior Provost Courts. Allen also had "general supervision of the administration of 'War Laws'" in the territory around Mayen, which was then occupied by the 3rd Division.<sup>50</sup>

Major Allen filed a report in March 1919, in which he detailed the "nature and extent" of his work.<sup>51</sup> According to this document, a total of 320 trials were held. Two hundred eighty six persons were convicted and 100 imprisoned. Additionally, 25,600 Marks were collected in fines. The offenses of the 286 convicted defendants varied:

- Selling wines and liquor 40
- Preaching propaganda 2
- Circulating false rumors 4
- Possession of firearms 12
- Possession of American goods 12
- Failure to carry identification cards 96
- Larceny of American goods 14
- Disobedience of military orders 15
- Selling food to Americans 9
- Prostitutes and venereal disease 42
- Miscellaneous, minor offenses 40

In the context of the times, the Army's ban on selling wine and alcohol in the occupied territory makes sense; after all, at home, the Eighteenth Amendment's prohibition on alcoholic beverages came into effect in January 1920 and lasted for the next thirteen years. But note that selling beer in the occupied territory was not



Major General Blanton Winship (shown here as a colonel) was a career judge advocate. While serving as an Army lawyer, he also commanded two Infantry regiments in France and was decorated with the Distinguished Service Cross. Winship served as TJAG from 1931 to 1933.

prohibited—almost certainly a recognition that depriving Germans of beer would be both impossible and ill-advised.

In addition to his criminal law duties, Allen also was tasked with investigating "all claims for property damage or personal injury submitted by civilian enemies."<sup>52</sup> This claims responsibility meant that Allen examined the claims filed by Germans against the U.S. for damage to their property or injury to themselves caused or committed by U.S. troops. Just as today, the Army paid these claims after a thorough investigation.<sup>53</sup>

### Conclusion

Judge advocates in World War I demonstrated that they were both superb lawyers

and outstanding Soldiers. Since the entire JAGD consisted of slightly more than 400 men out of a total Army of 3.7 million, it is not an overstatement to stress that these Army lawyers made contributions greatly disproportionate to their numbers.

Crowder's implementation of the Selective Service Act of 1917 was critical to the success of the entire American war effort. Frankfurter's work as legal counsel to Secretary of War Stimson similarly meant that a judge advocate was contributing to the Army at the highest level.

Outside Washington, D.C., White's efforts in London helped maintain good order and discipline among U.S. troops in England. Chipperfield's work as a liaison officer at the front in France, and the

extraordinary heroism of Kincaid and Winship, likewise showed how uniformed attorneys could enhance mission success in non-legal ways.

Finally, the challenges faced by Patterson as the first African-American lawyer to serve in the JAGD deserve special mention. In a period where Jim Crow reigned in the South and men and women of color faced discrimination as a matter of routine, Patterson's service in the 92nd Division demonstrated that African-Americans merited an expanded role in the U.S. Army.

While this article has only touched on the experiences of a handful of the Army lawyers who served in World War I, the story of these judge advocates—who they were, what they did, and where they did it—should not be forgotten as we commemorate the 100th anniversary of the end of World War I. **TAL**

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*Fred L. Borch is the Regimental Historian & Archivist for the The Judge Advocate General's Corps.*

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## Notes

1. David Trask, *The Entry of the USA into the War and its Effects*, in *WORLD WAR I: A HISTORY* 239, 245 (Hew Strachan ed., 1998) [hereinafter Trask].

2. For more on the AEF in World War I, see RICHARD S. FAULKNER, *PERSHING'S CRUSADERS: THE AMERICAN SOLDIER IN WORLD WAR I* (2017).

3. James Brown Scott, *Judge Advocates in the Army*, 11 *AM. J. INT'L L.* 650, 650 (1917).

4. JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975* 116 (1975) [hereinafter *THE ARMY LAWYER*].

5. Trask, *supra* note 1, at 651.

6. *Id.*

7. *Id.*

8. While he could have served in the JAGD, Gaspar Griswold Bacon (1886–1947) decided instead to serve as a Field Artillery officer during World War I. He was a member of the 81st Division and left active duty as a major. During World War II, Bacon obtained a commission as a major in the Army Air Forces and took part in the D-Day landings in Normandy on 6 June 1944. He was honorably discharged as a colonel in 1945. Parkman Dexter Howe, *Gaspar Griswold Bacon*, *PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY* 426–428 (Oct. 1947–May 1950).

9. FAULKNER, *supra* note 2. For a comprehensive study of Crowder and the JAGD in World War I, see JOSHUA E. KASTENBERG, *TO RAISE AND DISCIPLINE AN ARMY: MAJOR GENERAL ENOCH H. CROWDER, THE JUDGE*

*ADVOCATE GENERAL'S OFFICE, AND THE REALIGNMENT OF CIVIL AND MILITARY RELATIONS IN WORLD WAR I* (2017).

10. Prior to 31 January 1924, the top uniformed lawyer in the Army was “the Judge Advocate General.” On that day, however, War Department General Order No. 2, announced that the position would now be known as “The Judge Advocate General.”

11. For more on Crowder, see DAVID A. LOCKMILLER & LEWIS B. HERSHEY, ENOCH H. CROWDER: SOLDIER, LAWYER, AND STATESMAN (1955). See also, Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859–1932)*, *ARMY LAW.*, May 2012, at 1–3.

12. BERNARD ROSTKER, *I WANT YOU!: THE EVOLUTION OF THE ALL-VOLUNTEER FORCE* 24 (2006). For more on the draft in World War I, see GERALD SHENK, *WORK OR FIGHT!: RACE, GENDER, AND THE DRAFT IN THE WORLD WAR ONE* (2005). See also, GEORGE Q. FLYNN, *THE DRAFT, 1940–1973* (1993).

13. For more on the trials arising out of the Houston Riots, see JOHN MINTON, *THE HOUSTON RIOT AND COURTS-MARTIAL OF 1917* (1990). See also, GARNA L. CHRISTIAN, *BLACK SOLDIERS IN JIM CROW TEXAS, 1899–1917* (1995).

14. *THE ARMY LAWYER*, *supra* note 4, at 105.

15. For more on controversy over reforming the Articles of War, see Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 *MIL. L. REV.* 1 (1967) [hereinafter *Crowder-Ansell Dispute*]. As for Crowder, he retired from active duty in 1923, after 46 years of service. Major General Crowder then topped off his remarkable career as a soldier by immediately accepting an appointment as the first U.S. Ambassador to Cuba, a post he held until he left Havana in 1927. He died in 1932.

16. *THE ARMY LAWYER*, *supra* note 4, at 118. For a short biography of Frankfurter, see MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* (1991).

17. For more on Johnson's tenure at the NRA, see Hugh S. Johnson, *Man of the Year*, *TIME*, Jan. 1, 1934.

18. <http://www.arlingtoncemetery.net/hsjohnson.htm>

19. Questionnaire for the Judge Advocates Record of the War, John Baker White, National Archives and Records Administration (NARA), Washington, D.C., Record Group 153, Records of the Office of the Judge Advocate General, Entry 45, Box 1.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Questionnaire for the Judge Advocates Record of the War, Burnett M. Chiperfield, NARA, Washington, D.C., Record Group 153, Records of the Office of the Judge Advocate General, Entry 45, Box 1 [hereinafter *Chiperfield Questionnaire*].

25. Search for Burnett Chiperfield, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov>.

26. *Id.*

27. For more on the 33rd Division in World War I, see FREDERIC L. HUIDEKOPER, *THE HISTORY OF THE 33RD DIVISION A.E.F.* (1921).

28. *Chiperfield Questionnaire*, *supra* note 24.

29. *Id.*

30. *Id.*

31. Search for Burnett Chiperfield, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov>.

32. *Chiperfield Questionnaire*, *supra* note 24.

33. Search for Burnett Chiperfield, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS*, <http://bioguide.congress.gov>.

34. *Chiperfield Questionnaire*, *supra* note 24.

35. *Chiperfield Questionnaire*, *supra* note 24.

36. *Chiperfield Questionnaire*, *supra* note 24.

37. Questionnaire for the Judge Advocates Record of the War, J. Leslie Kincaid, NARA, Washington, D.C., Record Group 153, Records of the Office of the Judge Advocate General, Entry 45, Box 3.

38. *Id.*

39. *Id.*

40. Only one other judge advocate was awarded the Army Distinguished Service Cross for extraordinary heroism in World War I. This was then COL Blanton Winship (discussed *infra*) who, like Kincaid, earned the decoration while in command of a line unit. Winship would later serve as The Judge Advocate General (TJAG) from 1931 to 1933.

41. Clarence S. Darrow (1857–1938) was a criminal defense lawyer known for his eloquence. He is perhaps best known for representing the teenaged killers Leopold and Loeb in 1924 and John T. Scopes in the so-called Scopes Monkey Trial in 1925.

42. Questionnaire for the Judge Advocates Record of the War, Adam E. Patterson, NARA, Washington, D.C., Record Group 153, Records of the Office of the Judge Advocate General, Entry 45, Box 4 [hereinafter *Patterson Questionnaire*].

43. Oscar DePriest (1871–1951) was a prominent black leader in Chicago in the early years of the last century. He was elected alderman of Chicago's second ward in 1915, becoming the first African-American elected to the city council of Chicago. In 1928, DePriest became the first black to win a seat in the U.S. House of Representatives in the 20th century.

44. *Patterson Questionnaire*, *supra* note 42.

45. *THE ARMY LAWYER*, *supra* note 4, at 149–51.

46. *Id.*

47. War Department, General Order No. 9, 1923.

48. *Id.*

49. MARIE G. PIETRANTONI, *BLANTON WINSHIP GOVERNOR OF PUERTO RICO: A STUDY OF HIS GUBERNATORIAL ADMINISTRATION 1934–1939*, 132–169 (2016).

50. Questionnaire for the Judge Advocates Record of the War, Matthew H. Allen, NARA, Washington, D.C., Record Group 153, Records of the Office of the Judge Advocate General, Entry 45, Box 1.

51. *Id.*

52. *Id.*

53. *Id.*



(Credit: OTJAG Strategic Initiatives Office)

## Aubrey Daniel Honored with Distinguished Member Status

By Fred L. Borch

On 16 August 2018, The Judge Advocate General of the Army (TJAG)—Lieutenant General (LTG) Charles N. Pede—honored Mr. Aubrey Daniel with Distinguished Member status in our Regiment. Daniel, who served as a judge advocate captain in the late 1960s and early 1970s, is best known as the lead trial counsel in *United States v. Calley*. This court-martial, tried at Fort Benning in 1971, was the only successful criminal prosecution arising out of war crimes committed by Soldiers at the village of My Lai in Vietnam on 16 March 1968.

Mr. Daniel's conviction of Lieutenant William L. "Rusty" Calley was important,

and Daniel's mostly extemporaneous closing argument has been singled out by trial attorneys for its excellence. But LTG Pede stressed that he was honoring Daniel with Distinguished Member status for another reason: a letter of protest that then Captain Daniel wrote to President Richard M. Nixon after the president interfered in the *Calley* case. Daniel wrote the letter because, after the court-martial panel sentenced Calley to be confined at hard labor for life for murdering unarmed and unresisting Vietnamese civilians, Nixon instead ordered the Army to return Calley to his on-post quarters where Calley would be under house arrest while the verdict and sentence were reviewed.

At the time, it was clear to almost everyone that President Nixon had interfered in the *Calley* case in response to angry letters, draft-board resignations, and public opinion polls showing that the vast majority of Americans viewed Lieutenant Calley either as a scapegoat or as a Soldier simply doing his duty. Daniel thought otherwise, and wrote to Nixon that it was shocking to him that "so many people across the nation have failed to see the moral issue which was involved in the trial of Lieutenant Calley—that it is unlawful for an American soldier to summarily execute unarmed and unresisting men, women, children, and babies."

Moreover, continued Daniel, Nixon's unprecedented intervention in the court-martial, occurring as it did before the record of trial had been typed up or gone to the convening authority for action, had further elevated a mass murderer of innocents into a national hero. The intervention injected politics into the judicial system whose "fundamental precept" was that the law must be free of such politics. The intervention failed to uphold moral principles concerning protection of the weak and it damaged the credibility of the military justice system.

Daniel's letter was "a magnificent expression of American idealism," *The New York Times* said in an editorial the day after it printed the letter in full.<sup>1</sup> It was a "courageous statement of what this country is really all about: respect for human freedom, for individual rights and for impartial justice under law."<sup>2</sup>

Fifty years after the incident at My Lai, LTG Pede said he wanted the lawyers under his command to remember what Daniel did. "It was the principled stand of Mr. Daniel that I've always admired," Pede said at the ceremony honoring Mr. Daniel, who, at age seventy-seven, has retired from the practice of law and lives full-time in Italy. **TAL**

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*Fred L. Borch is the Regimental Historian & Archivist for the The Judge Advocate General's Corps.*

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### Notes

1. *The Calley Issues*, N.Y. TIMES (Apr. 8, 1971) <https://www.nytimes.com/1971/04/08/archives/the-calley-issues.html>.

2. Id.

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April 3, 1971

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The President of The United States  
White House  
Washington, D.C.

Sir:

It is very difficult for me to know where to begin this letter as I am not accustomed to writing letters of protest. I only hope that I can find the words to convey to you my feelings as a United States citizen, and as an attorney, who believes that respect for the law is one of the fundamental bases upon which this nation is founded.

On November 26, 1969, you issued the following statement through your press Secretary, Mr. Ronald Ziegler in referring to the My Lai incident:

An incident such as that alleged in this case is in direct violation not only of U.S. military policy, but is also abhorrent to the conscience of all the American people.

The Secretary of the Army is continuing his investigation. Appropriate action is and will be taken to assure that illegal and immoral conduct as alleged be dealt with in accordance with the strict rules of military justice.

This incident should not be allowed to reflect on the some million and a quarter young Americans who have now returned to the United States after having served in Vietnam with great courage and distinction.

At the time you issued this statement, a general court-martial had been directed for a resolution of the charges which had been brought against Lieutenant William L. Calley Jr. for his involvement at My Lai.

On December 8, 1970, you were personally asked to comment on the My Lai incident at a press conference. At that time you made the following statement:

... What appears was certainly a massacre, and under no circumstances was it justified.

One of the goals we are fighting for in Vietnam is to keep the people from South Vietnam from having imposed upon them a government which has atrocity against civilians as one of its policies.

We cannot ever condone or use atrocities against civilians in order to accomplish that goal.

These expressions of what I believed to be your sentiments were truly reflective of my own feelings when I was given the assignment of prosecuting the charges which had been preferred against Lieutenant Calley. My feelings were generated not by emotionalism or self-righteous indignation but by my knowledge of the evidence in the case, the laws of this nation in which I so strongly believe, and my own conscience. I knew that I had been given a great responsibility and I only hoped that I would be able to discharge my duties and represent the United States in a manner which would be a credit to the legal profession and our system of justice. I undertook the prosecution of the case without any ulterior motives for personal gain, either financial or political. My only desire was to fulfill my duty as a prosecutor and see that justice was done in accordance with the laws of this nation. I dedicated myself totally to this end from November of 1969 until the trial was concluded. Throughout the proceedings there was criticism of the prosecution but I lived with the abiding conviction that once the facts and the law had been presented there would be no doubt in the mind of any reasonable person about the necessity for the prosecution of this case and the ultimate verdict. I was mistaken.

The trial of Lieutenant Calley was conducted in the finest tradition of our legal system. It was in every respect a fair trial in which every legal right of Lieutenant Calley was fully protected. It clearly demonstrated that the military justice system which has previously been the subject of much criticism was a fair system. Throughout the trial, the entire system was under the constant scrutiny of the mass media and the public, and the trial of Lieutenant Calley was also in a very real sense the trial of the military judicial system. However, there was never an attack lodged by any member of the media concerning the fairness of the trial. There could be no such allegation justifiably made. I do not believe that there has ever been a trial in which the accused's rights were more fully protected, the conduct of the defense given greater latitude, and the prosecution held to stricter standards. The burden of proof which the government had to meet in this case was not beyond a reasonable doubt but beyond possibility. The very fact that Lieutenant Calley was an American officer being tried for the deaths of Vietnamese during a combat operation by fellow officers compels this conclusion.

The jury selection, in which customary procedure was altered by providing both the defense and the prosecution with three preemptory challenges instead of the usual one, was carefully conducted to insure the impartiality of those men who were selected. Six officers, all combat veterans, five having served in Vietnam, were selected. These six men who had served their

country well were called upon again to serve their nation as jurors and to sit in judgement of Lieutenant Calley as prescribed by law. From the time they took their oaths until they rendered their decision, they performed their duties in the very finest tradition of the American legal system. If ever a jury followed the letter of the law in applying it to the evidence presented, they did. They are indeed a credit to our system of justice and to the officer corps of the United States Army.

When the verdict was rendered, I was totally shocked and dismayed at the reaction of many people across the nation. Much of the adverse public reaction I can attribute to people who have acted emotionally and without being aware of the evidence that was presented and perhaps even the laws of this nation regulating the conduct of war. These people have undoubtedly viewed Lieutenant Calley's conviction simply as the conviction of an American officer for killing the enemy. Others no doubt out of a sense of frustration have seized upon the conviction as a means of protesting the war in Vietnam. I would prefer to believe that most of the public criticism has come from people who are not aware of the evidence either because they have not followed the evidence as it was presented or having followed it they have chosen not to believe it. Certainly, no one wanted to believe what occurred at My Lai, including the officers who sat in judgement of Lieutenant Calley. To believe however that any large percentage of the population could believe the evidence which was presented and approve of the conduct of Lieutenant Calley would be as shocking to my conscience as the conduct itself since I believe that we are still a civilized nation. If such be the case, then the war in Vietnam has brutalized us more than I care to believe, and it must cease. How shocking it is if so many people across this nation have failed to see the moral issue which was involved in the trial of Lieutenant Calley - that it is unlawful for an American soldier to summarily execute unarmed and unresisting men, women, children, and babies. But how much more appalling it is to see so many of the political leaders of the nation who have failed to see the moral issue or having seen it, to compromise it for political motives in the face of apparent public displeasure with the verdict. I would have hoped that all of the leaders of this nation which is supposed to be the leader within the international community for the protection of the weak and the oppressed regardless of nationality, would have either accepted and supported the enforcement of the laws of this country as reflected by the verdict of the court or not make any statement concerning the verdict until they had had the same opportunity to evaluate the evidence that the members of the jury had.

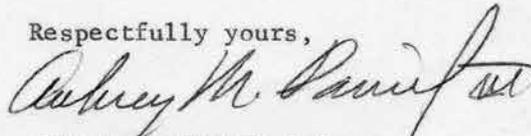
In view of your previous statements concerning this matter, I have been particularly shocked and dismayed at your decision to intervene in these proceedings in the midst of the public clamor. Your decision can only have been prompted by the response of a vocal segment of our population, who while no doubt acting in good faith, cannot be aware of the evidence which resulted in Lieutenant Calley's conviction. Your intervention has in my opinion, damaged the military judicial system and lessened any respect it may have gained as a result of these proceedings. You have subjected a

judial system of this country to the criticism that it is subject to political influence when it is a fundamental precept of our judicial system that the legal processes of this country must be kept free from any outside influences. What will be the impact of your decision upon future trials, particularly those within the military?

Not only has respect for the legal process been weakened and the critics of the military judicial system been given support for their claims of command influence, the image of Lieutenant Calley, a man convicted of the premeditated murder of at least twenty-one unarmed and unresisting people, as a national hero has been enhanced, while at the same time support has been given to those persons who have so unjustly criticized the six loyal and honorable officers who have done this country a great service by fulfilling their duties as jurors so admirably. Have you considered those men in making your decisions? The men who since rendering their verdict have found themselves and their families the subject of vicious attacks upon their honor, integrity, and loyalty to this nation. It would seem to me to be more appropriate for you as the President to have said something in their behalf and to remind the nation of the purpose of our legal system and the respect it should command. I would expect that the President of the United States, a man whom I believed should and would provide the moral leadership for this nation, would stand fully behind the law of this land on a moral issue which is so clear and about which there can be no compromise. For this nation to condone the acts of Lieutenant Calley is to make us no better than our enemies and make any pleas by this nation for the humane treatment of our own prisoners meaningless.

I truly regret having to have written this letter and wish that no innocent person had died at My Lai on 16 March 1968. But innocent people were killed under circumstances that will always remain abhorrent to my conscience. While in some respects what took place at My Lai has to be considered to be a tragic day in the history of our nation, how much more tragic would it have been for this country to have taken no action against those who were responsible. That action was taken, but the greatest tragedy of all will be if political expediency dictates the compromise of such a fundamental moral principle as the inherent unlawfulness of the murder of innocent persons, making the action and the courage of six honorable men who served their country so well, meaningless.

Respectfully yours,



AUBREY M. DANIEL III  
Captain, JAGC  
Trial Counsel  
US v. Calley

cc: Hon Harry F. Byrd Jr.  
Hon William B. Spong Jr.  
Hon Harold Hughes  
Hon George McGovern  
Hon Edmund S. Muskie  
Hon Robert Taft

302B Lumpkin Rd.  
Fort Benning, Georgia 31905



# Up Close

## On Target

### Paralegal PV2 Emily Stith Has the 2020 Olympics in Her Sights

*By Major Jack B. Cohen and Captain Nicole Ulrich*

**Paralegal PV2 Emily Stith began shooting seriously when she was thirteen years old.** In the six years since, she has medaled in five international competitions. She now has the 2020 Tokyo Olympics in her sights. We interviewed Stith recently about her interest in shooting and the challenges of training for the Olympics while serving in the JAG Corps.

#### **Tell us, how did you get into shooting?**

Growing up, my dad was on the Navy Hi-Power team. A friend of our family knew of a junior team at a club where he shot. My dad and our friend took me shooting at that club on a cold Saturday, and I fell in love with the sport right away. Prior to that weekend, I had only shot a BB

Gun. I was thirteen years old at the time, so it was almost six years ago. Normally, we like to start juniors at age eleven or twelve, but I made up the difference of starting a little late by taking it very seriously. My family picked up and moved to Colorado Springs so I could train at the Olympic Training Center.

#### **Why did you decide to join the Army?**

My father was in the Navy, my uncle was in the Army, and my sister served in the Marine Corps. The military influence in my life was so heavy that I could not picture life without the military. I didn't want to go straight into college and the secondary training I could receive from my Army MOS was appealing. I competed in the U.S. Army Junior Air Rifle National Championships at the Fort Benning United States Army Marksmanship Unit (USAMU) range and fell in love with the facilities and the unit. My enlistment contract had an "Option Nineteen," where you choose your unit, and therefore, I chose the USAMU. Although I was still nervous walking into the recruiter's office, I had a letter of acceptance to the USAMU to help with the processing.

#### **How did you decide what weapons system to compete on? What do you find compelling about international rifle competition?**

I fell in love with competition rifles because you could change so many things to make yourself shoot even better. To the degree that if you change the way your feet are positioned, it changes your center of gravity and it can impact your shot. At times, you are making adjustments that can make a correction equal to a single hair's width.

#### **In what disciplines do you compete?**

I compete in two disciplines: the 50-meter three position women's rifle and the 10-meter women's air rifle. The 50-meter three position you compete with a small-bore .22 caliber and take forty shots in each position. In that event, the "10-ring" is the size of a little pinkie finger nail. In the 10-meter air rifle, you shoot sixty shots, all from the standing position. In that discipline, the "10-ring" is the size of a twelve

point font period at the end of a sentence. In both events, the shots are scored electronically by the targets downrange and you see the results on a monitor at your firing point.

There are only six females in the Marksmanship Unit. Two of us are in International Rifle competing in the same disciplines. The others are: two in shotgun, one in service rifle, and one in service pistol.

In my discipline, you are considered a “junior” competitor until December of the year you turn twenty-one years of age.

### **How did marksmanship go for you in basic training?**

I had a lot of fun! I ended up helping other trainees who had never shot before. Personally, it went well, shooting thirty-seven out of forty in qualification. Some of the male basic trainees who had done a lot of shooting before wanted to go head-to-head with me, but I think I proved that was a bad idea.

### **Why did you choose the paralegal MOS?**

In a separate part of the enlistment contract, you have to pick an MOS in the event you decide to move on from the U.S. Army Marksmanship Unit. I always had an interest in law. A paralegal job was open, which was very unusual. I had a GT score of 117, which opened doors to a lot of different MOSs. What I really like about the 27D MOS is that we do not have to wait to start taking college classes with tuition assistance (usually one year wait in other MOSs). Once I am settled in here, I plan to sign up for online college.

### **Where does interest in the law come from? Any legal background in your family?**

My dad was the Navy’s equivalent of an MP (MA – Master of Arms). I also developed an interest in the Advanced Placement (AP) courses (civics, government) I took in high school. I like studying the application of law and regulations.

### **Do you get a chance to interact with the legal office at Fort Benning, GA?**

Not with the office at Fort Benning, but I was briefly an advanced individual training

(AIT) holdover, and I had a chance to help the J Co with legal work they would receive from their brigade.

I have really benefited from my NCO leadership between 1SG Robles at J Co. and here at my gaining unit with 1SG Baker. Both are phenomenal leaders and a joy to be around.

### **Have you ever heard of the publication *The Army Lawyer*?**

Yes, I have! The instructors at AIT familiarized us with JAG Corps resources like *The Army Lawyer*.

### **Have any of your Marksmanship teammates asked for a POA or legal advice yet?**

No, they have not, and it’s a good group of people in the unit, so there are no legal issues that I know of. However, when I first got to the unit I found myself correcting in-processing memos that were not in compliance with Army Regulation 25-50!

### **Do you think your role as a Soldier helps you be a better competitor now?**

Attention to detail has been reemphasized to me going through basic training and advanced individual training, which is very important in shooting. It has been good to regroup and go back to the basics on my shooting after being away from competitive shooting during my Army training. I have a ton of trust in the U.S. Army Marksmanship Unit and it has a positive family unit dynamic, which helps foster a good environment for shooting success.

### **International rifle requires you to take notice of very tiny details and adjustments and the legal field is all about facts and details. What draws you to those two very different and yet similarly detail-oriented fields?**

Shooting is all about chain reactions—footwork impacts balance. Paralegal work is also full of chain reactions. For example, the way you write a charge on an Article 15 impacts the disposition of punishments. In both disciplines, you want to do everything right and prove you know how to apply your knowledge.

### **You have a busy year planned. In what events are you competing?**

I have the USA Shooting National Rifle Championships here at Fort Benning, Georgia, starting in June. Then, I have the Junior World Cup in Suhl, Germany, at the end of August 2018. After that, it will be the World Junior Championships in Changwon, South Korea in the beginning of September.

### **I assume your goal is to go to the 2020 Olympics, correct?**

I missed out on Rio by not making it through preliminary rounds. I have learned from that and put Tokyo 2020 in my sights. Winning a medal internationally five times has helped. The Olympic selection procedure is a single, three-day match during the spring of 2020. I will know if I make the 2020 team in the spring of 2020. I am currently working on my training plans, all the way to the details of my meal preparation. My leadership likes to say that if you want race car results, you have to use race car fuel. Our unit’s mission is to win, support Army marketing, and increase lethality. It is inspiring to be here in the Home of Champions. Everyone in the unit has the goal to be a champion, it’s in our motto.

### **Is there anything you would like to message to other paralegals about the opportunities the Army offers?**

Keep certified within your MOS, but also strive to be well above the standard with what you know. “We are the standard” was the AIT J Co. motto, but the knowledge is perishable. Stay on top of your craft.

### **What do you want people to know about you?**

I am easy to get along with, but I’m extremely competitive. If you put in ten reps, I’m going to put in twelve. I have worked hard for what I have and everything I have is by the grace of God.

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(Credit: istockphoto.com/MHJ)

# Practice Notes

## View from the Bench

### Using Character and Outside Acts to Prove Your Case

By Lieutenant Colonel Christopher E. Martin

*It is useless to attempt to reason a man out of a thing he was never reasoned into.<sup>1</sup>*

#### **We tend to analyze people and events by using assumptions to fill in the gaps.**

This tendency is exactly why Military Rule of Evidence (M.R.E. or Rule) 404<sup>2</sup> and related rules exist. We so often judge others by

context or past behavior that a logical check is needed to ensure that we move beyond assumptions, and consider the actual evidence at hand. Hence, M.R.E. 404 normally prohibits use of a person's character or

character trait to prove that on a particular occasion the person acted in accordance with the character or trait.<sup>3</sup> Accusations must rise or fall on their own facts.

Good trial practice, then, includes presenting whatever direct evidence is available: a telling of the "facts" as the party believes them to be. But after the facts are asserted, the real convincing often comes through returning to assumptions in a more appropriate form known as inferences.<sup>4</sup> If direct evidence is the factual "telling," then M.R.E. 404-type evidence is part of the "showing"—the circumstantial who, what, when, where, why, or how that puts the facts in context to persuade the factfinder.

Character evidence and the use of evidence for non-character purposes is a robust and nuanced area of the law. There is no substitute for research and careful thought based on the unique facts of a case. The goal of this note is to provide a framework for analysis. Follow this framework, supported by case research and the facts of your case, and you will have a reliable method for determining how to use character or related evidence.

#### **Step One: Is Actual Character Relevant?**

The first question should always be whether evidence of actual character is relevant to your case. Rule 404(a) provides three exceptions to the general prohibition against character evidence.

#### ***On the Defensive: Evidence by the Accused, About the Accused***

First, the accused can offer up evidence of his or her own trait that is pertinent to the charged offense.<sup>5</sup> The key word is "pertinent." In a forcible rape case, for example, an opinion that the accused is a peaceable or peaceful person may be admissible under this rule.<sup>6</sup> For a crime of dishonesty, such as larceny, an opinion that the accused is honest may be admissible, because it speaks to the permissible inference that an honest person does not steal.<sup>7</sup> This same part of the rule, however, limits when the non-specific trait of general military character, or "good Soldier," evidence may be used. The Rule specifically prohibits evidence of general military character for the offenses listed therein, including rape and larceny.<sup>8</sup>

It is crucial to understand the distinction between “pertinent” character evidence and evidence of general military character under M.R.E. 404(a). A Soldier accused of rape might be able to defend against the rape by presenting evidence that he is “peaceful,” but he may not under M.R.E. 404(a)(2) introduce evidence that he did not commit the rape because he is a “good Soldier,” because evidence that the accused is a good duty performer, reliable Soldier, or the like is simply not pertinent to the question of whether he committed rape. On the other hand, an accused may present “good Soldier” evidence for offenses not specifically excluded, such as absence without leave or conduct unbecoming an officer and a gentlemen, on the theory that a “good Soldier” does not do such things.<sup>9</sup>

Under M.R.E. 405, character evidence must, with only a few exceptions, be introduced in the form of reputation or opinion, such as “I believe he is an honest person.” The specific *instances* that form the basis of the opinion are inadmissible on direct examination.<sup>10</sup> But good advocates understand that a witness must still have a proper basis to form his or her opinion. So while a military judge may properly stop a witness from testifying on direct about *what* she observed about the accused, the witness can and should explain in general terms *how* she came to form her opinion about the accused.

A properly laid foundation can be nearly as persuasive as describing the underlying acts themselves.<sup>11</sup> Like the trait itself, the foundation must be pertinent, or relevant. If the character trait is honesty, foundational testimony about three deployments and numerous firefights that the accused and witness experienced together is likely to generate a sustained objection. On the other hand, evidence that the witness observed the accused being forthright in tense situations would be a solid basis to render an opinion as to honesty. The more sound the basis for the witness’s opinion, the more likely the military judge will admit it, and the more likely the factfinder will find it persuasive.

A final option, to which the defense holds the key, is to introduce character evidence through the use of affidavits or “other written statements.”<sup>12</sup> The limitations as

to reputation or opinion evidence and other rules of evidence still apply, and the prosecution may rebut in kind this evidence if introduced.<sup>13</sup>

When an accused admits evidence of a pertinent character trait, “good Soldier” or otherwise, the prosecution may rebut it. This is when specific instances come into play, subject to the discretion of the military judge, and usually in the form of “did you know” or “have you heard” questions.<sup>14</sup> If the defense witness’s testimony was, for example, that the accused is a peaceful person, the prosecution can ask on cross-examination if the witness was aware that the accused assaulted his wife. Asking such questions requires a good faith basis, and the military judge will instruct that the question, and the answer (if the witness admitted knowledge), may be considered only for the purpose of assessing the witness’s testimony and/or to rebut the opinion.<sup>15</sup> Even with such limiting instructions, such questions can be damaging, and the offering party should carefully consider potential impeachment when deciding whether to offer character evidence.

#### ***On the Offensive: Evidence by the Accused, About the Alleged Victim***

Next, M.R.E. 404(a)(2)(B) allows the accused to proactively offer a pertinent trait of the victim, subject to the limitations of M.R.E. 412. It also allows the prosecution to rebut any trait so offered, and opens the door for a prosecution attack-in-kind of the accused’s same trait, if the door is so opened.<sup>16</sup> Similarly, M.R.E. 404(a)(2)(C) allows the prosecution to rebut a claim that the alleged victim was the first aggressor in a homicide or assault case.<sup>17</sup> A survey of reported cases suggests that neither provision is widely used, although each should be considered in instances where they are relevant.

#### ***Credibility is Always in Issue for a Testifying Witness***

And finally within this area, M.R.E. 404(a)(3) makes clear that it does not overwrite the longstanding rule, as embodied in M.R.E. 607, M.R.E. 608, and M.R.E. 609, that a witness’s character for truthfulness or untruthfulness is always in issue when he or she testifies.<sup>18</sup> As with character evidence,

evidence as to truthfulness or untruthfulness is offered in the form of reputation or opinion, subject to the military judge allowing cross-examination about specific instances of conduct in order to probe the basis of the witness’s opinion.<sup>19</sup> However, although evidence introduced under M.R.E. 404 is admissible as substantive evidence on the merits, evidence offered under M.R.E. 608 or M.R.E. 609 to impeach a witness is only admissible to determine the credibility of the witness.<sup>20</sup>

#### **Step Two: What do Outside Acts Say about the Offense?**

If opinion or reputation evidence could be described as fairly limited in scope, then M.R.E. 404(b) leans the other way. The whole point is to allow in extrinsic evidence of acts not on the charge sheet, to draw some permissible inference. This is powerful circumstantial proof when properly applied. M.R.E. 404(b) allows either side to present evidence of a “crime, wrong, or other act” when the evidence is offered for a non-character, non-propensity purpose.<sup>21</sup> But if “non-character” evidence is the subject, then why does this part of the Rule follow right after a longer discussion in the same Rule about character? Because M.R.E. 404 on the whole reflects the idea that the same evidence can sometimes lead down both a character and a non-character path. Understand this distinction, and you are well on your way toward mastery in this area.

Consider this example: an accused is charged with stealing portable gaming devices from two barracks rooms in his hallway and selling them in local pawn shops. There is evidence of an uncharged offense that, six months ago, the accused stole a custom hunting knife from his roommate and pawned it. A direct opinion from the roommate that the accused is a “thief” would be excluded under M.R.E. 404(a)(1)-(2).<sup>22</sup> Testimony from the roommate might, however, be admissible under an M.R.E. 404(b) theory that the accused had a “plan” to steal his roommate’s hunting knife and sell it for a profit, and that he had this same plan, to sell stolen items for a profit, when he took the portable gaming devices. The correct focus is on the pertinent purpose, the *plan*; allowing evidence of the prior larceny is just a vehicle to explain

that purpose and is limited accordingly.<sup>23</sup> The conceptual overlap between character and non-character uses may be obvious, but the distinction is crucial under the law and to how the facts may be considered by the factfinder.

Habit evidence under M.R.E. 406<sup>24</sup>—a close cousin of M.R.E. 404—is another useful tool for distinguishing the permissible uses of character-related evidence. Consider an AWOL (Absent Without Leave) case. Testimony that the accused was “the type of person to go AWOL” would be prohibited by M.R.E. 404.<sup>25</sup> Evidence of an uncharged act, that the accused previously went AWOL for three days to see his girlfriend, might be admissible to prove that the accused had the same motive, to see his girlfriend, when he committed the charged AWOL offense. Evidence that the accused always reported for duty at 0800 hours would be habit evidence.<sup>26</sup> Character evidence permits “more general character or character traits;”<sup>27</sup> M.R.E. 404(b) permits a pertinent purpose, such as motive, when it exists across both an uncharged and charged offense; and habit evidence “requires proof of a very specific, frequently repeated behavioral pattern.”<sup>28</sup> Understanding these distinctions should help apply the rules.

### Step Three: Introducing Outside Acts

Non-character evidence is full of potential when properly applied. Ask the following five questions in every case, three of which are reflected in the familiar holding of *United States v. Reynolds*,<sup>29</sup> and you will be prepared to leverage whatever evidence is available.

#### Question One: Do I have evidence of an outside act?

Potential evidence under M.R.E. 404(b) may be broader than you think. Although sometimes called “uncharged misconduct,”<sup>30</sup> M.R.E. 404(b) allows much more than that. The outside acts do not have to be unlawful or “bad” acts.<sup>31</sup> They do not even have to be prior acts.<sup>32</sup> They do not have to be acts by the accused.<sup>33</sup> And they can be offered by either the prosecution or the defense.<sup>34</sup> The non-character purposes are not limited to the examples listed in the Rule itself.<sup>35</sup> The outside acts must, however, have some

independent relevance, for a non-character purpose, under M.R.E. 401 and 402.<sup>36</sup> And when requested by the accused, the prosecution must provide notice of M.R.E. 404(b) evidence that it intends to use at trial.<sup>37</sup>

Finally, keep in mind that uncharged acts that are intrinsically connected to the charged offense may be admissible apart from M.R.E. 404(b) as part of the *res gestae*, or evidence that helps place the charged act in context.<sup>38</sup> An example might be evidence, as an uncharged act, that the accused took pictures during an alleged assault. Unless there is a specific reason to exclude it, a relevant uncharged act that occurs in the midst of a charged act usually does not fall within the limitations of M.R.E. 404(b).

#### Question Two: Does the evidence reasonably support a finding by the court members that the person committed the other crimes, wrongs or acts?<sup>39</sup>

It is up to the military judge to decide whether to admit M.R.E. 404(b) evidence, as a matter of conditional relevance under M.R.E. 104(b).<sup>40</sup> However, it is *not* the role of the military judge to decide whether the outside acts occurred, but rather simply to decide whether court members could reasonably conclude that the other acts occurred, and that the person in question committed them. As the Supreme Court explained in relation to the analogous federal rules, “[i]n determining whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.”<sup>41</sup>

#### Question Three: Does the outside evidence make some fact of consequence more or less probable?<sup>42</sup>

This is often where counsel stumble. Although the CAAF’s admonition against “broad talismanic incantations of words such as intent, plan, or modus operandi”<sup>43</sup> might sound overly familiar, the need for this constant reminder has unfortunately

stood the test of time. Each of the permitted uses listed in M.R.E. 404(b), sometimes summarized by the mnemonic “KIPPOMIA,”<sup>44</sup> are unique words with unique meanings.<sup>45</sup> Again, this list is not exclusive.<sup>46</sup> It would take a much longer article to cover all of the significant nuances and distinctions of non-character uses of evidence. But then again, that is your homework. Take the time to think through your case and the possible non-character uses of the evidence at issue. Motions to admit or exclude M.R.E. 404(b) evidence rise or fall on this very point. It always boils down to another mnemonic: CYA, or Can You Articulate?

#### Question Four: Is this evidence subject to a rule of exclusion or a rule of super-inclusion?

Remember that when outside sexual acts or behavior are at issue, the landscape can change. When acts relate to an alleged victim, for example, M.R.E. 412<sup>47</sup> may exclude evidence that would otherwise be relevant under M.R.E. 404(b) or related rules. When acts relate to the accused, M.R.E. 413 and 414,<sup>48</sup> on the other hand, may allow evidence of other sexual offenses or acts of child molestation, even if they would be excluded under M.R.E. 404(b). And even if these acts would also be admissible under M.R.E. 404(b), acts admitted under M.R.E. 413 or 414 may be offered for any purpose, including to show propensity, which goes beyond what M.R.E. 404(b) itself allows.<sup>49</sup> The point here is that M.R.E. 404(b), like all rules of evidence, cannot be applied in a vacuum.

#### Question Five: Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice?<sup>50</sup>

Whichever side of the argument you are on, do not assume that evidence will come in just because it is available. All evidence must be legally and logically relevant, and not excluded under M.R.E. 403.<sup>51</sup> The military judge has wide discretion to exclude even relevant evidence if the probative value of the evidence is substantially outweighed by the various concerns listed in M.R.E. 403. The same reminder is due here: Can You Articulate? Arguing evidence in context helps refine the presentation of evidence, and also helps the judge make

well-informed decisions about the use of the evidence. As in most things, preparation and forethought go a long way towards the effective use of character or character-related evidence.

### Step Four: What Should You Introduce?

This is where the art of trial practice comes in. Good advocacy means always seeing the big picture. Perhaps you can find a way to introduce character evidence, or a non-character use for evidence, but should you? Will opinion evidence do more harm than good by opening up rebuttal to areas that one side would rather not revisit? Will uncharged acts actually detract from the storyline and confuse the members? Every case is different, and the decision is yours. But when you decide to open the door to character evidence or non-character uses, the proof remains the same: Can You Articulate? When you can, you are well on your way to both telling and showing your side of the case. **TAL**

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*LTC Martin is a military judge at the 2nd Judicial Circuit U.S. Army Trial Judiciary, Fort Bragg, North Carolina.*

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### Notes

- Jonathan Swift, in A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS 468 (Tryon Edwards, ed., F.B. Dickerson Co. 1908).
- MANUAL FOR COURTS-MARTIAL, UNITED STATES, Mil. R. Evid. 404 (2016) [hereinafter MCM].
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(1).
- Inference BLACK'S LAW DICTIONARY 700 (5th ed. 1979).
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(A).
- See, e.g., United States v. Credit, 8 M.J. 190, 192-93 (C.M.A. 1980) ("As rape is a crime of violence, appellant could defend against it by presenting evidence of his good character for peaceableness.").
- See, e.g., United States v. Pearce, 27 M.J. 121 (C.M.A. 1998) (finding an opinion as to honesty relevant to a charge of larceny, but noting that such an opinion cannot be used to impermissibly bolster a witness's character for truthfulness until after that character has been challenged).
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(A).
- See generally *id.*
- MCM, *supra* note 2, Mil. R. Evid. 405(a)-(b).
- See THE 2018 ADVOCACY TRAINER: A MANUAL FOR MILITARY JUSTICE PRACTITIONERS (Peter K. Odom ed., Office of the Judge Advocate General 2018), for good demonstrations and hands-on exercises.

- MCM, *supra* note 2, Mil. R. Evid. 405(c).
- Id.*
- MCM, *supra* note 2, Mil. R. Evid. 405(a). See also *Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Pearce*, 27 M.J. 121 (C.M.A. 1988); *United States v. White*, 36 M.J. 306 (C.A.A.F. 1993).
- See U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK, 1116 (10 Sept. 2014) [hereinafter MILITARY JUDGE'S BENCHBOOK] for a sample instruction.
- MCM, *supra* note 2, Mil. R. Evid. 404(a)(2)(B).
- Id.* Mil. R. Evid. 404(a)(2)(C).
- Id.* Mil. R. Evid. 607, 608, 609.
- Id.* Mil. R. Evid. 608(a)-(b).
- Id.* Mil. R. Evid. 608, 609. See also *United States v. Robertson*, 39 M.J. 211 (C.A.A.F. 1994).
- MCM, *supra* note 2, Mil. R. Evid. 404(b)(1)-(2).
- Keep in mind that the defense normally holds the key to direct character evidence. See *Michelson*, *supra* note 14.
- The military judge will instruct on the specific purpose for which the evidence may be considered. See *Military Judge's Benchbook*, *supra* note 15, at 1102.
- MCM, *supra* note 2, Mil. R. Evid. 406.
- STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 406.02 at 4-176 (7th ed. 2011).
- Id.*
- DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS § 6-8 at 260 (4th ed. 2010).
- Id.*
- United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).
- See, e.g., *id.* at 109 (referencing a "substantial survey of the cases and statutes dealing with uncharged misconduct.").
- See, e.g., *United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993) ("Prior acts need not be unlawful to be admissible... [t]he critical requirement is that the evidence be offered for a purpose other than to prove the defendant's propensity to engage in the conduct charged.").
- See *United States v. Young*, 55 M.J. 193, 196 (C.A.A.F. 2001) (discussing the widely-accepted view in both military and federal practice that uncharged acts may occur before, during, or after the charged offense).
- The Rule refers to crimes, wrongs, or other acts in relation to a "person," not the accused specifically. See MCM, *supra* note 2, Mil. R. Evid. 404(b)(1).
- See, e.g., *United States v. Benson*, 48 M.J. 734 (A.F. Ct. Crim. App. 1998) (in court-martial for assault with a loaded firearm against a civilian, the military judge erred when he disallowed the defense from presenting evidence about prior threats with a gun made by the civilian, after the civilian testified that he wasn't the kind of person who would try to take someone's life).
- See MCM, *supra* note 2, Mil. R. Evid. 404(b)(2).
- See *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989) (citing *United States v. Ferguson*, 28 M.J. 104, 109 (C.M.A. 1989)); see also discussion of "Question Three," *infra*. Practical application of M.R.E. 404(b) almost always contemplates the use of uncharged acts. But see *United States v. Guardado*, 75 M.J.

- (Army Ct. Crim. App. 2016), *rev'd in part*, 77 M.J. 90 (C.A.A.F. 2017) (distinguishing M.R.E. 404(b) uses of charged offenses from the C.A.A.F.'s prohibition, in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), against using unproven, charged acts to argue propensity for those same charged acts). Given that M.R.E. 404(b) is the subject of "much litigation," *Reynolds*, 29 M.J. at 108, counsel for both sides must always be prepared to articulate intended M.R.E. 404(b) uses.
- MCM, *supra* note 2, Mil. R. Evid. 404(b)(2)(A)-(B).
- See, e.g., *United States v. Metz*, 34 M.J. 349, 351 (C.A.A.F. 1992) (in addition to being admissible under M.R.E. 404(b), evidence, in a murder trial, that the accused had lifted up his wife by the nose and "roughed her up" were part of the *res gestae* of the murder, to help place identity and intent evidence against the accused in context); *United States v. Tobin*, 38 C.M.R. 423 (C.M.A. 1968) (uncharged misconduct evidence that was "part and parcel" of the charged offenses did not require a limiting instruction).
- See *Reynolds*, 29 M.J. at 109.
- MCM, *supra* note 2, Mil. R. Evid. 104(b).
- United States v. Mirandes-Gonzalez*, 26 M.J. 411, 413-14 (C.M.A. 1988) (quoting *Huddleston v. United States*, 485 U.S. 681, 690 (1988)).
- See *Reynolds*, 29 M.J. at 109.
- United States v. Brannan*, 18 M.J. 181, 185 (C.M.A. 1984).
- Knowledge, Intent, Plan, Preparation, Opportunity, Motive, Identity, Absence of Mistake. See M.R.E. 404(b)(2). The mnemonic "KIPPOMIA" is sometimes taught to counsel as a practical memory aid. See, e.g., CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK (July 2018).
- See, e.g., *United States v. Jenkins*, 48 M.J. 594 (A. Ct. Crim. App. 1998) (distinguishing, in an M.R.E. 404(b) analysis, the terms "motive," "intent," and "plan.").
- See *United States v. Castillo*, 29 M.J. 145, 150 (C.M.A. 1989) ("[T]he sole test under Mil.R.Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime.").
- MCM, *supra* note 2, Mil. R. Evid. 412.
- MCM, *supra* note 2, Mil. R. Evid. 413, 414.
- See the C.A.A.F.'s discussion of M.R.E. 413 in *United States v. Wright*, 53 M.J. 476, 480 (C.A.A.F. 2000) ("Contrasted to Rule 404(b)'s 'general prohibition' against propensity evidence, 'the new rules for sex offense cases authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant.'") (quoting discussion by Congresswoman Susan Molinari).
- See *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989).
- MCM, *supra* note 2, Mil. R. Evid. 403.



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## Contracting in a Deployed Environment

### Notes from the 408th Contracting Support Brigade

By Major Nolan Koon

**In June 2014, Iraq's second largest city, Mosul, fell to the Islamic State of Iraq and the Levant (ISIS),** and its leader, Abu Bakr al-Baghdadi, declared a global caliphate from its ruins. Behind an international coalition of 60 nations, led by the United States, and a fighting force numbering more than one hundred thousand, the Government of Iraq liberated Mosul approximately three years later in July 2017. The Battle of Mosul marked the effective end of ISIS's caliphate and heralded the movement's eventual defeat in Iraq.

It is axiomatic that the fight was won by the audacity and the bravery of the Warfighter, who closed with, and decisively defeated the enemy. However, victory on the battlefield was enabled and supported by several others, including the warranted contracting officer (KO). As the Army has outsourced its logistical tail, it has increasingly turned to a multitude of contractors to fulfill its sustainment requirements. Thus, with the recent end of major combat operations against ISIS in Iraq, it is an opportune moment to reflect upon the 408th

Contracting Support Brigade's (CSB) mission and its support of Operation Inherent Resolve (OIR).

The 408th CSB is regionally aligned with USCENTCOM and is one of six CSBs in the Army formation. It is missioned to provide operational contract support to USARCENT and serve as the Lead Contract Service throughout Southwest Asia. The brigade headquarters is split between Shaw Air Force Base, South Carolina, and Camp Arifjan, Kuwait. It has three Regional Contracting Centers (RCCs) (i.e., contract battalions) in Camp As Sayliyah, Qatar; Union III, Iraq; and Camp Arifjan, Kuwait. It also has KOs in the United Arab Emirates, Pakistan, Afghanistan, and Jordan. The 408th CSB force structure is comprised of a mix of Army (both Active Duty and Army Reserve/National Guard), Air Force, and DA civilians. In addition to OIR, the 408th CSB supports contract requirements for Operation Spartan Shield, which is USARCENT's steady state operation to build partner capacity in the Middle East. As part of its Afghan Reach Back Cell, it awards contracts for commodity buys (i.e., goods and supplies) for Operation Freedom's Sentinel.

The 408th CSB's three main lines of effort are base life support (BLS), transportation, and contingency contracting administration services (CCAS). Contingency contracting administration services relates to cradle-to-grave contracting where 408th CSB KOs administer massive contracts awarded by Army Contracting Command—Rock Island (ACC-RI), Rock Island Arsenal, Illinois, such as the Logistics Civil Augmentation Program (LOGCAP) and Army Prepositioned Stock-5 (APS-5).<sup>1</sup> In FY17, the 408th CSB awarded approximately 2,500 contract actions with a value exceeding \$614 million in support of operations across the CENTCOM area of responsibility. It also administered 197 contracts/task orders valued at nearly \$21 billion as part of its CCAS mission.

During its support of the Battle of Mosul, and, more broadly, operations in Iraq, KOs encountered a number of contract challenges. The most notable involved the ground movement of equipment and supplies. Military logistical convoys,

which were ubiquitous in past conflicts, and a lifeline to troops, were supplanted by contracted carriers in OIR. But KOs operating in Erbil, Iraq, could not award trucking contracts to Iraqi Arab companies because they could not get through Kurdish checkpoints. In some instances, KOs had to facilitate the release of Iraqi Arab truck drivers, who were detained at the border by the Kurdistan Regional Government and the Peshmerga Armed Forces. Accordingly, for movements of materials which originated from outside of Northern Iraq, KOs arranged for the shipments to be down-loaded and picked up by another carrier at the border, who could operate in the Kurdish-controlled region.

It was during the height of the 2017 ISIS counter-attacks in Mosul, though, that KOs faced their greatest challenge. KOs were pressed to keep pace with the momentum of operations on the battlefield. When the Warfighter needed transportation assets, it would send a transportation movement request (TMR) to an Army movement control team (MCT), who, in turn, forwarded the TMR to a KO to put on a contract. A contract was required every time a U.S. unit had to establish or augment a Tactical Assembly Area (TAA); move a team room; purchase Class IV material; resupply; etc. The Federal Acquisition Regulations (FAR) and the contracting process are predicated on promoting competition, and not necessarily designed with speed and agility in mind. Market research/acquisition strategy must be performed; solicitations are drafted; potential offerors are notified; bids/quotes/offers are submitted; evaluations are performed; and only then can contracts be awarded.

In an effort to accelerate the time from requirement validation to contract award, KOs increasingly turned to blanket purchase agreements (BPAs). Blanket purchase agreements are a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with a pool of qualified sources (i.e., a sources list). Still, because each TMR was placed on an individual BPA call (i.e., contract), KOs were still overwhelmed by contract requirements. Ultimately, KOs coordinated with requiring activities to obtain bulk funding. The KOs would then award a

single trucking contract for a month based on a forecasted need, i.e., how many TMRs, truck assets, and mileage would the battle space owner need and consume during the period of performance. At the end of the month, the KOs reconciled the actual usage against the forecasted amount and issued a contract modification for purposes of contractor payment.

Even with the end of major combat operations in Iraq, the 408th CSB will continue to support OIR requirements and operations in Syria. Operational commanders in Syria will be asked to forecast their requirements sooner than ever and move their requirements generation timeline to the left because of vendor vetting. As part of the FY2012 NDAA, the U.S. Government is prohibited from contracting with the enemy. Initially implemented only in Afghanistan through Task Force 2010, USCENTCOM intends to expand vendor vetting across the rest of the theater of operations. The 408th CSB has already been registering contractors in an on-line database, i.e., the Joint Contingency Contracting System (JCCS). However, vendor vetting will employ evidence and intelligence-based analysis to determine whether contractors constitute an unacceptable force protection risk.

It is anticipated that the vetting process will add five to seven weeks to the contract award process—though there is an expedited 45-day process for urgent requirements. To put this in perspective, during the Battle of Mosul, requiring activities sometimes asked KOs to award within 48 hours or less. With the use of simplified acquisition procedures, 408th CSB KOs can typically award a contract in two weeks. This highlights an incongruity in contingency contracting. It is easy to forecast requirements for regularly recurring needs, such as service contracts with defined periods of performance and IT life-cycle replacements. However, forecasting can devolve into speculation, when the unpredictability of the battlefield is injected into the validation process. During OIR, when success on the battlefield exceeded planners’ and Commanders’ expectations, tactical assembly area base life support contracts were frequently modified, terminated, and/or awarded unexpectedly as a result of ground yielded by ISIS.

Finally, KOs are attempting to register and stand-up a Syrian vendor pool that can be successfully vetted. Some Syrian companies are wary of registering for fear that the Syrian government will learn they are working with the U.S. Other Syrian companies simply do not have access to the internet, which makes on-line registration on JCCS impossible.

Regardless of past or future challenges, the 408th CSB and its KOs will continue to support the Warfighter and military operations in the CENTCOM AOR. **TAL**

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*MAJ Koon is the Command Judge Advocate for the 408th Contracting Support Brigade.*

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## Notes

1. As part of APS-5, the Pentagon maintains a mechanized division’s worth Bradley Fighting Vehicles and Abrams tanks in warehouses in Kuwait and Qatar. Although ACC-RI awarded the APS-5 service contract, the 408th CSB has been delegated administrative contracting officer (ACO) responsibilities and serves as “the eyes and the ears” of the primary contracting officer (PCO), who is back at Rock Island Arsenal.



(Credit: istockphoto.com/adrian825)

## Rear Provisional Commanders Can Have NJP Authority

By Major A. Jason Nef

**Buried deep in Army Regulation (AR) 27-10, *Military Justice*, Table 3-1, footnote 4, is this sentence:** “Only if imposed by a field grade commander of a unit authorized a commander in the grade of O-5 or higher.”<sup>1</sup> This sentence refers specifically to a field grade commander’s ability to punish noncommissioned officers (NCOs) in the grades of E-5 and E-6 by reducing them one grade through nonjudicial punishment (NJP) proceedings.<sup>2</sup> This sentence is often misunderstood to mean that only

commanders in the grade of O-5 may reduce NCOs at NJP proceedings. The ability to reduce NCOs in the grade of E-5 and E-6 is tied to a field grade commander’s “promotion authority” and not necessarily the grade of O-5.

Although battalion and squadron commanders are normally in the grade of O-5, if an O-4 is given command of a unit that is *authorized an O-5 commander*, that O-4 can exercise full field grade NJP authority over NCOs.<sup>3</sup> Furthermore, there is a separate

and distinct authority for O-4 commanders of rear provisional battalions, squadrons, and brigades to exercise full field grade NJP authority over NCOs.<sup>4</sup> The practice of establishing rear provisional units is commonplace in this era of near-constant deployments.<sup>5</sup> Due to the lack of non-deploying personnel, it is not uncommon for an O-4 to be placed in command of a rear provisional battalion, squadron, or brigade, at home station. However, because of the footnote discussed above, many military justice leaders presume that those rear provisional commanders in the grade of O-4 are unable to exercise full NJP authority over noncommissioned officers.

The underlying restriction on a commander’s ability to reduce a Soldier during NJP proceedings is found in AR 27-10, para. 3-19b(6)(a), which states:

The grade from which reduced must be within the promotion authority of the imposing commander or of any officer subordinate to the imposing commander. For the purposes of this regulation, the imposing commander or any subordinate commander has “promotion authority” within the meaning of UCMJ, Art. 15(b) if the imposing commander has the general authority to appoint to the grade from which reduced or to any higher grade (see AR 600-8-19).

The rules governing promotion authority for NCOs in the grades of E-5 and E-6 are found in AR 600-8-19, *Enlisted Promotions and Reductions*. Specifically, AR 600-8-19, para. 3-1b states that “[f]ield grade CDRs of any unit authorized a CDR in the rank of LTC or higher . . . [s]erve as the promotion authority to the rank of SGT and SSG for Soldiers assigned to units attached . . . or assigned to their command.”<sup>6</sup> Although it is uncommon for an O-4 to be given command of a unit that is authorized an O-5 commander, AR 27-10 and AR 600-8-19 clarify that an O-4 commander has the same authority to reduce NCOs during NJP proceedings as an O-5 or higher commander. However, the rule governing promotion authority for an O-4 commander of a provisional battalion or brigade is separate and distinct from this.

When an O-4 is given command of a rear provisional unit, the source of authority changes. Instead of AR 600-8-19, para. 3-1*b*, the operative rule now is now listed in para. 1-9*f*(2), which states that “BN and BDE CDRs of provisional units in the rank of major or above have promotion authority to the ranks of SGT and SSG.” This rule gives effect to the discretionary policy found in AR 220-5, *Designation, Classification, and Change in Status of Units*, para. 2-5*b*, which states that “[c]ommanders of provisional units created as rear or home elements of deployed units may have promotion or reduction authority.”<sup>7</sup>

It is important to remember that the NJP authority may be exercised by *commanders only*. Therefore, an O-4 who is serving as an officer-in-charge (or some similar leadership role), but not as the actual commander, is prohibited from exercising any NJP authority whatsoever.

In conclusion, when an O-4 is in command of a rear provisional unit, or a unit that is authorized a commander in the grade of O-5 or higher, they may exercise full field grade NJP authority over NCOs under their command. The authority for each derives from different provisions of AR 600-8-19, but the end result is the same. **TAL**

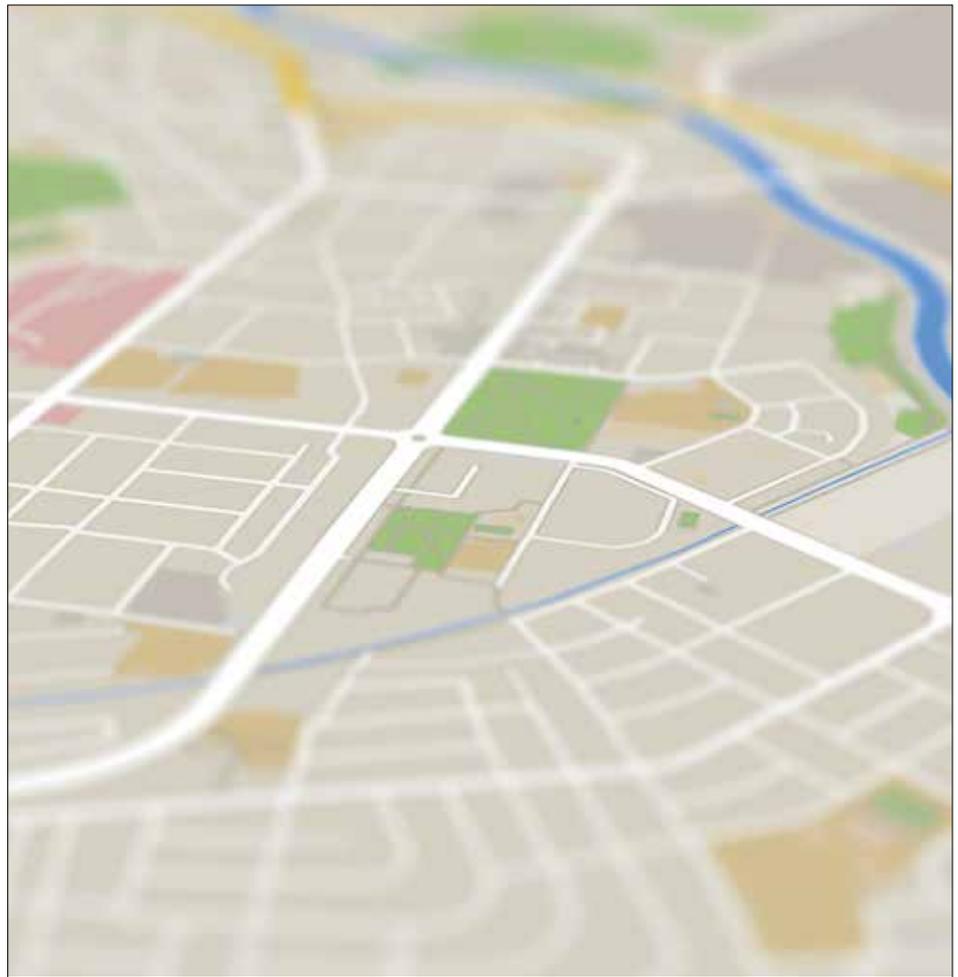
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*MAJ Nef is currently a student at the Command and General Staff College in Leavenworth, Kansas. He would like to thank LTC Keirsten Kennedy and MAJ Jason Marquez for their help with this note.*

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## Notes

1. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 3, Table 3-1 (11 May 2016).
2. *Id.*
3. See U.S. DEP'T OF ARMY, REG. 600-8-19. ENLISTED PROMOTIONS AND REDUCTIONS para. 3-1*b*(1) (25 Apr 2017) [hereinafter AR 600-8-19].
4. AR 600-8-19 para. 1-9*f*(2).
5. See, generally, DEPLOYING JUSTICE, A HANDBOOK FOR THE CHIEF OF MILITARY JUSTICE (June 2008).
6. Emphasis added.
7. U.S. DEP'T OF ARMY REG. 220-5, DESIGNATION, CLASSIFICATION, AND CHANGE IN STATUS OF UNITS para. 2-5*b* (15 Apr. 2003).



(Credit: istockphoto.com/hkeita)

## Initial Client Meetings

### Creating the Roadmap for Successful Family Law Counsel

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*By Lieutenant Colonel Mike Harry*

#### Introduction

In fiscal year 2017, Army legal assistance offices saw approximately 116,000 cases. Of that large number, over 31,000 related to family law.<sup>1</sup> That is 31,000 instances where an attorney meets a family law client for the first time. That is the equivalent of almost two divisions' worth of complicated and emotional files. In some eighteen years of practice, both civilian and military, encompassing active and National Guard

duty, I have seen initial client meetings take numerous forms. Further, in a former life within the corporate world, I was often a “client” as the litigation manager. In this capacity, I regularly retained, collaborated with, and sometimes terminated litigation counsel. I gleaned some perspective of what it is like on the client side of the desk. Understanding that all legal situations are unique, which is why the practice of law is inherently personal, the initial client



Captain Robert Hogarth, a legal adviser for the North Carolina National Guard's Staff Judge Advocate office, talks with a legal services client as part of their legal assistance available to service members and their families. The SJA office recently received the 2013 Army Chief of Staff's Award of Excellence in Legal Assistance for a Reserve component. (U.S. Army National Guard Photo by Captain Rick Scoggins, North Carolina National Guard Public Affairs/Released)

meeting sets the roadmap for the attorney-client relationship. This relationship, in turn, often drives whether the representation results in success or failure. This note reviews some best practices in establishing the attorney-client relationship from before the meeting happens through the development of the legal strategy.

## **Analysis**

### **1. Pre-Meeting**

You mean business, so make your workspace look that way. Your office aesthetic is the first impression you will make on clients, superiors, and subordinates. Place your law degree in a prominent position where clients will be able to read it.

Diplomas from Army or other military schools may also be displayed. Other accoutrements should only be displayed if they do not clutter your work area. This includes coins, PCS gifts, and the like.<sup>2</sup> Place your computer and monitor in a position where others cannot see the screen. Remove client files and other work product from your desk so the client consciously or unconsciously understands that he or she is your primary duty. Make sure you have a box of tissues for clients that may potentially cry. Have bottles of water (not purchased with appropriated funds) to set clients at ease. Everything must be done and placed with a purpose. The purpose is to ensure that the client understands he or she will be dealing with a serious legal practitioner. Finally, do

not allow clients to break the perimeter of your desk. The perimeter is the point where a client would be able to read your computer. This places you in the best position to initiate a successful initial client contact.

### **2. Initial Client Contact**

Ideally, you will have a client card or other understanding of the reason a client seeks legal assistance. However, this is not always possible. Develop a script and practice it.<sup>3</sup> This is doubly important if you, like me, tend to operate on the more laid back side of the assertiveness scale. The client must understand that you are capable of successfully handling their problem. It is highly unlikely that your client made the appointment because he inherited \$5

million dollars. The likelihood is something really bad happened or is about to happen. Introduce yourself, look them in the eye and give a firm handshake. From there, sit the client in a way that you can take notes and observe their behavior. With the personal formalities complete, move on and dispose of the legal formalities—the two Cs.

### 3. Confidentiality and Conflicts of Interest

Do not mess up the easy stuff. As with any state, our Army rules for professional responsibility address confidentiality and conflicts of interest.<sup>4</sup> Develop an opening discussion point where you outline your confidentiality duties (rule 1.6). To paraphrase, offer that you cannot reveal information related to the representation unless the client consents after consultation.<sup>5</sup> Depending on the situation and the complexity, you may also need to explain you are allowed to disclose information to carry out the goals of the representation and must disclose information that you, as counsel, reasonably believe necessary to prevent the client from committing a criminal act likely to result in imminent death, substantial bodily harm, significant impairment of the readiness of a military unit, aircraft, or weapons system.<sup>6</sup> The bottom line is you do not gossip about what clients tell you.

After setting the client at ease by ensuring him you will not call his boss, friends, or family, clear for any conflicts of interest (rule 1.7). Ask whether the potential client has spoken to any other attorney about the matter in which they came in and whether they have had an attorney for any other problem.<sup>7</sup> As with many subtleties of advocacy, this standard two minutes serves an additional purpose. By explaining the rules and why you are doing it (the “what and why”) you begin building the attorney client relationship. Use the talk to instill confidence through the accurate demonstration of two points of law. Further, if the client discloses past legal problems you get a window into his character and propensity for truthfulness (or lack thereof). This sets the stage to delve into the actual legal problem(s).

### 4. Ascertain the Problem and Define Success

Who, what, where, when, why, how. Good questions are almost all simple derivatives

of the above. If time permits, take the client card and set up an intake checklist to drill down into the client’s problem. Using a marital separation as an example, begin discussions along the following general lines of inquiry:

- When were you married?
- Who are you married to?
- When did you separate?
- Where are both of you residing now?
- How long have you lived there?
- How many kids do you have, if any?
- Where are the kids residing?
- How much money are you providing/receiving each month in support?

After locking in the essential data points, ask open ended questions to get the client talking:

- Tell me what happened.
- Why in your perspective did you separate?
- Why in your spouse’s perspective did you separate?
- When did command get involved and what have they done?

Ask the client to talk about their marriage. As an alternative, ask the client to describe their married life from the beginning.

Actively listen and look to spot several critical issues. First, identify whether there may be any criminal culpability on behalf of your client, the spouse, or other actor. This includes sexual assault and adultery. Also look for fraternization or other inappropriate relationships. Second, identify whether there are friction points that indicate that the marital relationship is irretrievably broken. Third, identify whether the marital issue is leading to work performance issues. Fourth, identify potential child custody and support issues, thinking through a home state and best interest of the child lens.<sup>8</sup> Finally, use the client’s tone, words, and body language to evaluate truthfulness and understand what acceptable and successful legal solutions may entail.

Conclude by asking what the client believes would be a successful result and offering what, with your knowledge and experience, a successful result may look like.

Either way, do not sugarcoat the likely result and its second and third order effects. As you weigh the pros and cons of a legal solution and the next steps, remember the practicalities. Most clients will be poor. Therefore, money matters. It either played a role in the discord or will play a role in any marital separation or divorce. Just keeping a client in the Army a few more months may make the difference between solvency and bankruptcy. Therefore, think with your head, not with your heart, and get their budget.

### 5. Get the Budget

You can identify a person’s priorities by reviewing their budget, leave and earnings statement, and checking account. Money, or more accurately, the profligate spending thereof, the gambling thereof, and the using thereof to consume drugs or alcohol is the cause of most family and consumer law issues inside and outside the military. One benefit of military clients is that you can ascertain the client’s income. Keep the pay chart available. Have the client complete the sample budget sheet then look for irregularities between income and expenses.

Rent/Mortgage	Dollar (\$)
Car #1	
Car #2	
Insurance	
Gas	
Food	
Cable	
Phone	
Daycare	
Credit card/interest	
Entertainment	<b>*Most Important</b>

You will be able to understand whether your client can afford a Dodge Challenger (R/T Scat Pack) or Ford F-150 (Black Ops edition).<sup>9</sup> You will be able to identify potential drug or alcohol issues. You can also tell whether your client can afford to pay interim support payments under Army Regulation 608-99, or conversely, how much money your client needs to sustain while separated. Think creatively. Use the budget to frame your arguments and course of action, whether that is to negotiate a higher or lower interim support payment

or to counsel clients to sell property to increase liquidity to set the stage for a potential reconciliation.<sup>10</sup>

#### **6. Develop and Confirm the Course of Action**

Using the client's answers, demeanor, and the newfound knowledge of their finances, set a course of action that is suitable and feasible. Though acceptability will be within the client's purview under our rules for professional conduct you can frame the potential outcomes.<sup>11</sup> This is done by identifying the client's best alternative to a negotiated agreement (BATNA).<sup>12</sup> To paraphrase, the BATNA is what you will do if you cannot settle with the counterparty (usually a spouse or the command).

If you can negotiate better terms than your BATNA, then you should accept a settlement. If you cannot negotiate terms better than your BATNA then you should walk away and pursue your best alternative course of action.<sup>13</sup> Obviously, a good BATNA increases your leverage. If you know you have solid alternative courses of action, you do not need to concede as much because you have alternatives to a deal. Conversely, if your options are slim, your counterparty can make heavy demands and extract concessions. Work with your client to improve your BATNA. If you have a strong alternative, consider revealing it to the counterparty to solve your client's problem on favorable terms as quickly as possible because time is almost never the legal assistance attorney's friend.<sup>14</sup>

Legal issues get worse the longer they are unresolved. Therefore, look for solutions that solve the underlying problem or provide a path to resolution as quickly as possible. This is especially true when representing young Soldiers who may have short attention spans or may neglect to follow up on required action items.

Balancing BATNA and time, a successful representation often entails lowering interim support payments so a client can stay financially solvent while determining whether to seek a divorce. This may just entail a few phone calls and creative negotiation. Another successful representation that can save clients thousands of dollars is identifying a correct divorce jurisdiction. Again, perform the legal analysis, combine it with your BATNA, coordinate with the

client, and communicate any client hand-offs. Regardless, give clients peace of mind and ensure your effective representation by following up on any open issues.

#### **7. Communicate and Follow Up**

If the issue cannot be concluded in one visit, regularly communicate the case's status and set appropriate follow up meetings. This may be weekly or monthly. The point is to maintain the client's confidence. There is a strong correlation in client satisfaction and effective follow up.<sup>15</sup> Often the positive resolution of the legal issue takes a back seat to the client's perception that his problem is being actively addressed by a competent, empathetic attorney. Within this construct, however, do not make excuses or apologize for your legal work. If you followed the above steps, you set the stage to be effective. Quite simply, you will often be playing a losing hand.

#### **8. Conclusion**

The initial client meeting sets the roadmap for the attorney-client relationship. This relationship, in turn, often drives whether the representation is successful. Like advocacy in the courtroom, the initial meeting can be scripted, practiced, and trained. It makes everything that comes after easier. The client will be more open. When the client is more open to disclose facts and circumstances, it improves your ability to analyze the situation, understand the BATNA, and to develop potentially successful courses of action. This puts you and the client on the same page by defining success and the likelihood of getting there. Success may simply be keeping your client in the Army for a few months longer so he or she can bank some extra money or receive additional medical care. For others, it may be separation as quickly as possible. There is nothing worse than a client with a losing fact pattern who leaves his attorney meeting with a false sense of security. Once success is defined, develop the roadmap. This may be negotiation with opposing counsel, letters to a commander, rebuttal briefs, or litigation. No matter, every problem requires a different tool. Develop those tools with the information gleaned, and the confidence gained, from the ability to conduct effective client interviews. **TAL**

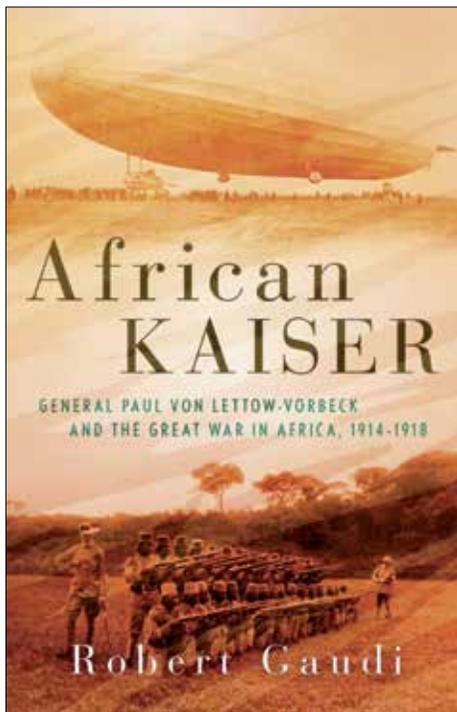
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#### **Notes**

1. Fiscal Year 2017 legal assistance statistics, CLIENT INFORMATION SYSTEM (17 April 2018) (on file with author).
2. I recommend refraining from having visible family photos. There is no need for legal assistance clients to be able to identify your spouse, children, or other family members.
3. I have never been able to eliminate the "drop in" client. This often happened during my National Guard service wherein you would only see customers and clients once per month. To properly manage these situations, I recommend a baseline checklist while taking proactive steps to not unknowingly or unnecessarily creating an attorney-client relationship.
4. U.S. DEP'T OF THE ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS rules 1.6 and 1.7 (28 June 2018) [hereinafter AR 27-26].
5. *Id.*
6. *Id.*
7. *Id.*
8. [http://www.uniformlaws.org/shared/docs/child\\_custody\\_jurisdiction/uccjea\\_final\\_97.pdf](http://www.uniformlaws.org/shared/docs/child_custody_jurisdiction/uccjea_final_97.pdf).
9. In the unlikely event your client can afford one of the above mentioned vehicles and does not already own one, the vehicle becomes a need, not a want.
10. U.S. DEP'T OF THE ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY para. 2-1 (28 Oct. 2003) [hereinafter AR 608-99].
11. AR 27-26, *supra* note 4, rule 1.2.
12. ROGER FISHER & WILLIAM URY, GETTING TO YES, NEGOTIATE AGREEMENT WITHOUT GIVING IN 97-108 (3rd ed. 2011).
13. *Id.*
14. *Id.*
15. <http://lawfirmsuites.com/2016/02/keeping-clients-happy-as-a-solo-attorney/> (last visited 23 May 2018).



# Book Review

## African Kaiser

### General Paul Von Lettow-Vorbeck and The Great War in Africa, 1914–1918<sup>1</sup>

Reviewed by Major J. Eagle Shutt

*His only god, in the end, was the God of Battles.*<sup>2</sup>

#### I. The Forgotten Genius

In *African Kaiser*, Robert Gaudi vividly details the masterful guerrilla campaign of General Paul Emil von Lettow-Vorbeck, the only undefeated German commander in World War I.<sup>3</sup> Von Lettow commanded the *Schutztruppe*, a racially integrated unit led by both German officers and African

noncommissioned officers (NCOs).<sup>4</sup> During four years of constant warfare in unforgiving German East Africa, von Lettow and his troops faced innumerable operational issues. They suffered from heat and disease.<sup>5</sup> Surrounded by enemy territories and blockaded by sea,<sup>6</sup> they endured chronic food, water, and materiel shortages,<sup>7</sup> and they typically lacked modern rifles and artillery.<sup>8</sup> Yet von Lettow never lost a battle, counteracting superior numbers by choosing his fights and seizing the initiative.<sup>9</sup> Von Lettow only surrendered command after learning of the armistice.<sup>10</sup> He returned home a national hero, honored by parade and monument.<sup>11</sup>

Although he constantly harried his enemies, he engendered both admiration and love.<sup>12</sup> In 1927, the British Expeditionary Force invited von Lettow to its ten-year reunion, at which the Prussian general received a standing ovation.<sup>13</sup> In 1945, after Field Marshal Jan Smuts discovered that von Lettow was destitute, he arranged a pension for his old adversary.<sup>14</sup>

Von Lettow's leadership qualities remain as relevant as ever, as his East Africa campaign parallels current American conflicts in multiple dimensions. One century ago, his smaller force successfully resisted a more numerous, better-equipped foe. His enemy typically concentrated on defense, presenting static targets which he systematically exploited.<sup>15</sup> He even utilized improvised explosive devices, provoking his opponent into a tit-for-tat series of measures and countermeasures.<sup>16</sup> Understanding his success may illumine current counterinsurgent strategies.<sup>17</sup>

Despite his unprecedented accomplishments, von Lettow's guerilla strategies have largely been obscured by the monumental scope and tragedy of World War I.<sup>18</sup> A recent best-selling World War I history never mentions von Lettow,<sup>19</sup> who operated on a considerably smaller scale and played only an indirect part in the central drama in Europe. Additionally, many von Lettow sources are in German.<sup>20</sup> Despite historical interest in the German East African campaign,<sup>21</sup> *African Kaiser* is the first von Lettow biography in over fifty years.<sup>22</sup>

Gaudi succeeds brilliantly at introducing von Lettow and his East African campaign to the military reader. Through evocative language and sweeping narrative, *African*

*Kaiser* is immersive history that reads like fiction. Blending the styles of Robert K. Massie and Erik Larson, Gaudi merges biography (von Lettow) and history of an event (the German East African Campaign). This hybrid approach is not entirely successful, occasionally proving confusing. Regardless, Gaudi paints an indelible portrait of von Lettow, a one-eyed, chain-smoking, tradition-bound Prussian, whom his enemies respected, feared, and, paradoxically, loved. Gaudi's hero is driven and resourceful, but compassionate and honorable. However, Gaudi eschews source notes, an omission which leads to accuracy and bias concerns. Ultimately, he avoids addressing unsettling questions about the Prussian general, whose legacy has become increasingly controversial. Nevertheless, von Lettow's leadership lessons alone make *African Kaiser* a must read.

#### II. Biography and History

Like Massie and Larson, Gaudi does not limit himself to standard biographical or historical paradigms, nor does he clearly state a purpose, scope, or thesis. Rather, he merges history and biography in creative ways. In his magisterial *Dreadnought*,<sup>23</sup> Massie explains an historical event (the German-British battleship arms race) by introducing a host of characters, whose personalities and conflicts drive events. In *Devil in the White City*,<sup>24</sup> by contrast, Larson juxtaposes the seemingly incongruous history of Chicago's World Fair with the biography of a notorious serial killer active during the same time and place.

Gaudi's biography/history hybrid draws from both historical approaches. Like Massie, Gaudi uses personalities as the engine to drive events. Through Gaudi's lens, the disastrous Tanga landing is explicable by von Lettow's initiative and Major General Arthur Aitken's complacency.<sup>25</sup> Like Larson, Gaudi eclectically selects characters, events, and places, and even zips back and forth through time. In describing the German East Africa campaign, he creatively fuses von Lettow's campaign with stolen signals, naval battles, spies, zeppelins, and aviation pioneers. However, Gaudi's tangents occasionally prove confusing. For example, Gaudi opens by rapidly shifting from Giza to East Africa to a warship off the Estonian coast.<sup>26</sup>

Despite the eclecticism, *African Kaiser* is eminently readable and does not require

prior historical knowledge. Gaudi has a gift for simplifying the complex. He carefully refrains from overwhelming the reader with foreign terms and clearly describes large-scale events, such as colonial uprisings and campaign military movements.

### III. Leadership Lessons

Gaudi highlights specific traits or capacities that made von Lettow a successful military leader. In the crucible of staff officer work, military education, and gritty operational environments, von Lettow forged and refined strategies and innovations. He attended war college, served as a staff officer, deployed to China, and studied tactics and logistics.<sup>27</sup> While deployed to Africa, he observed successful guerrilla methods practiced by Boer commandos.<sup>28</sup> After studying the Battle of Sedan, he concluded that the French lost due to their rigid military structure and lack of initiative.<sup>29</sup>

As a corrective, von Lettow stressed self-reliance, in which a leader could act with conviction in the absence of specific direction.<sup>30</sup> In selecting leaders, he used meritocratic principles. His leadership cadre included native NCOs, and he respected native fighters.<sup>31</sup> He demanded total dedication.<sup>32</sup> At the outset of his East Africa campaign, he specifically instructed his subordinates to take the initiative, move quickly, and make surprise attacks.<sup>33</sup>

Von Lettow cultivated a thorough operational knowledge of his environment. He conducted inspections, studied the land, and traveled extensively.<sup>34</sup> He learned Swahili and interrogated natives to learn ways to adapt, which allowed him to live off the land.<sup>35</sup> Adaptability was his forte. He constantly maximized his assets through innovation. He instituted native recruiting initiatives, developed a carrier corps, and acquired anti-malarials.<sup>36</sup> He recognized that traditional war strategies may not work in specific environments, such as bush fighting.<sup>37</sup> In response to supply and personnel shortages, he changed tactics to a guerrilla campaign.<sup>38</sup> When faced with a superior force, he sought concealment and used the terrain for defensive advantages.<sup>39</sup>

As a result of his unique experiences, von Lettow became the indispensable leader—uniquely qualified to persevere against overwhelming odds in an

inhospitable environment. As Gaudi writes, von Lettow had adapted his *Schutztruppe* into a “highly efficient mobile fighting force, aggressive and completely self-supporting.”<sup>40</sup>

### IV. Scholarship

In assessing von Lettow’s leadership traits, a related issue is whether Gaudi has accurately portrayed von Lettow himself. Gaudi’s failure to use footnotes presents serious concerns of accuracy and bias and runs counter to current history and biography norms,<sup>41</sup> though the casual reader may not care.<sup>42</sup> He relies on both primary and secondary sources in framing his conclusions, but without pinpoint citations, his narrative is hard to fact-check. He erroneously refers to Loyal North Lancers as “white European residents of India,” when in fact they were British troops from a North Lancashire regiment.<sup>43</sup> He also misstates that General Aitken was Lord Beaverbrook’s brother,<sup>44</sup> though this mistake has been made elsewhere.<sup>45</sup>

Additionally, two of Gaudi’s key primary sources are Richard Meinertzhagen’s diaries and von Lettow’s memoirs. Modern scholarship has exposed Meinertzhagen as a fraud,<sup>46</sup> of which Gaudi is keenly aware.<sup>47</sup> Von Lettow’s personal accounts are likewise problematic, as he subtly omits at least some incidents that might harm his reputation. For example, as horses rarely survived, von Lettow relied on a steady supply of porters, brutally impressed natives who died by the thousands.<sup>48</sup> To prevent escape, von Lettow roped porters together and ordered that escapees be shot,<sup>49</sup> facts entirely omitted in his written recollections.<sup>50</sup>

Minor errors and problematic sources aside, Gaudi judiciously evaluates available evidence and avoids unsupported conclusions. For example, he delicately considers whether von Lettow had an affair with author Isak Dinesen before concluding that von Lettow intentionally omitted this romance from his memoirs.<sup>51</sup> Moreover, his assessment of von Lettow’s achievements and character are largely consonant with extant literature.<sup>52</sup>

### V. The General’s Legacy

In the 21st century, von Lettow’s memoir claims and achievements have come under

increasing scrutiny. Gaudi clearly sides with the consensus of traditional scholars who view the Prussian general as an outstanding military leader and innovator.<sup>53</sup> But some historians now question whether von Lettow was a true guerrilla warrior,<sup>54</sup> or even whether he innovated at all.<sup>55</sup> Additionally, recent scholarship indicates that von Lettow’s warfighting tactics had a devastating impact on African civilians.<sup>56</sup>

Perhaps over relying on von Lettow’s memoirs, Gaudi’s portrait of von Lettow does not fully capture the general’s ruthlessness.<sup>57</sup> For example, when retreating in 1917, von Lettow ordered a scorched-earth strategy to deny cattle and food resources to the Allies.<sup>58</sup> For natives, the result was starvation.<sup>59</sup> *African Kaiser’s* greatest deficiency is Gaudi’s failure to address fully von Lettow’s ancillary effects. This lacuna is particularly glaring because Gaudi squarely describes the atrocities and hardships from prior colonial actions.<sup>60</sup> He briefly mentions that von Lettow practiced the “wolf strategy” by plundering and ravaging villages.<sup>61</sup> Gaudi includes ransacked towns but omits specifics regarding community consequences.<sup>62</sup> Problematically, he seems fully cognizant of African impact research:

Of course, von Lettow got blamed for many things by many different people after the war. . . . He got blamed for the deaths of *askaris* and German soldiers and African carriers by historians as yet unborn, and also for the death of any native who died from the flu or starvation when their fields were stripped clean of yams by the invading *Schutztruppe*.<sup>63</sup>

Gaudi’s omission may be attributable to a bias favoring von Lettow, whom he repeatedly terms a genius.<sup>64</sup> He compares the Prussian general to Gylippus, a heroic figure from the Peloponnesian War.<sup>65</sup> Perhaps too uncritically, Gaudi envisions von Lettow as a compassionate old-school gentleman, while systematically discounting or ignoring contradictory evidence.<sup>66</sup> In Gaudi’s defense, while he does not specifically evaluate African village impacts, he does address high porter mortality rates.<sup>67</sup> Regrettably, high civilian impacts were commonplace in World War I theaters.<sup>68</sup>

Criticisms aside, *African Kaiser* is aimed at the general public, like Larson's *Devil in the White City*.<sup>69</sup> In introducing von Lettow to a new audience, Gaudi intends to both educate and entertain. He succeeds marvelously at both, weaving a thrilling tale of heroism and high adventure. The military reader will find *African Kaiser* an accessible and entertaining way to learn leadership from one of history's great generals. **TAL**

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## Notes

- ROBERT GAUDI, *AFRICAN KAISER: GENERAL PAUL VON LETTOW-VORBECK AND THE GREAT WAR IN AFRICA, 1914-1918* (2017).
- Id.* at 31.
- Id.* at 410.
- Gaudi claims that the *Schutztruppe* became "the first racially integrated army in modern history." *Id.* at 2.
- See, e.g., id.* at 195-96, 227, 230.
- Id.* at 137.
- See, e.g., id.* at 384.
- Id.* at 137.
- See, e.g., id.* at 228, 233.
- Id.* at 405.
- Id.* at 410, 419.
- EDWIN P. HOYT, *GUERRILLA: COLONEL VON LETTOW-VORBECK AND GERMANY'S EAST AFRICAN EMPIRE* 449 (1981).
- GAUDI, *supra* note 1, at 413-14. Von Lettow opposed the British Expeditionary Force (BEF) in numerous guerilla campaigns. *See id.*
- Gen. von Lettow-Vorbeck Dead, *N.Y. TIMES* (Mar. 10, 1964), <http://www.nytimes.com/1964/03/10/gen-von-lettowvorbeck-dead.html?mcubz=0>. Field Marshal Smuts commanded the BEF in East Africa from 1916-17, during World War I. *See generally* RICHARD STEYN, *JAN SMUTS—UNAFAID OF GREATNESS* (2015).
- GAUDI, *supra* note 1, at 240, 393.
- Id.* at 240-44.
- See generally* Dan Lamothe, *Meet Operation Freedom's Sentinel, the Pentagon's New Mission in Afghanistan*, *WASH. POST* (Dec. 29, 2014), [https://www.washingtonpost.com/news/checkpoint/wp/2014/12/29/meet-operation-freedom-sentinel-the-pentagons-new-mission-in-afghanistan/?utm\\_term=.33dca8d3987f](https://www.washingtonpost.com/news/checkpoint/wp/2014/12/29/meet-operation-freedom-sentinel-the-pentagons-new-mission-in-afghanistan/?utm_term=.33dca8d3987f).
- See* Major Thomas A. Crowson, *When Elephants Clash: A Critical Analysis of Major General Paul Emil von Lettow-Vorbeck in the East African Theater of the Great War* 97 (Jun. 2003) (unpublished M.A. thesis, U.S. Army Command and General Staff College), <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA417332>. *See also* Lieutenant Colonel John C. Stratis, *A Case Study in Leadership—Colonel Paul Emil von Lettow-Vorbeck* (Apr. 9, 2002) (unpublished research project, U.S. Army War College), <http://www.dtic.mil/get-tr-doc/pdf?AD=ADA404449>.
- G.J. MEYER, *A WORLD UNDONE: THE STORY OF THE GREAT WAR, 1914 TO 1918* (2007) (ebook).
- See, e.g., the Lettow-Vorbeck family website, http://www.lettow-vorbeck.de/literat.htm#afrika* (last visited Sep. 21, 2017).
- See, e.g., HOYT, supra* note 12; ROSS ANDERSON, *THE FORGOTTEN FRONT: THE EAST AFRICAN CAMPAIGN 1914-1918* (2014).
- See* LEONARD MOSLEY, *DUEL FOR KILIMANJARO: AFRICA 1914-1918* (1964).
- ROBERT K. MASSIE, *DREADNOUGHT: BRITAIN, GERMANY, AND THE COMING OF THE GREAT WAR* (1991).
- ERIK LARSON, *THE DEVIL IN THE WHITE CITY: MURDER, MAGIC, AND MADNESS AT THE FAIR THAT CHANGED AMERICA* (2004).
- GAUDI, *supra* note 1, at 172, 181.
- Id.* at 1-3.
- Id.* at 40 (war college), 61-63 (China), 64 (tactics and logistics), 83-90 (staff officer in Africa).
- Id.* at 40-41.
- Id.* at 33.
- Id.*
- Id.* at 2, 24.
- Id.* at 107.
- Id.* at 159.
- See, e.g., id.* at 144.
- Id.* at 101 (interrogations and bushcraft), 107-08 (Swahili), 394-95 (subsistence).
- Id.* at 224-25.
- Id.* at 101.
- Id.* at 235, 239-241.
- Id.* at 312.
- GAUDI, *supra* note 1, at 2.
- See, e.g., MASSIE, supra* note 23 (biography with endnotes); IAN KERSHAW, *HITLER 1889-1936: HUBRIS* (1998) (biography with footnotes); ANTHONY READ, *THE DEVIL'S DISCIPLES: HITLER'S INNER CIRCLE* (2003) (biography with footnotes); ROGER NELSON, *THE PURSUIT OF VICTORY: THE LIFE AND ACHIEVEMENTS OF HORATIO NELSON* (2005) (biography with footnotes); STEPHEN B. OATES, *LET THE TRUMPET SOUND: A LIFE OF MARTIN LUTHER KING* (1994). For history, *see, e.g., J.M. ROBERTS, THE PENGUIN HISTORY OF THE WORLD* (1995) (history with endnotes); MEYER, *supra* note 19 (history with endnotes). *But see* BRUCE CATTON, *THE CIVIL WAR* (1960) (history without citations).
- Michael Dirda, *'African Kaiser': A Sweeping Military History that Reads Like a Novel*, *WASH. POST* (Mar. 15, 2017), [https://www.washingtonpost.com/entertainment/books/african-kaiser-a-sweeping-military-history-that-reads-like-a-novel/2017/03/15/e9ec903c-05a0-11e7-b9fa-ed727b644a0b\\_story.html?utm\\_term=.94a6f01e8406](https://www.washingtonpost.com/entertainment/books/african-kaiser-a-sweeping-military-history-that-reads-like-a-novel/2017/03/15/e9ec903c-05a0-11e7-b9fa-ed727b644a0b_story.html?utm_term=.94a6f01e8406).
- Allan Mallinson, *General Paul von Lettow-Vorbeck: The Lion of German East Africa*, *THE SPECTATOR* (Aug. 12, 2017), <https://www.spectator.co.uk/2017/08/general-paul-von-lettow-vorbeck-the-lion-of-german-east-africa/>.
- Id.*
- See, e.g., BRIAN GARFIELD, THE MEINERTZHAGEN MYSTERY: THE LIFE AND LEGEND OF A COLOSSAL FRAUD* 82 (2007) (arguing that General Aitken's advancement was due to his brother, Sir Max Aitken, later Lord Beaverbrook).
- See generally id.* at 48.
- See* GAUDI, *supra* note 1, at 178-80.
- William J. Astore, *East Africa, in 8 HISTORY IN DISPUTE: WORLD WAR I, FIRST SERIES* 89 (D. Showalter ed. 2002).
- See* Dan Whitaker, *The Uncatchable Lizard*, *HISTORY TODAY*, Feb. 2013, at 31.
- See* PAUL EMIL VON LETTOW-VORBECK, *MY REMINISCENCES OF EAST AFRICA* (1920), <https://archive.org/stream/myreminiscences00lettouft#page/n0/mode/2up>.
- See* GAUDI, *supra* note 1, at 128, 130-31; ISAK DINESEN, *OUT OF AFRICA* (1938). Gaudi puts a favorable spin on von Lettow's reticence, noting that, as a gentleman, he was reluctant to discuss romantic matters. *See* GAUDI, *supra* note 1, at 37 (discussing the omission of other romantic relationships from his memoirs).
- See* Crowson, *supra* note 18; HOYT, *supra* note 12; MOSLEY, *supra* note 22; Stratis, *supra* note 18. For revisionist interpretations, *see infra* notes 54-56.
- See, e.g., HOYT, supra* note 12.
- See* Whitaker, *supra* note 49, at 31 (arguing that von Lettow engaged more in perpetual retreat than actual Guerrilla warfare).
- See* 1 HEW STRACHEN, *THE FIRST WORLD WAR: TO ARMS 569-70* (2003). *See also* Stuart Mitchell, *Smuts, Lettow, and the War in German East Africa, in THE GREATER WAR: OTHER COMBATANTS AND OTHER FRONTS, 1914-1918*, at 101 (J. Krause ed. 2014). *See generally* F. Jon Nesselhuf, *General Paul von Lettow-Verbeck's East Africa Campaign: Maneuver Warfare on the Serengeti 8-11* (May 2012) (unpublished M.A. thesis), [https://digital.library.unt.edu/ark:/67531/metadc115128/m2/1/high\\_res\\_d/thesis.pdf](https://digital.library.unt.edu/ark:/67531/metadc115128/m2/1/high_res_d/thesis.pdf) (arguing that recent historical scholarship has shifted to an increasingly negative view of von Lettow's campaign).
- See* EDWARD PAICE, *TIP AND RUN: THE UNTOLD TRAGEDY OF THE GREAT WAR IN AFRICA* (2007).
- See* Whitaker, *supra* note 49, at 31.
- Id.*
- Id.*
- See* GAUDI, *supra* note 1, at 118.
- Id.* at 27-28, 400.
- See id.* at 303-04.
- Id.* at 421. In his bibliography, Gaudi cites *Tip and Run*. GAUDI, *supra* note 1, at 424. Moreover, Gaudi details an Askari memorial warning label asserting that the German East Africa campaign claimed "about half a million people, most of them African civilians, killed directly and indirectly by acts of war." *Id.* at 420.
- Id.* at 125, 304, 408.
- Id.* at 25.
- For example, Gaudi dismisses as implausible an allegation that von Lettow handed a pistol to a disgraced subordinate and implied that the subordinate should kill himself. *Id.* at 303.
- Id.* at 18, 132.
- See, e.g., MEYER, supra* note 19, at 290, 305, 411-12, 514, 583, 609.
- See* LARSON, *supra* note 24.



(Credit: istockphoto.com/JanPietruszka)

## No. 1

# Cyber Warfare for JAs

## Understanding the Legal Operating Environment

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*Major Phillip Dickerson and Brigadier General Joseph B. Berger*

### I. Introduction

In October of 2017, the Wall Street Journal reported Russia opened a new battle-front with NATO by exploiting a point of vulnerability for almost all allied soldiers: personal smartphones.<sup>1</sup> The campaign targeted the contingent of some 4,000 NATO troops deployed to Poland and the Baltic States and involved sophisticated drones equipped with surveillance electronics.<sup>2</sup>

Although some NATO officials played down the threat posed, others said that in a crisis, compromised cellphones could be used to slow NATO's response to Russian military action if, for example, the personal cellphone of a commander was used to send out fake instructions.<sup>3</sup> Beyond the disruption of communications, if a compromised phone were brought into a secure area such as a military command post, it could be used to collect sensitive information. The ubiquitous smartphone represents one more potential attack vector, in peace and war.

Similarly, October of 2017 saw the liberation of Raqqah from ISIS by U.S. backed forces in Northern Syria.<sup>4</sup> Despite this major loss, and certainly prior to it, ISIS was alarmingly effective in its use of social media to recruit fighters, inspire acts of terrorism, and project an image of unwavering confidence to the West.<sup>5</sup> This success required a sophisticated public relations strategy. It also required a working internet connection.<sup>6</sup> Counter-terrorism experts agree that ISIS almost certainly uses satellite internet to get online.<sup>7</sup> Satellite Internet requires no local infrastructure, and the very small aperture terminal (VSAT) satellite stations required for internet access can be purchased for about \$500 in countries like Turkey and then smuggled into ISIS-controlled parts of Syria.<sup>8</sup>

Violent extremist organization (VEO) use of the internet is well-established. The Financial Times reported back in 2014, that the internet was ISIS's command-and-control network of choice, specifically noting

that the terrorist group sent out over 40,000 tweets per day during its assault on Mosul.<sup>9</sup> Then in 2016, the Washington Post declared that the encrypted messaging application Telegram surpassed Twitter as ISIS's communication app of choice.<sup>10</sup>

These case-studies clearly demonstrate that the use of cyberspace is an indispensable and absolutely necessary part of both modern society and warfare. It will only grow in importance to both friendly forces and adversaries, and U.S. military units need to be able to defend it and leverage it offensively. Unfortunately, commanders at corps level and below are unlikely to have authority to conduct what are commonly understood to be Offensive Cyber Operations (OCO), but they may have authority to engage in cyber-related activities.

Similar to the relationship between electronic warfare (EW) and signals intelligence (SIGINT) or between intelligence activities and intelligence-related activities, the categorization of actions involving

cyberspace can be a nuanced, facts-and-circumstance based determination. Brigade commanders are not going to have the authority to implant a computer virus that will destroy a centrifuge or turn off the power at a North Korean missile base, but cyber tools and capabilities exist that those commanders may be able to utilize in certain circumstances. It is imperative that the judge advocates advising those commanders understand the current legal operating environment, can correctly issue spot, and have a framework for subsequent analysis.

## II. Definitions

In Section 954 of FY 2012 National Defense Authorization Act, Congress affirmed that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our nation, allies, and interests, subject to the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict.<sup>11</sup>

Joint Publication (JP) 3-12 (R) defines cyberspace as a global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, *including the internet*, telecommunications networks, computer systems, and embedded processors and controllers (emphasis added).<sup>12</sup>

Offensive cyberspace operations are cyberspace operations intended to project power by the application of force in or through cyberspace.<sup>13</sup>

Electronic warfare (EW) refers to military action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or to attack the enemy.<sup>14</sup> EW includes activities such as electromagnetic jamming, electromagnetic hardening, and signal detection, respectively.<sup>15</sup> EW affects, supports, enables, protects, and collects on capabilities operating within the electromagnetic spectrum (EMS), including cyberspace capabilities.<sup>16</sup>

Title 50 U.S.C. Section 403-5, defines Open Source Information as “publicly, available information that anyone can lawfully obtain by request, purchase, or observation” and defines Open Source Intelligence (OSINT) as “produced from

publicly available information that is collected, exploited, and disseminated in a timely manner to an appropriate audience for the purpose of addressing a specific intelligence requirement.”<sup>17</sup>

As described in Joint Publication 2-01, OSINT is developed using media and Web-based sources. OSINT processing transforms (converts, translates, and formats) text, graphics, sound, and motion video in response to user requirements. For example, at the national level, the ODNI Open Source Enterprise provides translations of foreign broadcast and print media.<sup>18</sup> OSINT is also developed from information collected by commercial companies that use their own assets or purchase information from independent contractors who monitor media.<sup>19</sup>

Signals Intelligence (SIGINT) is defined as intelligence produced by exploiting foreign communications systems (e.g., radio or other electromagnetic means) and non-communications emitters (e.g., radar).<sup>20</sup> The National Security Agency (NSA) is the national SIGINT manager and all SIGINT operations must be conducted under authority delegated from the NSA.

## III. So What’s The Difference?

These definitions demonstrate the significant amount of overlap that exists and the confusion that can result. Cyberspace operations may include the internet, but may not. EW operations may include cyberspace, but may not. And a given operation affecting the EMS may be classified as SIGINT or EW depending on the underlying intent. Furthermore, it is not uncommon that a given operation could legitimately be defined as either an OCO or EW operation. Often, the ultimate categorization that is adopted will very likely be the result of the authorities possessed by the classifier.

EW and SIGINT missions may use similar—or even the same—resources. The two differ, however, in the intent, the purpose for the task, the detected information’s intended use, the degree of analytical effort expended, the detail of information provided, and the timelines required.<sup>21</sup> EW missions respond to the immediate requirements of a tactical commander or exist to develop information to support

future cyberspace or EW operations.<sup>22</sup>

The primary intent of SIGINT is to meet national intelligence requirements over a longer period of time.

And if that distinction wasn’t confusing enough, often the same activity may start its life as EW, but will live a “second life” as SIGINT.<sup>23</sup>

The analysis of intelligence derived from all intelligence disciplines across all echelons, including theater and national collection assets, provides insight about enemy cyberspace and EW operations.<sup>24</sup> Leveraging the information collection requirements process may support aspects of cyberspace and EW operations.

## IV. What Can Be Done: A Scenario

### A. VEO utilization of the internet

As discussed above, ISIS’s primary means of communication among fighters is mobile phones, specifically utilizing apps like Telegram, because its primary means of communicating with the outside world is through VSAT connections to the internet. During the planning of an advise and assist mission intended to support a partner force’s assault on an ISIS position, a special forces battalion staff identifies these two facts as opportunities to disrupt ISIS communications that could give the partner force a distinct, if not decisive, advantage. The commander knows his unit, with the broader coalition force, has the capability to disrupt both of these avenues of communications. So, he turns to his judge advocate and asks what he’s allowed to do.

### B. Disrupt the Cellular Network, WiFi Networks, and VSATs

The planners inform the commander that the unit has an organic capability to jam WiFi and GSM signals in a two-kilometer radius around the device. The commander is also aware that the capability exists to gain access to specific WiFi routers through the internet. The staff suggests the unit send a small recon element out to map the networks operating in the target area so the jamming tool can be utilized most effectively. Alternatively, it’s likely that the same information could be obtained through the use of internet-based tools. However, obtaining *intelligence* via



Cyber warfare operators assigned to the 275th Cyber Operations Squadron of the 175th Cyberspace Operations Group of the Maryland Air National Guard configure a threat intelligence feed for daily watch in the Hunter's Den at Warfield Air National Guard Base, Middle River, Md., Dec. 2, 2017. (U.S. Air Force photo by J.M. Eddins Jr.)

an internet connection, rather than the EMS, will likely require SIGINT authorities. This is where much of the confusion over authorities manifests itself. Currently, SIGINT authorities are unlikely to be delegated to the battalion level, or at least not in a timely enough manner to be effective in such a mission.

It is critical to remember the Laws of Armed Conflict apply to cyber and EW operations. Therefore, judge advocates, working with the staff, must ensure the targets are valid military targets and weigh the impact on the civilian population of disrupting cellular and internet connections.

### **C. Monitor Facebook, Twitter, etc. for adversary response to the assault**

Generally speaking, monitoring publicly available social media communications falls squarely within the definition of OSINT. If, however, these communications are taking place within a restricted group of some

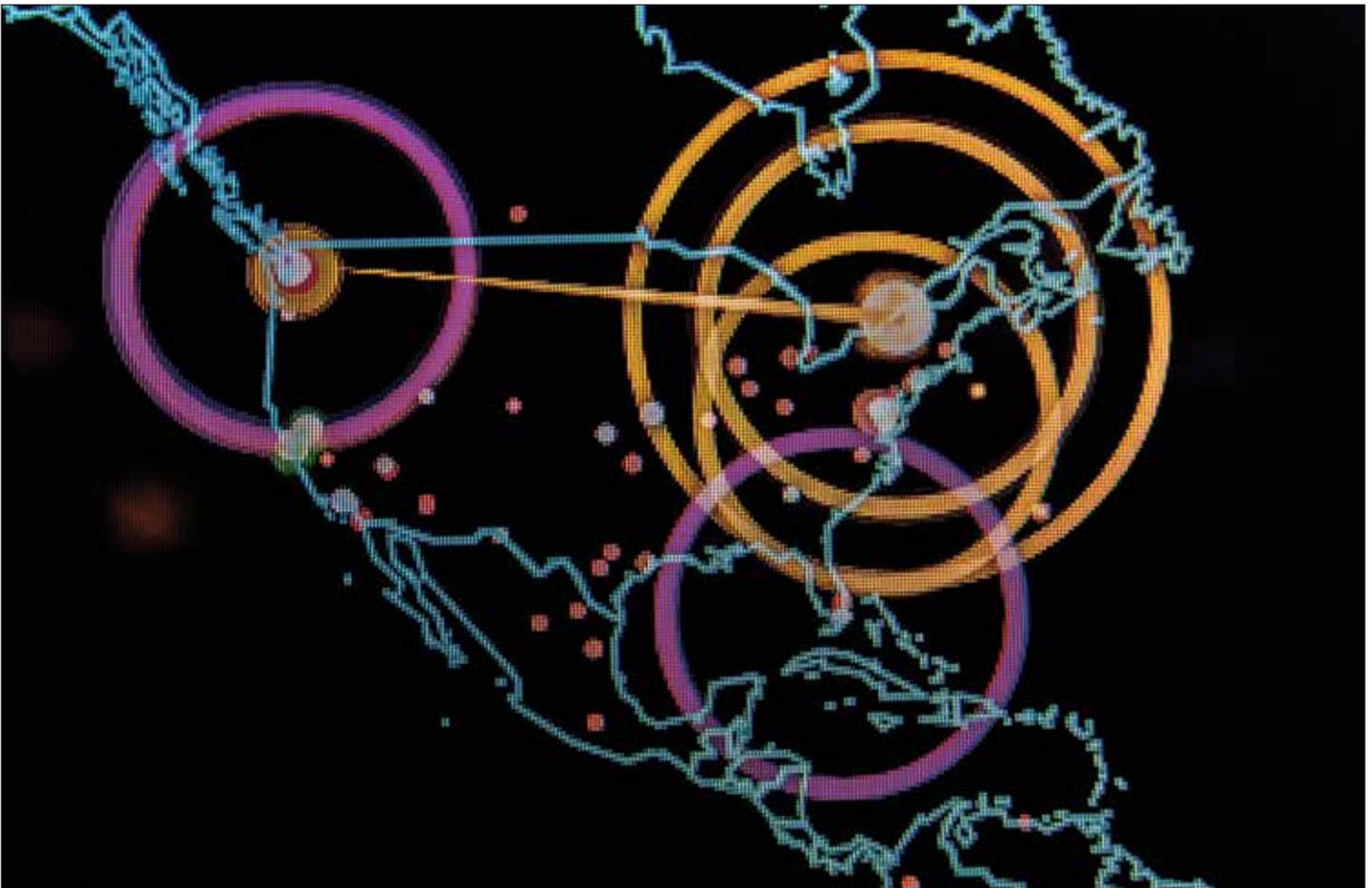
sort, additional authorities may be required before the unit may proceed. It is also important to note that OSINT refers only to the gathering of information, not the introduction of data into the information environment.<sup>25</sup>

Further consideration must be given when contracting for OSINT. Typically, the U.S. Government is not allowed to enter into a contract for goods or services that it could not legally obtain or engage in on its own.<sup>26</sup> For example, if the U.S. Government cannot dispose of hazardous waste in a particular manner, it could not hire a contractor to dispose of the waste if it believed the contractor intended to dispose of it in this prohibited way. Additionally, the U.S. Government is often prohibited from tasking a contractor to violate local laws that the contractor is subject to. For example, U.S. Forces-Korea could not task a local contractor to dispose of waste in a way that violates South Korean environmental laws.

This principal raises interesting concerns with regard to contracting for open-source information or intelligence. The legal advisor must consider whether any concerns regarding U.S. persons have been raised, whether U.S. or foreign privacy laws have been violated in the collection of the data in question, and whether the unit has the authority to obtain this type of information/intelligence. Deconfliction with partner forces is critical; understanding privacy laws that may apply to partner forces, even extraterritorially, is equally important.

### **D. Conduct information operations via cyberspace before, during, and after the assault**

Information Operations (IO) are those actions specifically concerned with the integrated employment of information-related capabilities during military operations, in concert with other lines of operation,



The Norse data wall on the operations floor of the 275th Cyber Operations Squadron, called the Hunter's Den, provides real time worldwide cyber attack sources and attack locations for the 175th Cyberspace Operations Group of the Maryland Air National Guard at Warfield Air National Guard Base, Middle River, Md., Dec. 2, 2017. This portion of the screen is focused on attacks within North America. (U.S. Air Force photo by J.M. Eddins Jr.)

to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting friendly forces.<sup>27</sup> Thus, cyberspace is a medium through which some information-related capabilities, such as military information support operations (MISO) or military deception (MILDEC), may be employed.

IO in cyberspace raises a number of issues that must be considered. When considering a possible IO activity, the unit must have both product/message authority *and* dissemination authority. The unit may have the ability to produce anti-VEO message, but may only have the authority to disseminate via print and audio-broadcast. In such a scenario, the unit may have to seek additional authority to disseminate its authorized message via internet-based platforms. Another consideration that must be analyzed is geography. It's fairly easy to limit the distribution of leaflets dropped

from a plane or broadcast via radio signal to the authorized area of responsibility/area of hostilities (AOR/AOH). Doing so in cyberspace (i.e., "geo-fencing"), however, can prove much more difficult. Additionally, even if the recipients of a cyber-delivered IO product can be geographically constrained to the AOR/AOH, what if that message transits though or resides on a server in a third country?

## V. Russian cyber operations within Syria targeting mobile devices

### A. Network mapping as force protection

The modern battlefield is rarely defined by clear front lines. Often, U.S. forces find themselves operating in close vicinity to potential adversaries. As a result, it is important for a commander to have a sense of who is operating nearby. Judge advocates

must be prepared to help the commander identify tools that the commander may have to determine who is, in fact, operating in close proximity. It could be classified as EW, but if it is a state actor adversary, EW collection authority may be limited or non-existent, especially during training or Phase Zero operations. Such collection could be classified as SIGINT if the activity is related to planning operations against an enemy force, but the commander very likely does not have SIGINT authorities. There may be an argument for inherent force-protection authority, but this can be a difficult case to make.

### B. Disrupt the intruder

As noted above, U.S. forces often find themselves operating near adversaries that may not be members of a targetable force. If that adversary is attempting to compromise U.S. forces' cell phones through cyber/

EW equipment carried by UAVs, what authority does the commander have to repel the intrusion? The right of self-defense is inherent, but an act of intelligence gathering may not be considered a hostile act authorizing a kinetic response. Can the commander turn on a jammer that blocks the signal penetrating the unit's mobile devices? What if the commander knows the jammer will also bring down the UAVs?

If those same mobile phones are being penetrated through the phone's internet connection, can the commander authorize his 17 series Soldier to "hack-back" against the intrusion? What if the commander believes his unit's network of mobile devices has been penetrated in support of an imminent attack? Can the inherent right of self-defense be used to authorize an OCO?

## VI. Conclusions (But Not Really)

The introduction of cyberspace operations at the tactical level is still in its nascent stages. As the Chief of Staff of the Army has noted, "The character of war is changing very significantly", and cyber is one of the three key emerging technologies driving that change in character.<sup>28</sup> The battlefield is constantly evolving. Like the earlier introduction of airpower, there has been a steady clamor for new rules to deal with the threats, and more specifically, rules to deal with cyberspace. Identifying authorities and tools that can be leveraged against the myriad of emerging threats will remain a fluid challenge. Our foundational law of war principles remain the bedrock and start point for analysis.

This short practice note is, at best, a rough roadmap in the next step of any analysis for judge advocates practicing at the tactical level. Judge advocates must understand the key definitions outlined here and the basic interplay between the capabilities and attendant authorities (e.g., SIGINT versus EW). With that understanding, judge advocates can begin to more effectively spot issues, address risk for commanders, and contribute to a broader understanding of the capabilities and rules inherent in the changing nature of warfare.

Future iterations of this discussion—which must occur and need to be captured and shared—will rely heavily on practitioners' experiences. Addressing

electromagnetic spectrum issues will not be limited to niche jobs in specialized commands. While the strategic level issues may reside in those formations, their practical (and tactical level) application is in the hands of our junior practitioners. You must write the next chapters. **TAL**

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## Notes

1. Thomas Grove et al., *Russia Targets NATO Soldier Smartphones, Western Officials Say*, *WALL ST. J.*, Oct. 4, 2017, <https://www.wsj.com/articles/russia-targets-soldier-smartphones-western-officials-say-1507109402>.

2. *Id.*

3. *Id.*

4. Anne Barnard & Hwaida Saad, *Raqqa, ISIS 'Capital,' Is Captured, U.S.-Backed Forces Say*, *N.Y. TIMES*, Oct. 17, 2017, <https://www.nytimes.com/2017/10/17/world/middleeast/isis-syria-raqqa.html>.

5. Clint Finley, *It'd be Great to Kick ISIS Offline – If it were Possible*, *WIRED*, Mar. 30, 2016, <https://www.wired.com/2016/03/how-is-isis-online/>.

6. *Id.*

7. *Id.*

8. *Id.*

9. Robert Hannigan, Opinion, *The web is a terrorist's command-and-control network of choice*, *FIN. TIMES*, Nov. 3, 2014, <https://www.ft.com/content/c89b6c58-6342-11e4-8a63-00144feabdc0>.

10. John Warrick, *The 'app of choice' for jihadists: ISIS seizes on Internet tool to promote terror*, *WASH. POST*, Dec. 23, 2016, [https://www.washingtonpost.com/world/national-security/the-app-of-choice-for-jihadists-isis-seizes-on-internet-tool-to-promote-terror/2016/12/23/a8c348c0-c861-11e6-85b5-76616a33048d\\_story.html?noredirect=on&utm\\_term=.12848116ce4c](https://www.washingtonpost.com/world/national-security/the-app-of-choice-for-jihadists-isis-seizes-on-internet-tool-to-promote-terror/2016/12/23/a8c348c0-c861-11e6-85b5-76616a33048d_story.html?noredirect=on&utm_term=.12848116ce4c).

11. Section 954 of FY 2012 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 954 (2011).

12. This definition is notable because it makes clear the fact that cyberspace is more than just the internet. For example, a smartphone's 4G connection allows it to connect to the internet, the 4G connection itself is not an internet connection. Similarly, a wireless router's signal may allow devices to connect to the internet, but the WiFi signal itself is not "the internet." This is an important distinction to understand since a cyber tool or effect may be delivered via the internet or delivered via a WiFi connection and different authorities may apply to each.

13. JOINT CHIEFS OF STAFF, JOINT PUB. 3-12, CYBERSPACE OPERATIONS ch. 2, para. 2 (Jun. 8 2018).

14. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE ch. 1, para. 4 (Jan. 25 2007) [hereinafter JP 3-13.1].

15. JP 3-13.1, *supra* note 14, at vi.

16. JP 3-13.1, *supra* note 14, ch. 1, para. 5.

17. 50 U.S.C. § 403-5 (2006).

18. ODNI News Release No. 6-05, ODNI Announces Establishment of Open Source Center, Nov. 8, 2005, [https://www.dni.gov/files/documents/Newsroom/Press%20Releases/2005%20Press%20Releases/20051108\\_release\\_content.htm](https://www.dni.gov/files/documents/Newsroom/Press%20Releases/2005%20Press%20Releases/20051108_release_content.htm).

19. JOINT CHIEFS OF STAFF, JOINT PUB. 2-01, JOINT AND NATIONAL INTELLIGENCE SUPPORT TO MILITARY OPERATIONS ch. 3, para. 19 (Jul. 5 2017).

20. JOINT CHIEFS OF STAFF, JOINT PUB. 2-0, JOINT INTELLIGENCE app. B, para. 3 (Oct. 22 2013) [hereinafter JP 2-0].

21. U.S. DEP'T OF ARMY, FIELD MANUAL 3-12, CYBERSPACE AND ELECTRONIC WARFARE OPERATIONS para. 1-130 (Apr. 11 2017) [hereinafter FM 3-12].

22. *Id.*

23. JP 3-13.1, *supra* note 14, ch. 1, para. 10.

24. JP 2-0, *supra* note 20, para. 2-10.

25. For example, while a commander could direct his S2 section to review and analyze information on Twitter, the commander may not, without additional authorities, direct his S2 section to disseminate information on Twitter, regardless of whether that information consists of S2's own messages—or messages previously created by others—factual or otherwise.

26. 31 U.S.C. § 1301 (1982).

27. U.S. DEP'T OF AIR FORCE, POL'Y DIR. 10-7, INFORMATION OPERATIONS para. 1 (Aug. 4 2014).

28. David Thornton, *Army Trying to Keep up with Changing Character of War*, *FEDERALNEWSRADIO.COM*, <https://federalnewsradio.com/army/2018/06/army-tries-to-keep-up-with-changing-character-of-war/> (quoting General Mark Milley at the 21 June 2018 Capitol Hill National Security Forum).



General John J. Pershing was commander of the American Expeditionary Forces on the Western Front in World War I.  
(Credit: Regimental Historian & Archivist)

## No. 2

# General Pershing and his JAG

## The Friendship that Helped Win WWI

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*By Major Robert W. Runyans*

*You will assume without a moment's hesitation that I have both your professional and personal interests at heart in everything that I suggest. Our uninterrupted friendship has extended over too many years to permit me any other view.<sup>1</sup> – Major General Enoch H. Crowder.*

*Professionally [Crowder's] exceptional record speaks for itself more eloquently than anything I could say. I had a high regard for him, both as a man and an officer.<sup>2</sup> – General of the Armies John J. Pershing*

### I. Introduction

Thirty-five miles separate the northwestern Missouri towns of Edinburg and Laclede.<sup>3</sup> Although never particularly populous, and located over 4,500 miles from the Western Front in France,<sup>4</sup> this small geographic area retains distinction for the 1859 and 1860 birthplaces of Major General (MG) Enoch H. Crowder and General of the Armies (GEN) John J. Pershing.<sup>5</sup>

Pershing, the more heralded of the two men, needs little introduction and features prominently in any study of U.S. involvement in World War I. His command of the American Expeditionary Forces (AEF)—then, the largest American command in history<sup>6</sup>—fought alongside British and French forces to achieve the final defeat of imperial Germany.<sup>7</sup> Of lesser acclaim, but well-known to judge advocates, is fellow

Missourian Enoch H. Crowder.<sup>8</sup> Serving as the Judge Advocate General (tJAG)<sup>9</sup> and Provost Marshal General throughout the conflict,<sup>10</sup> MG Crowder's duties as a "swivel chair"<sup>11</sup> general included drafting and implementing the Selective Service Act,<sup>12</sup> which provided seventy-two percent of the AEF's manpower.<sup>13</sup> To succinctly state each man's signature contribution to victory in World War I: one led the army that the other raised.

Considering the symbiotic relationship between these major achievements, it is fitting that these officers also enjoyed a long personal relationship that preceded and followed their wartime association. Marked by a voluminous exchange of letters, their personal relationship began as a friendship between Missourians with similar biographies, matured into a professional

association between officers that decisively contributed to victory in World War I, and concluded as the two aging lawyers<sup>14</sup> attempted to steward the Judge Advocate General's Department.<sup>15</sup> In recognition of the 100th anniversary of the Armistice, it is especially appropriate now to celebrate and study this relationship. As illuminated by their correspondence and actions, it remains an ideal example of a judge advocate supporting an operational commander and a sterling illustration of brotherhood in the profession of arms.

### II. Origins

Relationships are built, in part, from mutual interests and common experiences. Against these criteria, even the most superficial examination of Pershing and Crowder's biographies reveals that they

had both. As native Missourians born at the advent of the Civil War,<sup>16</sup> each served as a secondary school instructor before winning acceptance to, and attending, the U.S. Military Academy.<sup>17</sup> There, although their attendance did not overlap, each performed fairly well academically,<sup>18</sup> and commissioned into the cavalry.<sup>19</sup> Following commissioning, both men would serve on the closing American frontier,<sup>20</sup> participate in final actions against the Apache and Sioux,<sup>21</sup> and become professors of military science at midwestern universities.<sup>22</sup> Their careers would also take them abroad, with service in Cuba,<sup>23</sup> the Philippines,<sup>24</sup> and as observers in the Russo-Japanese War.<sup>25</sup> Each would also see Europe during the pre-war era, as both men toured that continent separately for professional purposes.<sup>26</sup> As noted, Pershing—in addition to Crowder<sup>27</sup>—also found time to earn a law degree.<sup>28</sup>

Of all these similar experiences, two stand out as being particularly important in their friendship. First, and most interesting to judge advocates, was their mutual interest in the legal profession that dominated most of their initial, surviving correspondence.<sup>29</sup> From 1910 to 1917, almost every letter discussed an array of legal topics, including judge advocate assignments,<sup>30</sup> proposed changes to the Articles of War,<sup>31</sup> prison reform,<sup>32</sup> and academic thoughts on the charge of desertion.<sup>33</sup> With letters sent to and from such exotic locations as the Philippines' Moro Province<sup>34</sup> and the mysterious location of "Headquarters Punitive Expedition, U.S. Army, Somewhere in Mexico,"<sup>35</sup> the very existence of this correspondence underscores both their mutual interest in the law and the value each placed on his relationship with the other.

Second, if legal matters formed the quantitative bulk of their early correspondence, it was their shared Missouri heritage that likely played a larger qualitative role in their friendship. As geographic bonds remain a common fixture of friendships between service members, Pershing and Crowder's frequent references to hometown July 4th celebrations,<sup>36</sup> remarks on mutual friends,<sup>37</sup> and plans for joint visits<sup>38</sup> probably mirror correspondence still common among all ranks today, albeit via different media. Further, the fact that such references often accompanied requests for

the other to "write to me oftener"<sup>39</sup> or the transatlantic lament of "I wish you and I could have a talk,"<sup>40</sup> provides additional evidence of this bond's weight. Reflecting the true importance of Missouri in their friendship, Pershing likely captured it best in a curious letter of recommendation to Crowder concerning another officer who was "possibly just a little bit different from other people,"<sup>41</sup> but still "a Missourian."<sup>42</sup>

Most important, considering their later wartime roles, their Missouri bond also contained a temporal component in addition to mere geographic coincidence. In one letter to Crowder, Pershing described tJAG as a "red-blooded American from Northwestern Missouri,"<sup>43</sup> who—like him—was "born amid the active scenes of conflict."<sup>44</sup> Given each man's families' experiences during the Civil War,<sup>45</sup> these "active scenes of conflict"<sup>46</sup> may have animated the pair further, as both men cited certain failures of the federal government in the Civil War as reasons for their joint support of universal conscription in World War I.<sup>47</sup> Writing on the topic, Crowder probably spoke for Pershing when he stated that "[t]he relics of the past and our childhood recollections themselves often exercise a directing force in the shaping of our points of view and our activities."<sup>48</sup> Ultimately, the U.S. experience with universal conscription would unite them as strongly professionally as their Missouri roots and shared interest in the law did personally.

### III. The War Years

In addition to uniting Crowder and Pershing around a common idea, universal conscription served as the catalyst that layered a professional association on top of their personal friendship. With war looming, President Wilson tasked Crowder to draft the Selective Service Act (the "Act")<sup>49</sup> on February 4, 1917.<sup>50</sup> Efficiently completing a draft for Congress on 5 February 1917,<sup>51</sup> tJAG was then appropriately dual-hatted as Provost Marshall General—with the charge to administer the Act's apparatus—on 28 May 1917,<sup>52</sup> ten days after the Act's passage<sup>53</sup> and in the same month that Pershing was selected as the American Expeditionary Forces's (AEF) commander and sailed for France.<sup>54</sup> Given these new roles, Pershing's success as a combat

commander was directly tied to Crowder's success as Provost Marshall General.

To fully appreciate this new professional nexus between the two friends, it is important to consider the strategic situation in 1917. With an ill-equipped and inexperienced force formed from a total U.S. Army of less than 120,000 active Soldiers,<sup>55</sup> Pershing was surrounded by hardened allies accustomed to casualties in excess of 300,000 in single operations like Verdun in 1916.<sup>56</sup> With such carnage being routine since 1914, the pressure for Pershing to contribute quickly to the Allied effort by subordinating his smaller Army to the command of British and French officers was both heavy and understandable.<sup>57</sup> Resisting this pressure, Pershing refused to commit to such an arrangement and stuck firm to the idea that he would command American forces, in an American sector, while conducting American offenses.<sup>58</sup> This position rankled the British and French, and resulted in diplomatic pressure on President Wilson to intervene.<sup>59</sup> Thus, Pershing's position could only hold if he received the necessary manpower.

Crowder understood Pershing's predicament. While tJAG certainly wanted to succeed as a matter of professional duty, he also privately assured his friend that "you need never contemplate a failure"<sup>60</sup> and that "I am completely absorbed in the work of the draft . . . so as to give you assurances that the flow of man-power to the cantonments and thence to the battle-field shall not be interrupted."<sup>61</sup> These assurances probably helped to assuage Pershing's private concern that "Americans—have got the burden of this thing on our shoulders"<sup>62</sup> and his urging to Crowder that "the armies we shall need should be called out without delay."<sup>63</sup> In his private response to Pershing's concerns, Crowder made perfectly clear his position, stating that Pershing should "consider me as working in elbow-touch with you and in subordinate relations to your great work, with no desire on my part quite so strong as to see you succeed in every way."<sup>64</sup>

Beyond these words of encouragement, Crowder also got results. During his administration of the Act, Crowder provided 2,758,542<sup>65</sup> of the "doughboys"<sup>66</sup> that composed a U.S. force of approximately

3.5 million.<sup>67</sup> When considering universal conscription began with the Act's passage in May 1917,<sup>68</sup> and that the armistice was signed on 11 November 1918,<sup>69</sup> the staggering scale of this accomplishment cannot be overstated. With these results, Pershing became secure in his separate station and led the AEF in operations such as the Meuse-Argonne offensive, where the weight of American participation finally overcame the will of Germany to continue their effort.<sup>70</sup> Reflecting pride in their joint contributions to this result, Crowder wrote candidly in their personal correspondence that "as I am raising the Army and you are fighting it, none of the other States of the Union are doing much."<sup>71</sup> Needless to say, such a frank assessment would have been inappropriate for official communications.

Befitting their friendship, Pershing also recognized the importance of Crowder's duties and took care to encourage him. Understanding that Crowder was self-conscious about his stateside status,<sup>72</sup> Pershing wrote that "I need not say that to have you here would give me the greatest pleasure . . . I honestly and candidly think that your work there, and your presence there close to the Secretary, are far more valuable."<sup>73</sup> Discouraging Crowder from further efforts at a combat role might have also been an additional act of mercy, as Pershing had no issue with dismissing officers he found ill-suited to combat duty despite long-associations.<sup>74</sup>

Further, Pershing was also correct about the importance of Crowder's proximity to the Secretary of War. As a member of the "War Council,"<sup>75</sup> Crowder became privy to official AEF communications sent to other departments.<sup>76</sup> From this perch, Crowder offered Pershing candid assessments and provided insight into the bureaucracy's inefficiency. For example, noting that not all of Pershing's requests for material had been met, Crowder convinced the War Department to make a special survey of AEF's communications and identify the deficiencies.<sup>77</sup> As he explained to Pershing, "I pointed out that it was not fair to charge you with a hundred percent of performance unless you were given a hundred per cent of compliance."<sup>78</sup> Being very responsive to Pershing's invitation "to write to you as illuminatingly as I can about



"...and the number is 246..." Photograph shows the drawing of the first number for the Second Draft of men to serve in the U.S. Army during World War I. Shown in the image is Secretary of War Newton D. Baker picking the first capsule out of the bowl. Left-to-right: Captain Charles R. Morris, Major General Enoch Crowder, and Secretary of War Baker. (Photo Credit: USAMHI)

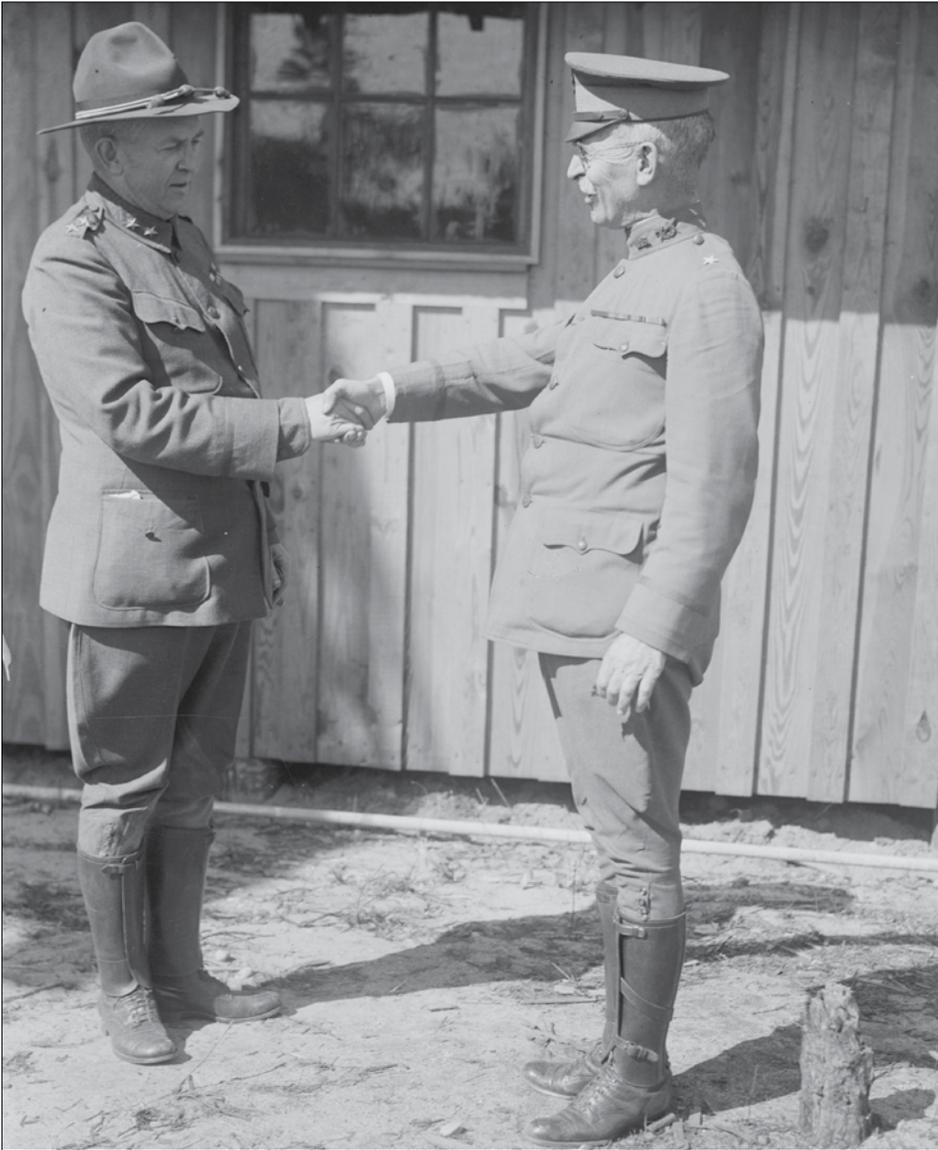
conditions on this side,"<sup>79</sup> Crowder carried this further and advocated for Pershing at the highest levels of the War Department.<sup>80</sup> In his varied roles, Crowder thus supplied Pershing's army as a matter of professional duty, provided protection to his friend's political flank in D.C., and enabled an outlet for candid conversations during a fraught time. Few relationships have accomplished so much during war.

#### IV. Later Years

It is worth noting that Crowder and Pershing's relationship endured a rocky period following the war. Given his dual-hatted responsibilities during World War I, significant portions of Crowder's legal duties fell to a subordinate, Brigadier General Samuel Ansell.<sup>81</sup> For various reasons, rooted in both professional judgments and personal animosity, the two men

collided in a very public debate over the fairness of the military justice system, the system's balance of discipline and justice, and the role of commanders in the process.<sup>82</sup> Crowder was ultimately vindicated in the public spectacle, but he carried a bitterness about the affair and towards those who he felt were less than absolutely loyal.<sup>83</sup> Although Pershing did not side against Crowder, and provided support in his correspondence,<sup>84</sup> Crowder felt that Pershing was insufficiently supportive given his rank and fame.<sup>85</sup>

Viewed another way, whatever hard feelings Crowder harbored about the experience, he overcame them with regard to Pershing. Following the war, the two continued their frequent correspondence, shifting from discussions about their wartime duties and resuming their old conversations about Missouri<sup>86</sup> and the



Franklin Bell (1856–1919), left, a U.S. Army officer, shakes hands with Brigadier General Enoch Crowder (1859–1932), at Camp Upton, a U.S. Army installation in Yaphank, New York, during World War I (Credit: Flickr Commons project, 2015).

legal profession—especially judge advocate assignments.<sup>87</sup> In addition to lower-level assignments, their correspondence soon focused on the appointment of future tJAGs.

This new focus was due, in large part, to the pair’s final accolades at the end of their long careers. Pershing, returning from France a hero, was appointed to the congressionally created rank of “General of the Armies” in 1919<sup>88</sup> and served as Chief of Staff until 1924.<sup>89</sup> Crowder was also reappointed to a third four-year term as the Judge Advocate General on 18 February 1919,<sup>90</sup> but again was dual-hatted for much of this term as an envoy to Cuba.<sup>91</sup>

With Crowder’s retirement looming, and with the wounds of the “Ansell-affair” still fresh, tJAG succession was a natural topic of conversation.

With three candidates identified, Pershing—as Chief of Staff—repeatedly sought Crowder’s advice on the selection of judge advocates Walter Bethel, Edward Kreger, or John Hull.<sup>92</sup> Pershing stated his preference for Bethel, who previously served as the AEF’s judge advocate.<sup>93</sup> Crowder expressed a contrary preference for Edward Kreger, calling him “unquestionably the best lawyer in the Department.”<sup>94</sup> Further offering his candid

thoughts, Crowder also provided what must rank among the ultimate “third-file” comments made by a tJAG to an Army Chief of Staff. Recalling that Bethel “years-ago”<sup>95</sup> failed to complete a revision of *Winthrop’s Unabridged Military Law*<sup>96</sup> while assigned to West Point, Crowder conceded that the “Department will be safe and thoroughly efficient”<sup>97</sup> under Bethel’s guidance, while offering faint praise of his “high average . . . performance.”<sup>98</sup> While Pershing would push back on Crowder’s characterization of Bethel,<sup>99</sup> and initially offered his own criticisms of Kreger,<sup>100</sup> there is no record that he challenged Crowder’s exceptionally harsh criticism of Hull: “Hull never decided a legal question except by throwing dice. He is not a lawyer and never will be one . . .”<sup>101</sup>

Ultimately, MG Bethel became tJAG during Pershing’s tenure as Chief of Staff and served from 1923–1924.<sup>102</sup> MG Kreger also achieved this position, after later winning Pershing’s confidence and respect,<sup>103</sup> and served from 1928–1931.<sup>104</sup> Despite Crowder’s criticism, MG Hull occupied the office between the favored successors.<sup>105</sup>

## V. Conclusion

Although ultimately anticlimactic, this discussion of future tJAGs is important for several reasons beyond its showcase of extreme candor and hints of palace intrigue. As their correspondence soon shifted to more nostalgic topics and inevitable concerns for poor health,<sup>106</sup> this marked one of the last, truly substantive discussions between the two leaders. Reflective of the extraordinary trust and rapport between the two men, it underscores how remarkable it was that their relationship developed these qualities primarily through written communication.<sup>107</sup> Although few judge advocates can expect to share so many common experiences and mutual interests with their commander-clients, the relationship between Pershing and Crowder remains a reminder to all professionals that diligent effort put forward to establish rapport and trust can pay great dividends.<sup>108</sup>

Second, this final discussion is also reflective of their shared concern for the institutions that each served for over thirty-five years.<sup>109</sup> Capturing this concept, Crowder wrote to Pershing that “[t]he time is growing all too short in which we can

be fair to subordinates who have served faithfully and honestly, and with great efficiency.<sup>110</sup> Although referring directly to Kreger's candidacy, Crowder's statement evoked their larger professional obligation to steward the profession and develop a future Army.<sup>111</sup> Speaking volumes about each man as a professional and leader, their mutual concern for institutions is an excellent reminder to current members of the profession of arms about obligations to an enduring organization.

Beyond stewardship, Crowder's support to Pershing is also particularly instructive for today's judge advocates. To quote a bit of doctrine:

No matter the level of command to which assigned, judge advocates have several roles. They are counselors, advocates, and trusted advisors to commanders and Soldiers. They are Soldiers, leaders, and subject matter experts in all of the core legal disciplines. In every aspect of their professional lives, judge advocates serve the Army and the Nation with their expertise, dedication, and selflessness.<sup>112</sup>

In each of these roles, it is undebatable that Crowder performed remarkably well. Although his greatest contribution occurred in non-legal role, his expert legal mind drafted the Act that enabled Pershing's success as a combat leader. Possessing a tireless work-ethic,<sup>113</sup> Crowder's dedication to implementing the Act then ensured that Pershing received the necessary manpower. As an advocate for his friend in France, Crowder was also invaluable in his state-side role as a conduit for information and counsel. Most of all, as a trusted advisor, his frequent communications marked by sage advice and candor stands unique in history with respect to the practice of law. He rightfully deserves to be remembered as the "Greatest Judge Advocate in History,"<sup>114</sup> and he remains the ultimate example of expert support, across varied roles, to an operational commander.

Naturally, Crowder should not receive all the credit. As shown in their correspondence, credit for the critical rapport developed between these men also belongs

to Pershing. From the tinder of their common experiences, both made efforts to communicate with each other over the decades and across vast distances. Considering their joint roles in creating their relationship, and considering the extraordinary benefits for the nation that it provided, Pershing and Crowder's association should inspire not only legal professionals, but all Soldiers engaged in the defense of this nation. The U.S. Army values the importance of teamwork at every level to accomplish its mission. Here was an example of such teamwork and comradeship under the stress of world war. It succeeded brilliantly. **TAL**

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## Notes

1. Letter from Enoch H. Crowder to John J. Pershing (Aug. 18, 1917) (on file with the Library of Congress, Manuscript Division, John J. Pershing Papers, General Correspondence, Box 56 [hereinafter Pershing Papers]). The correspondence between Pershing and Crowder dates from April 17, 1910 to February 10, 1932.

2. DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER, AND STATESMAN 261 (1955). In the only book-length biography of Crowder, LOCKMILLER quotes a letter received from Pershing. The letter is dated May 28, 1940. *Id.*

3. Distance from Edinburg, Mo. to Laclede, Mo., GOOGLE MAPS, <http://maps.google.com> (follow the "Get Directions" hyperlink; then search for "Edinburg, Mo." and "Laclede, Mo."; then right click on the map location for "Edinburg" and select "Measure Distance"; then click on the map location for "Laclede").

4. Distance from Edinburg, Mo. to Verdun, France, GOOGLE MAPS, <http://maps.google.com> (follow the "Get Directions" hyperlink; then search for "Edinburg, Mo" and "Verdun, France"; then right click on the map location for "Edinburg" and select "Measure Distance"; then click on the map location for "Verdun"). Verdun is used as an example of the location of the Western Front in World War I. *See, e.g.*, ROBERT A. DOUGHTY ET AL., WARFARE IN THE WESTERN WORLD: MILITARY OPERATIONS SINCE 1871 523-633 (1996).

5. *See* LOCKMILLER, *supra* note 32, at 13-21 (discussing Crowder's childhood); GENE SMITH, UNTIL THE LAST TRUMPET SOUNDS: THE LIFE OF GENERAL OF THE ARMIES JOHN J. PERSHING 3-15 (1998) (discussing the early life of General Pershing).

6. *Compare* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 306-07 (1988) (citing other scholarship and concluding that approximately 2.1 million Soldiers served in the Union Army), *with* ENOCH H. CROWDER, THE SPIRIT OF SELECTIVE SERVICE 363 (1920) (noting that approximately 3.5 million men were serving in the U.S. military on Nov. 11, 1918). *See also* I.C.B. DEAR ET AL., THE OXFORD COMPANION TO WORLD WAR

II 1192-1198 (1995) (indicating a U.S. Army strength of over 8.1 million on Mar. 31, 1945 and exclusive of approximately 4 million additional service members in the U.S. Navy and U.S. Marine Corps).

7. MITCHELL YOCKELSON, FORTY-SEVEN DAYS 320 (2016). YOCKELSON discusses the U.S. Army's performance in the Meuse-Argonne offensive of 1918, and argues that it was the "deciding factor" in the war. *Id.* *See also* DOUGHTY ET AL., *supra* note 5, at 624-33 (discussing U.S. participation in the reduction of the St. Mihiel Salient and the Meuse-Argonne offensive in 1918). *Id.*

8. *See* Fred L. Borch, *The Greatest Judge Advocate in History? The Extraordinary Life of Major General Enoch H. Crowder (1859-1932)*, ARMY LAW., May 2012. *See also* JOSHUA E. KASTENBERG, TO RAISE AND DISCIPLINE AN ARMY 7-12 (2017). (discussing the lack of study of judge advocates during World War I and commenting that Pershing is the only U.S. leader from that conflict to receive significant study).

9. *Id.* Borch, *supra* note 9, at 3. The author notes that the office now referred to as "The Judge Advocate General" was referred to as "the Judge Advocate General" until 1924. *Id.*

10. WAR DEP'T, BIOGRAPHICAL DATA ON MAJOR GENERAL ENOCH H. CROWDER (1932) (on file with the Library of Congress, Manuscript Division, John J. Pershing Papers, General Correspondence, Box 56) [hereinafter WAR DEP'T]; U.S. MILITARY ACADEMY, THE REGISTER OF GRADUATES AND FORMER CADETS 2879 (2010) [hereinafter REGISTER]. *See* LOCKMILLER, *supra* note 23, at 133-216; Borch, *supra* note 9, at 4.

11. LOCKMILLER, *supra* note 3, at 148 (stating that "Crowder was preeminently a swivel chair general and for him the law was truly a jealous mistress."). *Id.* "Swivel chair general" was a derogatory reference to officers serving in Washington D.C. during World War I. *Id.* at 192. Crowder's status was part of the reason that he turned down the possibility of promotion to Lieutenant General. *See* LOCKMILLER, *supra*, at 191-92. Of note, Kastenbergs claims that Crowder was also offered a fourth star after the Armistice. KASTENBERG, *supra* note 89, at 352.

12. Selective Service Act, ch. 15, 40 Stat. 76 (1917) (codified as amended at 50 U.S.C. §201).

13. DAVID STEVENSON, WITH OUR BACKS TO THE WALL 146 (2011).

14. *See, e.g.*, SMITH, *supra* note 56, at 44 (noting that Pershing received a law degree while serving as a professor of military science at the Univ. of Nebraska).

15. KASTENBERG, *supra* note 89, at 5. KASTENBERG notes that this term referred to the staff department supervising all judge advocates.

16. *See, e.g.*, LOCKMILLER, *supra* note 23, at 17; SMITH, *supra* note 6, at 4.

17. *Id.* *See, e.g.*, LOCKMILLER, *supra* note 3, at 22; SMITH, *supra* note 56, at 12-14. Pershing also indicated that he previously turned down an appointment to the U.S. Naval Academy. JOHN J. PERSHING, MY LIFE BEFORE THE WORLD WAR, 1860-1917: A MEMOIR 36 (John T. Greenwood ed., 2013) [hereinafter BEFORE THE WORLD WAR]. This publication is an edited compilation of Pershing's draft, unpublished memoir. The editor notes that the original papers are located in the Manuscript Division of the Library of Congress. BEFORE THE WORLD WAR, *supra*, at Editor's Note.

18. U.S. MILITARY ACADEMY, OFFICIAL REGISTER OF THE OFFICERS AND CADETS OF THE UNITED STATES MILITARY

ACADEMY 10 (1881), available at <http://digital-library.usma.edu/cdm/compoundobject/collection/p16919coll3/id/2081/show/2063/rec/9> [hereinafter USMA 1881]; U.S. MILITARY ACADEMY, OFFICIAL REGISTER OF THE OFFICERS AND CADETS OF THE UNITED STATES MILITARY ACADEMY 10 (1886), available at <http://digital-library.usma.edu/cdm/compoundobject/collection/p16919coll3/id/2300/rec/69> [hereinafter USMA 1886]. The 1881 publication notes that Crowder graduated thirty-first out of class of fifty-four cadets. In contrast to his high marks in law, Crowder received the fifth most demerits in his graduating class. USMA RECORDS 1881, *supra*, at 10. The 1886 edition notes that Pershing graduated thirtieth in a class of seventy-seven and ranked thirteenth in discipline. USMA RECORDS 1886, *supra*, at 10. Pershing also served as First Captain of the U.S. Corps of Cadets. In response to this accolade, Pershing is quoted as saying that “[n]o other military promotion has ever come to me quite equal to that.” SMITH, *supra* note 6, at 23. See also David R. Hughes, *The Class of 1881, It’s Great 75<sup>th</sup> Year*, ASSEMBLY, July 1936, at 12–16, available at <http://digital-library.usma.edu/cdm/compoundobject/collection/assembly/id/7594/rec/26>. This article, published by the U.S. Military Academy’s alumni organization, states that “the two most widely known members of the class were Colonel Andrew S. Rowan and Major General Enoch Crowder.” *Id.* at 16. As a matter of curiosity, the article further notes that Rowan “became a legend for his carrying of the ‘Message to Garcia.’” *Id.*

19. See, e.g., LOCKMILLER, *supra* note 23, at 33; REGISTER, *supra* note 101, at 3179.

20. See, e.g., LOCKMILLER, *supra* note 23, at 34–65; SMITH, *supra* note 56, at 27–38.

21. See, e.g., LOCKMILLER, *supra* note 23, at 93; SMITH, *supra* note 56, at 32, 37–38.

22. See, e.g., LOCKMILLER, *supra* note 23, at 38–49; SMITH, *supra* note 56, at 39–45.

23. See, e.g., LOCKMILLER, *supra* note 23, at 109–20; SMITH, *supra* note 56, at 51–55.

24. See, e.g., LOCKMILLER, *supra* note 23, at 66–85; SMITH, *supra* note 26, 95–118.

25. See, e.g., LOCKMILLER, *supra* note 23, 98–108; SMITH, *supra* note 56, at 85–91.

26. See, e.g., LOCKMILLER, *supra* note 23, at 130–31; SMITH, *supra* note 56, at 101–04.

27. See, e.g., LOCKMILLER, *supra* note 23, at 44.

28. See, e.g., SMITH, *supra* note 53, at 44.

29. See, e.g., Letter from Enoch H. Crowder to John J. Pershing (Apr. 17, 1910) (Pershing Papers). This letter is particularly interesting because it concerns the assignment of Captain Samuel Ansell to Pershing’s command in the Philippines. In this letter, Crowder states that Ansell is “abreast” of “the best men in the service.” *Id.* Pershing concurred in Crowder’s assessment, responding that “I consider him an exceptional man.” Letter from John J. Pershing to Enoch H. Crowder (Aug. 19, 1910) (Pershing Papers). A decade later, Crowder and Ansell would have a very public dispute over military justice reform that would involve the credibility of the Judge Advocate General’s Department. KASTENBERG, *supra* note 89, at 352–407.

30. See, e.g., Letter from Enoch H. Crowder to John J. Pershing (Sept. 11, 1916) (Pershing Papers). In this 14-page letter, Crowder listed his thoughts on forty-two candidates for appointment as judge advocates. See also Letter from John J. Pershing to Enoch H. Crowder

(Jun. 8, 1911) (Pershing Papers). Congratulating Crowder on his selection as the Judge Advocate General (tJAG), Pershing stated – without context – that “[t]his department has been allowed to lag behind. It has not kept up with the general progress that has been made in other departments.” *Id.*

31. See, e.g., Letter from Enoch H. Crowder to John J. Pershing (Sep. 19, 1916) (Pershing Papers).

32. See, e.g., Letter from John J. Pershing to Enoch H. Crowder (Mar. 30, 1915) (Pershing Papers).

33. See, e.g., Letter from Enoch H. Crowder to John J. Pershing (Apr. 5, 1915) (Pershing Papers).

34. See, e.g., Letter from John J. Pershing to Enoch H. Crowder (Aug. 19, 1910) (Pershing Papers).

35. Letter from John J. Pershing to Enoch H. Crowder (Jun. 15, 1916) (Pershing Papers). This letter is further revealing of Pershing’s rapport with Crowder. In addition to discussing the legal work of a mutual acquaintance, Pershing reveals his private frustration with the pursuit of Pancho Villa and states that “[t]he whole situation is pathetic.” *Id.*

36. Letter from Enoch H. Crowder to John J. Pershing (Jul. 22, 1918) (Pershing Papers).

37. Letter from John J. Pershing to Enoch H. Crowder (Dec. 17, 1921) (Pershing Papers).

38. Letter from John J. Pershing to Enoch H. Crowder (Oct. 15, 1918) (Pershing Papers).

39. Letter from John J. Pershing to Enoch H. Crowder (Jun. 28, 1918) (Pershing Papers).

40. Letter from Enoch H. Crowder to John J. Pershing (Jul. 22, 1918) (Pershing Papers). See also Letter from Enoch H. Crowder to John J. Pershing (Feb. 10, 1919) (Pershing Papers) (stating that “[t]here is a great deal you and I would talk about if we could have a meeting but which, if I undertook to write about it would not look well on paper.”) *Id.*

41. Letter from John J. Pershing to Enoch H. Crowder (Oct. 24, 1919) (Pershing Papers).

42. *Id.* See also LOCKMILLER, *supra* note 23, at 21. Lockmillier notes that “a sure password to his [Crowder’s] inner office was: ‘I’m a friend from Grundy County, Missouri.’” *Id.*

43. Letter from John J. Pershing to Enoch H. Crowder (Jun. 28, 1918) (Pershing Papers).

44. *Id.*

45. Among other observations, Pershing notes that his “earliest recollection” was of an 1864 raid on Laclede that killed a man named David Crowder (unknown relation). BEFORE THE WORLD WAR, *supra* note 187, at 16–17. Pershing’s father was also a target of that raid. SMITH, *supra* note 56, at 5. Crowder’s father served in the Union Army and his namesake uncle was killed in action. LOCKMILLER, *supra* note 23, at 19–20.

46. Letter from John J. Pershing to Enoch H. Crowder (Jun. 28, 1918) (Pershing Papers).

47. See CROWDER, *supra* note 67, at 76–91; JOHN J. PERSHING, MY EXPERIENCES IN THE WORLD WAR 21–22 (1920). Pershing relates that he convinced Texas officials to support the idea of universal conscription in 1917 and states that “[i]t was very important that a repetition of the experience in the Civil War should be avoided.” *Id.* at 21. Pershing also goes on to praise Crowder’s work in preparing the Selective Service Act and administering the draft. *Id.* at 27. Of note, Pershing’s autobiography also won the Pulitzer

Prize. John J. Pershing, *The 1932 Pulitzer Prize Winner in History*, THE PULITZER PRIZES, <http://www.pulitzer.org/winners/john-j-pershing> (last visited Jun. 18, 2018). Crowder wrote extensively on the failures of conscription and volunteering in THE SPIRIT OF SELECTIVE SERVICE. See CROWDER, *supra* note 67, at 76–91.

48. CROWDER, *supra* note 7, at 94 (1920); LOCKMILLER, *supra* note 3, at 19. LOCKMILLER dismisses the notion that Crowder was influenced by his childhood experiences during the Civil War and states that “[t]here is little to substantiate this thesis, and Enoch Crowder, who was six years old when the war ended, never claimed to have been thus influenced.” *Id.* Although it is impossible to know Crowder’s personal motivations, he specifically discussed failures of federal government policy and its resulting violence during the Civil War as justification for World War I’s system of universal conscription in THE SPIRIT OF SELECTIVE SERVICE. See generally CROWDER, *supra* note 7, at 76–91.

49. Selective Service Act, ch. 15, 40 Stat. 76 (1917) (codified as amended at 50 U.S.C. §201).

50. LOCKMILLER, *supra* note 23, at 152–55.

51. *Id.*

52. WAR DEP’T, *supra* note 101, at 2.

53. Selective Service Act, ch. 15, 40 Stat. 76 (1917) (codified as amended at 50 U.S.C. §201).

54. LOCKMILLER, *supra* note 23, at 163; PERSHING, *supra* note 48, at 45.

55. STEVENSON, *supra* note 134, at 247. Additionally, there were 164,000 National Guard troops available in April 1917. *Id.*

56. DOUGHTY ET AL., *supra* note 54, at 573. Reflecting the carnage of that battle and the general condition of the war’s combat, the German’s referred to it as a “sausage grinder.” *Id.*

57. SMITH, *supra* note 6, at 157. See also STEVENSON, *supra* note 14, at 247. The issue was “amalgamation” of U.S. forces into British and French commands. *Id.*

58. PERSHING, *supra* note 48, at 42–43. Pershing noted the instructions he received from the Secretary of War on May 26, 1917: “you are directed to cooperate with the forces of the other countries employed...but in so doing the underlying idea must be kept in view that the forces of the United States are a separate and distinct component of the combined forces, the identity of which must be preserved.” *Id.* at 42. See RUSSELL F. WEIGLEY, THE AMERICAN WAY OF WAR 202 (1973); RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 381–382 (1984) [hereinafter HISTORY] (stating that “Pershing’s insistence that the American soldier must fight in an American army is generally accorded one of his principle achievements.”) *Id.* at 382.

59. See C.J. BERNARDO & EUGENE H. BACON, AMERICAN MILITARY POLICY: ITS DEVELOPMENT SINCE 1775, 354 (1957); DOUGHTY ET AL., *supra* note 5, at 603.

60. Letter from John J. Pershing to Enoch H. Crowder (Oct. 15, 1918) (Pershing Papers).

61. Letter from Enoch H. Crowder to John J. Pershing (Aug. 29, 1918) (Pershing Papers).

62. Letter from John J. Pershing to Enoch H. Crowder (Jun. 28, 1918) (Pershing Papers).

63. *Id.*

64. Letter from Enoch H. Crowder to John J. Pershing (Jul. 22, 1918) (Pershing Papers).

65. CROWDER, *supra* note 7, at 363.

66. "Doughboys" was the general slang for infantry Soldiers in World War I. See e.g., WILLIS R. SKILLMAN, *THE A.E.F., WHO THEY WERE, WHAT THEY DID, HOW THEY DID IT* 62 (1920).
67. *Id.* at 363.
68. See LOCKMILLER, *supra* note 3, at 166-68. Registration began on Jun. 5, 1917 and the first lottery occurred on Jul. 20, 1917.
69. HISTORY, *supra* note 59, at 395.
70. YOCKELSON, *supra* note 8, at 320; HISTORY, *supra* note 59, at 393. In HISTORY, the author states that "[w]hen the Americans continued to arrive in mounting numbers and continued to go into battle...German calculations were so upset that the high command went into a funk from which it never emerged, except to importune the civil government to make peace." *Id.*
71. Letter from Enoch H. Crowder to John J. Pershing (Aug. 29, 1918) (Pershing Papers).
72. Crowder sought a combat command and was disappointed that he was not given a division in France. See LOCKMILLER, *supra* note 3, at 190. Crowder expressed this displeasure in multiple letters to Pershing, stating that "[r]emember Pershing, it is a hell of a thing to go through a war in which our Country is engaged, especially this World War, without getting shot at." Letter from Enoch H. Crowder to John J. Pershing (Feb. 25, 1918) (Pershing Papers). Among other comments, Crowder also stated that "I hate to think that it can be said that I have been efficient in the means of selecting other men to be shot at and equally efficient in not finding duty where I was not likely to be shot at myself." Letter from Enoch H. Crowder to John J. Pershing, (Jan. 19, 1918) (Pershing Papers).
73. Letter from John J. Pershing to Enoch H. Crowder (Jun. 28, 1918) (Pershing Papers).
74. SMITH, *supra* note 6, at 162.
75. Letter from Enoch H. Crowder to John J. Pershing (Jan. 19, 1918) (Pershing Papers). Crowder describes the creation of this Council during a late-night meeting with the Secretary of War. *Id.*
76. *Id.*
77. Letter from John J. Pershing to Enoch H. Crowder (Jan. 19, 1918) (Pershing Papers). Crowder states that he argued over several meetings "to analyze all the correspondence with you since you first set foot on foreign soil and see how many unsatisfied requisitions for men and material you had made." *Id.*
78. Letter from Enoch H. Crowder to John J. Pershing (Jan. 19, 1918) (Pershing Papers).
79. Letter from John J. Pershing to Enoch H. Crowder (Jul. 22, 1918) (Pershing Papers).
80. See, e.g., *id.* Crowder recognized that he had a close relationship with the Secretary of War. Letter from Enoch H. Crowder to John J. Pershing (Jan. 19, 1918) (Pershing Papers). In addition, Crowder also had a close relationship with many politicians, due to the role of tJAG during his service. KASTENBERG, *supra* note 9, at 8-9. This included Pershing's father-in-law, Senator Francis E. Warren. KASTENBERG, *supra* note 9, at 396. See Letter from Enoch H. Crowder to John J. Pershing (Feb. 10, 1919) (Pershing Papers). In one instance, this relationship served to notify Pershing of General Peyton March's attempt to curtail Pershing's command authority. KASTENBERG, *supra* note 9, at 396. Of note, Crowder had an especially contentious relationship with March. LOCKMILLER, *supra* note 3, at 260. Informed that March's gravesite in Arlington would be along a hillside next to his, Crowder is quoted as saying that "[w]e must locate another lot. I'll be damned if I have that old S-O-B- looking down on me throughout eternity." LOCKMILLER, *supra* note 3, at 260.
81. LOCKMILLER, *supra* note 3, at 202.
82. See LOCKMILLER, *supra* note 3, at 200-16; KASTENBERG, *supra* note 9, at 352-407; Borch, *supra* note 9, at 4. There is also speculation that Ansell's motives were not entirely pure, as Ansell believed that Crowder would not return to the Judge Advocate General's office after being appointed the Provost Marshall General. LOCKMILLER, *supra* note 3, at 202-03.
83. See, e.g., Letter from Enoch H. Crowder to John J. Pershing (Jan. 18, 1923) (Pershing Papers). In this letter, Crowder refers to the Ansell affair and points to an isolated incident when Bethel failed to confront an unnamed critic of Crowder. Crowder stated dismissively that Bethel "did not regard it as a matter of sufficient importance to give the offender a proper lesson in loyalty and decency." *Id.*
84. Letter from John J. Pershing, U.S. Army, to Enoch H. Crowder, (Apr. 19, 1919) (Pershing Papers). Pershing states that "[t]he Ansell affair and consequent investigation shows complete failure to appreciate war condition by those who are airing their views. Perhaps when some of the fighting men get home they shall be able to help you out." *Id.* See LOCKMILLER, *supra* note 3, at 215.
85. KASTENBERG, *supra* note 9, at 402.
86. See, e.g., Letter from John J. Pershing to Enoch H. Crowder (Dec. 17, 1921) (Pershing Papers). Pershing and Crowder visited the Univ. of Missouri together as honored guests at commencement on Apr. 21, 1920. *Pershing Arrives at 1:40 P.M. Tomorrow, City to Greet A.E.F. Leader and Crowder*, THE EVENING MISSOURIAN, April 20, 1920. Reporting on the joint visit, the local newspaper referred to the pair as "Missouri's two foremost sons." *All Columbia Out to See Pershing and E.H. Crowder*, THE EVENING MISSOURIAN, Apr. 21, 1920. During the visit, the two lawyers were also awarded honorary Doctorate of Laws degrees. *Pershing Awarded LL.D. By University*, THE EVENING MISSOURIAN, Apr. 22, 1920.
87. Letter from John J. Pershing to Enoch H. Crowder (Sep. 3, 1921) (Pershing Papers).
88. REGISTER, *supra* note 101, at 3179; SMITH, *supra* note 56, at 228.
89. REGISTER, *supra* note 101, at 3179; SMITH, *supra* note 56, at 253-56
90. WAR DEP'T, *supra* note 101, at 2.
91. LOCKMILLER, *supra* note 23, at 219, 231. See also Letter from Enoch H. Crowder to John J. Pershing (Feb. 18, 1920) (Pershing Papers). In a reversal of their wartime situations, Crowder writes from the U.S.S. Minnesota and expresses his appreciation for Pershing's correspondence, noting that "I am necessarily out of touch with affairs at home." *Id.*
92. Based on Crowder and Pershing's correspondence, Kreger and Bethel were the clear frontrunners. See, e.g., Letter from John J. Pershing to Enoch H. Crowder (Sep. 3, 1921) (Pershing Papers). Hull's candidacy appears to have been the result of Hull maneuvering himself into consideration through his relationship with Pershing's assistant, General Habbord. See Letter from Enoch H. Crowder to John J. Pershing (Jul. 18, 1921) (Pershing Papers); Letter from Enoch H. Crowder to John J. Pershing (Nov. 24, 1922) (Pershing Papers) (stating that "if Hull is appointed Judge Advocate General, the army will have the poorest lawyer and the best politician."). See also Letter from Enoch H. Crowder to John J. Pershing (Dec. 28, 1926) (Pershing Papers) (stating that "[f]or some reason General Habbord took a fancy to Hull."). *Id.*
93. See, e.g., Letter from John J. Pershing to Enoch H. Crowder (Sep. 3, 1921) (Pershing Papers). Pershing states that "my own selection, if it were left to me, would be General Bethel." *Id.*
94. Letter from Enoch H. Crowder to John J. Pershing (Jan. 18, 1923) (Pershing Papers).
95. Letter from Enoch H. Crowder to John J. Pershing (Jan. 18, 1923) (Pershing Papers).
96. Crowder most likely refers to the 1886 publication. See WILLIAM W. WINTHROP, *MILITARY LAW* (1886).
97. Letter from Enoch H. Crowder to John J. Pershing (Jan. 18, 1923) (Pershing Papers).
98. *Id.*
99. Letter from John J. Pershing to Enoch H. Crowder (Jan. 13, 1922) (Pershing Papers). Pershing states that "I regret that Bethel's claim could not have received a little bit stronger backing from you." *Id.*
100. Letter from John J. Pershing to Enoch H. Crowder (Sept. 3, 1921) (Pershing Papers).
101. Letter from Enoch H. Crowder to John J. Pershing (Dec. 28, 1926) (Pershing Papers).
102. *The Judge Advocate General's Corps, Regimental History*, <https://www.jagcnet2.army.mil/sites/history.nsf/homeContent.xsp?open&documentId=2CA917451330519E852580200070FA92> (last visited Jun. 18, 2018) [hereinafter *Regimental History*].
103. Letter from John J. Pershing to Enoch H. Crowder (Dec. 22, 1926) (Pershing Papers).
104. *Regimental History*, *supra* note 1023.
105. *Regimental History*, *supra* note 1023.
106. See, e.g., Telegram from John J. Pershing to Enoch H. Crowder (Feb. 10, 1932) (Pershing Papers).
107. Charles N. Pede, *Communication is Key – Tips for the Judge Advocate, Staff Officer and Leader*, ARMY LAW., June 2016, at 4, 5.
108. *Id.*
109. REGISTER, *supra* note 101, at 2879, 3179.
110. Letter from Enoch H. Crowder to John J. Pershing (Sep. 28, 1926) (Pershing Papers).
111. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP para. 35 (1 Aug. 2012); U.S. DEP'T OF ARMY, DOCTRINE PUB. 1, THE ARMY para 2-8 (17 Sep. 2012).
112. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 1-12 (18 Mar. 2013).
113. Crowder's work ethic is frequent reference for his biographers. Even in his obituary, he was praised for his "capacity for incessant work." Major General F.J. Kernan, *Enoch H. Crowder, SIXTY-THIRD ANNUAL REPORT OF THE ASSOCIATION OF GRADUATES OF THE U.S. MILITARY ACADEMY* 122 (1932) available at <http://digital-library.usma.edu/cdm/compoundobject/collection/aogre-union/id/19934/show/19684/rec/69>.
114. Borch, *supra* note 98, at 1.



A U.S. soldier assigned to the 1st Battalion, 503rd Infantry Regiment, 173rd Airborne Brigade Combat team exits a Russian Air Force helicopter during a multinational ground force training exercise (Credit: SPC Shardesia Washington).

## No. 3

# Ops and Interoperability

## Back-to-back symposiums examined emerging legal issues in LOAC

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*By Strategic Initiatives Staff*

From 28–30 May 2018, LTG Charles N. Pede, The Judge Advocate General (TJAG), U.S. Army, hosted nearly fifty multinational senior military lawyers at the 4th Major General John L. Fugh Symposium on Law and Military Operations (Fugh Symposium) and the Multinational Judge Advocate General Interoperability Symposium (MJIS). The biennial symposia convened at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. The events invited the most senior military legal officials and law of war experts from around the world to exchange views on current and emerging legal issues in the Law of Armed Conflict (LOAC).

AFRICOM, CENTCOM, EUCOM, NORTHCOM, PACOM, and SOUTHCOM all sponsored international military lawyers from their areas of operations to attend the symposia. The event was truly multinational as

attendees included military legal experts from Argentina, Australia, Brunei, Brazil, Canada, Colombia, France, Honduras, Iraq, Kuwait, Lebanon, Mexico, the Netherlands, New Zealand, Poland, Qatar, Romania, Singapore, Sri Lanka, Taiwan, the United Arab Emirates, the United Kingdom, Uganda, Ghana, Malawi, South Africa, Cameroon, Nigeria, and NATO. The first day of the symposia was in honor of Major General John L. Fugh, and featured four academic panel discussions focused around the potential legal issues of future conflict. The second day was dedicated to the MJIS, where a series of roundtable discussions focused on legal interoperability issues in targeting in an urban environment, mitigation of civilian casualties, and the protection of soldiers under domestic criminal law. Historically, interoperability is not a new concept. During World War I, the Central Powers

(Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire) fought against the Allied Powers (Great Britain, France, Italy, Romania, U.S., Russia, and Japan). In the First Battle of the Marne fought in 1914, French and British forces checked the German advance and mounted a successful counterattack, driving the Germans back to north of the Aisne River. The defeat meant the end of German plans for a quick victory in France.

The 1917 Battle of Caporetto was a resounding victory for the Central Powers during World War I. After more than two years of indecisive fighting along the Isonzo River, the Austro-Hungarian command devoted more resources to strengthening the Italian front. Using new infiltration tactics and heavy artillery, the 14th Army overwhelmed its enemy for nearly two weeks, until the Italian line finally held up near the Piave River with



Polish army Rak 120mm Self-Propelled Mortar Systems with 15th Mechanized Brigade fire for effect during a joint training exercise in Poland earlier this year with the U.S. and nineteen other countries. (U.S. Army photo by SPC Hubert D. Delany III)

help from the French, British, and later, American troops. Effective interoperability among the Allied forces would lead to the unraveling of the Central Powers and signing of the Treaty of Versailles.

Multinational coalitions are still common in modern military operations and play a central role in security strategies. The benefits of operating as a coalition are both practical in terms of the mass capabilities of the forces brought together to achieve mission success and political with respect to increasing the level of legitimacy recognized through collective action. However, managing differences between multinational partners brings additional complexity to any operation, thereby potentially causing adverse effects to the effectiveness of operating as a coalition. Thus, for a coalition to operate successfully,

the key is interoperability. Both the Fugh Symposium and the MJIS served to continue solidifying the foundation for future collaborative work between militaries, ultimately increasing interoperability.

The inaugural Fugh Symposium occurred in 2011, followed by the second in 2014 and the third in 2016. In 2016, the JAG Corps sponsored the MJIS in conjunction with the Fugh Symposium. The positive response received from that inaugural pairing of symposia prompted the continuation of the tandem event this year.

The Fugh Symposium commemorates the late Major General John L. Fugh, the first Chinese-American General Officer in the United States Army, and TJAG from 1991 to 1993. The Fugh Symposium provides a forum for exploration and discussion of contemporary legal topics

directly affecting the conduct of military operations and is geared for participation by a mixed audience of military, civilian, and academic legal community members.

This year's symposium explored legal issues associated with the nature of future conflict. Specifically, the Fugh Symposium presented four panels of subject matter experts from around the U.S. to help facilitate candid and thought-provoking discussions. The symposium began with a panel on the nature of future conflict. This discussion helped establish a foundation for the rest of the day by exploring what future conflicts might look like. The panel addressed how LOAC may apply to new technologies, how the law can inform development policy and Rules of Engagement on the modern battlefield, and how the United States and its European allies have differed in their

view of how conflicts are categorized (e.g., International Armed Conflict vs. Non-International Armed Conflict (NIAC)) in the fight against terrorist groups. The second panel addressed how existing laws apply to NIACs. The panelists led an engaging discussion on the importance of conflict classification and understanding these classifications as applied to the modern operational environment.

During the afternoon session, a panel convened on the weapons systems of future conflicts and the attempt to apply existing law to future weapons. Specific talking points included whether current laws of war set a minimal necessary degree of human involvement in war and new weapon systems, the Department of Defense Manual's treatment of direct participation in hostilities and membership in armed groups, and the challenges for lethal autonomous systems (and their programmers) in complying with proportionality. Finally, the day ended with a panel on weaponizing cyber capabilities. The panel led the audience in discussion on the application of LOAC in cyberspace, what constitutes an act of war in cyberspace, the challenges of attribution in cyberspace, and finally, on whether existing international law principles, including the LOAC, are sufficient to address cyber operations.

On 30 May 2018, the MJIS brought together senior ranking multinational military lawyers to discuss the persistent legal issues involved with operating as part of a coalition during multinational operations, especially high intensity conflict. This year's focus was on coalition interoperability in preparation for high intensity peer and near-peer conflicts. This event allowed for continued strategic dialogue that U.S. Army judge advocates began this past year with key allies on a variety of engagements around the world.

The MJIS emphasized the importance of close collaboration among military lawyers as a critical factor for coalitions to succeed and the *raison d'être* for establishing the MJIS forum. The MJIS forum by design allowed for a thorough discussion of lessons learned from recent multinational combat operations.

Following opening remarks by TJAG, COL Warren Wells—former Staff

Judge Advocate, Combined Joint Forces Land Component Command, Operation Inherent Resolve—presented a brief on Operation EAGLE STRIKE, a nine-month campaign to liberate Mosul, Iraq's second largest city, from the Islamic State, which involved some of the most intense urban warfare U.S. forces have seen since World War II. The result was a legally intensive operation that relied heavily on advice from judge advocates at all levels of command for ultimate success. The Islamic State in Iraq and Syria (ISIS) forces prepared extensive defensive positions in anticipation of the operation, including interconnected fighting positions, fortified buildings, obstacles, and underground shelters. These preparations alone would have made for a difficult campaign; however, ISIS also routinely used the civilian population against coalition forces both defensively as involuntary human shields and offensively as a means to create civilian casualty (CIVCAS) allegations. The result was a legally intensive operation that relied heavily on advice from military lawyers at all levels of command.

The first roundtable discussion, Targeting during Urban Operations, highlighted the expanded focus from counterinsurgency to a high-end, decisive action fight against a near peer adversary. This discussion provided a backdrop on the importance of the LOAC principles in the targeting process and interoperability during high-end, decisive action within an urban environment. The viewpoints of the multinational military lawyers on operating in such an operating environment proved critical to generating a greater understanding of how to conduct coalition operations more effectively, while respecting the applicable laws from coalition participants.

As the nature of warfare evolves and coalition partners continue to conduct operations in heavily populated environments, the risk of collateral damage persists. The second roundtable discussion addressed CIVCAS and highlighted the continued efforts by coalition forces to employ all feasible measures to avoid and minimize collateral damage.

The MJIS concluded with a roundtable discussion focused on the debate over legal treatment of certain actions by

commanders and service members in the course of NIAC, with the requirements of international humanitarian law (IHL). Some nations have revised their criminal codes in order to ensure service members acting in a NIAC have either immunity or at least a defense in law for acts committed while conducting international security operations. These revisions protect service members from domestic criminal liability when acting in compliance with the requirements of IHL.

Overall, the MJIS succeeded in advancing the interoperability discussion by facilitating frank dialogue focusing on the ways multinational coalitions can best manage the threats associated with urban operations, specifically targeting in an urban environment, mitigating CIVCAS, and command responsibility as they relate to service member immunity from domestic criminal liability when acting in compliance with IHL.

These symposia were much more than academic exchanges. The events facilitated deep thinking at both the strategic and operational levels about difficult problems, and proved to be an ideal forum to engage with senior military legal advisors from around the world. We look forward to continuing the dialog with our military counterparts from across the Globe, and know that the event in 2020 will be as interesting and informative as the last. **TAL**



An interpreter with the Japan Ground Self Defense Force explains to Soldiers of the Indiana National Guard's 76th Infantry Brigade Combat Team that they will be showing a "care under fire" demonstration during Orient Shield 2018, a joint training exercise aimed at increasing interoperability between the U.S. and Japan. (Credit: SPC Joshua A. Syberg/Released)

## No. 4

# Developing Regionally-Focused Leaders

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*By Colonel George R. Smawley and Colonel (Retired) Pamela M. Harms*

*Victorious warriors win first and then go to war; defeated warriors go to war and then seek to win.<sup>1</sup>*

### **I. Introduction**

Never has the U.S. military been more reliant upon strategic partners for mission success. Operations and readiness requirements in Iraq, Afghanistan, Korea, Eastern Europe, and across the contingency spectrum all rely upon the Army's ability to cultivate and leverage interoperability with others. In this multilateral world, Army leaders are empowered and most effective when they are able to think and act with a regional focus in concert with allies, and when they learn to link military education and experience with partners—both long-standing and evolving—in new and different ways.

In some regions, like Europe, experience and interoperability succeed as a product of decades of coalition work and comprehensive legal frameworks that bring predictability and definition to relationships. But in the absence of profound historical or cultural affinity, and recognizing our expeditionary Army is becoming increasingly CONUS-based, there is a growing need for leaders with regional fluency in the countries in which they operate. The regional alignment of forces (RAF) to combatant commands clearly established the strategic focus for regionally aligned units.<sup>2</sup> The challenge, then, is how to prepare officers and NCOs who will lead those units.<sup>3</sup>

This is particularly the case in regions like the Indo-Pacific, where U.S. forces operate in the absence of a unifying treaty construct like the North American Treaty Organization (NATO).<sup>4</sup>

The relative ease and consistency of the NATO treaty regime, and its established leadership and decision making structure, are straightforward when compared to the Indo-Pacific web of bilateral and multilateral agreements and arrangements governing military relationships. Where NATO was an event—a reaction to the post-WWII cold war environment—the legal framework for the Indo-Pacific has evolved over time in response to the region's economic and military importance throughout the past century.

The distinctions are important. The sixty-nine year experience of the NATO intergovernmental military alliance and its associated command structure, galvanized by the 1950 Korean War, brought a cohesive lexicon to how member states talk and function in support of one another and in support of the broader alliance. America's military, political, cultural, and historic ties make the relationships all the more predictable.

In the Indo-Pacific, however, the relationships are generally newer and are increasingly cultivated in an atmosphere of evolving threats—China, a nuclear North Korea, Philippine insurgency, and high probability of natural disasters across the region—and a more recent tapestry of national diplomatic, economic, and military arrangements and priorities.

In response, since World War II the U.S. has entered into myriad arrangements and agreements governing bilateral and

multilateral operations and activities, including three mutual defense treaties (Korea, Philippines, Japan); two collective defense treaties; (Compact Nation defense obligations the Taiwan Relations Act); thirteen different Acquisition and Cross-Servicing Agreements (ACSA)/Mutual Logistics Support Agreements (MLSA) and unassociated logistics support agreements; nineteen Status of Forces Agreements (SOFA), Diplomatic Notes, and Visiting Forces Agreements; and various facility and basing agreements.

This article describes some of the key operational and legal challenges of an expeditionary Army and the need for leaders who can function effectively in foreign environments across the spectrum of a theater level campaign. It describes observations from the Pacific Pathways initiative developed by U.S. Army Pacific in 2014 to enhance readiness through experience in partner nations without foreign basing. We offer a detailed case example of the complexities of operating in a largely bilateral environment, and the nature and history of some of those bilateral relationships. Finally, we argue that developing regionally-focused leaders for service in a complex world is, ultimately, a readiness issue meriting a systemic approach to leadership training, education, and career management.

## II. Regional Focus and Cultural Fluency

Regionally-focused leaders are officers and NCOs who have achieved a level of professional and cultural fluency within a geographic area of operations. They understand the operational environment, bilateral and multilateral legal regimes, personalities, priorities and agendas, and have the ability to optimize interoperability with allies and partners. These leaders are appropriately “talent matched” to their commands and missions. Just as small unit combat has a distinct physicality requiring a specific type of training and experience, so too do judge advocates and others in the sustainment force require special skills and understanding to achieve their full potential among regional partners. As noted in Joint Publication 3-0, *Joint Operations*:

... regional knowledge, and cultural awareness enable effective joint operations. Deployed joint forces should understand and effectively communicate with HN populations, local and national government officials, and multinational partners. This capability is best built on analysis of national, regional, and local culture, economy, politics, religion, and customs. Lessons learned from Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF) indicate these capabilities can save lives and are integral to mission accomplishment. Consequently, commanders should integrate training and capabilities for foreign language and regional expertise capabilities in contingency, campaign, and supporting plans, and provide for them in support of daily operations and activities.<sup>5</sup>

It has been said that you can't surge trust, empathy, or understanding. If we are truly an Army and a JAG Corps focused on operational readiness, then it is worth considering how the Corps prepares its leaders to operate within the RAF units, whether in combat, humanitarian assistance/disaster relief, or operations other than war. This is particularly important given our largely CONUS-based force, and the natural limit of synthetic training environments (Military Training Centers), which hone critical skills, but generally do not qualify as experience.

In his book, *Three Cups of Tea: One Man's Mission to Promote Peace...One School at a Time*,<sup>6</sup> former registered nurse and mountain climber Greg Mortenson tells a story (as relayed to his co-author, David Oliver Relin) about the importance of personal relationships and cultural understanding in his effort to build schools in rural Pakistan. He explains that that takes three cups of tea . . . not just one or two, to develop the requisite level of trust needed to get by-in from local leaders to get things done. It is a lesson in cultural understanding and patience which sometimes runs counter to the American desire to get things done quickly. It is also a lesson in regional understanding that was hard-fought by Provisional

Reconstruction Teams, Advise and Assist Brigades, and others, but is being lost as opportunities for deployments diminish and strategic priorities shift to other parts of the world.

This same kind of understanding—and patience—is required to get things done in regions like the Indo-Pacific. We have personally encountered planners and legal advisors of various services who, for example, are entirely too quick to cite their experience in Iraq or Afghanistan as a qualification for operating in the world's most populated Islamic country—Indonesia—or among the Muslim populations in India, Malaysia, or Bangladesh. Their cultures, religiosity, and rule of law traditions could not be more different.

So how can the Army and the JAG Corps identify and develop leaders with regional focus and fluency? At the unit level, the Army has cultivated and trained readiness via rotational brigades (Korea, Eastern Europe) and myriad exercises including the innovative Pacific Pathways program forged in 2014 by U.S. Army Pacific. That program, which ties and synchronizes U.S. and partner exercises in the Indo-Pacific region, enables “cooperative and persistent engagement with regional partners, fostering greater collaboration with Joint and intergovernmental stakeholders without forward basing.”<sup>7</sup> The allegorical reference refers to the idea that hands-on experience and presence in the region contribute to conditions and expertise that make future operations in Asia easier, via “pathways” laid by repeated and meaningful entry, exercise, and partnership.

A fundamental premise of the Pathways initiative is that development of readiness for regionally-focused units and leaders is a process of “relationships, rehearsal and reconnaissance.”<sup>8</sup> In a 2016 article in *Military Review*, MG Charles A. Flynn, Commanding General of the 25th Infantry Division, offered the following observations after two years of Pathways exercises:

Because of Pacific Pathways deployments, the leaders of our BCTs and other organizations have spent countless hours with their foreign counterparts, from every branch and across the Total Army; the bonds

they created through their shared tactical experiences in training will have positive strategic impacts. This is time well spent, as gestures of respect and friendship are all in an effort to create interoperability at the most junior levels.<sup>9</sup>

Soldiers, leaders, and, most important, commanders at every echelon learn and grow while deployed on Pathways. They develop confidence in their skills and abilities through the repetitive performance of tasks and the continual decision making associated with accomplishing missions in foreign countries.<sup>10</sup>

The Soldiers assigned to Pacific-based units (and those, like the Indiana National Guard, who participated in a 2018 Pathway to Indonesia and Hawaii) are developing precisely the kind of regional focus that will serve them now and in the future. The Senior Service Colleges have long-standing programs for regional orientation—academic seminars and trips overseas—but nothing can compare to the experience of actually serving in foreign countries with the same partners we will rely upon in real-world operations.

So what are the basic elements to consider when building a regionally-focused force? MG Flynn<sup>11</sup> and others reduce the basic building blocks for regionally-focused leaders and operations to three essential considerations: personal relationships, tactical rehearsals, and reconnaissance of possible areas of operation.

### **A. Relationships (People)**

Regionally-focused and engaged leaders are, in part, valuable to broader regional strategies because of the opportunities that arise from the relationships they build over time via routine engagement with partner militaries and other regional actors, including U.S. interagency personnel and non-governmental organizations. The challenge is to leverage these personal relationships in a way that garners mutual trust and understanding, creating opportunities for cumulative growth between and among militaries.

The importance of relationships finds expression at a number of levels, including the Military Personnel Exchange Program,<sup>12</sup>

attendance at various schools, training exercises, subject matter expert exchanges, and collaboration during regional professional conferences to name a few. It is the reason senior leaders at combatant commands and the service components spend so much time traveling and hosting—to personally engage counterparts in furtherance of common goals and objectives. This is no less important for staff officers, whether they operate within plans and exercises directorates, security cooperation programs, the medical community, or the JAG Corps.

Over the past eighteen months or so, Army judge advocates have participated in engagements and exercises with partner uniformed legal personnel across the Indo-Pacific, including Australia, Japan, Korea, Indonesia, Thailand, Cambodia, Nepal, Bangladesh, Taiwan, Singapore, and Malaysia. No doubt the same is happening in Europe, Africa and South America. Through these experiences, judge advocates develop relationships with foreign commanders, as well as develop expertise in foreign legal systems—military justice, operational law, ROE development—and in the legal and policy constraints on their operations, to name a few. They come to understand their professional development systems and the seams and gaps where the U.S. can provide assistance with, for example, opportunities for engagement in U.S. military training and academic centers. With sufficient time in the region, they also garner professional relationships—even friendships—which can serve as important resources for operations: people we can call with questions, coordinate with in advance of exercises, or engage with to solve real world problems such as foreign detention of U.S. personnel under criminal investigation.

The idea that relationships matter is recognized in joint doctrine, including in *Joint Publication 3-0, Joint Operations*, which states:

Most operations require commanders and other leaders to engage key local and regional leaders to affect their attitudes and gain their support. *Building relationships to the point of effective engagement and influence usually takes time.* Commanders can be challenged to identify key leaders,

develop messages, establish dialogue, and determine other ways and means of delivery, especially in societies where interpersonal relationships are paramount.<sup>13</sup>

The opportunity for personal relationships in a regional context simply cannot be replicated at training centers; it requires something more. The same could perhaps be said for foreign officers who attend U.S. schools, including the Judge Advocate Officer Basic and Advanced Courses. The Army values and supports foreign attendance at U.S. military schools precisely because it allows those officers to develop a vital understanding of U.S. Army education, culture, people, and operational focus. In exchange, U.S. officers have the chance to enter into personal relationships with current and future strategic leaders of partner nations. These relationships hold great promise for future readiness and cooperation in multilateral strategic environment, and should be actively cultivated.

### **B. Rehearsal (Process)**

The Pathways program offers a model for how the active component supports the RAF model and develops experience in leaders. Indeed, all the Geographic Combatant Commands (GCCs) and their associated service components and theater enabling commands work tirelessly to develop rigorous training and exercise programs designed to replicate the challenges of operating outside the U.S., with (and without) partner nations, the interagency, and others.

One of the challenges reserve component judge advocates have had is how to obtain valuable experience and regional understanding in advance of possible mobilizations, particularly in the case of the Korean Peninsula, where mobilization times could be as short as fourteen days in a theater where the U.S. might not control timelines the way it has during the past seventeen years of conflict. As a training and readiness exercise consideration, Army Service Components / Theater Armies must leverage reconnaissance in support of reserve component units that might logically be called upon to support the GCCs.

So, how does Legal Command shorten the anticipated mobilization time for legal support to operations in the Pacific Theater? How do we develop a cohort of trained, ready, and regionally-focused officers and NCOs who are prepared to deploy on short notice to the AOR, able to immediately integrate asymmetrically at all levels of command from brigade, to garrison, to JTF, to sustainment, to Non-Combatant Operations (NEO), to the USARPAC Main Command Post? And, importantly, how do we achieve regional currency in support of readiness for future contingencies?

In late 2017, leaders from the U.S. Army Legal Command, U.S. Army Pacific, and the 12th Legal Operations Detachment (LOD) met in Hawaii to develop a readiness training plan that would help answer these questions. Internally called “Pacific Surge”, the plan was born out of the idea that any conflict in the Pacific Rim would afford very little pre-mobilization time; certainly not the thirty to ninety days we have become used to. This requires a cohort of Reserve Personnel truly prepared to fall in on the considerable (53 PAX) un-resourced judge advocate contingency requirements for the AOR. While not equivalent to service and stationing in the region, from the RC perspective this offered an intense, hands-on introduction to the Pacific region.

On 25 January 2018, BG Ural Glanville, Commander for the Legal Command, approved a concept that would bring 12th LOD personnel to various locations in the Pacific for twenty-eight days under USARPAC guidance, with the purpose of providing real-time operational context, realistic readiness training, immersion, and systems integration (NIPR, SIPR, clearances, etc.).

The first of three cohorts of 12th LOD personnel were identified, and immediately began pre-deployment training as though for a real-world contingency mission. Medical, SERE, etc. The first cohort of four field grade officers arrived on 8 April 2018; the second of two field grades and one senior NCO arrived on 17 June. Each spent three days in orientation at HQ USARPAC (operational family of plans, network access, badging, etc.), and then were sent out to units in support of exercises—Key Resolve (KR), the NEO TTX—and real

world tasks: one to USARPAC SJA for exposure to fiscal, operational and administrative law issues; one to Japan for the KR/NEO exercise; one to 25ID for KR; and one to 8th TSC for exercise and real-world experience. The second cohort, in June and July, had a similar experience among Hawaii-based units.

The third cohort of approximately a dozen officers and NCOs trained exclusively in Korea in coordination with the 8th U.S. Army and its subordinate units. There they integrated with respective legal staff sections and developed as much experience with the mission on the Korean peninsula as possible during the three week readiness training program. The after action reviews were extremely positive, and from the perspective of 12th LOD personnel offered them a regional perspective and mission orientation they could never have achieved in an academic or CONUS training environment. The rehearsal of moving from CONUS to theater for several weeks left them better prepared, better regionally oriented, and better trained in support of possible contingency mission than ever before.

### C. Reconnaissance (Places)

The nature and importance of reconnaissance in military operations is well understood. In its most basic form it is concerned with developing situational understanding through intelligence and assessment of an enemy, an area of operation, etc. It can involve land, sea, space, or any partition thereof. In a regional context, reconnaissance enables and empowers leaders through awareness, and affords a contextual and first hand appreciation for the operational environment.

Although methods of reconnaissance vary greatly, we argue there is a profound benefit for judge advocate leaders who actually *walk the ground* in areas they may one day operate. This is a key justification for pre-deployment site surveys and senior leader recons, and is echoed by commanders at all levels. As noted by MG Flynn,

Mere presence alone provides remarkable insights into our partnered countries’ governments. Given the growing importance of the South

China Sea, its surrounding nations, and the extensive span of tactical operations in Balikatan this year, the units participating in the Pathways TF were well versed in what was required to operate in the Philippines. Our planners at every echelon, our understanding of the operational environment, and our knowledge of the threats and the political nuances in that environment were excellent. . . . From port operations, to customs, command-and-control nodes, airspace, and cyber, the reconnaissance that our soldiers and leaders accomplished on Pathways was extraordinary. It set conditions for the United States to be in a position of relative advantage upon arrival if called upon to respond to a crisis.<sup>14</sup>

For regionally-focused leaders, the idea of reconnaissance simply identifies the inherent value of in-country experience with partner nations and the ability to rapidly anticipate challenges they can expect to encounter while serving in and among the different countries in the Indo-Pacific. It is something that can be learned over time, when there is time. But when there isn’t, as in the case of humanitarian assistance missions arising from natural disasters, the experience that these leaders bring becomes invaluable and assists commanders and others to make informed decisions in support of Army operations.

### III. The Challenge of Complex Regional Legal Regimes—The Indo-Pacific

The United States military remains steadfastly committed to the Indo-Pacific region as an enduring focal point of strategic interest and priority, just as it has since Commodore Dewey first made contact with the Chinese in 1842. North Korean aggression and missile development, Chinese expansion into the South China Sea, and a seemingly intractable extremist threats elsewhere are reminders of the challenges the U.S. and partner nations face in the region.

Secretary of Defense Mattis, speaking in June 2017 at the Shangri-La defense summit in Singapore, noted that



South Korean soldiers coordinate fires during a joint artillery exercise with U.S. Soldiers from the 1st Battalion, 82nd Field Artillery Regiment, 1st Armored Brigade Combat Team, 1st Cavalry Division. (Credit: U.S. Army photo by SSG Keith Anderson, 1st Armored Brigade Combat Team Public Affairs, 1st Cav. Div.)

[t]he United States will continue to adapt and continue to expand its ability to work with others to secure a peaceful, prosperous and free Asia, with respect for all nations upholding international law... Because we recognize no nation is an island, isolated from others, we stand with our allies, partners and the international community to address pressing security challenges together.<sup>15</sup>

The global importance of the region therefore cannot be understated. As summarized by U.S. Indo-Pacific Command (USINDOPACOM), the U.S. presence underpins national security, economic, and national leadership “across roughly half the earth’s surface, from the West Coast of the U.S. to the western border of India, and from Antarctica to the North Pole. The region’s 36 nations are home to more than 50% of the world’s population, five of the top seven largest militaries, and the world’s the largest democracy and its largest Muslim-majority nation. Approximately 375,000 U.S. military and civilian

personnel are currently assigned to the USINDOPACOM area of responsibility.”<sup>16</sup>

Any discussion about the importance of developing leaders with regional fluency can find easy examples in the legal regime behind American partnership and presence in the Indo-Pacific region, an area largely composed of a mosaic of mature albeit evolving mutual defense and cooperation treaties; bi-lateral compacts; domestic legal arrangements based on status as U.S. territories; special relations status based on U.S. law; cross-service and military logistics support agreements; SOFAs; and facilities and basing agreements.

To understand the patchwork of largely bilateral agreements which enable U.S. operations in the Pacific Rim, it is important to realize that each has its own historical basis—some quite interesting—and technical implementing requirements benefiting from regional fluency and understanding. The following paragraphs discuss some of the most important of our defense relationships in the region.

#### **IV. The Treaty Nations. Five of the U.S.’ seven treaty alliances are located in the Indo-Pacific Region**

##### **A. Japan**

The U.S.’s security relationship with Japan is governed by the Treaty of Mutual Cooperation and Security between Japan and the United States (MST) (1960).<sup>17</sup> Article V of the MST provides that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger. The U.S.’s position is that the territories administered by Japan include the disputed Senkakus Islands, claimed by China, Taiwan, and Japan. In addition to the MST, the U.S.-Japan SOFA was signed in 1960. There is also a mature ACSA with Japan, the latest of which entered into force in 2017.

The Guidelines for Japan-U.S. Defense Cooperation of 2015 further define the Alliance between the U.S. and Japan,

providing a general framework and policy direction for the roles and missions of each country. The Guidelines outline that the U.S. and Japanese forces operate as a bilateral, rather than a combined or coalition, force. Under this construct, U.S. forces will operate in support of Japan's defensive operations. Therefore, Judge advocates advising commanders on the defense of Japan must have a working knowledge of Japan's Constitution and its laws that place strict limits on the use of force by the Japanese Self-Defense Force.<sup>18</sup> Exercise YAMA SAKURA, the largest annual Army command post exercise conducted in the Indo-Pacific AOR each year, exercises this bilateral construct.

### **B. The Republic of Korea**

The U.S.-Republic of Korea (ROK) security relationship is governed by the Mutual Defense Treaty between the United States and the Republic of Korea (1953). The treaty entered into force four months after the Korean War Armistice Agreement was signed, and provides that an armed attack in the Pacific area on either of the Parties in territories under their respective control would be dangerous to its own peace and safety and the Parties would act to meet the common danger. The treaty also grants the U.S. military the right to "dispose" its armed forces in and about the territory of the ROK, as determined by mutual agreement. The U.S. also has a SOFA with Korea, signed in 1966, and a MLSA, the most recent of which was signed in 1988.

Unlike the U.S.-Japan bilateral security arrangement, the U.S. and ROK forces prepare to conduct combined/coalition operations. In 1950, after tens of thousands of North Korean People's Army forces crossed the 38th parallel, the UN Security Council issued UNSCR 84, recommending the creation of the United Nations Command (UNC) under the authority of the United States.<sup>19</sup> Based on this recommendation, the U.S. established the UNC under the command of a U.S. four-star general officer (originally GEN Douglas MacArthur). The UNC exercised operational control over ROK units during the Korean War and until the creation of the ROK-U.S. Combined Forces Command (CFC) in 1978. The Commander of CFC is a U.S. four-star general who is triple-hatted

as the Commander, UNC, CFC and U.S. Forces Korea (a sub-unified command of USINDOPACOM). The CFC deputy commander is a ROK four-star general officer. Exercise ULCHI FREEDOM GUARDIAN (UFG), an annual U.S.-ROK joint and combined CPX, focuses on training for joint/combined operations.<sup>20</sup>

### **C. The Philippines**

The U.S. security relationship with the Philippines is governed by the Mutual Defense Treaty between the Republic of the Philippines and the United States (1951). It is U.S. policy that it does not speculate as to whether or not the treaty applies to disputed land features in the South China Sea. Under the treaty, the Parties recognize that an armed attack in the Pacific area on either Party would be dangerous to its own peace and safety and that it would act to meet the common dangers. The treaty clarifies that an armed attack is deemed to include an armed attack on the metropolitan territory of either Party, or on the island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific. State Department guidance issued on 11 July 2014 applies this mutual defense provision to those attempting to resupply the Philippine Naval vessel *Sierra Madre* in the South China Sea.<sup>21</sup> The U.S. also has a Visiting Forces Agreement with the Philippines which entered into force in 1999, and a MLSA, the most recent of which was signed in 2017.

Throughout the Cold War, the two largest overseas U.S. military bases were located in the Philippines: Clark Airbase and Subic Bay Naval Base (the largest U.S. military base overseas is now Camp Humphreys in South Korea). Both were closed in the early 1990s; however, after lease negotiations broke down the Philippine Government refused to renew the leases. Over twenty years later, the U.S. and Philippine Governments signed the Enhanced Defense Cooperation Agreement (EDCA) in 2014. Although the EDCA affirmed the parties' understanding that the U.S. would not establish a permanent military presence or base in the Philippines, the Philippine Government agreed that U.S. forces, vehicles, vessels, and aircraft may conduct certain military

activities at "Agreed Locations" within the Philippines. To date, there are five such "Agreed Locations" on Philippine military bases. Exercise BALIKATAN is the annual joint/combined bilateral exercise conducted in the Philippines to address contingency plans for the defense of the Philippines.

### **D. Australia and New Zealand**

The security relationship with Australia and New Zealand is governed by the Security Treaty between Australia, New Zealand and the United States (ANZUS Treaty) (1951). This treaty was intended to protect the security of the Parties in the Pacific, and each Party declared that it would act to meet the common danger of an armed attack in the Pacific Area on any of the Parties. An armed attack includes an attack on the metropolitan territory of any of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific.

The U.S. continues its robust alliance with Australia. The U.S. has a SOFA with Australia (1963), as well as an ACSA (2010). The 2014 Force Posture Agreement between Australia and the U.S. reaffirms the U.S.-AUS strong defense relationship and intent to expand and increase opportunities for joint and combined training in locations within Australia. The Agreement authorizes the U.S. Forces to undertake mutually determined activities in Australia, including security cooperation exercises and joint/combined training. It also provides U.S. Forces unimpeded access to and use of "Agreed Facilities and Areas" for these activities. This includes a U.S. Marine Rotational Force in Darwin, funded under a separate cost sharing arrangement. Exercise TALISMAN SABER is the biennial, joint/combined bilateral exercise conducted in Australia that includes all components of USINDOPACOM and Australia's army, navy and air force to exercise combined operations across the full range of military operations in the Indo-Pacific.<sup>22</sup>

In 1986, the U.S. suspended its ANZUS Treaty obligations to New Zealand when New Zealand refused to allow U.S. Navy vessels to enter its ports unless they specifically declared they were not carrying nuclear weapons. The resulting U.S. sanctions cooled relations between the two

countries for twenty-five years. In 2010, the parties signed the Wellington Declaration, reaffirming close ties between the two countries and restoring military cooperation. In 2012, the Washington Declaration provided a framework and strategic guidance for security cooperation and defense dialogues. In November 2016, the destroyer USS Sampson visited New Zealand, the first bilateral ship visit in more than thirty years. Currently, USARPAC units participate in the New Zealand Defense Force biennial joint exercise SOUTHERN KAITPO, and biennial Army exercise KIWI KORU. While the U.S. has an ACSA (2012) with New Zealand, there is no SOFA.<sup>23</sup>

### **E. Thailand**

The security relationship between the U.S. and Thailand is governed by the Southeast Asia Collective Defense Treaty (Manila Pact) (1954). The Manila Pact was signed by the U.S., Thailand, Australia, New Zealand, Philippines, France and the United Kingdom. Under the Manila Pact, the Parties recognize that aggression by means of an armed attack in the Treaty area against any of the Parties or any State or territory which the Parties designate, would endanger its own peace and safety, and agree it will act to meet the common danger. The Manila Pact area is the general area of Southeast Asia, including the entire territories of the Asian Parties.<sup>24</sup> The Manila Pact was originally part of the Southeast Asia Treaty Organization (SEATO), which was implemented to prevent the spread of communism in the region. SEATO was disbanded in 1977, but the Manila Pact remains in force and represents the formal security agreement between the U.S. and Thailand.

In 2012, the U.S. Secretary of Defense and his Thai counterpart issued a Joint Vision Statement for the Thai-U.S. Defense Alliance, focusing on partnerships for regional security in Southeast Asia, supporting stability in the Asia-Pacific Region and beyond, bilateral and multilateral interoperability and readiness, and relationship building, coordination and collaboration. After a military coup in Thailand in 2014, the U.S. reduced the size of joint military exercises, and took other steps to curtail ties with the Thai junta. Relations have since thawed, however, with

a 2017 Joint Statement between President Trump and Prime Minister General Prayut Chan-o-cha reaffirming the importance of the U.S.-Thai enduring alliance and resolving to further strengthen the alliance through a broad range of measures, including defense modernization efforts. The two leaders also welcomed closer military-to-military cooperation and joint exercises, including exercise COBRA GOLD, the largest multilateral military exercise in Asia. The US has no SOFA with Thailand, although it has an ACSA (2014).

### **F. Taiwan**

In 1979, pursuant to a U.S.-China Joint Communique, the U.S. recognized the Government of the People's Republic of China as the sole legal government of China, acknowledging there is but one China and Taiwan is part of China. The communique also stated, however, that the U.S. would maintain cultural, commercial, and unofficial relations with the people of Taiwan. Legislation passed that same year, known as the Taiwan Relations Act (TRA),<sup>25</sup> provides the legal basis for this unofficial relationship. Under the TRA, U.S. policy is to preserve and promote extensive ties with Taiwan, consider any effort to determine the future of Taiwan by other than peaceful means a threat to the peace and security of the Western Pacific and a grave concern to the U.S., provide Taiwan with arms of a defensive character, and maintain U.S. capacity to resist any resort to force or other forms of coercion that would jeopardize the security, or social or economic system of Taiwan.

USARPAC maintains a robust security cooperation program with Taiwan, conducting its activities with Taiwan under a program called "LU WEI," which means Army Strong. These security cooperation activities include observer training, mobile training teams, and subject matter expert exchanges, including legal SMEEs developed and executed by the USARPAC OSJA. Because the U.S. does not recognize Taiwan as a separate nation, the U.S. has no SOFA or ACSA with Taiwan.

### **G. The Compact Nations**

The Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau maintain a special

relationship with the United States. After WWII, pursuant to UNSCR 21 (1947), all three Pacific Islands were placed under the UN Trusteeship System and the U.S. was appointed the Administering Authority. The Commonwealth of the Northern Marianas Islands (CNMI) was also placed under the administration of the United States. Although in 1975 CNMI chose to become a U.S. territory, Micronesia, the Marshall Islands and Palau have chosen to become sovereign countries, each entering into a Compact of Free Association with the United States.<sup>26</sup> The Compact provides the U.S. full authority and responsibility for the security and defense of the Compact Nations, including the obligation to defend the countries from attack or threats of attack as the U.S. and its citizens are defended. Therefore, USINDOPACOM plans must account for the U.S. obligation to defend these countries.

Under the Compact, the U.S. also may establish and use military areas and facilities in the Compact Nations, subject to the terms of separate agreements. The U.S. currently has an agreement with the Marshall Islands to use Kwajalein Atoll, home of the U.S. Army Space and Missile Defense Command's Ronald Reagan Ballistic Missile Defense Test Site, supported by U.S. Army Garrison—Kwajalein. The U.S. also has a SOFA with each country, but no ACSA, as the countries do not have their own defense forces (under the Compact, citizens of these countries are eligible to volunteer for service in the U.S. Armed Forces).

### **V. Summary**

Regionally focused leaders are a critical part of the future of the Army. Despite recent hints of unilateral rhetoric in US policy channels, there is little to suggest that DoD will waiver from its ever increasing role in programs facilitating partnership, shared strategic approaches, access, cooperation, and operational and tactical interoperability with strategic allies. Whether as part of Pacific Pathways, Army Europe's multi-faceted Atlantic Resolve, Army Africa's interagency and regionally partnered Unified Focus, or the National Guard's State Partnership Program, training and readiness will remain inextricably linked to regional alignment with partner forces.

Judge advocates and paralegal NCOs who serve and practice in RAF units or those with distinct regional focus, such as Special Forces or the Army Service Components/Theater Armies, face special challenges as do Reserve Component units on the time-phased force and deployment data roster (TPFDD). These leaders work hard to achieve maximum readiness for short-turn operational requirements, and are reconciling routine military training requirements with the professional obligation to function effectively outside the US with partners in real-world scenarios that are difficult to predict or replicate, e.g., humanitarian assistance missions in Liberia and Nepal.

Despite many years of increasing cooperation, most of the international legal regimes outside the NATO community are new to Army practitioners, complex, often bilateral, and evolving. The USINDOPACIFIC area of operation serves as a good example. As the Judge Advocate General's Corps works to increase the readiness of leaders to serve in these compelling locations, it—and the rest of the Army—should consider the: (1) the academic opportunities afforded leaders for regional specialization; (2) regional operational training for Active, Reserve, and National Guard; and (3) the manner in which the talent management process is leveraged to cultivate cohorts of legal professionals at all echelons within the respective communities of practice most directly supporting the respective GCCs and other regionally focused commands. We also recommend that the Army Judge Advocate General's School make a concerted effort to better track and engage foreign alumni of the School's academic programs, akin to what the U.S. Army War College does.

In our view, regionally focused leaders rarely happen by accident and require either a dedicated effort or specialization by individuals (e.g., as a result of heritage or language ability), or a deliberate process by Army organizations to identify and cultivate the expertise and fluency required for service in support of GCCs. There is genuine goodness and wisdom to the idea of developing judge advocates who are versatile experts, at least in the early phases of a career model. But at the mid-grade and senior level, the institutional Army

maximizes the potential of its leaders and enhances Army readiness when it develops the regional-focus these Soldiers need to function most effectively among the people, places, and processes they may one day face in support of GCC requirements and operations. The past sixteen years in places like Iraq and Afghanistan have demonstrated the worth of such expertise. The question is how we are preparing for the next decade in places now far less familiar. **TAL**

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### Notes

1. SUN TZU, *THE ART OF WAR* (Lionel Giles trans., Thrifty Books) (2009).
2. See HEADQUARTERS, DEP'T OF ARMY, EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES (27 Dec. 2012); HEADQUARTERS, DEP'T OF ARMY FRAGMENTARY ORDER 1 TO EXECUTION ORDER 052-12 IN SUPPORT OF REGIONALLY ALIGNED FORCES annex AA (17 Oct. 2013); HEADQUARTERS, DEP'T OF ARMY FRAGMENTARY ORDER 2 TO EXECUTION ORDER 052-12 IN SUPPORT OF REGIONALLY ALIGNED FORCES, para 1.C.2.A (29 Jul. 2015).
3. For overview of the professional considerations required for judge advocates serving in regionally aligned units, see Lieutenant Colonel Ryan Dowdy, et al., *A Primer on Key International Law Issues for the Regionally Aligned Legal Advisor*, ARMY LAW, Nov. 2015, at 16–29.
4. See generally Colonel Brian Brady, *The North Atlantic Treaty Organization Legal Advisor: A Primer*, ARMY LAW, Oct 2013, at 2–25.
5. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS III-23 (Jan. 17 2017) [hereinafter JP 3-0]; see also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3126.01A, LANGUAGE, REGIONAL EXPERTISE, AND CULTURE (LREC) CAPABILITY, IDENTIFICATION, PLANNING, AND SOURCING (31 Jan. 2013) [hereinafter CJCSI 3126.01A].
6. GREG MORTENSON AND DAVID OLIVER RELIN, *THREE CUPS OF TEA* (2006).
7. See <https://www.usarpac.army.mil/pdfs/Pacific%20Pathways%2016%20Tri-fold.pdf> (last visited 19 Jul 2018).
8. MG Charles A. Flynn, *Pathways: A Division Commander's Observations in the Pacific*, 96 MIL. REV., no. 6, Nov.–Dec. 2016, 107, 109 [hereinafter Flynn].
9. *Id.* at 109–110.
10. *Id.* at 111.
11. *Id.* at 109.
12. See 10 U.S.C. 311 (2012)
13. JP 3-0, *supra* note 5, at III-19.

14. Flynn, *supra* note 8, at 111.

15. Amy R. Connelly, *James Mattis says U.S. committed to Asian-pacific nations*, UPI.COM (Jun. 3 2017, 6:13 AM), <https://www.upi.com/James-Mattis-says-US-committed-to-Asian-Pacific-nations/9111496481151/>

16. <http://www.pacom.mil/About-USPACOM/>.

17. The original U.S.-Japan Security Treaty was signed in 1951 after Japan gained full sovereignty at the end of the Allied occupation. This earlier treaty expired upon the entering into force of the MST.

18. See Information Paper: Intro to U.S.-Japan Security Operations and Defense Cooperation (Jan. 18, 2017) found on JAGCNet, RAF Repository, for an excellent discussion of this issue. <https://www.jagcnet2.army.mil/Sites%5C%5Cio.nsf/0/B8B7A48BB89CF723852580F00079AB4C%24File/Japan%20Security%20Cooperation%20Information%20Paper.pdf>

19. S.C. Res. 84, U.N. Doc. S/1588 (Jul. 7, 1950). The UN exercises no control of the United Nations Command.

20. Implementing the results of the June 2018 Singapore Summit between President Donald Trump and North Korean Chairman Kim Jun Un, Defense Secretary James Mattis indefinitely suspended UFG.

21. The *Sierra Madre* is a Philippine Navy ship anchored near Ayungin shoal in the Spratly group of islands in the South China Sea, west of Palawan, Philippines. The Philippine Navy deliberately ran it aground to mark the Philippine claim to the reef and a small contingent of Philippine soldiers are stationed onboard.

22. In 2019, the CPX portion of this exercise has been combined with Exercise PACIFIC SENTRY, a USINDO-PACOM Joint readiness CPX.

23. There is, however, a U.S.-New Zealand Exchange of Notes Constituting a Chapeau Agreement, which addresses certain defense commitments, including liability and claims and use of information. Exchange of Notes Constituting a Chapeau Agreement between the Government of New Zealand and the Government of the United States of American Concerning the Establishment of Certain Mutual Defense Commitments, 16 July 1996.

24. Article VIII of the Manila Pact specifically provides that the treaty area is the general area of Southeast Asia, including the territories of the Asian Parties, and the general area of the Southwest Pacific, but not including the Pacific area north of 21 degrees 30 minutes north latitude.

25. Pub. L. No. 96-8, 93 Stat. 14 (1979).

26. See the International Trusteeship System of the United Nations Charter, in particular Article 76. Micronesia and the Marshall Islands signed a Compact of Free Association with the U.S. and gained independence in 1986. Palau signed a Compact of Free Association with the U.S. and gained its independence in 1994.



(Credit: iStock/ koya79)

# Closing Argument

## Demolishing the Foundation of Five

By Major Trenton Powell

**The Army JAG Corps should abandon the Foundation of Five as a leadership model because it has no basis in Army doctrine,** confuses the chain-of-command and noncommissioned officer (NCO) support channels, and de-emphasizes members of the organization. This unique leadership

model describes a group of people at JAG Corps offices that serve in certain roles. Across the force, the members of the Foundation of Five include the staff judge advocate, the deputy staff judge advocate, the legal administrator, the command paralegal, and the senior civilian. While these five

individuals usually comprise the foundation in the vast majority of installations, there are variations on the members, and it does not always include five persons. Whatever the case may be, its best use is not as a leadership model, but rather a technique or tool to build consensus and promote collaboration.

Army Regulation (AR) 600-20, Army Command Policy is one doctrinal reference that discusses accountable leadership and command and why a clear and articulable chain of command is paramount to ensure mission success. Paragraph 2-1a, provides in part, "A simple and direct chain of command facilitates the transmittal of orders from the highest to the lowest levels in a minimum of time and with the least chance misinterpretation."<sup>1</sup> This regulation goes on to articulate the role of the NCO support channel as an important concept in Army leadership doctrine. It states, in part, "[T]he NCO support channel (leadership chain) parallels and complements the chain of command."<sup>2</sup> These two sections are a small part of this overarching command policy regulation, but the point is that doctrine envisions a single individual being solely responsible for the successes and failures of an organization; and, effective use of the chain of command through subordinate leaders is vital in achieving these successes. Simplifying the chain of command and leveraging the NCO support channel promotes efficiencies in units and places those in and outside the organization on notice that decisions, responsibility and information flow up and down the chain, and a single individual at the top is ultimately accountable.

The Foundation of Five model conflicts with this basic paradigm. No other branch in the Army uses the same or similar language when referring to certain members of its teams.<sup>3</sup> In this regard, Field Manual 1-04, Legal Support to the Operational Army,<sup>4</sup> stands alone.<sup>5</sup> Paragraph 4-20 states,

The SJA leads the OSJA at the level of division headquarters and above and at installations that support operational units. The SJA manages and leads with the help of key advisors: the deputy SJA, the legal administrator, the command or chief parale-

gal NCO, and the civilian advisor. Together, they are known as the foundation of five. With the advice and assistance of the other members of the foundation of five, the SJA ensures that the OSJA is led, trained, equipped, and supported in a manner to accomplish the mission. The foundation of five is a flexible and dynamic concept. SJAs should tailor the concept individually depending on their mission and office structure. Each division within the OSJA has a division chief and a noncommissioned officer in charge who receives direction, guidance, and support from senior leadership.<sup>6</sup>

The Foundation of Five as a leadership concept simply does not reconcile with core Army doctrine. Comparing the substance of this clause with those cited earlier in AR 600-20 illustrate the confusing nature associated with the Foundation of Five concept. Army Regulation 600-20 describes chains of command as simple, direct, and easily ascertainable. In addition, NCO support channels aid in the use and execution of the chain of command. On the other hand, in defining the JAG Corps' leadership model, FM 1-04 provides that the supervisory SJA has a set of key advisors, but the use and authority of these advisors may change based on "mission and office structure."<sup>7</sup> Furthermore, subordinate division chiefs and NCOs in charge receive "direction, guidance, and support from senior leadership."<sup>8</sup> Presumably, these senior leaders are members of the Foundation of Five whose duties and authorities are ever changing. This is just a difficult leadership model to apply in military organizations where clear chains of command and support channels ensure resource efficiencies and assign appropriate authority and responsibility.

Probably the most obvious problem is the use of the word foundation as part of a naming convention to describe the senior members of an organization. Used in this context, Webster's defines a foundation as "a body or ground upon which something is built up or overlaid."<sup>9</sup> Army JAG Corps offices are not built upon the SJA, the deputy SJA, the legal administrator, the command paralegal, and the designated senior civilian.

Arguing otherwise discounts the basic definition of foundation and ignores the structural building blocks of military organizations. While these individuals are essential in delivering legal support, and perform vital functions as The Judge Advocate General's representatives in the field, the body upon which the JAG Corps enterprise rests are the junior members of our team. The captains, junior NCOs, junior paralegals, civilian attorneys, and paraprofessionals are the actual foundation of the organization. Day-in and day-out, these individuals take the calls, get the transmittals signed, send the emails, draft the motions, and call the PT formations to attention. They are the JAG Corps' base and its support.

One benefit in moving away from using the Foundation of Five as a leadership model is that it will provide a paradigm shift in the organization and emphasize the most valuable assets in the JAG Corps—the junior judge advocates (JAs) and junior paralegals. These two groups are the organization's most important resource. The JAG Corps mission to provide principled legal counsel and premier legal services to the Army fails without the efforts of JAs and junior paralegals. This is not to say that other members of the team are not important and not value added. Rather, in objectively assessing the source of the JAG Corps power, it is this population's capacity and the critical capabilities it provides that allow the enterprise to achieve its objective and attain the desired end state. Eliminating the Foundation of Five as a leadership model is one small step in renewing focus on the JAG Corps' front line troops.

Even though the JAG Corps should eliminate the Foundation of Five as a leadership model, there is value in preserving the notion as a means, in some situations, to get buy-in and build consensus among the diverse populations of the enterprise. Leaders need advice and counsel, and while this concept may be the method to do, it should not be codified in JAG Corps doctrine and promoted as a model to lead offices across the Army. **TAL**

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## Notes

1. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-1a. (6 Nov. 2014).
2. *Id.* at para. 2-18a.
3. Asserted after an exhaustive search through doctrine in the Army Publishing Directorate (<https://armypubs.army.mil>).
4. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar. 2013) [hereinafter FM 1-04].
5. A new version of FM 1-04 is currently being drafted to nest with the latest version of FM 3-0, Operations. Whether the Foundation of Five concept survives in the new draft is unknown.
6. FM 1-04, *supra* note 4 at para. 4-20.
7. *Id.*
8. *Id.*
9. *Foundation*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/foundation> (last visited Aug. 25 2018).



## **AROUND THE CORPS**

Mr. Christopher Rydelek, Chief, Legal Assistance Office, offers legal counsel to a Soldier in the Legal Services Office at Fort Belvoir, Va.  
(Credit: Chris Tyree)



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