Army Lawyer

U.S. Army Judge Advocate General's Corps

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AROUND THE CORPS

BG Ronald D. Sullivan, Chief Judge, U.S. Army Court of Criminal Appeals (IMA) sits with LTC William Stephens (right), Circuit Chief, 8th Circuit OSTC, during an Article 6 inspection of the 7th MSC OSJA on 8 July 2023.

AROUND THE CORPS

Members of the 4ID OSJA and about 8,000 Ivy Division teammates participated in a Division PT event on Friday, 9 June 2023. The event, honoring those Ivy Soldiers who gave their all in the Battle of Kamdesh (Afghanistan, October 2009), required Ivy Soldiers to traverse two miles of rough terrain at an elevation of more than 6,000 feet. The Ivy Soldiers were steadfast in navigating six obstacles and moving several pieces of equipment along the way. STEADFAST AND LOYAL! (Credit: CW3 Brent M. Vestering)

Army Lawyer

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Issue 1 • 2023

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is a Professional Bulletin published six times a year by Headquarters, Department of the Army, under the auspices of The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the purpose of education and performance in legal responsibilities.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed at https://tjaglcs.army.mil/tal.

Articles may be cited as: [author's name], [article title in italics], Army Law., [issue number], at [first page of article], [pincite].

On the cover: SFC Roper mentors OBC students before leading them through a successful session of early morning physical readiness training at TJAGLCS. (Credit: 1LT David A. Chang)

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***The Army Lawyer* is actively seeking ideas, submissions, and photos.**

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MAJ Kier Elmonairy, Editor-in-Chief of The Army Lawyer from June 2022 to August 2023, is currently a student in the 72d Graduate Course. (Photo courtesy of author)

Editor's Note

A Note from the Editor

By Major Kier M. Elmonairy

Since its inception in 1971, *The Army Lawyer* (TAL) has served as a premiere messaging platform for the Judge Advocate General's Corps (JAG Corps), providing practical how-to articles alongside items of interest to the field. That has not changed. How TAL accomplishes its role, however, does change. Information on promotions and awards were staples of the publication until the early 1980s. Book reviews debuted in 2004. The "Lore of the Corps" department launched in 2010. In its most significant overhaul to date, TAL shed its designation as an Army pamphlet, printed in black and white with a three-ring punch, and moved to its current, color-photo format in 2018. Editors past made these changes to keep the publication responsive to the needs of our Corps and to improve the publication. As TAL begins a new publishing year, we are introducing some additional changes aimed at making this publication a reflection of the tremendous achievement, experience, and scholarship of our Corps.

New Departments

While "Practice Notes" and "Features" make up the bulk of TAL, the publication has always included additional recurring pieces like the "Book Review" or "Court Is Assembled." We are introducing two new recurring pieces to put a spotlight on the JAG Corps's greatest resource: its people. "Pivotal Perspective" brings us reflections on key moments of change in a JAG Corps career such as accession, retirement, or moving to the Reserves from active duty. "What's It Like?" follows Judge Advocate Legal Services personnel in their jobs and highlights the many unique opportunities available in our Corps. Between these two new departments, TAL will ensure that our practitioners receive as much attention as our practice.

Image Sponsorship

Since TAL's redesign in 2018, photographs have been an integral part of the publication. They not only enhance the articles in which they appear but also help tell the story of what our Corps has been up to between issues. Starting with this issue, TAL images in places like "News & Notes" and "Around the Corps" will come from offices that volunteer to sponsor the issue by providing the bulk of the images. This issue's sponsor is the First Corps Office of the Staff Judge Advocate. If you are interested in having your office sponsor an upcoming issue, please reach out to our Managing Editor, Ms. Jani Riley. You can reach her at jani.l.riley.civ@army.mil or (434) 971-3368.

Endnotes

We have also updated how TAL handles notes. Our "Practice Notes" and "Features" will see no change. Each factual assertion in those pieces will still have a note that provides citations to the sources our authors relied on. This points our readers to useful resources as they conduct further research into the topics our authors explore in those pieces. In our other pieces, such as "Lore of the Corps" or "Azimuth Check," however, we will now only require notes for direct quotations and direct references to authority. This change will help delineate between our more legal-focused departments and pieces focusing on other aspects of the JAG Corps experience.

These changes are all aimed at providing a first-class publication, worthy of legal professionals engaged in the most consequential practice of law in the world. Although TAL is always evolving, that goal remains constant.

Members of the Leadership Center team at the Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, VA, including (from left to right) CH (MAJ) Josh Chittim, TJAGLCS Chaplain/Ethicist; CW3 Melanie Sellars, Instructor/Writer; COL Robert Abbott, Director; LTC Zeke Cleek, Deputy Director; and LTC Mike Lamphier, Instructor/Writer; and LTC Laura O'Donnell, Assistant Director, TPU (not pictured). (Credit: Jason Wilkerson, TJAGLCS)

Court Is Assembled

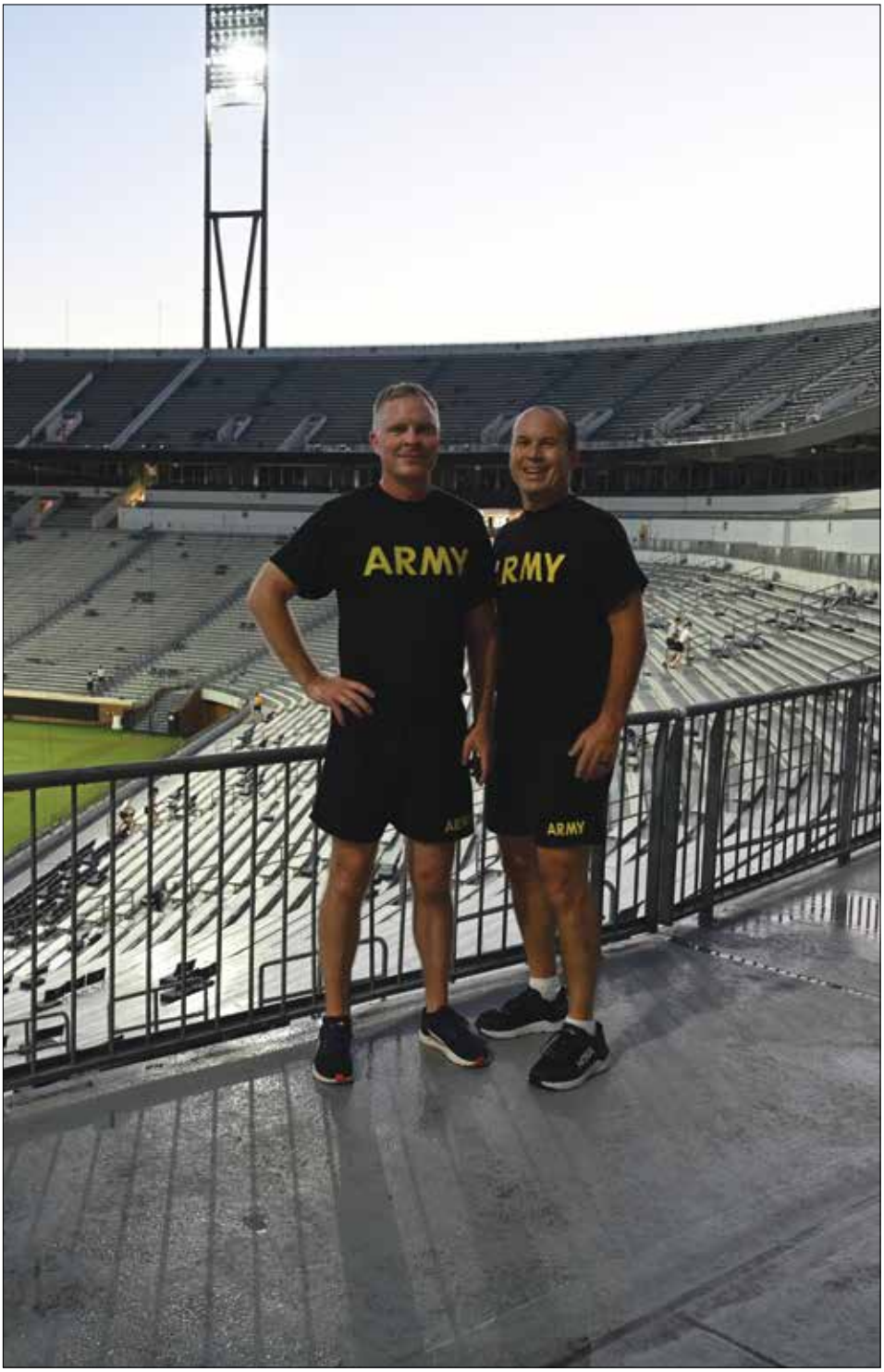
A Note to Leaders

By Colonel Robert J. Abbott

We dedicate this article to our beloved friend, colleague, and fellow Soldier, Chief Warrant Officer 3 (CW3) Melanie Sellars, who left this life much too soon, near the time this issue was going to print. A full memorial will be published in a future issue, but we would be remiss if we did not honor CW3 Sellars's leadership and service as a key member of our Leadership Center team.

Leadership is solving problems. The day [S]oldiers stop bringing you their problems is the day you have stopped leading them. They have either lost confidence that you can help or concluded you do not care. Either case is a failure of leadership.[1]

The best leaders are receptive to feedback and are always looking to improve themselves and their organizations. In 2019, The Judge Advocate General created the Leadership Center at The Judge Advocate General's Legal Center and School (TJAGLCS) to focus our legal professionals on the holistic study of leadership, help develop future Judge Advocate General's (JAG) Corps leaders, and improve JAG Corps organizations. Our leaders were listening to a growing voice in the field who craved not just exceptionally talented legal professionals but also more meaningful and connected leaders. The Leadership Center's mission is to "develop JAG Corps leaders and teams, adaptive to any environment"[2] by training and educating leaders and evaluating leadership practices across the JAG Corps. The vision is to create engaged, inclusive, and accountable organizations that empower all members to lead with principled counsel and steward the profession through servant leadership. The Leadership Center seeks to develop leaders by focusing on what the Army has already built, renewing doctrinal focus as the key to adaptiveness and



COL Robert Abbott and CH (MAJ) Josh Chittim participate in the 9/11 Memorial Physical Training event at Scott Stadium, University of Virginia in Charlottesville, VA, on 11 September 2023. (Credit: CW3 Melanie Sellars)

continuing to focus on relationships and our people as our top priorities.

"Leadership is the activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization."[3] This definition seems straightforward, so the concept of leadership appears simple in theory. However, this simplicity can obscure how difficult leadership can actually be. This article will reinforce some key aspects of leadership and convey what I feel are the most essential components of effective leadership not just in title, but in purpose as well.

Leaders are tasked with caring for, developing, and building their teammates to achieve greater organizational and personal success.[4] How we lead must change based on our mission and the needs of the people we are leading.[5] Many leaders find it challenging to effectively lead their teams and, despite a leader's best efforts, some subordinates may be left unsatisfied. Leadership is not about being the kindest, most empathetic, charismatic, or even most likeable person. Those are all wonderful attributes of many leaders, but they are not necessarily what make a leader stellar.

Leaders at all levels must accomplish the mission.[6] This requires holding subordinates to the standard and developing them in their shortcomings.[7] In my experience, great leaders are able to enforce standards while also developing their personnel and accomplishing the mission. They uphold the standard in a manner that motivates their teammates to want to be their very best.

Subordinates in any profession often express the concern that their leaders are not practicing what they preach.[8] Unfortunately, the JAG Corps is not immune to this criticism. The Judge Advocate General of the Army, Lieutenant General Stuart Risch, often challenges audiences at TJAGLCS to ensure their audio matches their video.[9] In keeping with our Corps's four constants,[10] Lieutenant General Risch places leadership and stewarding the profession through mentorship as two of his top priorities. Our constants challenge every leader in our formation to not just be technically proficient and demonstrate a mastery of the law; they also challenge them to be stewards of our profession, who provide principled counsel to our clients, and servant-leaders, who place the needs of their subordinates and the mission above their own. Our constants keep us grounded and remind us that what we say and do matters—that our teammates are looking at us to see what right looks like.

To ensure their audio matches their video, leaders often develop philosophies that convey their values, beliefs, and expectations. Many leaders will also share their personal keys to being a successful leader

with their teams. These leader-specific tools convey what that leader focuses on personally and believes will help their subordinates become successful leaders. What I offer next are my ten keys to successful leadership. Please note: this list conveys what I feel are the keys to successful leadership. It is a constantly evolving list, in no particular order, and is informed by personal experiences. It is also greatly influenced by similar lists of exceptional leaders with whom I have served.

Take Care of Your People

One of the most obvious things leaders can do to be successful is to take care of their people.[11] All of them.[12] Create an environment where everyone on the team feels valued and every teammate has the same opportunity to excel.[13] Send your troops to schools, award and recognize their efforts, and be the leader they need—the one they hope to one day be. A renowned leader and mentor to many, Colonel (Retired) Kevan Jacobson, tasked leaders to lead, not drive, their people.[14] He said leaders lift, motivate, and inspire their people to achieve some higher level of performance.[15] Drivers grind people down and drive them out. Each can achieve results, but those who lead will have a far greater impact. A good leader will understand it is not about them; rather, it must be about their team and the mission. Colonel Jacobson stressed a leader must love their people, show them they matter, let them know you care about them, and never forget you will fail every mission without your people.[16]

Build Relationships

Relationships are at the heart of everything we do. The best leaders will get to know their people not just professionally but personally as well.[17] Find a way to connect and express through words and actions that you value each member of the team. Learn about their families, hobbies, and career goals. Then show your teammates you care by helping them develop in those areas and achieve their goals.[18] This includes building relationships outside of your office across your posts, camps, and stations.[19] Establishing meaningful relationships with the other members of the staff and agencies on the installation can significantly impact your own organization. If the first time you reach out to a staff section is because you have an emergency, it may prove far more difficult to get the assistance you need. Building relationships in and outside of the office significantly expands your office's influence and allows a leader to accomplish the mission more effectively and efficiently.[20]

Be Present

The COVID-19 pandemic significantly changed organizations.[21] As the world returned from the pandemic, the faces of some organizations drastically changed.[22] Virtual interactions have become more common, which has its pros and cons.[23]

While I personally prefer in-person, face-to-face communication, being present is not merely confined to your physical presence. Your team should know you will be present when they need you. They need to know they can reach out and count on you to lead them through their best and most difficult times. Get out of your office, walk around, attend functions, and make yourself seen. When you get to know your team, you will understand them on a personal level and be able to support them accordingly. Keep in mind, your presence may also distract at times or feel intrusive. Respect those boundaries but let them know you are always available when they need you.

Be Self-Aware (Authentic and Honest)

"Do the best you can until you know better. Then when you know better, do better."[24] I keep this quote on my door as a reminder that there is always room for growth. This simple yet profound statement should be a hallmark for every leader. There is always someone out there who knows more than you. You should always strive to find ways to be better personally and professionally. Self-awareness is "your ability to perceive and understand the things that make you who you are."[25] It is an essential component of emotional intelligence.[26] Self-awareness consists of emotional awareness, accurate self-assessment, and self-confidence.[27] I include honesty and authenticity in self-awareness because you must be able to honestly assess your strengths and areas that require attention to grow as a leader. Also, subordinates can quickly pick up on a leader who lacks authenticity, which can create barriers to trust and stifle communication. Remain true to who you are, but constantly seek to grow in your craft and as a leader.

Communicate Effectively (and Listen)

The ability to effectively communicate up and down the chain of command enables a leader to build relationships and take care of their people.[28] Clear, honest, and meaningful communication is integral to developing trust and establishing the mutual respect that enhances effective leadership.[29] Every teammate can contribute to the success of the organization. Diverse perspectives can add context to every situation and fill in potential gaps a leader may have missed.

It is essential that leaders take the time to listen to the information they receive in order to make informed decisions.[30] Your subordinates will feel more valued and want to share more with you when they believe you care about what they are saying. A leader should always convey their guidance clearly and concisely while listening intently for feedback. Effective communication allows your subordinates to have a voice and helps leaders build more inclusive and productive teams.

Make Time

In her discussions to the field on emotional intelligence, Colonel Terri Erisman stresses the importance of making time for your people.[31] Our profession is demanding, everyone is busy, and there is always work that needs to be completed. We often ask ourselves where the time has gone at the end of an incredibly hectic day. Despite our heavy workloads, the best leaders will still find a way to make time for their people. This can be as simple as scheduling a twenty-minute mentorship block with a subordinate on your calendar, pulling away from your email to be actively present in a drive-by conversation, or supporting your teammates' activities outside of work. Making time really boils down to prioritizing and trying to remain as flexible as you can with so many competing interests.

Of course, there will be times when you are simply not available. The best leaders will have built capital with their teams

On 14 August 2023, LTC Michael Lamphier led students from the 220th OBC in a practical exercise that tests officership, military bearing, and advocacy. (Credit: MAJ Daniel Franco-Santiago)

by being effective communicators who have worked hard to establish meaningful relationships. Accordingly, their teammates will understand when the leader needs to get back to them a little later (when it is not an emergency). There are only so many minutes a day; make the most of them!

Empower Your People

Highly effective leaders understand they cannot do everything alone and must empower their subordinates. By providing clear intent and guidance, along with the tools and resources required, a leader can create a high-functioning team and a work environment conducive to growth. Through mutual trust and confidence, a legal office can best accomplish the numerous missions within its span of responsibility. Lieutenant General Risch often says that the day you think your people are there to serve you, it is probably time to start thinking about moving on. Leaders must understand it can never be about them; the focus must always remain on their teammates and the mission. Empowering teammates creates a climate of commitment where everyone is invested in mission success. By empowering subordinates and underwriting their mistakes, leaders build confidence and trust in their teams. This also helps organizations maximize their teams' effectiveness and efficiency.

Do Not Sweat the Small Stuff

We are all human, and, eventually, everyone on your team, including you, will make a mistake. Good leaders understand not all mistakes are equal and help subordinates work through and grow from their mistakes. Incidents involving character, integrity, or indiscipline should not be viewed on the same level as a scrivener's error on an action or an inadvertent processing error.

When a teammate makes a mistake, a leader should encourage them to acknowledge it, learn from it, and grow from the experience. Many mistakes can be fixed and are of little consequence in the grand scheme of your operations. Leaders should encourage innovation and be willing to underwrite the mistakes of their subordinates. Doing so will help build trust and confidence and allow your team to grow. If you fail at something intended to improve the organization, most leaders will still appreciate the effort and initiative. When a leader treats all mistakes equally, sets an unrealistic zero-defect work environment, or overreacts to something relatively small, it can destroy esprit de corps in an office and deplete the team's morale.

Have Fun

This one is pretty straightforward. Positive energy is infectious and can brighten the worst of days.[32] We are engaged in the most consequential practice of law on earth.[33] Providing principled counsel and premier legal services to our clients

presents amazing opportunities for growth and development. It can also be a ton of fun working together to meet our clients' demands. Never take yourself too seriously. Our Corps includes some of the most brilliant legal professionals in the world and our clients deserve our very best. A leader should find ways to have fun and encourage their teammates to do the same.

Really Care

You should never wait until Article 6 time to get to know your people. Ask for and review your teammates' personnel information upon their arrival, talk to them, develop relationships—show them they are valuable members of the team. Send birthday cards and get well soon notes, ask about their families and hobbies, and earn their trust and respect. When you show your teammates you care deeply for their well-being, they will develop a shared sense of purpose and a drive to excel both personally and professionally. Showing that you care also helps build loyalty within the organization.[34] Coach, counsel, mentor, train, teach, and develop your subordinates. Stop by their offices, laugh with them at social functions, sweat with them at physical training, create a shared sense of belonging, and let them know you are all on the same team and in this together. When you invest in your teammates, both professionally and personally, the organization and all of its members will thrive.

Final Thoughts

Major General Joseph Berger recently told the 219th Judge Advocate Officer Basic Course to "be the leader your subordinates want to become."[35] This humble but powerful comment illustrates the impact great leaders can have on their teams. It highlights that your positive leadership can be life-altering. Your teammates, your organization, and you can all flourish. Once you take the oath and don the uniform of your respective Service, you are no longer just a legal professional; you are a leader. Your teammates are counting on you to support and inspire them to perform at their highest levels. Push yourselves every day to be a leader of consequence and be the difference!

The JAG Corps Leadership Center is here to assist you in your quest to become the best leader you can be. Our website[36] provides tools and resources to help you develop your teams and grow as a leader. The key is to be deliberate, to seek out doctrine-based materials, to read, and to grow. We continue to expand our educational curriculum and outreach efforts and look forward to working with you and your teams in the future. The future of our Corps is in your hands; make the most of your opportunity to motivate and develop your teammates and improve your organization. Lead like a champion today! **TAL**

COL Abbott is the Director of the Judge Advocate General's Leadership Center at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Notes

1. Colin Powell, My American Journey 52 (1995).

2. *Leadership Center*, Judge Advoc. Gen.'s Legal Ctr. & Sch., https://tjaglcs.army.mil/center/leadership-center (last visited June 23, 2023).

3. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 1-74 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22]. Though not required by the *Army Lawyer*'s publication standards, the author hopes the citations to ADP 6-22 throughout this piece will help readers easily identify and apply this doctrine in their practice.

4. *See id.* paras. 6-36, 6-37, 6-43.

5. *See id.* paras. 4-4 to 4-6.

6. *See id.* para. 7-2 ("A leader's primary purpose is to accomplish the mission.").

7. *See id.* paras. 5-36 to 5-37.

8. *See, e.g.,* Daniel A. Effron et al., *From Inconsistency to Hypocrisy: When Does "Saying One Thing but Doing Another" Invite Condemnation?*, 38 Rsch. in Org. Beh. 61 (2018); George Bradt, *Practice What You Preach or Pay the Price*, Forbes (Apr. 10, 2023, 6:38 AM), https://www.forbes.com/sites/georgebradt/2013/04/10/practice-what-you-preach-or-pay-the-price/?sh=5c731f75528b.

9. Lieutenant General Stuart Risch, Judge Advoc. Gen., U.S. Army, Address to the 219th Judge Advocate Officer Basic Course, Judge Advoc. Gen.'s Legal Ctr. & Sch. (Apr. 28, 2023).

10. The Judge Advocate General's Corps's four constants include: servant leadership, stewardship, principled counsel, and mastery of the law. The Judge Advoc. Gen.'s Corps, U.S. Army, Four Constants (n.d.), https://www.jagcnet.army.mil/Sites/JAGC.nsf/0/46DCA0CA1EE75266852586C5004A681F/$-File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf.

11. *See* ADP 6-22, *supra* note 3, paras. 5-39 to 5-40.

12. *Id.* para. 4-12.

13. *Id.* paras. 6-25 to 6-28.

14. Colonel Kevan Jacobson, Staff Judge Advoc., U.S. Army Pacific, Address at the Judge Advoc. Gen.'s Legal Ctr. & Sch. Worldwide Continuing Legal Education Conference (Sept. 11, 2014).

15. *Id.*

16. *Id.*

17. *See* ADP 6-22, *supra* note 3, para. 5-46.

18. *See id.* para. 6-1.

19. *See id.* paras. 5-48 to 5-51.

20. *See id.*

21. *See* Kim Parker et al., Pew Rsch. Ctr., COVID-19 Pandemic Continues To Reshape Work in America (2022).

22. *Id.* at 4.

23. *See, e.g.,* Alex Macon, *The Scientific Pros and Cons of Virtual meetings – and How They Affect Business*, Cox Today (June 11, 2020), https://coxtoday.smu.edu/2020/06/11/the-scientific-pros-and-cons-of-virtual-meetings-and-how-they-affect-business.

24. This quote is attributed to Maya Angelou. *See, e.g., 21 of Maya Angelou's Best Quotes to Inspire: Remembering the Late Activist and Literary Icon's Most Uplifting Words of Wisdom*, Harper's Bazaar (May 22, 2017), https://www.harpersbazaar.com/culture/features/a9874244/best-maya-angelou-quotes.

25. Kendra Cherry, *What Is Self-Awareness?*, Verywell Mind (Mar. 10, 2023), https://www.verywellmind.com/what-is-self-awareness-2795023; *see also* ADP 6-22, *supra* note 3, paras. 6-14 to 6-19.

26. Daniel Goleman, Emotional Intelligence: Why It Can Matter More Than IQ 43 (1995).

27. *See id.* at 46-50.

28. *See* ADP 6-22, *supra* note 3, paras. 5-70 to 5-80.

29. *See id.*

30. *Id.* para. 5-71.

31. Colonel Terri J. Erisman, Executive Officer, Off. of Judge Advoc. Gen., Brief on Emotional Intelligence to the 71st Graduate Course, Judge Advoc. Gen.'s Legal Ctr. & Sch. (3 Oct. 2022).

32. *See* Sigal G. Barsade et al., *The Ripple Effect: Emotional Contagion and Its Influence on Group Behavior*, 47 Admin. Sci. Q. 644 (2002).

33. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 41-01, Message to the Regiment (13 July 2021) ("Each of you is part of the most consequential practice of law on earth every day. You should be proud of that—and know that we are immensely proud of you.").

34. *See* AR 6-22, *supra* note 3, para. 2-6.

35. Major General Joseph B. Berger III, Deputy Judge Advoc. Gen., U.S. Army, Address to The 219th Judge Advocate Officer Basic Course (Apr. 24, 2023).

36. *Leadership Center*, Judge Advoc. Gen.'s Legal Ctr. & Sch., https://tjaglcs.army.mil/center/leadership-center (last visited May 9, 2023).

(Credit: Zerbor - stock.adobe.com)

News & Notes

Thirty-Five Years of the Environmental Law Division

By Lieutenant Colonel Josiah T. Griffin

I think we can look forward to some efforts to make the Army a little more immediately and apparently useful to the country, in a role other than just national defense. For example, I think we can look for bigger [roles] in the environmental area.[1]

On 5 August 2023, the Environmental Law Division (ELD) commemorated its thirty-fifth anniversary as part of the U.S. Army Legal Services Agency.[2] For more than three decades, ELD has advised Army leadership on environmental matters, litigated both defensive and affirmative environmental cases, and provided guidance to the Army's field of environmental practitioners.[3] In these matters, ELD occupies a niche, but exceptionally significant, role in the Judge Advocate General's (JAG) Corps and the Army. More than 150 uniformed and Civilian attorneys have served in ELD since its founding. The history of ELD includes both the routine and the remarkable—everything from ordinary staff work to the creation of significant case law.[4] From humble beginnings as a sub-branch of the Army's Litigation Division, ELD has grown to fill an important role in both environmental litigation and policy matters of significant concern to the Army and the public. This article will discuss the events that necessitated an organization specifically focused on environmental law.

The Environmental Law Division's Origin Story

The impetus for creating ELD was more than just realigning resources to fit demands; it followed a dramatic increase in the Federal Government's involvement in environmental matters, groundbreaking environmental litigation for the Army, and a notorious criminal prosecution of Army employees for improper hazardous waste disposal. Suffice it to say, the story of ELD's creation is more compelling than a typical organizational origin story. It started with the rapid advance of the environmental movement in America while the Cold War loomed in the background.

Environmental Awareness in America

The 1960s marked a collective opening of the American public's consciousness to concerns about human contamination of the environment.[5] Among other things, Rachel Carson's widely-read book, *Silent Spring*, spread "the idea that if humankind poisoned nature, nature would in turn poison humankind."[6] As concern for the natural environment grew in the ensuing years, the U.S. Government began to grapple with the difficult task of balancing industrial production and environmental protection. The stakes could not have been higher on both sides of the scale—the industrial needs of the Cold War era continued to grow, even while communities began to see the unintended consequences of unrestrained production.[7] Carson described this issue starkly: "Along with the possibility of the extinction of mankind by nuclear war, a central problem of our age is the contamination of man's total environment with substances of incredible potential for harm."[8]

The impact of *Silent Spring* on the direction of public sentiment and public policy simply cannot be overstated;[9] the book played a substantial role in subsequent Federal activity with respect to the environment.[10] President Kennedy addressed the issue directly in response to a press question about possible negative effects of pesticides on humans, stating that public health service officials were "examining the matter" in response to "Ms. Carson's book."[11] Remarkably, according to the U.S. Environmental Protection Agency (EPA), the "EPA today may be said without exaggeration to be the

extended shadow of Rachel Carson."[12] This groundswell of support for environmental protection launched a massive legislative response, spearheaded by President Richard Nixon, who referred to the 1970s as the "Environmental Decade."[13]

The Environmental Decade

Against this backdrop of increased concern about the effects of industrial substances on the natural world came a rapid expansion of Federal environmental legislation.[14] Between 1970 and 1980, over a dozen new Federal environmental statutes or major rewrites of existing statutes became law, beginning auspiciously on the very first day of the decade. "On 1 January 1970, President Richard Nixon signed the National Environmental Policy Act (or NEPA), beginning the 1970s as the environmental decade."[15] The Act boldly declares policy meant to:

> encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[16]

The Code of Federal Regulations probably best summed up NEPA as "our basic national charter for protection of the environment."[17] The Act attempts to accomplish this objective not by setting any substantive standards, but by requiring Government agencies to engage in informed decision-making with public participation.[18] Essentially, it requires agencies to take a "hard look" at (and engage in a thorough analysis of) possible environmental impacts resulting from major Federal actions.[19]

The National Environmental Policy Act represented a significant change to the status quo of agency decision-making, ripples of which have continued into the present. Along with the rest of the Federal Government, the Army strained to adjust to this new obligation. *The Army Lawyer* issues from the early seventies include references to various environmental law courses and seminars designed to help judge advocates advise on these new environmental law requirements.[20] The JAG Corps's 1972 Worldwide Continuing Legal Education course included a lecture by John A. Busterud, Deputy Assistant Secretary of Defense for Environmental Quality, and a Presidential appointee to the recently established Council on Environmental Quality (CEQ). Mr. Busterud pointed out the drastic changes NEPA was implementing, the significant role of the CEQ in defining a major Federal action, and what he described as the courts' aggressive and liberal interpretations of NEPA.[21]

Indeed, the effects of NEPA and the other nascent environmental statutes fully materialized in the Federal court system, particularly, in the Federal Government's response to these new requirements. Notable environmental law professor, Richard Lazarus, stated, "[Federal circuit court opinions] prompted a major transformation within the vast hallways of the [F]ederal [G]overnment. NEPA changed the nature of those who worked for the [F]ederal [G]overnment. As environmental factors became relevant to [F]ederal agency decision making, those same agencies frequently needed to hire in-house experts."[22] The Army would begin hiring those in-house experts, but not before other significant events demanded more concerted efforts to deepen institutional expertise, including the tricky issue of developing and producing chemical munitions.

The Case of "the Aberdeen Three"

On 14 March 1968, sheep ranchers in Utah's Skull Valley region began reporting large numbers of dead or very ill sheep.[23] In the days that followed, it became increasingly evident that the affected sheep, which ultimately numbered over 6,000, died because of exposure to chemical agents from nearby Dugway Proving Ground.[24] What became known as "the Dugway Incident" caused local and national outrage.[25] While the Army did not immediately accept responsibility for the incident, it reluctantly acknowledged that Dugway Proving Ground conducted a weapons test involving VX nerve agent at high altitude the day before the ranchers discovered their sheep.[26] This incident revived the national

In 1972, the Army designated a program manager to oversee the destruction of its chemical weapons stockpile. This organization would eventually become the U.S. Army Environmental Command, presently responsible for environmental cleanup, conservation, compliance, and pollution prevention across the Service. (Credit: aec.army.mil)

conversation about the practical utility of chemical weapons and, ultimately, influenced President Nixon's decision to halt chemical weapons production in the United States in 1969.[27]

In 1972, the Army designated a program manager to oversee the destruction of its chemical weapons stockpile.[28] This organization would eventually become the U.S. Army Environmental Command, presently responsible for environmental cleanup, conservation, compliance, and pollution prevention across the Service.[29] Eighteen years after the pause on U.S. chemical weapons production, due to a changing political climate and stalled negotiations on a chemical weapons treaty, the United States lifted its moratorium on chemical weapons manufacture in 1987 and began production "of a new generation of American 'binary' chemical weapons designed to kill with invisible, odorless mists."[30] The Army developed this new generation of weapons as an alternative to so-called "unitary" chemical weapons, which contain a single lethal chemical produced and stored in bulk.[31] The U.S. Army produced these unitary munitions in facilities such as the Rocky Mountain Arsenal (RMA), a site on the northeast outskirts of Denver, which the Army selected to develop chemical weapons during World War II.[32]

In contrast to the older unitary design, "binary munitions contain two separated

Former Chemical Warfare Production Facilities – Completed December 2006 (four months ahead of the deadline): These included government facilities and equipment that produced chemical agents, precursors, and components for chemical weapons. The Army's Non-Stockpile Chemical Materiel Project completed the facilities' destruction, located at Newport Chemical Depot, Indiana; Pine Bluff Arsenal, Arkansas; Rocky Mountain Arsenal, Colorado; Aberdeen Proving Ground, Maryland; and Muscle Shoals, Alabama. (Credit: Bethani Crouch)

non-lethal chemicals that react to produce a lethal chemical when mixed during battlefield delivery."[33] The Pilot Plant at Aberdeen Proving Ground was one of the primary development sites for binary chemical weapons in the early 1980s; it was also the locus of an infamous contamination incident that brought the Army further scrutiny and condemnation.[34] The project was headed by three civilian chemical engineers.[35] Robert Lentz designed the binary nerve gas production process, William Dee led the team, and Carl Gepp managed Pilot Plant operations.[36]

The case of the "Aberdeen Three" achieved notoriety as the first ever criminal prosecution for violations of the Resource Conservation and Recovery Act,[37] which is "is the principal Federal law . . . governing the disposal of solid waste and hazardous waste."[38] On 29 June 1988, the United States criminally charged Carl Gepp, Robert Lentz, and William Dee with "knowingly ignor[ing] the law from 1983 to 1986 at the Pilot Plant, keeping dozens of lethal and carcinogenic chemicals in unauthorized storage areas, dumping some directly down drains without authorization and discharging acid into a creek without a permit, leading to a fish kill."[39] Gepp, Lentz, and Dee disputed the allegations, but following trial in 1989, they were ultimately sentenced to probation and community service.[40]

The case against the "Aberdeen Three" was not without controversy. Despite the gravity of a criminal prosecution, these three engineers were not solely responsible for the multiple decades of contamination caused by the development and production of munitions at Aberdeen Proving Ground. *Washington Post* reporter, Michael Weisskopf, described Carl Gepp, Robert Lentz, and William Dee as "three men caught up in the sea change that occurred between D-Day and Earth Day, when society's passion for bigger and better bombs was superseded by its desire for a cleaner and safer world."[41]

Beyond serving as a cautionary tale, the case of the Aberdeen Three also served as a strong impetus for greater action from the institutional Army. The Aberdeen Pilot Plant was shut down on 26 March 1986.[42] In May 1986, the Army opened an administrative investigation under Army Regulation 15-6, which concluded in April 1987. Lieutenant Colonel Lawrence Ward sent a memorandum to The Judge Advocate General (TJAG) on 23 February 1988, outlining multiple issues discovered at Aberdeen through the investigation and charging the institution to commit greater resources to these issues. Ward stated, "[U]ntil environmental compliance is adequately resourced and funded and becomes a priority command concern, environmental compliance will never be achieved."[43] Part of that resourcing and funding would soon materialize in the form of ELD.

The Environmental Law Division

While the Aberdeen case percolated in the background, the Army continued planning changes to environmental support. An increasing number of large and complex cases began to place a toll on the Army's support capability, specifically, the emerging RMA case. Rocky Mountain Arsenal continued chemical munitions production and development on and off until 1982, when production ceased and environmental cleanup and restoration began.[44] The most contaminated part of RMA is a 93-acre area containing an Army-constructed basin designed to hold liquid manufacturing wastes, and which has been dubbed the "most toxic square mile" on earth.[45]

When the EPA designated RMA a superfund site in 1987, the Litigation Division at the U.S. Army Legal Services Agency assumed much greater responsibility than it could adequately support while continuing work on other non-environmental cases. Colonel Barry Steinberg, the Chief of Litigation Division at the time, described the RMA case as "one of the biggest cases we ever faced at [the Litigation Division]."[46] Colonel Steinberg suggested convening a study to match resources to these emerging issues and new requirements, an idea that then-TJAG, Major General Fugh, ultimately approved.[47]

After studying the issues presented by Aberdeen, RMA, and other sites, and after soliciting comments from stakeholders, including the Army Corps of Engineers and the JAG Corps, it was evident that the Army would need to increase the number of environmental law practitioners to meet the increasing demand for expertise. Colonel Steinberg briefed the Secretary of the Army, John O. Marsh, who then formally established ELD on 5 August 1988.[48]

Prior to that time, environmental law responsibilities were officially dispersed between TJAG, the general counsel, and the Army Corps of Engineers. The new Division would handle all the JAG Corps's environmental law practice, including both policy and litigation matters. This structure

provided the needed resources to tackle RMA and future cases of similar complexity, as well the necessary expertise to advise the field on environmental law matters outside of litigation.[49] Colonel Steinberg became ELD's first chief.[50]

Professor Richard Lazarus plainly articulated the manifest truth: "It takes great judges and great advocates to make and to keep great law. And environmental law is no exception."[51] In that sense, ELD has greatly benefitted from many gifted practitioners in the nearly thirty-five years since its founding.[52] Although service in ELD carries a certain gravity commensurate with the seriousness of the subject matter, that service has not been humorless. Under the tenure of Colonel Calvin M. Lederer in the late 1990s, the ELD team referred to itself as "Gang Green."[53] Although that moniker has since fallen to the wayside, the ELD team and the Army continue to benefit from the contributions of many talented military and Civilian practitioners. The ELD team currently consists of twenty-four billets in two branches: litigation and installation readiness.

The Environmental Law Division Today

Today, ELD provides premier environmental legal support to enable Army readiness. The division accomplishes this mission by advising Army leadership on environmental matters, defending the Army in environmental litigation, recovering restoration costs and natural resource damages, negotiating with state and Federal administrative agencies and commissions, and by guiding the Army's field of environmental law practitioners.[54] The division currently handles a defensive litigation caseload with potential liability of more than $500 billion, spanning the entire alphabet soup of environmental statutes.[55] Since 1988, ELD has grown to fill an important role in both environmental litigation and policy matters of significant concern to the Army and the public. **TAL**

LTC Griffin is the Deputy Staff Judge Advocate at the Office of Staff Judge Advocate, U.S. Army Intelligence Center of Excellence at Fort Huachuca, Arizona.

Notes

1. Major General George S. Prugh, *A Shift in Focus*, Army Law., Dec. 1972, at 1, 1.

2. *See* Memorandum from Secretary of the Army to Dir. of Army Staff, subject: Establishment of the Environmental Law Division (5 Aug. 1988), *reprinted in* Army Law., Oct. 1988, at 3.

3. *See* U.S. Dep't of Army, Reg. 27-40, Litigation, ch. 6 (19 Sept. 1994). Pursuant to this regulation, the Environmental Law Division (ELD) serves as the Army's lead on environmental litigation matters. *Id.*

4. *See* David B. Howlett, *Readiness and the National Environmental Policy Act*, Army Law., no. 2, 2019, at 22.

5. Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 Va. Env't L.J. 75, 79 (2001) ("Many citizens were ready for an issue about which there could be a national consensus rather than further polarization. To a large extent, the environmental movement satisfied that need.").

6. Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement*, N.Y. Times Mag. (Sept. 21, 2012), https://www.nytimes.com/2012/09/23/magazine/how-silent-spring-ignited-the-environmental-movement.html. Rachel Carson is widely recognized for launching the modern environmental movement. *See, e.g., id.*

7. The archetypal example of unintended consequences is the tragic case of the Love Canal, which involved a chemical company near Niagara Falls dumping toxic waste products by the barrel into an abandoned canal. *See* Michael H. Brown, *LOVE CANAL, U.S.A.*, N.Y. Times, Jan. 21, 1979, at 23. The canal was later filled in and sold for development, which included a neighborhood of single-family homes along with an elementary school. *Id.* In 1978, many of the homes were discovered to be permeated with toxic chemicals. *Id.* New York state noted a spike in health problems in the area and the entire neighborhood had to be evacuated and abandoned. *See id.*

8. Rachel Carson, Silent Spring 8 (First Mariner Books 2002) (1962).

9. *See* Joshua Rothman, *Rachel Carson's Natural Histories*, New Yorker (Sept. 27, 2012), https://www.newyorker.com/books/page-turner/rachel-carsons-natural-histories.

10. Griswold, *supra* note 6 ("The early activists of the new environmental movement had several successes attributed to Carson—from the Clean Air and Water Acts to the establishment of Earth Day to President Nixon's founding of the Environmental Protection Agency, in 1970.").

11. Sound Recording of President John F. Kennedy's August 29, 1962, Press Conference, John F. Kennedy Presidential Lib. and Museum, at 26:45, https://www.jfklibrary.org/asset-viewer/archives/JFKWHA/1962/JFKWHA-124/JFKWHA-124 (last visited June 14, 2023).

12. Jack Lewis, *The Birth of EPA*, EPA J. (Nov. 1985), https://archive.epa.gov/epa/aboutepa/birth-epa.html; s*ee also* Rothman, *supra* note 9.

13. Gladwin Hill, *Midpoint of 'Environmental Decade': Impact of National Policy Act Assessed*, N.Y. Times, Feb. 18, 1975, at 14.

14. Robinson Meyer, *How the U.S. Protects the Environment, From Nixon to Trump*, The Atlantic (Mar. 29, 2017), https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001.

> A little less than 50 years ago, President Richard Nixon united with a Democratic Congress to pass laws that altered the everyday experience of almost everyone living in the United States. These laws arose from a flurry of legislating—nearly all emerged in the same two-year period—and they had astonishingly large goals.

Id.

15. *EPA and a Brief History of Environmental Law in the United States*, U.S. Env't Prot. Agency (June 15, 2016), https://cfpub.epa.gov/si/si_public_record_report.cfm?Lab=NERL&dirEntryId=319430.

16. 42 U.S.C. § 4321.

17. 40 C.F.R. § 1500.1(a) (2019).

18. Ms. Alison Polchek, Environmental Law Presentation in Montgomery, Alabama (30 July 2018) (unpublished course materials) (on file with author). *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

19. Polchek, *supra* note 18.

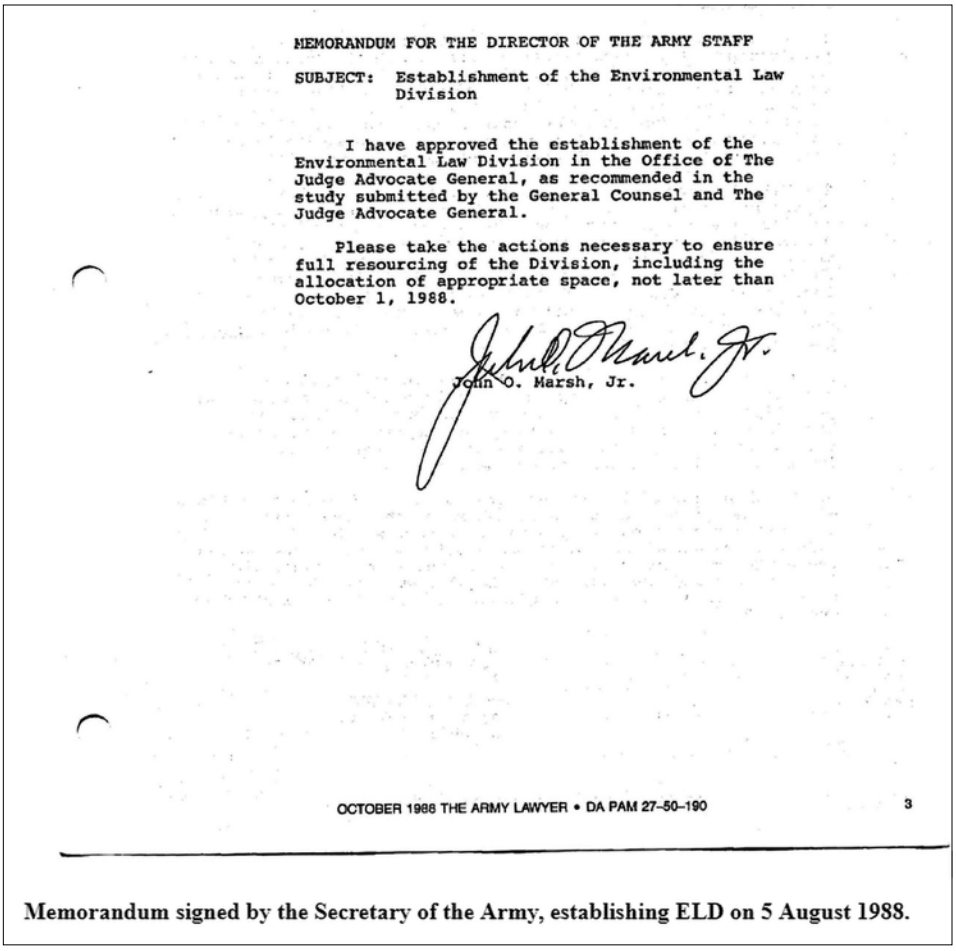
20. *See, e.g., Environmental Law Seminar*, Army Law., Dec. 1971, at 25.

21. *1972 JAG Conference*, Army Law., Nov. 1972, at 1, 3.

> Mr. Busterud stressed to the judge advocates present that the major impact that they were going to face in the future was the result of the National Environmental Policy Act of 1970 . . . . Finally, Mr. Busterud stressed the role of the courts in the National Environmental Policy Act interpretation process. He noted that the courts are becoming increasingly more aggressive in their interpretations of the statute and are reading the statute in a very, very liberal fashion. Thus, the scope of [the National Environmental Policy Act] may be said to be expanding through the courts' actions . . . . In effect, with respect to all of these areas, Mr. Busterud pointed out to the judge advocates present that their role in environmental law was an increasing one and that the area was one of dynamic change.

Id.

Environmental Law Division Logo, designed by Mr. David Howlett and generated by the author in 2019.



MEMORANDUM FOR THE DIRECTOR OF THE ARMY STAFF

SUBJECT: Establishment of the Environmental Law Division

I have approved the establishment of the Environmental Law Division in the Office of The Judge Advocate General, as recommended in the study submitted by the General Counsel and The Judge Advocate General.

Please take the actions necessary to ensure full resourcing of the Division, including the allocation of appropriate space, not later than October 1, 1988.

John O. Marsh, Jr.

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Memorandum signed by the Secretary of the Army, establishing ELD on 5 August 1988.

Memorandum signed by the Secretary of the Army, establishing ELD on 5 August 1988.

22. Richard J. Lazarus, *Judging Environmental Law*, 18 Tul. Env't L.J. 209 (2004) "Any fair judgment of environmental law's record during the past several decades would have to rate it as one of the [N]ation's great success stories of the second half of the twentieth century." *Id.* at 211.

23. Lorraine Boissoneault, *How the Death of 6,000 Sheep Spurred the American Debate of Chemical Weapons*, Smithsonian Mag. (Apr. 9, 2018), https://www.smithsonianmag.com/history/how-death-6000-sheep-spurred-american-debate-chemical-weapons-cold-war-180968717.

24. *Id.*

25. *Id.*

26. *Id.*

27. R. Jeffrey Smith, *U.S. Ushers in New Era of Chemical Weapons*, Wash. Post (Jan. 15, 1989), https://www.washingtonpost.com/archive/politics/1989/01/15/us-ushers-in-new-era-of-chemical-weapons/a75ea06e-fa96-4bec-b713-0a384ac07469/?utm_term=.53d733c2ca05 ("President Richard M. Nixon, declaring use of the munitions 'repugnant to the conscience of mankind,' halted the U.S. poison gas program in 1969 and pressed for an international ban on chemical weapons production.").

28. *About USAEC*, U.S. Army Env't Command (June 6, 2022), https://aec.army.mil/index.php/about-aec.

29. *Id.*

30. Smith, *supra* note 27.

31. *Introduction to Chemical and Biological Weapons*, Carnegie Endowment for Int'l Peace (Jan. 18, 2001), https://carnegieendowment.org/2001/01/18/introduction-to-chemical-and-biological-weapons-pub-630 [hereinafter Carnegie].

32. *See Rocky Mountain Arsenal (USARMY): Adams County, CO*, U.S. Env't Prot. Agency, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0800357 (last visited June 15, 2023).

33. Carnegie, *supra* note 31.

34. Michael Weisskopf, *The Aberdeen Mess*, Wash. Post (Jan. 15, 1989), https://www.washingtonpost.com/archive/lifestyle/magazine/1989/01/15/the-aberdeen-mess/247cede1-62dc-46c9-8387-0ac343a81673.

35. *Id.*

36. *Id.*

37. "The three engineers are the first [F]ederal officials to be criminally prosecuted on charges that they routinely violated environmental laws." *Id.*

38. *Resource Conservation and Recovery Act (RCRA)*, Fed. Reg., https://www.federalregister.gov/resource-conservation-and-recovery-act-rcra- (last visited June 15, 2023).

39. Weisskopf, *supra* note 34.

40. *The Aberdeen Three: Environmental Issues*, Wash. State Univ. Biological Sys. Eng'g, http://sites.bsyse.wsu.edu/pitts/be120/Handouts/cases/case70.htm (last visited June 15, 2023) [hereinafter *The Aberdeen Three*].

41. Weisskopf, *supra* note 34.

42. *The Aberdeen Three*, *supra* note 40.

43. Memorandum from Lieutenant Colonel Lawrence Ward to Major General Hugh R. Overhold, Judge Advocate General, U.S. Army (23 Feb. 1988).

44. *See Rocky Mountain Arsenal*, Colo. Dep't of Pub. Health & Env't, https://cdphe.colorado.gov/hm/rocky-mountain-arsenal (last visited June 27, 2023).

45. Seth Shulman, The Threat at Home: Confronting the Toxic Legacy of the U.S. Military, at xi (1992).

46. Oral History, Colonel (Retired) Barry Steinberg 158 (Nov. 18, 2022) (transcript available in the Judge Advocate General's Legal Center & School, Charlottesville, VA) [hereinafter Steinberg Oral History]. In November 2022, Colonel Steinberg sat for an oral history interview as part of The Judge Advocate General's Legal Center and School Oral History Program, where he recounted these events in complete detail, including an accounting of the many pioneering individuals who played a role in creating and staffing ELD. An upcoming episode of The Quill and Sword Podcast will feature excerpts from this interview.

47. *Id.* at 162.

48. *See* Memorandum from Sec'y of Army to Dir. of Army Staff, subject: Establishment of the Environmental Law Division (5 Aug. 1988); Steinberg Oral History, *supra* note 46, at 164-66.

49. It is also ironic that ELD lawyers spent much of the 1990s handling litigation related to the destruction of the Nation's chemical weapons stockpile, as required by law. *See* Department of Defense Authorization Act, 1986, Pub. L. No 99-145, § 1412, 99 Stat. 583, 747 (1985) (codified at 50 U.S.C. § 1521).

50. Steinberg Oral History, *supra* note 46, at 166.

51. Lazarus, *supra* note 22, at 218.

52. The list of past ELD chiefs alone includes many notable leaders in the JAG Corps: Colonel (COL) Barry P. Steinberg (Oct. 1988–Nov. 1989); Lieutenant Colonel (LTC) Scott P. Isaacson (Dec. 1989–June 1990); COL Joseph W. Cornelison (July 1990–Feb. 1991); COL William J. McGowan (Mar. 1991–Dec. 1994); LTC James S. Currie (Jan. 1995–June 1995); COL Calvin M. Lederer (July 1995–July 1997); COL Lawrence E. Rouse (Aug. 1997–June 2000); COL Nolan J. Benson, Jr. (July 2000–June 2002); COL Craig E. Teller (Jan. 2002–Dec. 2003); COL Jacqueline R. Little (Jan. 2004–July 2004); COL Allison A. Polchek (July 2004–June 2008); COL Sharon E. Riley (July 2008–Mar. 2011); COL Kenneth J. Tozzi (July 2011–June 2014); COL Gregory Woods (July 2014– June 2018); COL Leslie Rowley (July 2018– June 2021); COL Lance Hamilton (July 2021– July 2023), and COL Leslie Rowley for the second time (July 2023– Present).

53. U.S. Dep't of Army, Env't L. Div., Standard Operating Procedure (10 Jan. 1997) (on file with the author).

54. *Environmental Law Division*, JAGCNet, https://www.jagcnet2.army.mil/Sites/environmentallaw.nsf/homeContent.xsp?documentId=0F1817F738B3930C852582D0006C55CB (last visited June 15, 2023).

55. U.S. Judge Advoc. Gen.'s Corps, Env't L. Div., Litigation Presentation (2023) (unpublished PowerPoint presentation) (on file with author).

Photo 1:
Fort Riley's SDC, MAJ Joe DeFlorio, and the regional paralegal NCOIC, SFC Matthew Dutcher, in front of the TDS building at Fort Riley, KS, on 16 May 2023. (Credit: LTC Ted Allison)

Photo 2:
BG Daryl O. Hood (left), Commanding General, 20th Chemical, Biological, Radiological, Nuclear, Explosives (CBRNE) Command, presents the Meritorious Service Medal to MAJ William J. Cook III (right) during his retirement ceremony on Aberdeen Proving Ground, MD, on 21 February 2023. MAJ Cook concluded his twenty-year Army career as the Command Judge Advocate at the 20th CBRNE Command. (Credit: Angel Martinez-Navedo)

Photo 3:
The Judge Advocate General, LTG Stuart W. Risch, visited Fort Buchanan, Puerto Rico, in February 2023 as part of his ongoing outreach and recruiting efforts. During his visit, LTG Risch met COL Carlos Caceres, Commanding Officer of the 1st Mission Support Command, and various Army legal teams from the 1st Mission Support Command, Puerto Rico National Guard, and U.S. Garrison Command Fort Buchanan. (Credit: SGT Marcus Moyett)

Photo 4:
On Law Day, 1 May 2023, CPT Missi Fredette, military justice advisor, taught second-, third-, and fourth-grade students about the importance of voting. (Credit: Nathan Clinebelle)

Photo 5:
MSG Jennifer Kelly (center), Chief Paralegal NCO, 143d Expeditionary Sustainment Command, stands with newly inducted NCOs with the Camp Beuhring Office of the Command Judge Advocate for a group photo in front of the NCO arch at the NCO induction ceremony at Camp Beuhring, Kuwait. The NCO induction ceremony celebrates the newly promoted joining the ranks of a professional NCO corps and emphasizes and builds on the pride of such an elite corps. (Credit: CPT Katherine Alegado)

Photo 6:
MAJ Earle Noel (right), SJA, Joint Task Force Civil Support, received simulated mission updates during Exercise Vibrant Response 23, on 26 April 2023. Joint Task Force Civil Support conducts chemical, biological, radiological, and nuclear response and all-hazards defense support of civil authorities' operations in support of the lead Federal agency to save lives, mitigate human suffering, and prevent further injury. Vibrant Response is an annual U.S. Army North, U.S. Northern Command-directed Command Post Exercise planned in coordination with DoD, Department of Homeland Security, FEMA, and other Federal and state partners. As USNORTHCOM's Joint Force Land Component Command, U.S. Army North regularly plans and conducts this multicomponent exercise. (Credit: SSG Jacob Derry, Air Force)

Photo 7:
MAJ Joseph D. Librande, student at the 71st Graduate Course, competed in the Fuji Brazilian Jiu-Jitsu competition in Lynchburg, VA, on 22 April 2023. MAJ Librande took first place (gold) in the welterweight

division (170-185 lb). Also competing in the competition were his sons: David (13 years old) took gold, and Patrick (10 years old) took silver. (Credit: MAJ Joseph D. Librande)

Photo 8:
SGT Dawn R. Montalvo (front row, 1st from the right), Administrative Law Paralegal NCO at U.S. Army South, poses for a photo behind the Pentagon Memorial with her group during National Tragedy Assistance Program for Survivors. (Credit: SGT Dawn R. Montalvo)

Photo 9:
TJAGLCS faculty/staff and the 220th OBC compete in a friendly softball game held at the UVA softball field. (Credit: Avital Romberg)

Photo 10:
COL Joseph A. Keeler (then-ARSOUTH SJA) and LTC Stephen Hernandez (deputy SJA) during COL Keeler's retirement farewell. COL Keeler retired with thirty years of service on 21 April 2023. (Credit: SGT Dawn Montalvo)

Photo 11:
The Fort Carson TDS Office (4th Circuit) inspected earth works and learned about the capabilities of the mountain complex in Cheyenne Mountain, CO. Individuals include (from left to right) SGT Alex Hernicz; CPT Tim Bowman; MAJ Ira Gallagher; Engineering Flight Chief, Mr. Patrick Wentzel; Air Force Maj. George Statzell; and LTC Ted Allison. (Credit: LTC Ted Allison)

Photo 12:
In celebration of National Law Day, RCSM Michael J. Bostic, BG Alison C. Martin, and LTG Stuart W. Risch prepare to cut a cake at TJAGLCS. (Credit: Billie Suttles, TJAGLCS)

Photo 13:
SPC Ozlem Sayal, paralegal specialist with the 369th Sustainment Brigade, New York Army National Guard, is recognized as the Hellfighter Sustainer of the Week during a ceremony conducted by CSM Curtis Moss, Senior Enlisted Advisor at Camp Arifjan, Kuwait. SPC Sayal was chosen because of her extraordinary confidence and competence. (Credit: SSG Sebastian Rothwyn)

LTG (R) Flora D. Darpino engaged in mentorship with the 71st Graduate Course in a Q&A session with COL Robert J. Abbott, Director of the Leadership Center. (Credit: Billie Suttles, TJAGLCS)

Pivotal Perspective

A Q&A with Lieutenant General (Retired) Flora Darpino

On 28 March 2023, Lieutenant General (Retired) (LTG (R)) Flora D. Darpino, The 39th Judge Advocate General, delivered the Second Annual Kenneth Gray & Phyllis Propp-Fowle Lecture on Diversity, Equity, and Inclusion. Her remarks touched on her upbringing, her career as a judge advocate, and the leaders she met along the way who had the courage to make meaningful change. To read these remarks, be sure to read the Military Law Review, *volume 230, issue 4.*

After her remarks, LTG(R) Darpino sat down for a question-and-answer session with the students, staff, and faculty at The Judge Advocate General's Legal Center and School. Colonel (COL) Robert J. Abbott, the Director of the Leadership Center, moderated the session. Throughout, LTG (R) Darpino shared the insights, struggles, and triumphs of a storied career. What follows is a transcript of that session.[1]

COL Abbott: Good afternoon, ma'am. Thank you again for being here today.

LTG (R) Darpino: It really is a pleasure to be back. I want to thank some folks that I know traveled to be here today. We have friends from Maryland, North Carolina, South Carolina, and other places represented. I really appreciate having those faces in the audience. It helps calm me down. But then I would catch a look at General Nardotti, one of my idols, and I get all nervous again. So, it's give and take.

COL Abbott: First of all, thank you again. The words of wisdom you provided and the powerful message you delivered today resonates with our audience and with the crowd. I know sometimes it is difficult to be vulnerable and to talk about your upbringing and some of the challenges you faced. But I was honored and I really appreciated your approach.

One of the things I thought was absolutely profound was your reference to

the American dream. My question for you, ma'am, is, do you feel that the American dream is something that is actually achievable by members of this audience? Any advice for them as they pursue it?

LTG (R) Darpino: I think different people define the American dream differently. Sometimes that has to do with where you came from. My parents wanted us to be accepted, and that was achieved. I think we achieved that overall as a group. But, I think what you individually accomplish isn't what's most important. I think, since we are leaders, our responsibility is not inward looking as much as it is inspiring others to be able to achieve the full potential of what they are capable of. That is really what our focus needs to be as leaders. I think that if we lead correctly, we can lead everyone to be their very best. It is not easy. Some people do not react well to being pushed to be their very best. But if they know that it comes because you care about them, you really can inspire them. I have a daughter who is a fourth-grade teacher, and she has to do that with twenty-eight kids in her classroom every day. If she can do it with twenty-eight fourth graders, I challenge you to do it with the people that you have the privilege to lead, because that is what is required of great leaders.

COL Abbott: You mentioned the *privilege* of leadership, and I think that is a great way to put it. The Army defines leadership as influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization. What has been your most inspirational go-to throughout your career that led you to your tremendous success?

LTG (R) Darpino: First of all, I do not consider it my tremendous success. There is no way that you achieve anything as a member of Team Alone. What's that saying? "There's no 'I' in team." I really believe you have to have your team lift you up. Maybe it's your peers. In my first assignment, it was my fellow captains. We bonded together, protected each other, and, inspired each other to do well. It is never an individual achievement.

And I now realize that I forgot what the actual question was. [Laughter].

COL Abbott: What tips do you have to inspire and motivate our audience as they lead their teams?

LTG (R) Darpino: I honestly believe that you have to know those that you lead because you have to understand their individual capabilities. What that means is that you have to be vulnerable, because you have to be willing to talk to them in a genuine fashion. If you are just that hard piece of ice that stands before them and you are not vulnerable and they do not see you as a human being, then they are not going to share with you the things that they need to make them great. It can be something really easy that they need, but they are not going to share that if all they see is a block of ice. We're taught to stand tall, square our jaws, and put our shoulders back. All of those things. But being genuine and making that connection with people is what really inspires them because then you know them. You know their capabilities. You know how to make them be better.

Major Olesea Roan, student, 71st Graduate Course: Ma'am, we met when I was Lieutenant Olesea Collins. You really inspired me. Now I want to ask what has changed after you broke the first glass ceiling? When you spoke to us back then, I was so motivated to make it through because I always felt like as a woman, I would not have a chance. And now, what is the next challenge that we face as a Judge Advocate General's (JAG) Corps?

LTG (R) Darpino: I think the JAG Corps has great leadership. I really mean that. And I do not just mean the current leadership. It's like I said earlier, throughout my career, I ran into great leaders that forced change, that understood that the system was not allowing people to reach their full potential. I think that as long as the JAG Corps and the Army continue to identify and assign those leaders, male, female, whatever they look like, wherever they are from, no matter how bad their Bostonian accent is, the JAG Corps will be fine. There is all this other noise out there. I'm not talking about the naysayers, but there is this other noise out there. We have got to build a new trial structure. We are going go to war with whomever. There is all this other stuff out there. But if the Corps itself, with the leadership, is strong, we will achieve our goals. We will achieve the mission because we will build the right people and put them in the right places. Then we cannot fail. I honestly believe that.

COL Abbott: Ma'am, we talked a lot about your upbringing and the values instilled in you by your parents. I found the part about always giving your best at whatever you do and being better than those around you particularly motivating. The third thing you also mentioned is that the people around you are always watching. Which of those three things focused you or drove you the most to continue to move forward throughout your career?

LTG (R) Darpino: I think they are a package deal. I am a storyteller, like a good Italian. We moved around a lot when I was young. My dad ended up being an agronomy major in college because he wanted to be a better farmer. Then he went into food processing. He worked in food processing plants. As he was promoted, we would move to a different town where he would run the factory or whatever it was he was going to do. One of these moves was to a rural town—we were always in rural places in Pennsylvania. For the first six months we lived there, not one person spoke to us. No neighbors, no one. We would be walking around and no neighbors, no one, spoke to us.

My father's hobby is gardening. Those of you who know me know I do not have as much of a green a thumb as he does, but gardening is my hobby. Everywhere we lived, he had a huge patch to garden, because he missed having his hands in the earth. One Sunday he was out there working in his patch. Down our driveway, three town elders were walking towards him and he stood up. In his mind, he's thinking, "Oh, my gosh, they have watched us. They have watched that I have raised my girls to be polite. They have watched that I am hard working. They have watched and now they are going to come and talk to me." He takes off his gloves and they walk up to him and they say, "Mr. Darpino, we want you to know that we do not work on Sundays, and we prefer if you do not work on Sundays

either." My father takes a breath and just says, "That factory over there, that's where I work. This is what I do as a hobby and to stay sane. But thank you for coming by and I look forward to getting to know you." Eventually, having daughters that he raised right, who were polite, and being a good leader at the factory where the majority of men in the town worked, turned the tide for my father. Eventually, they did accept us. So it is the three together. He had to work harder to be considered equal, so on and so forth.

COL Abbott: Ma'am, you talk about the importance of always giving your best at everything you do. Was there ever a time when you were worried that your best might not be good enough?

LTG (R) Darpino: Anybody who knows me knows that is true. I did say of the TJAG appointment that I laid in bed for three days worried that I would fail. Then I would switch over to just raw anger, vacillating between the two. So yes, I think, and I know you all know as leaders, but that is part of being humble. If you walk into every situation thinking, "Oh, man, baby, I am going to be king," that says something about you and it does not say anything good about you. You know you have to go in and learn that job. You know you have to trust the people around you. You know you have to build a new team. I mean, that is what the military is about. It is change, and adapting, and building new teams. You change continuously and with that is always that element of, "Oh, boy. Can I do this?" And so I cannot think of a time that I did not go into a job where I thought, "Will my best be good enough?" I just knew that it was what I had to do.

Brigadier General Jackie Thompson, Senior Defense Counsel, Office of Military Commissions: I want to ask this question for some of the young folks who are coming up behind you. There are people here who think about family and what they do in their personal lives. Now you have had such hard jobs. How did you balance family and the Corps?

LTG (R) Darpino: Thank you, Jackie. I appreciate that. I think the honest answer is that I am not a mother alone. I hate to use the term, but I had a great teammate. Chris and I were parents together and we never viewed raising our children as *my* responsibility. We viewed it as *our* responsibility. And in order to be able to do that, we had to look at all of the tasks that needed to be accomplished and all of the wishes that we had, and we needed to prioritize what was important. And for the rest, we had to either contract it out or not do it.

For me, I will say there was a lot of guilt on occasion. My mother stayed home and she dusted, vacuumed, and cleaned the entire house every single day. I could not do that. I also could not let myself feel like a failure for not doing that, because that was not important. I think that is the hard thing about being dual military or being a single parent. It is accepting the fact that you cannot do everything and you have to give yourself permission to let some things go. That does not mean that you let your children down, or your parents down, or yourself down.

And so, I will try to get through this without crying. When I was a staff judge advocate (SJA) in Iraq as a colonel, I came back on rest and recuperation leave. It was around Christmas when I was leaving again and I felt like I was leaving my daughters. This was my second deployment. I left Chris there with girls in high school. I am beating myself up a little bit. I forget to follow my own advice. I get back to Iraq and I dump my bag out on my bunk. I find a note from my oldest daughter and what she says in the note is, "Mom, I know you feel really guilty about leaving us but you should not. You have been a great mom. We always knew you were there for us. We always knew you loved us. We always knew you would do anything for us. But you have also done the things that have made us proud to be your daughters, made us proud to have you as part of our family. We look up to you. So do not beat yourself up. You have given the best example that you could give your own daughters." Now, I have saved two notes: the one where Chris told me he loved me in college, and that note because that was like they are telling me I have to listen; caution myself, as they say. So thank you, Jackie.

COL Abbott: Ma'am, if you look around this room, you see leaders from every Service and every rank. It is just a great collection of the future of our military. What would you say is the most powerful thing that they can take away from your comments today?

LTG (R) Darpino: You know, this is a Gray & Propp-Fowle chair lecture. I think the most important thing is that you, as leaders, really have to keep your eye open for opportunities to force change, but that is not enough. You have to have the courage to do so. You have to be willing to be the person who is going to push for that change, and know that the right people in the right jobs are going to change minds. Be not afraid to do what is right. Ask, just like—as I mentioned earlier—General Huffman asked for that battle roster. He did not know that someone was not going to take women, but he asked the right question and then he forced change. He did not ask, "Did you replace anybody?" He said, "Take your best. I know that is not your best." Be prepared to force that change. That is your responsibility to every member of your team. Do not let them be overlooked.

COL Abbott: I think that is an extremely powerful mandate. The ability to impact change and to give everyone a voice and ensure that everyone has the opportunity to be successful is important. But just as you did throughout your career, some of these individuals may run into some naysayers. When they run into those naysayers, what is your most powerful strategy to avoid getting caught up in the naysayers and staying focused on what you have to do?

LTG (R) Darpino: I feel like anybody that is of my generation could be asked that question. I am looking at folks in the audience. With the naysayers, you have to hear what they are saying, because you cannot ignore it. You have to hear what they are saying. And then, I think it really is helpful to try to understand *why* they feel that way. Because just to put out the hand and ignore it does not validate that individual's being part of your team or outside your team. But if you understand why they feel that way, you then can impact change by showing them that their concerns are really not an issue.

Okay. Wow, that was convoluted. So let us just go to General Carey. General Carey knew that naysayers were out there saying

that they did not want women on their team. He knew why that was; but, he did not ignore it. Instead, he sent that brigade paralegal non-commissioned officer down there—who was fantastic—knowing that that guy was going to have to either come to his office and give voice to why he did not want her, or, he was going to have to accept her. But if you do not understand the arguments that are out there, then you don't have the ability to combat them. I think listening, but not letting them sway, is important.

COL Abbott: Ma'am, in the Leadership Center's curriculum, we often talk about how attentive listening is a huge part of effective communication—the importance of not just listening to the words, but actually hearing what is being said. You can sit here and you can focus on what is being said in front of you. But if you are not paying attention to the details of what is being said, you may never really take away the message. I think that goes into what you were just saying. You have to hear what is being said and then make the decisions based on your best interest or the interest of the command or your client.

When you are looking at tough decisions with tough clients, we talk about principled counsel and being able to deliver those hard messages sometimes to clients who just are not interested in hearing what you have to say. I think you said it very well earlier. It was something to the effect of: "It is not the lawyer, it is the law." What was your go-to for dealing with tough commanders or clients when you had to deliver difficult advice?

LTG (R) Flora D. Darpino provided the Second Annual Kenneth Gray & Phyllis Propp-Fowle Lecture to the 71st Graduate Course in April 2023. (Credit: Billie Suttles, TJAGLCS)

LTG (R) Darpino: First of all, I think you have to pick your moment, not pick your battles, because you have got to fight the battles that need to be fought. You cannot let something unethical slide. Those battles need to be fought, but you have to pick the right moment. I think judge advocates are extraordinarily lucky in that we have access. We're often the fly on the wall. So, we hear those things, and then we know that we have the ability to address it because we have established ourselves as being honest, being creative thinkers, being problem solvers, that we can pick the right time. Typically, it is not, "Hey, sir, that ain't right." That is not what we do. That does not help us further the goal of having them do the right thing. It is very important that we find the right moment to do those things, and that's done by being there and speaking their language.

First Sergeant Tiffany Diringer: Ma'am, what advice would you give to the leaders who are choosing people for positions where they are going to meet resistance and to ensure that leaders know that they are putting the right people in the right places?

LTG (R) Darpino: I am not so sure that my advice would be any different than advice I would give a leader when they were going to work for a tough boss. I will tell you this. I do not know if we have all heard the saying, "Every SJA needs an SJA." You always need that person you can go to for advice. There have been occasions when somebody was going into work for a really tough, tough commander, and they would get that phone call. It would be from somebody who had already served with that person, and they would say, "Okay, this is the way it works. You walk in the room, you say something, and immediately they scream at you. All they are trying to do is to see if you are a scared rabbit. If you are a scared rabbit and you run away, you will never succeed with that guy. So, when they start to scream at you, you need to stand really tall and say, 'I don't think it works that way, sir. Here is what I think.'"

I would submit that you really have to handle this inequity-in-leadership challenge in the same way. You would have to say to

LTG (R) Flora D. Darpino and her husband, COL (R) Chris O'Brien, stand next to the newly unveiled display box in the regimental mess at TJAGLCS. (Credit: Billie Suttles, TJAGLCS)

that leader, "That's a command where there have not been women before. I would not be surprised if they hit a lot of resistance." It is your responsibility to make sure they know you understand that, that you are there when they need you, and that there is this back channel that they can always call when something happens. You need to be their backstop, even if you are not going to intervene, because they do not need your help, they just need your support. They can handle themselves, but you need to be there for them when they need you. That is what I would do. I hope I answered your question.

Lieutenant General Stuart W. Risch: Many may not know that when General Darpino was TJAG and General Pede and General Wilson and I were one stars, she came to us and asked a question: "It seems like mentorship is not all that it should be within our Regiment. Should we start a formal mentorship program?" All of us were adamant in saying, "Absolutely not. It has got to be informal. People have to gravitate to the leaders that they want to come to." Fast forward to where we are right now, I hope you all realize we are starting a formal mentorship program. Well beyond her time, she understood that.

Ma'am, in light of that, I'd ask you along the mentorship lines, especially in an environment where you may have been the only woman there, what was it like? To whom did you go to for mentorship? And, to tie it back to diversity, equity, and inclusion, who were those diverse leaders for you and the non-diverse leaders as well? Then, how did you flip the script when you were the leader seeking to be a mentor for others, as well?

LTG (R) Darpino: I guess he's the big guy, so he gets to ask the really tough questions now. [Laughter].

Thank you, Stuart. You are correct. I had one female boss my entire career, and that was only for about eight months. So I only had male bosses. Some of my bosses, like General Odierno, were as big as a doorframe. His mere presence in a room commanded respect. You know, the Secretary of Defense, Lloyd Austin, same sort of thing. So I cannot emulate them because, well, I'm not going to go there. But, I can look at what they do as leaders. I can say that is what I think works. For example, General Odierno and General Austin are both incredible at making eye contact. That is something that I can do.

I do not think mentorship necessarily means that if you do not have mentors, you will not be successful. If you are introspective and you think about who you are and you look for attributes that you think will work for you as a leader. I cannot really say that I had mentors because I did not. Now, I did have Chris O' Brien, but I did not have any senior mentors. It was based on that that I thought that it was my responsibility

to help others. I had to find people that I saw promise in and I had to make sure I helped further their career.

What does that mean? It means each of you is a talent scout. You find those people that have great potential and then you help them reach and achieve that potential. It also means—and, I hesitate to say this—that there are some times where people need to be coached that maybe this life is not for them. That is a more delicate conversation, but it's another important form of mentoring. Perhaps they are a great, great attorney, but this moving every two years and changing jobs is not what they want. I think you always have that responsibility to find those people, make sure that you help lead them to greatness, and continue to be a talent scout.

COL Abbott: Ma'am, very similar to that last comment about being a talent scout; other services call it sponsoring. In the Army, we've often called it being a champion for someone or being that voice in the room. When you're looking for those individuals to champion and to be a talent scout for, at what point do you capitalize the conversation to get their name out there or to put their name before other leaders who may not otherwise recognize their talent? Or, is there a point that might be considered too far?

LTG (R) Darpino: I have never asked for someone to work for me. I have always been given whoever the JAG Corps sends. What I thought was important throughout my career was to get to know people and find that talent. If I continued to surround myself with people that were potentially like me and that I liked, I was not going to grow as a leader either. And so, I never asked for someone to work for me. But, throughout my career, when an opening was coming up and I knew someone who I think is really good for that job, I feel I have a responsibility to say, "You are starting the Leadership Center. I think maybe you ought to look at this guy, Abbott."

COL Abbott: There are a lot of questions on that still, ma'am. [Laughter].

LTG (R) Darpino: Maybe I would say, "You have got to look at Abbott. You have got to look at Martin. You have got to look at Dunlap. These are folks that have that skill set." That is my responsibility. As a leader, you have a responsibility to make the organization stronger. And so you must do that.

COL Abbott: Ma'am, obviously, the topic of our discussion today has covered a lot of bases, but the primary focus is diversity, equity, and inclusion. You talked about some of the extremely impactful decisions and advice you have given to your clients to further women in combat, to improve the foxhole for persons of color, and basically, to give everyone the same opportunities. Is there anything you'd recommend we particularly focus in on with our efforts, be it women in leadership positions or persons of color moving through the ranks? Or, is it just keeping that eye open for talent and making sure we put the right people in those jobs?

LTG (R) Darpino: I think that is a tough question. Thank you for that one. It is such a balance. It really is such a balance. Leadership itself, I mean. Some people believe you are born a leader. Are you born a leader? Can you learn to be a leader through training? There are all these debates surrounding the subject. I truly believe being a leader is about caring. It is about caring for the people that work for you. It is about caring for the mission. It is about trying to care about people's success: your clients, the people who work for you, and your peers. I've always been the person who would prefer to be in the background making sure other people succeed. Being in the spotlight has always been dreadful for me. I do not like it; I get nervous.

Right. Where is this coming from? Where is this going? I think it is a balance. You really do have to figure out how to make sure that the right people are given the opportunity to succeed. Again, that goes back to knowing them. There are going to be some people out there who, because of their background, whatever that may be, have had to work so much harder than those around them and they really deserve to have that chance. You see them getting overlooked even though they have worked so hard to get where they are. If you know their talent, then you absolutely do have a responsibility. That goes back to caring about people and caring about the organization because you want everyone to be the best they can. You want to give them their opportunity. You also want to make sure that you are cultivating leaders for the future and not picking the same team every time. And so are the guys—you know I say, guys, I'm from the Philly area, so that means men and women—whose hand is going up all the time. What about the person in the back who's a little quieter, but gosh darn it, they are good. Come on. It is your chance. I think it is a balance.

COL Abbott: Ma'am, I have one final question for you: since you have left the JAG Corps, what do you miss most about it?

LTG (R) Darpino: Oh, I think that that's a pretty obvious answer. It is not the stage. No, it is all of you. That is what it was always about. It is always about the people. No matter what grade you are, no matter what you do, it is the people. I walk in this place and I am seeing lieutenants walk by, I am seeing majors, and I am like, "Oh, my God. I miss this." I miss the talent. I miss the conversations. I miss my teammates. That is the hardest part about walking away. I do not necessarily miss the legal work. I do to some degree.

It is a team. I have been part of one of the greatest teams for thirty-plus years. Then, suddenly, they are like, "Go home to your husband. Have a good time." Take advantage of this. Take advantage of that. We were, this weekend, with friends of ours that we made in the Basic Course. I mean, seriously, they are the ties that can never be broken.

COL Abbott: Ma'am, thank you so much for joining us today and spending the majority of your day with us. It's been an honor.

Notes

1. This transcript has been edited for brevity and clarity.

Luggage layout at CRC prior to deploying. Although individual orders may vary, deployers are typically authorized four bags to carry their issued equipment and personal effects. Luggage can be duffle bags, rucksacks, or roller bags, and should generally be camouflage patterned or black. (Photo courtesy of author)

What's It Like?

You Have Been Tagged for an Individual Deployment. Now What?

By Captain Nino C. Monea

With deployments becoming rarer, especially for judge advocates, a Soldier may serve for years without ever being part of a unit deployment. An individual deployment as an augmentee is an alternative path to gain the invaluable experience of serving down range. Some people may actively seek it out by searching the Worldwide Individual Augmentation System (WIAS) tasker[1] or asking to deploy as part of a routine permanent change of station cycle. Others simply receive notice they are slated to deploy. However you come by the opportunity, the individual deployment process can be daunting. Unlike a unit deployment, where you will have battle buddies going through the steps with you and a higher headquarters directing your deployment processing, an individual deployment requires a degree of self-motivation to ensure you get out the door on time and fully prepared.

This article aims to serve as a guide to first-time individual deployers, particularly those who are relatively new to the Army and might not know what to expect. The observations in this article are drawn from several recent individual deployers. Everyone had a slightly different process,

but consistent best practices were to jump on tasks as soon as you can and seek help from as many sources as possible. This article discusses six major phases that occur once you have been informed about your individual deployment: getting in touch with your forward unit, requesting your orders, completing pre-deployment tasks, scheduling and packing for travel, attending pre-deployment training at Fort Bliss, and final preparations.

Coordination with Your Forward Unit

First things first: get in touch with personnel at your gaining unit. Talking with people doing your future job will not only give you a sense of the work but also help you figure out what to bring (as you may not receive a formal packing list), what life is like on the base, and the other steps in this deployment process.

Senior leaders in your office will likely be able to help identify names at your forward unit, but you should also lean on your network of Judge Advocate General's Corps colleagues. Do you know anyone who deployed in the past with your gaining unit, or even to the region? Reach out. The Judge Advocate General's Corps Personnel Directory[2] might not have an up-to-date listing of judge advocates who are deployed, but it probably will contain contacts for the higher headquarters of the forward office. The higher headquarters will likely be able to help get you in touch with its deployed personnel.

Your Request for Orders and the Orders Process

Second, be on the lookout for your request for orders (RFO). Your home unit will use the RFO to produce the official orders for your assignment. An RFO will contain information about your deployment, such as length, location, job description, certain required items, clearance level, and your deployment status.[3] Some may contain more information than others.[4]

The RFO will probably come from the Personnel, Plans, and Training Office (PPTO), and you should have it a few months before you deploy. If you have not received your RFO by three months out or so, ask your supervisor to reach out to PPTO. You will not be able to properly start the rest of the process until you have it.

The CRC Barracks at Fort Bliss, TX. During CRC, deployers stay in a barracks room about the same size as those at DCC in Fort Moore, GA. Deployers should bring their own sheets, pillows, and personal hygiene supplies, as CRC will not provide them. (Photo courtesy of author)

As soon as you receive your RFO, start working to get your formal orders cut. The recent transition to IPPS-A[5] may streamline this process for some, but best not leave things to chance. It is better to get familiar with the various staff sections of your home unit to guarantee everything necessary is being done. Recall that S1 is personnel, S2 is intelligence, S3 is operations, S4 is logistics, S5 is plans, and S6 is signal.[6] Typically, the S1 or S3 shops will take the lead, but every unit is a little different, so the safest course of action is to go to every staff section, explain your situation, provide them your RFO, and get a point of contact that you can follow up with to ensure the ball is rolling along. The most important thing is figuring out who specifically will be responsible for cutting your orders, or, if it turns out your RFO has an error, figuring out who will correct your orders. Correcting an RFO can be extremely onerous and can take weeks, so tarry not!

Another office with which you should be talking to help convert your RFO into orders is your installation's unit deployment manager (UDM). This individual might be located under a "Deployment and Mobilization Office" or "Deployment Readiness Office"; the best bet may simply be to search online for your base's directory. Talk to the UDM early and bring your RFO. They might ask you to go through your staff sections first, but they can review your RFO to ensure it is correct. The more time you allocate to square yourself away, the easier it will be.

Pre-Deployment Tasks to Complete

Once you receive your RFO and identify the personnel who will help you get your orders, you should start completing as many pre-deployment readiness tasks as you can. Do not wait for your official orders before starting. The biggest category to address is medical issues. Check out the Medical Protection System (MEDPROS)[7] and schedule appointments for anything that is listed as a

Teammates at Special Operations Joint Task Force–Central. From left to right: Ms. Charlotte Garrett, USAF; LT Lauren Sides, USAF; and CPT Nino Monea, Army JAG Corps. (Photo courtesy of author)

deployment-limiting deficiency.[8] Schedule pre-deployment concussion testing (Automated Neurocognitive Assessment Metrics, or ANAM).[9] If you are at an installation that offers a Soldier Readiness Program (SRP),[10] schedule an appointment. If not, do not worry; you will be able to complete it during pre-deployment training at Fort Bliss.

Beyond medical issues, there are many other tasks to complete. If you wear glasses, get two sets of them and gasmask inserts. Ensure you have two sets of dog tags. Talk to your forward unit about getting network access request packets to help you get on their computer systems and determine if you need a Secure Internet Protocol Router (SIPR) token to access classified systems. They can also help you put in exception-to-policy requests if needed. Most of the tasks will require coordinating with the S shops—all the more reason to establish contacts with each of them early. For example, the S1 shop can help validate your DD Form 93 (Record of Emergency Data)[11] and Servicemembers' [sic] Group Life Insurance allotments,[12] renew your (and your dependents') ID cards if they are set to expire while you are away, and start the process on finance issues (if you have dependents, you should receive family separation pay).[13] If you need to request a higher clearance for your deployment, S2 can start the investigation process.[14] The S4 can sort through Government travel card issues and may be able to let you draw equipment for your deployment, and so on.[15]

Scheduling and Packing for Travel

Once you have your formal orders, you can start booking flights. Flights will normally be handled by your S4 shop,[16] your installation port call office,[17] or the CWT Sato (SATO) travel office.[18] Regardless of what you use, it is prudent to get the number for SATO in case you need to change your flights mid-travel due to cancellations or other hiccups. At installations without a UDM or port call office, the process is different. Mainly, you will be working with the S shops that fill this role, most likely the S4, and will use the line of accounting number on your orders to book the flight. No matter your method, the flight will likely be to Fort Bliss for pre-deployment training, and then the team at Fort Bliss will book your flight to your final destination.

For each leg of your journey, your orders should state how much luggage you are authorized to bring, normally up to four bags of up to seventy pounds each (backpacks, duffel bags, rucksacks, or roller bags) on your flight overseas.[19] Unless you are traveling light, you have to pack strategically. Mandatory gear includes a helmet, body armor with plates, and, for U.S. Central Command, chemical gear. That alone will probably fill up about one ubiquitous green duffel bag and weigh close to fifty pounds. If you struggle to pack compactly, consider investing in a large, tri-wheel military roller bag.[20] Another strategy is to reach out to your gaining unit for their mailing address and ship yourself a box of civilian clothes and whatever other

keepsakes you will need. Just be sure to check mail restrictions for your destination country,[21] and allow a couple of weeks for it to arrive.

Your flight overseas will be extremely long; make sure one of your bags is appropriate for a carry-on and bring whatever you need to make the flight bearable (such as earplugs and movies downloaded onto your laptop). In the author's experience, your flight will be on a chartered commercial airplane (in uniform), rather than a military aircraft, so you will travel in relative comfort but have numerous, lengthy layovers. Worst case scenario, your flight will be delayed multiple days, so account for that when packing your carry-on bag.

The Continental U.S. Replacement Center at Fort Bliss

Individual deployers must ordinarily complete a ten-day training at the Continental U.S. Replacement Center (CRC) at Fort Bliss, Texas, immediately before deploying.[22] Military deployers fall under Alpha Company.[23] Think of it like a condensed version of basic entry training: you will be staying in a barracks room, following a fairly rigid schedule, and checking off completion requirements in a group. Completion requirements vary by the region and country of deployment, but the main components include PowerPoint trainings, computer-based trainings, an SRP,[24] weapons draw and qualification, and an equipment draw.

As soon as you get your RFO, go to the CRC website and request a welcome packet.[25] It will tell you what you need to bring and what kind of online trainings to complete. It would behoove you to start chopping away at the online trainings while still at your home station as some require a Government computer to access (be sure to save digital and physical copies of your training certificates and bring them). You should also fill out a CRC reservation form about forty-five days out, but no less than two weeks out, even if you do not have your orders yet.[26] The more you complete beforehand, the smoother it will go at CRC. It is important to avoid failing to complete all of the requirements within the ten-day timeline and being forced to re-cycle. However, you should hold off on your pre-deployment health assessment, and periodic health assessment.[27] These must be completed no more than twenty-five days before the SRP at Bliss,[28] which will probably be about halfway through. Doing your pre-deployment health assessment and periodic health assessment two weeks before arriving at CRC is a good rule of thumb.

Humanitarian aid mission to Kyrgyzstan, done in partnership with the U.S. Embassy in Bishkek. From left to right: CPT Jack Leeton, USA; a Kyrgyz officer; and CPT Nino Monea, Army JAG Corps. (Photo courtesy of author)

In terms of living arrangements at CRC, linens are not provided,[29] so bring things to furnish a spartan barracks room: bedsheets, a pillow, shower shoes, bath and hand towel(s), soap, and any other personal hygiene products you cannot live without. You can only wear your combat uniform or physical training uniforms, so do not bother bringing a lot of civilian clothes to CRC.

While at CRC, you will also complete two equipment draws: Central Issue Facility (CIF) and Rapid Fielding Initiative (RFI). Upon redeployment you will mostly get to keep the RFI-issued equipment (generally anything that directly touches your skin), including combat jackets and pants, gloves, and eye protection. Most of it is optional to draw, but you will probably be required to take a helmet and body armor. You will have to return most of the CIF-issued equipment upon redeployment. The timing

of your equipment draw must be separately considered. If you have your home station issue any of this required gear, you can bring that with you to CRC to avoid drawing more, but the downside is that you will have to lug it around for longer. Alternatively, your forward unit may be able to request a waiver for CRC or for drawing certain equipment. If you do not think you will need any of the equipment or preparedness tests that CRC offers, inquire with your forward unit about waiving it. Be forewarned: waiving CRC altogether requires very high approval, so give lots of lead time.[30]

Final Considerations

Finally, here is a little bit of practical advice that should hold up for just about any deployment. Some mobile device plans are better than others when it comes to international data and messaging, so it pays to research your options prior to deploying. No matter your data plan, you can utilize third-party apps for encrypted communications. It is recommended that you download a virtual private network prior to getting to your deployment location because many local wi-fi connections block this type of activity. For additional connectivity, you can purchase a wi-fi puck if your deployed station does not offer reliable internet.

Additional military and non-military benefits may become available during your deployment. If you have student loans, contact your providers and tell them that you are deploying, as you may be entitled to special benefits. Various organizations provide care packages and letters to deployed Soldiers or Family members who are staying behind.[31] The DoD Savings Deposit Program (SDP) allows you to earn 10 percent interest on up to $10,000 while deployed, and for three months after redeployment.[32] Once you have arrived in theater, contact your local S4 section about whether your unit is enrolled in the Army Direct Ordering Program, which allows deployed Soldiers to request replacement uniform components.[33] If you are deployed to an area qualifying for combat zone tax exclusion, you may be able to contribute more than normal to your TSP account.[34]

As you approach the date of deployment, stay calm even if things appear to be going haywire. Odds are something will not go as planned. Two weeks out from my deployment, my Government travel card was suspended for suspicious charges, my orders were not yet finished, and my company commander told me I likely would not deploy on time. But I managed to surmount these obstacles, get orders with three days to spare, and board the plane on time. Best of luck![35] **TAL**

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Notes

1. Individual deployment opportunities are catalogued on a platform called "Tour of Duty." More information can be found at *HQDA G-3-5-7 Mobilization Division Tour Of Duty*, U.S. Army Human Res. Command (June 27, 2022), https://www.hrc.army.mil/content/HQDA%20G-3-5-7%20Mobilization%20Division%20Tour%20Of%20Duty.

2. U.S. Army Judge Advoc. Gen.'s Corps, JAGC Personnel Directory (1 Dec. 2022). The directory is published annually each December and is available on JAGCNet: https://www.jagcnet2.army.mil.

3. *See, e.g.*, U.S. Dep't of Army, Pam. 600-8-105, Military Orders fig.2-8 (20 Dec. 2022) [hereinafter DA PAM. 600-8-105] (depicting a sample of a completed DA Form 2446).

4. *See id.*

5. *See What is IPPS-A?*, IPPS-A, https://ipps-a.army.mil/what-is-ipps-a (last visited June 6, 2023).

6. U.S. Dep't of Army, Field Manual 6-0, Commander and Staff Organization and operations para. 2-46 (16 May 2022) [hereinafter FM 6-0].

7. *MedPros*, U.S. Army, https://medpros.mods.army.mil/portal (last visited Apr. 18, 2023) (requiring a Common Access Card to visit).

8. *See* U.S. Dep't of Army, Reg. 40-502, Medical Readiness 10 tbl.2-2 (27 June 2019).

9. *See Neurocognitive Assessment Branch (ANAM)*, U.S. Army Med., https://armymedicine.health.mil/Regional-Health-Commands/Office-of-the-Surgeon-General/R2D/ANAM (last visited Apr. 18, 2023).

10. U.S. Dep't of Army, Reg. 600-8-101, Personnel Readiness Processing ch. 4 (6 Mar. 2018).

11. U.S. Dep't of Def., DD Form 93, Record of Emergency Data (Feb. 2023).

12. *Servicemembers' Group Life Insurance (SGLI)*, U.S. Dep't of Veterans Affs., https://www.va.gov/life-insurance/options-eligibility/sgli (last visited May 13, 2023).

13. *See* U.S. Dep't of Def., DD Form 1561, Statement to Substantiate Payment of Family Separation Allowance (FSA) (1 Dec. 2017); FM 6-0, *supra* note 6, paras. 2-47 to 2-48.

14. *See* FM 6-0, *supra* note 6, paras. 2-51.

15. *See id.* paras. 2-58, 2-62.

16. *See id.*

17. If you have not heard of port call, this is a good time to search online for your base directory again. It may also be called some variation of "overseas travel office" or "OCONUS travel office."

18. CWTSATO Travel, https://www.cwtsatotravel.com (last visited May 13, 2023).

19. *See generally* DA PAM. 600-8-105, *supra* note 3, ch. 2 (discussing the type of information contained in an order).

20. For examples, see *Mercury Luggage Deployment Bag with Wheels Military Trolley Bag*, Jinfa Outdoor, http://www.jinfaoutdoor.com/p/3-359.html (last visited Apr. 18, 2023). No endorsement intended; this merely demonstrates the product.

21. *International Shipping Prohibitions & Restrictions*, U.S. Postal Serv., https://www.usps.com/international/shipping-restrictions.htm (last visited Apr. 18, 2023).

22. Memorandum from Alpha Co. Deployment Commander, CONUS Replacement Ctr., subject: Fort Bliss CONUS Replacement Center (CRC) A Co. Mobilization Welcome Letter, para. 11(i)(1) (12 Oct. 2022) [hereinafter CRC Welcome Letter].

23. *See id.*

24. Even if you completed a Soldier Readiness Program at your home station, you will have to do it again at the Continental U.S. Replacement Center. But it is still smart to complete one at your home station, as it is easier to fix deficiencies there.

25. *See Military Deployers*, U.S. Army Fort Bliss, https://home.army.mil/bliss/index.php/units-tenants/crc/military-dod-civilian-deployers (last visited Apr. 18, 2023).

26. *Id.*

27. *See* CRC Welcome Letter, *supra* note 22, para. 6(b). To complete your health assessments online, visit https://medpros.mods.army.mil/portal (common access card required), and follow the link under "Self Service" for health assessments. From there, select the tabs for each assessment.

28. CRC Welcome Letter, *supra* note 22, para. 6(b).

29. *CONUS Replacement Center*, U.S. Army Fort Bliss, https://home.army.mil/bliss/index.php/units-tenants/crc (last visited Apr. 18, 2023).

30. CRC waiver requests should be submitted to Headquarters Department of the Amy, G-3/5/7, ATTN: Current Operations Contingency Plans Division (DAMO-O0), 3200 Army Pentagon, Washington, DC 20310-3200, and be routed through your deployed unit.

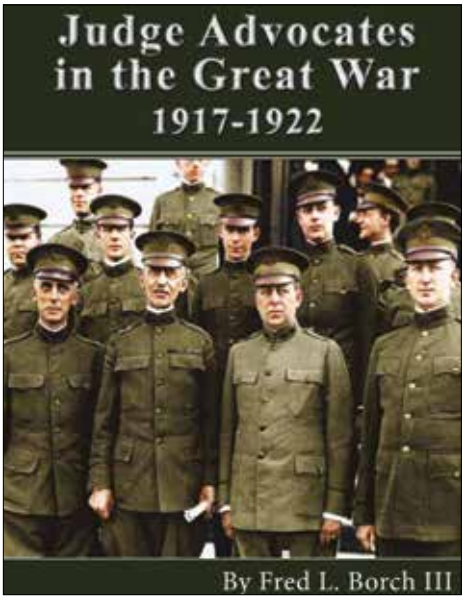
31. *E.g., Deployed Support*, Soldiers' Angels, https://soldiersangels.org/get-support/deployed-support (last visited Apr. 18, 2023).

32. *Savings Deposit Program*, Dep't of Def.: Mil. Compensation, https://militarypay.defense.gov/Benefits/Savings-Deposit-Program (last visited June 6, 2023).

33. *E.g., Army Direct Ordering Sustains Deployed Soldiers*, Def. Visual Info. Dist. Serv. (Mar. 14, 2009), https://www.dvidshub.net/news/31112/army-direct-ordering-sustains-deployed-soldiers.

34. *See* Combat Zone Tax Exclusion, Touchpoint Curriculum (2020).

35. Captain Monea is happy to answer questions and can be reached at antonino.c.monea.mil@army.mil.



Book Review

Judge Advocates in the Great War: 1917–1922

Reviewed by Captain Bradan T. Thomas

Mr. Fred Borch has done it again. More than twenty-five years in the making, *Judge Advocates in the Great War: 1917–1922*[1] masterfully shepherds readers through the history and evolution of the U.S. Army Judge Advocate General's (JAG) Corps during its critical development more than a century ago.[2] Dividing his coverage of legal operations during the Great War geographically, Mr. Borch provides a host of information about how our organization supported the Allied war effort on multiple fronts. Through expert use of primary sources, *Judge Advocates in the Great War: 1917–1922* whisks readers effortlessly from the marbled halls of Washington, D.C., through the damp trenches of France, to the frozen tundra of Siberia, all places where judge advocates (JAs) served dutifully.[3]

While Mr. Borch is a stalwart champion of preserving our Corps's history and development on an organizational level,[4] the focus of his latest monograph is more granular and personal. Beyond mere descriptions of the remarkable feats the JAG Corps accomplished as a whole during the global crucible of World War I, *Judge Advocates in the Great War: 1917–1922* devotes individualized attention to the JAs who served in the Great War. More than a thin roster of names or a simple list of service dates, Mr. Borch presents biographical information and available personal data on nineteen "legal clerks" and each of the 436 JAs who served our Corps during the Great War.[5]

Opening with a brief history of the Army when the United States entered World War I, Mr. Borch sets the scene for its dizzying expansion from a force of 133,000 Soldiers to a mighty titan composed of nearly three million (due largely to conscription overseen by a JA).[6] Of course, to serve its purpose, the War Department needed to clothe, train, and transport this mass levy; this challenge required new infrastructure and partner-force cooperation.[7] Eventually, some two million "doughboys" served in the American Expeditionary Forces (AEF), which General John J. Pershing organized into two armies, seven corps, and forty-two divisions.[8] General Pershing's AEF supported the Allied cause throughout the United States' involvement in the war, fighting in battles such as Cantigny, Château-Thierry, and Saint-Mihiel.[9] Doughboys also carried the Allied torch at the Meuse-Argonne offensive, which proved decisive in "the war to end all wars."[10]

Alongside the Army's rapid growth was the culling of a robust pool of uniformed lawyers to advise, assist, and accompany the fighting force wherever the war required. Two months after Congress declared war on the Central Powers, the War Department sought to expand the JAG Corps by commissioning twenty civilians to serve as JAs.[11] Soon thereafter, Congress authorized the appointment of additional uniformed attorneys in the JAG Corps, prompting interest from over five thousand applicants; the War Department offered commissions to approximately three hundred.[12]

With additional legal support to AEF operations, the Army asked more of the JAG Corps and its newly commissioned JAs than ever before, and both did what they do best: they rose to the occasion. Mr. Borch outlines the impressive performance of numerous JAs who shaped our Army and our Corps into the fighting force we know today. One such individual was Major General Enoch Crowder, whose served as the Judge Advocate General for twelve-years.[13] His tenure as the Judge Advocate General coincided with his appointment as the Provost Marshal General, the role in which he oversaw the Selective Service Act that effectuated the military draft of millions of Americans.[14] Major General Crowder was instrumental in several changes that resonate throughout our Corps today, such as overseeing revisions to both the Articles of War and the *Manual for Courts-Martial*.[15] Another example of selfless service in uncertain times was future Supreme Court Associate Justice Felix Frankfurter, who left his position on the Harvard Law School faculty in 1917 to serve as Secretary of War Henry Stimson's legal counsel in Washington, D.C.[16]

Much like today, JAs' call to service during World War I extended beyond domestic borders, leading to their practice in increasingly complex and untrodden legal territory. Mr. Borch deftly captures the JAG Corps's wholesale evolution from a barebones, nearly dormant force to a full-scale, tiered legal organization replete with nine "bureaus" of practice specially created to meet the demand of a global conflict.[17] While these practice areas have evolved over the last century, the JAG Corps mission has remained the same: to provide "principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army."[18]

In describing the development of and approach to new practice areas and

Sergeant Major Edmond G. Toomey (standing) was a legal clerk assisting Major Albert J. Galen (seated) in Siberia. (Credit: Fred L. Borch III)

legal issues, such as conflict of laws, fiscal concerns related to expenditures abroad, and court-martial jurisdiction over Civilians accompanying the force,[19] Mr. Borch provides insight about the JAs who oversaw and effectuated those advancements. From then-Brigadier General Walter Bethel, the top AEF attorney and adviser to General Pershing,[20] to Major John White, who worked to formalize the Army's criminal jurisdiction over its own Soldiers in the United Kingdom,[21] JAs sought to provide solutions to both existing and forecasted problems. This included efforts away from the front lines, such as the public campaign of then-Brigadier General Samuel Ansell, Acting Judge Advocate General between 1917 and 1919, to reform the Articles of War in favor of affording more due process to Soldiers facing court-martial.[22]

Beyond coverage of sweeping organizational changes, the showpiece of *Judge Advocates in the Great War: 1917–1922* is the detailed compendium of biographies that covers each of the 436 JAs who made those changes possible.[23] Recognizing that "[o]ur Army's people are our greatest strength,"[24] Mr. Borch honors the service and preserves the memory of those who sported the quill and sword insignia on their lapels during the Great War, providing as much detail as primary sources allow.[25]

Thanks to Colonel William Seward Weeks and his foresight in collecting and organizing these biographies a century ago[26] (and to Mr. Borch for unearthing them some years later), we now have an unrivaled opportunity to commune with our professional predecessors and learn about those that helped to grow and shape our organization. These biographies, some of which accompany questionnaires that offer additional detail, provide a snapshot of each JA's wartime duties and, in some cases, fascinating specifics about their impressive pre- and post-war endeavors.[27]

Numerous JAs who served in the newly expanded JAG Corps went on to excel in various capacities, both in and out of uniform. At least sixteen of the 436 JAs who served in the Great War became general officers (to include eight judge advocates general),[28] and countless others continued to serve honorably at lower ranks.[29] Of those who hung up their uniforms after the war were fifteen judges serving at all levels and in multiple countries (to include the U.S. Supreme Court and one of the war crimes trials convened at Nuremberg following World War II), four congressmen, three senators, three college football coaches, two secretaries of war, one Olympian, and numerous professors at prestigious law schools (plus one dean).[30] Beyond this impressive slate of individuals, JAG Corps alumni served nationwide in numerous elected and nominative positions at the Federal, state, and local levels.[31]

Among perhaps the most notable figures outside of the JAG Corps (in addition to Associate Justice Frankfurter) are Lieutenant Colonel Edmund Morgan, who chaired the committee that ultimately

proposed the Uniform Code of Military Justice after World War II,[32] and Colonel John Wigmore, whose widely hailed treatise on evidence was the precursor to the Federal Rules of Evidence.[33] While these are but a few concrete examples of JAs who extended influence well beyond their uniformed service, each of the 436 JAs who served in our Corps during World War I undoubtedly informed our modern practice.

To excel and adapt to the needs of the future, we, as a Corps, must understand and appreciate our past. While the legal challenges we face are modern, our ability to surmount them is not—it has been the lifeblood of our organization since 1775.[34] Through changed conditions, shattered paradigms, and unpredictable outcomes, we are connected to our past—collectively and individually—through the oath we take, the insignia we wear, and the organization we serve. Our faithful Regimental Historian and Archivist has sourced and spotlighted a rare opportunity for the twenty-first century JA to connect to our Corps's past. Tomes exist on the history of the Great War, but precious is the chance to learn about each individual who selflessly contributed to the legal wellbeing of the Allied forces worldwide.

Though no person featured in *Judge Advocates in the Great War: 1917–1922* is alive today, Mr. Borch has preserved their service, sacrifice, and selflessness forever. As stewards of the dual profession of arms and law,[35] JAs owe it to their future to learn about our past. Those interested in a copy of the book may request one from the Regimental Historian and Archivist at The Judge Advocate General's Legal Center and School. **TAL**

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Notes

1. Fred L. Borch III, Judge Advocates in the Great War: 1917–1922 (2021). The Judge Advocate General's (JAG) Corps distributed copies of *Judge Advocates in the Great War: 1917–1920* throughout the Corps in late 2021.

2. During World War I, our Corps was known as the "Judge Advocate General's Department." The Judge Advoc. Gen.'s Corps, The Army Lawyer: A History of The Judge Advocate General's Corps, 1775–1975, at 198 (1975) [hereinafter JAG Corps History]. The change in designation from "Department" to "Corps" occurred after World War II. *Id.*

3. While the War Department recruited attorneys to serve as judge advocates (JAs) based on their legal acumen, some did fight in combat. For example, prior to becoming the seventeenth Judge Advocate General, then-Colonel Blanton Winship earned the Distinguished Service Cross for "extraordinary heroism in action" for having "personally led [the few available men] forward under heavy rifle, machine-gun, and shell fire," "destroying several machine guns and killing many of the enemy." Borch, *supra* note 1, at 55–56. Additionally, then-Lieutenant Colonel J. Leslie Kincaid earned the Distinguished Service Cross while volunteering to command a battalion of the 106th Infantry Regiment, which he led in combat and fought alongside, machine gun in hand. *Id.* at 57.

4. *E.g.*, Fred Borch, Lore of the Corps: Compilation from *The Army Lawyer* 2010–2017 (2018) (surveying the Corps's history in the arenas of leadership, law of armed conflict, and military justice, among others).

5. *See generally* Borch, *supra* note 1, at 105–231 (summarizing biographies and accomplishments of JAs). While more than nineteen legal clerks served alongside JAs, only detailed records of JAs are known to exist. Nevertheless, Mr. Borch profiled each legal clerk for whom a record exists. *Id.* at 237–41.

6. *Id.* at 1, 17–18.

7. *Id.* at 2.

8. *Id.* at 4.

9. *Id.* at 4–7.

10. *Id.* at 7–8. The phrase "the war to end all wars" derives from H.G. Wells's writings during the outbreak of the war, which were later compiled into *The War that Will End War*. H.G. Wells, The War that Will End War (1914). He later wrote in *In the Fourth Year* that the phrase was popularized in late 1914. H.G. Wells, In the Fourth Year: Anticipations of a World Peace, at i (1918).

11. Borch, *supra note* 4, at 15.

12. *Id.* at 16.

13. While the senior uniformed attorney in the U.S. Army is currently "The Judge Advocate General," that position was formerly "the Judge Advocate" prior to 31 January 1924. JAG Corps History, *supra* note 2, at 139.

14. Borch, *supra* note 1, at 17–18. See generally Joshua E. Kastenberg, To Raise and Discipline an Army: Major General Enoch Crowder, the Judge Advocate General's Office, and the Realignment of Civil and Military Relations in World War I (2017), for a comprehensive overview of Major General Crowder's contributions to the JAG Corps during World War I.

15. Borch, *supra* note 1, at 17.

16. *Id.* at 19–20. While then-Major Frankfurter accepted a commission in the JAG Corps, it would be a mistake to call him a "uniformed" attorney, as he opted to wear civilian clothes during his service. *Id.*

17. *Id.* at 37. The nine "bureaus" were "Executive Administration, Discipline and Courts-Martial, Contracts and Finance, War Risk Insurance, Administrative Law, Transportation Matters, French and International Law, Civil Affairs, and Constitutional and Statute Law." *Id.* at 37–38.

18. U.S. Dep't of Army, Field Manual 1-04, Legal Support to Operations para. 1-1 (8 June 2020).

19. Borch, *supra* note 1, at 40–43, 51–53.

20. *Id.* at 37–38.

21. *Id.* at 42–43.

22. *See id.* at 24–30. See generally Battlefield Next, *Interview with Mr. Fred Borch on the Ansell-Crowder Controversy of 1917–1920*, The Judge Advoc. Gen.'s Legal Ctr. & Sch., at 06:39 (Apr. 29, 2020) (downloaded using Apple Podcasts), for a discussion of the Ansell-Crowder dispute about due process in the military justice system in the early twentieth century.

23. Borch, *supra* note 1, at 105–236.

24. General James C. McConville, Initial Message to the Army Team (2019), https://api.army.mil/e2/c/downloads/561506.pdf.

25. These biographies were apparently created and compiled for inclusion in *Judge Advocates Record of the War*, which was intended to be a "yearbook" to commemorate those who served in the Corps. Borch, *supra* note 1, at xiii.

26. *Id.* at 221. On 1 August 1918, Colonel Weeks began his assignment as the Executive Officer at the Office of the Judge Advocate General. *Id.*

27. *See* Borch, *supra* note 1, at 105–236.

28. *See generally id.* at 105–231.

29. An astounding example of a servant-leader and dedication to duty, Edward Leroy Van Roden, served as a captain in the JAG Corps during World War I, participated in the Normandy invasion on 6 June 1944, and ultimately retired as a brigadier general. *Id.* at 216. In addition to these uniformed duties, he subsequently served on the Simpson Commission, which investigated the "Malmedy massacre" in 1948. *Malmedy Massacre Investigation: Hearing Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 4 (1949) (statement of Kenneth C. Royall, Sec'y of the Army).

30. *See generally* Borch, *supra* note 1, at 105–231 (summarizing biographies and accomplishments of JAs).

31. *See generally id.*

32. Comm. on a Uniform Code of Mil. Just., Uniform Code of Military Justice, at i (1949), https://www.loc.gov/item/49046774.

33. Borch, *supra* note 1, at 229.

34. *See* JAG Corps History, *supra* note 2, at 7.

35. The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 41-01, Message to the Regiment (13 July 2021).

(Credit: VectorMine - stock.adobe.com)

Azimuth Check

Mentorship

Will *You* Know It When You See It?

By Major General Joseph B. Berger with Lieutenant Colonel John E. Swords

Minus their higher rank and greater experience, my two mentors[1] were mirror images of myself. We all went to the U.S. Military Academy, sharing the same commissioning source. All of us were Funded Legal Education Program officers. We were (and still are) married; each has two to three kids. We are active in our faiths. And yes, all of us are white males—so much for leveraging the proven power of diversity.[2]

That is where I found myself as a mid-grade lieutenant colonel. And as a result, I was missing many of the trees and probably all of the forest. Worse, imperfect as it was, I only had both mentors after I became a field-grade officer; one as a mid-grade major, the other as a new lieutenant colonel. I had certainly been counseled more than a few times. And, although I did not always realize it at the time, especially when it was not voluntary, coaches had worked to help me address specific shortcomings. But mentors, and more importantly, the *right* mentors? No—I was wholly deficient in this critical area that empowers personal and professional growth.[3]

The reality of where I was and whether I would continue to grow as a leader hit me when I finally made the time to think about it deliberately. As I started the National War College, I conducted a long overdue and necessary self-assessment. While detrimentally late, it has allowed me to help others see themselves. So, to try and empower mentors and protégés alike, I started using a tool that paints an informative picture. I think it will do the same for you.

The tool is relatively simple; but, you must start with a clear understanding of what a mentor is.[4] For example, completing the matrix with your current supervisors may result in a misapplication. I am certain they coach and counsel you, but, they may not be mentors at this point in your service. To whom with greater experience do you go based on voluntary, mutual agreement for guidance focused on professional growth? That is a mentor.[5] And when you seek out mentorship via that voluntary, mutual agreement, it should be a deliberate and intentional investment of your time and energy rather than an accidental arrangement.[6] You may find yourself more likely to make such investments with potential mentors with whom you share interests. While this can be both a positive and a negative, I urge you to be cognizant of the possibility that you may seek out individuals who are similar to you in myriad ways and fight against what is "comfortable."

You can conduct your own self-assessment by building the template referenced in Figure 1 below. The leftmost column contains the names of your protégés or mentors. Across the top, start with a basic set of characteristics. Those should include, at a minimum: gender, race, rank, and cohort (or branch, if outside the Judge Advocate Legal Services (JALS)). Judge advocates may also want to consider the individual's commissioning source. All JALS members may want to consider the individual's "bench" and key additional skill identifiers (am I a court reporter only reaching out to other court reporters?). You may also want to expand on the basic set of characteristics and include additional factors like branch or career management field, faith, or family situation.

Figure 1 depicts my situation as a mid-grade lieutenant colonel when I first deliberately contemplated from whom I sought mentorship. As I worked over the next few years to broaden the perspective that would shape the leader I wanted to be, I worried less about rank and looked outside of JALS. The relationships reflected in Figure 2 did not happen overnight. I sought out diverse mentors and actively nurtured my relationship with them over time. A "truth" I have found to be accurate my entire career is that you cannot surge relationships; you must grow them organically. So, I urge you to cultivate your mentorship relationships, ensure their roots take hold,

Figure 1

Name	Gender	Race	Rank	Cohort
R	Male	White	COL	JA
D	Male	White	BG	JA

WHERE I WAS

Figure 2

Name	Gender	Race	Rank	Cohort
J	Male	White		=
T	Female	White		≠
D	Male	White		=
P	Male	API		≠

WHERE I AM

and continuously care for them to ensure they grow strong. I promise that it will be worthwhile. My mentorship connection with disparate individuals helped me become a far better leader than I would have by relying solely on mirror images of myself.

As I contemplated the sources I sought mentorship from, it drove me to likewise think about those I mentored. I asked myself if I was as much a part of the problem as a mentor as I was as a protégé. Fortunately, the self-assessment for mentors remains unchanged for protégés. However, to be more thorough, I added an additional baseline column that required me to answer whether the person had ever worked for me. If the answer was yes, I annotated the number of years they had. I'm unsure what "perfect" looks like, but the result of that second phase was much healthier.

I was surprised by the number of people who had never worked for me. I had protégés outside our branch (and even our Service, which is a benefit of time in the joint force). There were representatives from both genders and most ethnicities. Just as importantly, these individuals came from less "objective" criteria: they had a variety of family backgrounds and upbringings, represented a spectrum of religious and political beliefs (or non-beliefs), and many had jobs I had never had. I was learning and benefiting from the exchanges in each of those relationships, whether as a mentor or mentee. The "mentoring up" was happening, and I do not think I had even realized it in the moment.

Mentors are only one piece of the puzzle. I also similarly analyzed who I went to for advice: not mentors, but peers and subordinates. Who served as my "trusted agents"? Again, were they like me, and, thus, more likely to think the same way, which can result in confirmation bias in decision-making? Or, were they challenging me to think about the issue from a different perspective? I learned much about empathy through this process.

All of this can be summed up in a series of questions I challenge you to ask yourself. Sketch it out using the tool above or develop your own system. Either way, leverage the disciplined step of reducing it to writing to allow yourself to see the reality better and empowering yourself to improve. When it comes to mentorship, whom do you pick as a mentor? Do they challenge you or simply act as a cheerleader? Do they provide answers or ask you more questions to help frame your thinking? And, remember to challenge your protégés. Who are their other mentors? Do you challenge them about those choices?

Immutable characteristics do not automatically make a person a better or worse mentor for you, just as yours do not automatically make you a great mentor for a protégé. They are just one (or more) of the multiple characteristics, traits, and experiences that empower us to help others see their challenges differently. And that usually exposes them to a broader set of solutions, which is the true power of diversity in mentorship. But, you cannot leverage it unless you know what it looks like. **TAL**

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Notes

1. Mentorship may seem like a more recent concept, but its roots are at least 2,700 years old. Homer's epic poem, *The Odyssey,* written in the late eighth or early seventh century BCE, is credited with the term's origin and its underlying concept. *See* David Marquet, *The Original Mentor Failed – What Went Wrong?*, Forbes (Jan. 12, 2017), https://www.forbes.com/sites/davidmarquet/2017/01/23/the-original-mentor-failed-what-went-wrong. Therein, Odysseus asks his close friend, Mentor, to care for his son, Telemachus, and his palace while he fights in the Trojan War. Stamatia Dova, *"Kind Like a Father": On Mentors and Kings in* The Odyssey, Harv. univ. Ctr. for Hellenic Studs. (Nov. 2, 2020), https://chs.harvard.edu/stamatia-dova-kind-like-a-father-on-mentors-and-kings-in-the-odyssey. In this arrangement, Mentor was to advise and teach Telemachus by providing prescient counseling and coaching during the duration of Odysseus's absence. *Id.* Odysseus remains at war from Telemachus's infancy to his early adulthood. *Id.* During this time, Mentor fails in his endeavor. *See* Marquet, *supra.* However, disguised as Mentor, the goddess, Athena, eventually steps in and provides the requisite positive mentorship to get Telemachus successfully back on track. *Id.;* Dova, *supra.* A subtle point not to be missed: Mentor was essentially a mirror image of Telemachus, and that relationship failed. Athena had some different characteristics and helped lead Telemachus to success. Let this serve as a reminder that not all mentors are created equally, and just because an individual acts as a mentor does not mean they are the *right* mentor for your developmental needs.

2. *See, e.g.*, David Rock & Heidi Grant, *Why Diverse Teams are Smarter*, Harv. Bus. Rev. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter.

3. *The Benefits of a Mentoring Relationship*, Univ. of Southampton, https://www.southampton.ac.uk/professional-development/mentoring/benefits-of-a-mentoring-relationship.page (last visited June 14, 2023).

4. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession, tbl.6-3 (31 July 2019) (C1, 25 Nov. 2019).

5. *See* Matt D'Angelo, *How to Find a Mentor*, Bus. News Daily (Feb. 21, 2023), https://www.businessnewsdaily.com/6248-how-to-find-mentor.html.

6. *See* Laurence Bradford, *8 Tips for an Amazing Mentor Relationship*, Forbes (Jan. 31, 2018), https://www.forbes.com/sites/laurencebradford/2018/01/31/8-tips-for-an-amazing-mentor-relationship/?sh=72d394c21e2c.

GEN Dwight Eisenhower (Photo courtesy of author)

Lore of the Corps

JAG Department to JAG Corps
Why Did It Happen?

By Fred L. Borch III

Why does the Army have a Judge Advocate General's Corps today? Or, to phrase the question another way: Why did Congress abolish The Judge Advocate General's *Department* (JAGD)—which had existed since 5 July 1884[1]—to create a "Corps" of uniformed lawyers on 1 February 1949? The answer is that Congress was convinced after World War II that "the Army system of justice" must be improved with reforms to the Articles of War.[2] As these reforms would require many more uniformed attorneys, and greater participation by these judge advocates (JAs) in court-martial proceedings, it was time for a "professional" and "separate corps of [JAs]" that would be more "independent" and less susceptible to improper control by commanders.[3] Why the Army created this new Judge Advocate General's Corps (JAGC), and how Congress thought it would improve military justice in the Army, is the subject of this Lore of the Corps.

During World War II, the Army convicted some 1,700,000 Soldiers at courts-martial; 80,000 of these trials were by general courts-martial.[4] When one realizes that the Army tried only about 500 courts-martial in 2021[5]—both general and special courts—it should be apparent that military justice in the Army in the 1940s was remarkably different from today. As a House Committee Report noted in 1947, "approximately 90 percent" of the work done by Army lawyers at posts, camps and stations "consists of matters relating directly to military justice and . . . more than 50 percent of [JAGD] work in Washington is of the same nature."[6]

But it was more than numbers, as criminal proceedings under the Articles of War were themselves very different. There was no requirement for either trial counsel or defense counsel at courts-martial to be lawyers,[7] and most were not.[8] Additionally, while the 1920 Articles of War in effect in World War II called for every general court-martial to have a law member (the forerunner of today's military judge, albeit with much less authority over the trial), this was not an absolute requirement.[9] As a result, general courts-martial for serious offenses like murder, rape, and robbery routinely had no legally qualified personnel participating in them. As Congress saw it,

this lack of professional legal participation meant a lack of due process for an accused Soldier at a military tribunal, and most members of Congress—and the American public—believed that requiring lawyers at general courts-martial would result in more due process and consequently a fairer and more just outcome.[10]

Complaints about the unfairness of the Articles of War, especially the absence of legally qualified defense counsel and pervasive command influence at all levels, spurred Congress to implement reforms to the Articles of War. For the first time in history, both trial and defense counsel at general courts-martial were to be members of the JAGD, as was the law member.[11]

While legally-qualified personnel were not part of the special court-martial process (and would not be until 1969[12]), the new requirement for uniformed lawyers at general courts-martial under the revised Articles of War necessarily meant a much larger JAGD.[13] A majority in Congress also believed that this required a more "professional" body of uniformed attorneys—and they viewed the JAGD as insufficiently professional.[14] These same members of Congress also determined that JAs needed to be more independent from the chain of command so as to reduce the ability of commanders to interfere with court-martial proceedings through command influence, and they sought to accomplish this goal by including a statutory language that gave The Judge Advocate General (TJAG) the power over all JA assignments.[15]

While one might think that having a new JAGC would meet with approval, there was fierce pushback. Secretary of War Robert B. Patterson testified in opposition.[16] General of the Army Dwight D. Eisenhower, then serving as Army Chief of Staff, also testified against the proposal.[17] The two men apparently were satisfied with the status quo of a department and did not like the idea of a separate—and more independent—organization in the Army. Some who argued against a Corps also claimed that the effort was "another attempt to establish special privileges for another professional group."[18]

In the end, the reform-minded Congress prevailed. Prior to the enactment of the Selective Service Act in 1948, the peacetime authorized strength of the JAGD—by statute—was "one Judge Advocate General with the rank of major general and one hundred and twenty-one officers in grades from colonel to captain, inclusive."[19] The Selective Service Act radically altered the role of lawyers in the active Army, as it contained language creating a Judge Advocate General's Corps with two Regular Army major generals (as TJAG and Assistant TJAG) and three brigadier generals.[20] Since these general officer positions were statutory, there would no longer be the situation like that which existed in early 1947, when Major General (MG) Thomas H. Green was the only general officer in the entire JAGD and was begging the Army's leadership for another general officer to assist him in carrying out his duties as TJAG.[21]

MG Thomas H. Green (1949) (Photo courtesy of author)

As for commissioned officers in the newly-created Corps, Congress decreed that the numbers were to be determined by the Secretary of the Army, but that the minimum number of judge advocates "shall be not less than 1 ½ per centum of the authorized active list commissioned officer strength" of the Army.[22]

For the first time in history, legislation also provided that the Corps would have warrant officers and enlisted personnel "in such numbers as the Secretary

of the Department of the Army may determine."[23] Prior to this time, warrant officers and enlisted Soldiers were detailed to the Department as "clerical assistants," but they were not a part of it.[24] While the Army's leadership would determine just how many Soldiers would serve in the Corps, Congress was telling the Army that it expected the Corps to have such personnel assigned to it.[25]

When examining the need for a corps instead of a department, some members of Congress had also argued that the new JAGC needed its own separate promotion lists, so that it would be even more insulated from command influence.[26] Opposition from the War Department and then-TJAG, MG Thomas H. Green, doomed this proposal.[27] Ultimately, the Corps would get its own promotion lists—but not until the 1970s and for an entirely different reason.[28]

When examining the need for a corps instead of a department, some members of Congress had also argued that the new JAGC needed its own separate promotion lists, so that it would be even more insulated from command influence.

On 1 February 1949, the JAG Department became the JAG Corps. The differences were both important and substantial: the Corps's general officer leadership now had a robust *statutory* basis and the minimum number of officers in the Corps likewise had a firm legal basis. No longer would the number of uniformed lawyers and the personnel framework under which they operated be determined by the Army's military and Civilian leaders. On the contrary, Congress had decided the issue and made revolutionary changes because it concluded that the administration of military justice required it. While some observers may have questioned the need to create a JAG Corps in 1949, the role played by judge advocates, legal administrators, and paralegal specialists in the Army today indicates that the decision was a wise one. **TAL**

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Notes

1. An Act to Consolidate the Bureau of Military Justice and the Corps of Judge-Advocates of the Army, and for Other Purposes, ch. 218, 23 Stat. 113 (1884).

2. *See* H.R. Rep. No. 80-1034, at 4 (1947) ("Amending the Articles of War to Improve the Administration of Military Justice, to Provide for More Effective Appellate Review, to Insure the Equalization of Sentences, and for Other Purposes").

3. *Id.* at 10.

4. The Judge Advocate General's Corps, The Army Lawyer: A History of The Judge Advocate General's Corps 1775-1975, at 191-92 (1976) [hereinafter The Army Lawyer].

5. Off. of the Judge Advoc. Gen., U.S. Army, Report to Congress: U.S. Army Report on Military Justice for Fiscal Year 2021 app. (31 Dec. 2021).

6. H.R. Rep. No. 80-1034, at 10 (1947).

7. *See* Articles of War, art. 11, 41 Stat. 787, 788 (1920).

8. H.R. Rep. No. 80-1034, at 10-11 (1947).

9. *See* Articles of War, art. 8, 41 Stat. 787, 788 (1920) ("[T]he law member . . . shall be an officer of the Judge Advocate General's Department, except that when an officer of that department is not available for the purpose the [convening] authority shall detail instead an officer of some other branch of the service. . . .").

10. H.R. Rep. No. 80-1034, at 8, 10 (1947).

11. *See* Selective Service Act of 1948, Pub. L. No. 80-759, § 206, 62 Stat. 604, 628.

12. *See* Manual for Courts-Martial, United States ch. II, ¶ 4 (1969).

13. *See* H.R. Rep. No. 80-1034, at 11 (1947).

14. *See id.* at 10.

15. A. B. Butts, *The Judge Advocate General's Corps of the United States Army*, 21 Mississippi L.J. 203, 219 (1950).

16. H.R. Rep. No. 80-1034, at 9 (1947).

17. *Id.*

18. *Id.*

19. 10 U.S.C. § 61 (1934).

20. Selective Service Act of 1948, Pub. L. No. 80-759, § 246, 62 Stat. 604, 643 (1948).

21. Fred L. Borch III, *A History of the No. 2 Lawyer in the Corps*, Army Law., no. 3, 2021, at 16, 16-17. The Army's Judge Advocate General today is a lieutenant general, but this rank is not required by statute.

22. § 246, 62 Stat. at 643.

23. *Id.*

24. U.S. War Dep't, Gen. Order No. 27, para. XII (22 Mar. 1918).

25. Butts, *supra* note 15, at 204.

26. *See* H.R. Rep. No. 80-1034, at 8 (1947).

27. *See id;* § 246, 62 Stat. at 643.

28. *See* Fred L. Borch III, *The History of Separate Boards for Judge Advocate Field Grade Officers*, *in* Lore of the Corps: Compilation from The Army Lawyer 2010-2017, at 35, 35 (2018).

LTG Bruce C. Clarke commanded the Seventh U.S. Army from 1956 to 1958. (Photo courtesy of author)

Leadership in the "Pentomic Army" of the 1950s

Timeless Principles from Seventy-Five Years Ago

By Fred L. Borch III

It is frequently said that "the principles of leadership are timeless," meaning the hallmarks of good leadership today are no different from those of fifty or one hundred or two hundred years ago. The *Guide for Armor Leaders*,[1] published by the Seventh U.S. Army for junior leaders in the 1950s, illustrates this notion that leadership principles then, as now, are essentially the same. What is important is that this period in Army history, seventy-five years ago, was the era of the Pentomic Army.[2] Officers and noncommissioned officers were expected to lead on battlefields where atomic weapons would be prevalent—and where leaders would face atomic "blast waves," "rays of flash heat," and "radiation."[3]

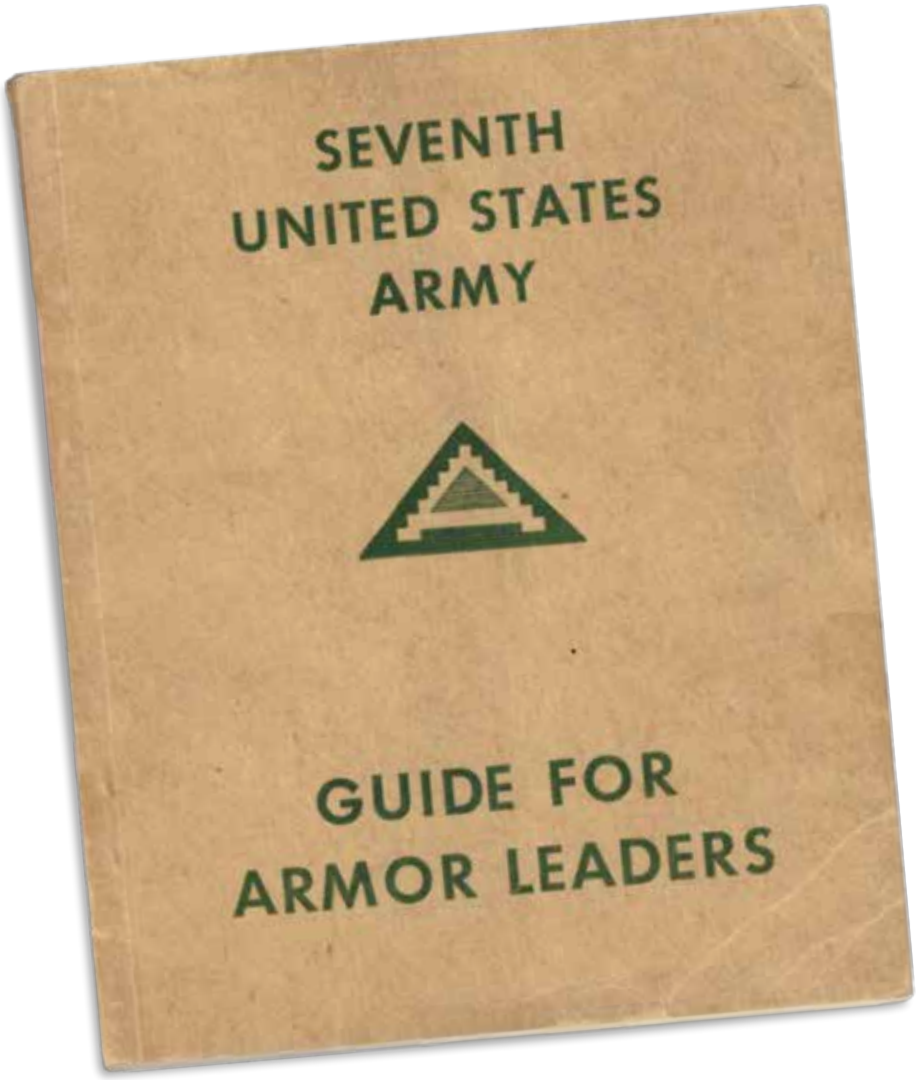
The idea that the Army leaders would fight on nuclear battlefields emerged in response to then-Chief of Staff Matthew Ridgway's belief that America's Cold War strategy of nuclear deterrence/massive retaliation would fail.[4] As a result, Ridgway, and his successor as chief of staff, General Maxwell Taylor, decided that the Army should be reorganized for both nuclear and non-nuclear battlefields.[5]

Ridgway and Taylor were convinced that the key to success in ground combat would be the Army's use of tactical nuclear weapons. Lieutenant General Bruce C. Clarke, who penned the foreword for the *Guide*, also believed that the Army in Europe had to be able to fight on an atomic battlefield, and he was proud of transforming the Seventh Army into the "first pentomic army."[6] This explains why the *Guide* talks about leadership in nuclear war.

A close look at the *Guide* shows, however, that the leadership principles being espoused are no different from those in instruction today.[7] The *Guide* begins with this statement: "The primary duty of the leader is the accomplishment of his assigned mission. Everything else, including the welfare of his men, is subordinate to the mission."[8] But while the *Guide* stresses that mission comes first, it does acknowledge that it is "rarely possible to accomplish any mission without attention to the morale and esprit de corps of the men" in a unit.[9]

In developing good leadership, the Guide identifies these "principles of leadership":[10]

a. Know your job.
b. Know your men.
c. Know yourself.
d. Keep your men informed.
e. Set the example.
f. See that the men understand their jobs; supervise and follow through.
g. Train men as a team.
h. Take responsibility.[11]



The *Guide for Armor Leaders* set out leadership principles for officers and NCOs who were expected to fight on battlefields where atomic weapons would be prevalent. (Photo courtesy of author)

These principles are followed by "rules for a leader:"[12]

a. Be loyal to your country, your superiors, and your subordinates.
b. Always maintain soldierly bearing and attitudes.
c. Take pride in yourself and in the Army.
d. Concentrate on increasing your physical, mental, and technical abilities.
e. Prompt and willing obedience to all orders both for yourself and your men.
f. Watch over your subordinates' state of mind and feelings.
g. Maintain pride in yourself and your unit.
h. Remember:

1. In the long run it is better to take the blame than "pass the buck."
2. Understand just where your responsibility begins and ends and accept it.
3. In situations for which you are not the responsible leader, search for opportunities to help the responsible leader do his job better.[13]

While the *Guide* was published some seventy-five years ago for a different Army and a different era, the principles in it are still relevant today for judge advocates, legal administrators, and paralegal specialists who want to be the best possible leaders in our Corps. As the current leadership regulation puts it, today's Army looks for leaders who have "character, presence, and intellect" because these attributes get results.[14] And getting results—accomplishing the mission—is what good leadership is all about. **TAL**

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Notes

1. Seventh U.S. Army, Guide for Armor Leaders (1957) [hereinafter Guide].

2. The adjective "pentomic" reflected the recurring number five in the pentomic division structure. Each division consisted of five battle groups. Each battle group had five companies, and each company had five platoons. *See* A. J. Bacevich, The Pentomic Era: The U.S. Army Between Korea and Vietnam 5 (1986).

3. Guide, *supra* note 1, at 94-95.

4. *See* Joe Buccino, *Ike v. Ridgway: Lessons for Today from the Philosophical Battle Between Two of America's Greatest Military Leaders*, Modern War Inst. (Apr. 14, 2020), https://mwi.usma.edu/ike-vs-ridgway-lessons-today-philosophical-battle-two-americas-greatest-military-leaders.

5. For more on the Pentomic Army, see Bacevich, *supra* note 2.

6. Bruce Cooper Clarke, a 1925 graduate of the U.S. Military Academy who commanded two armored divisions in World War II and a corps during the Korean War, commanded the Seventh Army from 1956 to 1958. Marvine Howe, *Gen. Bruce C. Clarke Dies at 86; Ex-Army Commander in Europe*, N. Y. Times, 20 Mar 1988, at 36.

7. *See* U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 7-2 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22] ("A leader's primary purpose is to accomplish the mission. . . . Mission accomplishment takes priority over everything else, especially in combat where their unit may be at risk of destruction.").

8. Guide, *supra* note 1, at 1.

9. *Id.*

10. *Id.* at 3.

11. *Id.*

12. *Id.* at 4.

13. *Id.*

14. U.S. Dep't of Army, Reg. 600-100, Army Profession and Leadership Policy para. 1-9 (5 Apr. 2007).

In Memoriam

Remembering Recently Departed Members of the Regiment

By Fred L. Borch III

The following members of our Regiment, in alphabetical order, passed away in 2022.

BAXTER, Murray B. (1951-2022). Major (Retired) Murray Bryan Baxter died on 28 July 2022. He was seventy years old.

Born on 1 October 1951 in Norfolk, Virginia, Murray graduated from the University of Florida with a degree in chemistry in 1973 and from the University of Florida School of Law three years later. After completing the Judge Advocate Basic Course in 1977,[1] he served with the 1st Infantry Division in Goppingen, Germany, and at U.S. Army Europe in Heidelberg, Germany, until returning to Charlottesville, Virginia, for the 31st Graduate Class. After retiring from active duty, Murray returned to Florida. He was living in Deltona at the time of his death.[2]

COL (R) George B. Barrett (Photo courtesy of author)

BARRETT, George B., Jr. (1921-2022). Colonel (Retired) George Bertrand Barrett, Jr. died at home on 28 December 2022. He was 101 years old.[3]

Born on 17 October 1921 in Louisville, Kentucky, George graduated from Louisville Male High School in June 1939 and from the University of Notre Dame in December 1942. He enlisted in the Army in 1943, and, after completing Officer Candidate School, served as a military police officer in Tehran, Iran, and Rome, Italy, from 1945 to 1946. George remained in the Army after World War II and, while serving in the 1st Infantry Division in 1950, he was selected to attend Columbia Law School at the Army's expense. He graduated in 1954. After transferring to our Corps, George completed the 18th Basic Class in 1954 and then served as an assistant staff judge advocate at First Army in New York and in the Iceland Defense Force in Iceland. He subsequently served at West Point as an instructor in the Department of Law before completing the 9th Career (today's Graduate) Course in 1961. George went on to serve at VII Corps in Stuttgart, Germany, and twice at The Judge Advocate General's School. He also had a tour of duty with the 1st Infantry Division in Vietnam from 1967 to 1968.

After retiring from active duty in 1970, George settled with his family in Charlottesville. He then practiced law until October 1985, when he closed his practice. George was active in the community and served as Commissioner in Chancery for the Circuit Court of Albemarle County from 1977 to 1986.

George's wife, Joy, predeceased him in 2001. He is survived by three sons and four grandchildren and was interred in the Culpeper (Virginia) National Cemetery.[4]

BECK, Travis J. (1982-2022). Staff Sergeant Travis Jackson Beck died on 10 October 2022. He was forty years old and was suffering from pancreatic cancer.

Born on 26 May 1982 in Dekalb County, Georgia, Travis enlisted in the Army after graduating from high school in 2006. He then served ten years on active duty before transitioning to the U.S. Army Reserve in 2016. His paralegal assignments included duty at Fort Eisenhower (formerly Fort Gordon), Georgia; the Pentagon; and the 151st Legal Operations Detachment, Alexandria, Virginia. Travis deployed to Iraq as part of Operation Iraqi Freedom.

As a civilian, he worked for Relman Colfax PLLC, a civil rights law firm, where he was employed at the time of his death. Travis was a litigation support manager, and "worked across cases to manage electronic discovery and information."[5] He "went above and beyond to meet case needs, often working long hours and regularly offering to travel to support trial teams."[6]

Travis is survived by his wife, Tracy, and three children. He was a lifelong, diehard Atlanta Braves fan and proposed to his wife at a Braves game.[7]

BRANNON, Barney L., Jr. (1933-2022). Colonel (Retired) Barney L. Brannon, Jr. died in Lebanon, New Hampshire, on 21 February 2022. He was eighty-eight years old.

Born on 15 August 1933 in Deland, Florida, Barney graduated from high school in Brunswick, Georgia, in 1951. He worked for a year as a swimming and diving instructor and as a wine steward on Sea Island before entering North Georgia College. A year later, he was drafted into the Army and served at Forts Eisenhower and Bliss and at White Sands Proving Ground before leaving active duty to return to college on the GI Bill at the University of Georgia.

After earning an accounting degree in 1957, Barney continued his studies at the University of Georgia School of Law. He passed the Georgia bar exam in 1959 and graduated with honors the following year.

Barney entered our Corps in 1960 and served in a variety of locations, including Vietnam and Germany. His last tour—from 1976 to 1979—was as the Commandant at The Judge Advocate General's School. During his tenure, Barney made significant changes to the school curriculum, including renaming the Advanced Course to the Graduate Course.

After retiring from active duty in 1979, Barney returned to Athens, Georgia, where he worked as the director of the Institute of Continuing Legal Education for the state

COL (R) Barney L. Brannon (Photo courtesy of author)

of Georgia. After eighteen years at the institute, Barney retired once more to pursue his love of skiing. "He had a natural ear for languages and an innate curiosity about people and cultures that endeared him to strangers everywhere he went. For Barney, the world was divided between people who were his friends and people who were yet to become his friends."[8]

Barney is survived by his wife, Anita, one son, and one daughter. He also leaves five grandchildren and one ten-month-old great-grandson, whom he was thrilled to meet shortly before his death.[9]

CROSWELL, David L. (1971-2022). Major (Retired) David Lee Croswell died on 19 October 2022. He was fifty-one years old.

Born on 10 October 1971, David grew up in Reedville, Virginia. After graduating from Roanoke College in 1993, he earned his law degree from Mercer University in 1996. He also earned an LL.M. in military law from The Judge Advocate General's School in 2008 and an LL.M. in environmental and energy law from Georgetown Law School in 2018.

David enlisted in the Army as a private at the age of twenty-five after graduating from law school and subsequently transferred to our Corps. He served in a variety of assignments and locations during his judge advocate career, including: brigade judge advocate, 25th Infantry Division, Fort Richardson, Alaska; chief, military justice, Eighth U.S. Army, Korea; administrative law attorney and trial defense counsel, V Corps, Germany; and prosecutor, Office of Military Commissions, Washington, D.C, and Guantanamo Bay, Cuba.

After retiring from active duty as a major, David worked in Anchorage, Alaska, where he worked for U.S. Congressman Don Young (Alaska-At Large). He also worked for U.S. Congressman Rob Wittman (Va-1). David is survived by his brother and four nephews.[10]

CROW, Sam A. (1926-2022). Colonel (Retired) Samuel "Sam" Alfred Crow, who had a distinguished career as a U.S. district court judge and retired as an Army Reserve judge advocate colonel, died at his home in Topeka, Kansas, on 2 December 2022. He was ninety-six years old.

Born in Topeka on 5 May 1926, Sam enlisted in the Navy in 1944 and, after World War II, worked his way through the University of Kansas. After receiving his undergraduate degree in 1949, he enrolled in the Washburn University School of Law, from which he graduated in 1952. A year later, he was a partner in the law firm of Rooney, Dickinson, Prager & Crow.

Sam entered the Judge Advocate General's Corps as an Army Reservist in the 1950s and retired in 1986.

Sam was appointed as a Federal magistrate judge in 1973 and was subsequently nominated and confirmed as a U.S. district court judge in 1981. He served with distinction until his retirement in October 2022 at the age of ninety-six. As Sam explained, President Reagan had appointed him to the bench for life and he did not want to let him down. His motto was, "Be careful, do your best, and do it with enthusiasm."[11]

ESCAPA, Ramón M. (1979-2022). Captain Ramón Manuel Escapa, who was serving as a circuit judge in Schuyler County, Illinois, at the time of his death, died on 19 June 2022. He was forty-two years old.

Born on 24 December 1979 in Rio Piedras, Puerto Rico, Ramón was a judge advocate captain in the Illinois National Guard for twelve years. His assignments included trial counsel, command judge advocate, and defense counsel.

Ramón is survived by his wife, Michelle, and four children.[12]

FUCHS, Beatrice G. (1922-2022). Captain Beatrice Galos Fuchs, who served a tour of duty as a judge advocate at Fort Meade, Maryland, in the 1950s, died on 23 November 2022. She was 100 years old and had "a remarkable life well lived."[13]

Born on 3 June 1922 in Brooklyn, New York, Beatrice earned her law degree from Brooklyn Law School in 1944 and later received her master of laws from George Washington University. At the time she began practicing law, women represented less than five percent of the legal profession.[14]

Early in her career, she served as an Army lawyer at Fort Meade. She then worked in the D.C. family court, where she advocated for children.

"Grandma Beats," as she was known to her twelve grandchildren and six great-grandchildren, is also survived by her daughter and three sons. Her husband predeceased her.[15]

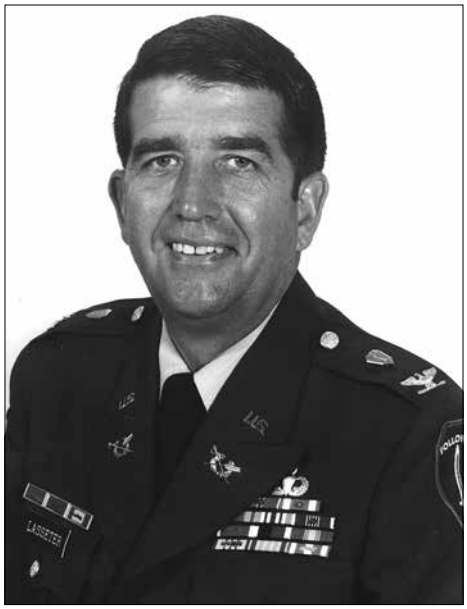
KERRANE, Barbara (1979-2022). Major Barbara Kerrane died at her home on 5 April 2022. She was forty-three years old.

Born in Lawton, Oklahoma, on 22 February 1979, Barbara grew up in a military family and lived in a variety of locations, including Fort Liberty (formerly Fort Bragg), West Point, Fort Sill, and Fort Lewis. After graduating from the University of Texas at Arlington, she became a police officer. She then completed a master's degree at Norwich and earned her law degree at Texas Wesleyan University. In 2008, Barbara and her husband, who also was a police officer in Arlington, Texas, left the police department to join the Army.

Barbara began her Army legal career in the Texas Army National Guard. She served at Camp Mabry, Texas, before deploying to Iraq. Upon her return to Texas in 2011, she transitioned to the active component to join her husband, Evan, at Fort Cavazos (formerly Fort Hood).

Barbara subsequently served at Fort Moore (formerly Fort Benning) as the legal advisor at the Western Hemisphere Institute for Security Cooperation. She also served as the trial counsel at 3d Brigade, 3d Infantry Division. During this time, she

MAJ Barbara Kerrane (Photo courtesy of author)



COL (R) Earle F. Lasseter (Photo courtesy of author)

LTC Timothy D. Litka (Photo courtesy of author)

completed an LL.M in taxation from the University of Alabama.

After a tour as a defense counsel at Fort Sill, Barbara served in Washington, D.C., with the Defense Counsel Assistance Program, Environmental Law Division, and Special Victim Counsel Program.

Barbara is survived by her husband, Major Evan Kerrane, and a son and daughter. She is interred at Arlington National Cemetery.[16]

LASSETER, Earle F. (1933-2022). Colonel (Retired) Earle Forrest Lasseter, who retired after thirty years of active-duty service and then had a successful career in private practice, died in Columbus, Georgia, on 29 April 2022. He was eighty-eight years old.

"Earle the Pearl," as he was known to his Army lawyer peers, was born in Gadsden, Alabama, on 26 December 1933. When he was twelve years old, his parents enrolled him in the Georgia Military Academy in College Park, Georgia, from which he graduated in 1953. Earle then attended Auburn University and, after graduating in 1957, was commissioned as a second lieutenant through the Army Reserve Officer Training Corps program.

He served as an Armor officer for seven years, including a tour of duty in Germany, before attending law school at the University of Alabama on the Excess Leave Program from 1964 to 1967. After passing the Alabama bar, Earle transferred to our Corps. For the next twenty-one years, he served in a variety of locations, including Germany, Taiwan, and Vietnam. He always considered the highlight of his career to be his time as the staff judge advocate, 82d Airborne Division, and his two tours as the staff judge advocate, U.S. Army Infantry School and Fort Moore, Georgia. Earle was also especially proud of being a master parachutist and had more than 200 jumps to his credit.

After retiring from active duty, Earle joined the Columbus, Georgia, law firm of Pope, McGlamry, Kilpatrick, and Morrison. He practiced law with that firm for many years, specializing in the areas of personal injury and products liability, automotive crashworthiness, and wrongful death.

Earle is survived by his wife, Sally, his son, David, his daughter, Fern, and two grandchildren.[17]

LITKA, Tim D. (1971-2022). Lieutenant Colonel Timothy David Litka died on active duty in Leavenworth, Kansas, on 19 November 2022. He was fifty-one years old and, at the time of his death, was serving as the legal advisor to the director and senior legal instructor, U.S. Army Command and General Staff College, Fort Leavenworth.

Born in Ohio on 4 January 1971, Tim attended the University of Akron, from which he earned a degree in psychology in 1994. He earned his juris doctor four years later from the University of Toledo College of Law.

Immediately after passing the Ohio bar examination, Tim served as a public defender in Stark County, Ohio. Deciding that he wanted to use his law degree for a different kind of public service, however, he applied for a commission in the Corps. He was directly commissioned as a first lieutenant in 2000. After completing the Judge Advocate Basic Course, Tim served at Fort Cavazos as a legal assistance officer with the 4th Infantry Division before joining the Trial Defense Service at Fort Cavazos in 2001.

In 2003, then-Captain Litka was reassigned to the Washington, D.C., area, where he had tours at the U.S. Army Legal Services Agency with the Government Appellate Division and on the eJustice team at the Office of the Judge Advocate General's Criminal Law Division.

In 2006, Tim left active duty, was admitted to the District of Columbia bar, and started his own law firm—Office of Timothy Litka, LLC—in Washington, D.C. He continued his service as an Army Reserve lawyer until 2010, when he decided to return to active duty and was re-accessed into the active component.

Then-Major Litka deployed to Iraq in 2011 for six months as a brigade judge advocate, 4th Infantry Brigade Combat Team, 3d Infantry Division, before being assigned to Fort Eisenhower, Georgia, with

duty as the command judge advocate, 7th Signal Command. After completing the Judge Advocate Graduate Course in 2012, Tim was assigned to U.S. Army, Japan. He served as the deputy staff judge advocate at Camp Zama until 2014, when he was assigned to be the legal advisor, Marshall Center, Garmisch, Germany.

After a second deployment to Iraq as the legal advisor to the chief, Office of Security Cooperation-Iraq, Tim was assigned to be the staff judge advocate, First U.S. Army, Division West, located at Fort Cavazos, Texas. He left that position in 2021 for Fort Leavenworth, Kansas.

Tim was extraordinarily proud of his years as a judge advocate in the active and Reserve components. He relished his time with his family, his friends, and his community. During his twenty-two years of selfless service, Tim always took time to plan adventures so that his family had unforgettable memories.

Tim's military awards reflect his exemplary service and include: the Defense Meritorious Service medal with two oak leaf clusters, the Meritorious Service Medal with five oak leaf clusters, the Army Commendation Medal with two oak leaf clusters, and the Army Achievement Medal.

Tim is survived by his wife of fifteen years, Amy Fernandez Litka, and his daughter, Ava Litka. His mother, Eleanor Ruth Litka, two sisters, and one brother also survive him, along with ten nieces and nephews. He was interred in the Fort Leavenworth National Cemetery on 26 November 2022.[18]

MAGERS, Larry C. (1948-2022). Sergeant Major (Retired) Larry Clifton Magers died in Fort Worth, Texas, on 30 August 2022. He was seventy-three years old.

Born on 22 December 1948, Larry was the oldest of three siblings and graduated from the University of Texas at Arlington. He served over twenty years in the Army Reserves as a legal clerk and paralegal specialist. His Army career culminated as the command paralegal sergeant major for the 16th Legal Services Organization.

Larry is survived by his wife, Gaylynn, two sons, and five grandchildren.[19]

MARSHALL, Cameron C. (1994-2022). Staff Sergeant Cameron Courtney Marshall died in Stafford, Virginia, on 17 April 2022. He was twenty-seven years old.

Born on 13 May 1994 at Bethesda Naval Hospital, he grew up in Agawam, Massachusetts, and, after graduating from high school in 2012, Cameron enlisted in the Army. After completing Basic Combat Training and Advanced Individual Training, he served as a paralegal in Korea. He subsequently served at Fort Jackson and at Fort Liberty with XVIII Airborne Corps. At the time of his death, he was stationed in the National Capitol Region.

Cameron was passionate about cooking and was "an avid connoisseur and creator of soups."[20] He also loved cars and drove a yellow Corvette.

Cameron is survived by his wife, Kaitlyn, and a son and daughter.[21]

MOGRIDGE, James D. (1943-2022). Colonel (Retired) James "Jim" Donald Mogridge died in Oxford, Mississippi, on 2 February 2022. He was seventy-nine years old.

After completing high school and college, Jim graduated from Memphis State Law School, where he was an editor on the law review. He served for a time in the Federal Bureau of Investigation before joining our Corps.

Jim served in a variety of locations and assignments, with his last assignment as a trial judge.

In retirement, he moved to his farm in Thaxton, Mississippi. "Jim enjoyed raising cows, gardening, singing in the church choir, entertaining his grandchildren, and cooking Sunday dinners for his family."[22] He is survived by his wife, Judy, two sons, and six grandchildren.[23]

SKEETE, Brent E. (1982-2022). Sergeant First Class Brent Emmanuel Skeete died in Killeen, Texas, on 4 May 2022. He was thirty-nine years old.

Born on 18 June 1982 in Brooklyn, New York, Brent graduated from high school in Killeen, Texas, where he wrestled and played football. He enlisted in the Army in 2007 and, over the next fifteen years, served our Corps as a paralegal specialist. Brent was stationed in a variety of locations, including Kuwait, Iraq, and Afghanistan.

Brent was proud of his Trinidadian culture, making his signature "Greene Skeete" drink, and motorcycles. He is survived by his wife, Julia, and two daughters. Brent was interred at the Central Texas State Veterans Cemetery.[24]

SULLIVAN, Bob J. (1939-2022). Command Sergeant Major (Retired) Robert John Sullivan died in Killeen, Texas, on 28 March 2022. He was eighty-three years old.

Born in Detroit on 19 January 1939, Bob served thirty-two years in the Army. He served in a variety of locations, including overseas assignments in Vietnam, Thailand, Germany, and Korea. After retiring as a command sergeant major with the 13th Support Command, Fort Cavazos, Texas, he worked in the III Corps Office of the Staff Judge Advocate. Bob served as an arbitrator for landlord-tenant disputes and dealt with installation bar issues. He retired from this position in October 2012.

Bob is survived by his wife, Helen, his daughter, two sons, and two stepsons. Eleven grandchildren and six great-grandchildren also survive him.[25]

SUMNER, Craig G. (1961-2022). Chief Warrant Officer Five (Retired) Craig G. Sumner died after a brief battle with cancer on 6 February 2022. He was living in Gilbert, Arizona, at the time of his death. Craig was sixty years old.

Born on 8 November 1961 in Muncie, Indiana, Craig earned an undergraduate degree from the University of Arizona and a masters from Bowie State. He served thirty years in the Army as an enlisted Soldier and as a warrant officer. He completed his outstanding career as a legal administrator, having served in a variety of locations including three tours of duty in Iraq.

After retiring from the Army in 2016, Craig worked for the Department of Homeland Security's Immigration and Customs Enforcement until his death.

Craig enjoyed boating and fishing and was an avid Colts fan. He also loved music. He is survived by his wife, Kristi, whom he married in 2016, and one son, one daughter, and four grandchildren.[26]

VOLKERT, Charles J., Jr. (1982-2022). Captain Charles John Volkert, Jr., who served as a judge advocate in the Pennsylvania National Guard from 2014 to 2018, died

CW5 (R) Craig G. Sumner (Photo courtesy of author)

in Lehigh Valley Hospice on 26 July 2022. He was thirty-nine years old.

Born in Allentown, Pennsylvania, on 18 December 1982, Charles graduated from high school in Emmaus, Pennsylvania, in 2001. He then enlisted in the Marine Corps and deployed twice to Iraq as part of Operation *Iraqi Freedom*. Honorably discharged as a corporal in 2005, he entered Bucknell University, from which he graduated in 2009. Volkert completed law school three years later at the Penn State Dickenson School of Law.

He was an assistant district attorney in Cumberland County, Pennsylvania, from 2010 to 2018, when he joined the U.S. Department of Justice as an assistant U.S. attorney. He served in that role in Buffalo for two years before being assigned to work in Allentown, Pennsylvania, in 2020. He was an Army lawyer in the Pennsylvania National Guard from 2014 to 2018, serving as a trial counsel for the 28th Expeditionary Combat Aviation Brigade.

Charles is survived by his wife, Lindsay, and two children. He was interred with military honors in the Emmaus Moravian Cemetery.[27]

WEEDMAN, W. Steven (1963-2022). Colonel (Retired) Walter Steven Weedman died in Temple, Texas, on 1 June 2022. He was fifty-eight years old.

Born on 13 June 1963, Steve entered the Corps in 1990. He subsequently served in a variety of assignments, including: trial defense counsel; chief, criminal law; appellate attorney; general law attorney; special assistant to the assistant secretary of the Army; deputy staff judge advocate; chief, military personnel law; and staff judge advocate. He deployed to Iraq on three occasions and served in Germany and Italy.

Steve is survived by his ex-wife and three daughters.[28]

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

Notes

1. The Judge Advoc. Gen.'s Sch., The Thirty-First Judge Advocate Graduate Class (1982) (on file with author).

2. *Murray Bryan Baxter,* Alavon Direct Cremation Serv., https://www.alavondirectcremationservice.com/obituaries/MURRAY-BRYAN-BAXTER?obId=25958501 (last visited May 1, 2023).

3. Only one other Army judge advocate has lived to the age of 101—Colonel Howard S. Levie. Born on 19 December 1907, Howard was a member of our Corps in the 1950s and 1960s. He died at his home in Rhode Island in 2009. For more on Howard Levie, see Fred L. Borch, *The Cease-Fire on the Korean Peninsula: The Story of the Judge Advocate Who Drafted the Armistice Agreement that Ended the Korean War*, Army Law., Aug. 2013, at 1.

4. *George Bertrand Barrett, Jr.*, Hill & Wood Funeral Serv., https://www.hillandwood.com/obituaries/George-Bertrand-Barrett-Jr?obId=26771019 (last visited May 1, 2023).

5. *Relman Colfax Remembers Colleague and Friend Travis Beck*, Relman Colfax (Oct. 13, 2022), https://www.relmanlaw.com/news-remembering-travis-beck.

6. *Id.*

7. *Id.*; *Travis Jackson Beck*, Dignity Mem'l, https://www.dignitymemorial.com/obituaries/tucker-ga/travis-beck-10964507 (last visited May 1, 2023).

8. *Barney Brannen*, New Brunswick News, https://www.legacy.com/us/obituaries/thebrunswicknews/name/barney-brannen-obituary?id=34449224 (last visited May 1, 2023).

9. *Id.*

10. *Notice of Passing, MAJ (Ret.) David Lee Croswell*, JAGCNet (Nov. 1, 2022, 10:08 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=91BDDB2741C-2F2EE852588ED004CDA75.

11. *In Loving Memory of Judge Sam A. Crow,* Penwell-Gabel, https://www.penwellgabeltopeka.com/Obituary/257492/Judge-Sam-Crow/Topeka-KS (last visited May 1, 2023).

12. *Notice of Passing – Captain Ramón Manuel Escapa*, JAGCNet (July 1, 2022, 9:45 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=C7A8EECF3B7DE9E-885258872004B23EE.

13. *Beatrice Galos Fuchs,* Wash. Post, https://www.legacy.com/us/obituaries/washingtonpost/name/beatrice-fuchs-obituary?id=38249859 (last visited May 1, 2023).

14. *Beatrice Galos Fuchs,* Wash. Jewish Week (Dec. 7, 2022), https://www.washingtonjewishweek.com/beatrice-galos-fuchs.

15. *Id.*

16. *Notice of Passing – Major (MAJ) Barbara Kerrane*, JAGCNet (Apr. 14, 2022, 8:47 AM), https://www.jagcnet.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=E287D2AF65E3378C8525882400464181; *Barbara Kerrane*, Dignity Mem., https://www.dignitymemorial.com/obituaries/falls-church-va/barbara-kerrane-10698303 (last visited Apr. 24, 2023).

17. *Notice of Passing, Colonel (Retired) Earle Forrest Lasseter*, JAGCNet (May 6, 2022, 8:23 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=04F87B44931885DD8525883A00401B8F.

18. Fred L. Borch III, *In Memoriam: Timothy D. Litka (1971-2022)*, Army Law., no. 2, 2022, at 28, 28.

19. *Notice of Passing, SGM(R) Larry Clifton Magers*, JAGCNet (Sept. 22, 2022, 10:46 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=FE1F781EC-237C388852588C5004E077C.

20. *Notice of Passing –Staff Sergeant (SSG) Cameron Courtney Marshall*, JAGCNet (May 2, 2022, 12:14 PM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=8670B-17DC24E03078525883600594324.

21. *Id.*

22. *James "Jim" Donald Mogridge*, Oxford Eagle (Feb. 9, 2022, 7:53 AM), https://www.oxfordeagle.com/2022/02/09/james-jim-donald-mogridge.

23. *Id.*

24. *Notice of Passing, Sergeant First Class (SFC) Brent Emmanuel Skeete*, JAGCNet (May 19, 2022, 9:45 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=B6D1D9ED7B-BC4FB785258847004A2D80.

25. *Notice of Passing, Command Sergeant Major (Retired) Robert (Bob) John Sullivan*, JAGCNet (Apr. 6, 2022, 9:40 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=179F6ED94A-0781708525881C004ADE15.

26. *Craig G. Sumner,* Legacy, https://www.legacy.com/us/obituaries/name/craig-sumner-obituary?id=32869770 (last visited May 2, 2023).

27. *Notice of Passing, Captain Charles John Volkert, Jr.*, JAGCNet (Aug. 1, 2022, 7:30 AM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=FD043CD-885C5B5BE85258891003E83B2; *Charles John Volkert, Jr.,* Schantz Funeral Home, P.C., https://www.schantzfh.com/obituary/charles-volkert-jr (last visited May 2, 2023).

28. *Notice of Passing, Colonel (Retired) W. Steven Weedman*, JAGCNet (June 9, 2022, 1:19 PM), https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeDisplay.xsp?open&documentId=909E069AC-C4763048525885C005D7CE8.

AROUND THE CORPS

CW3 Michael Rodriguez, Sr Legal Administrator for I Corps, holds a plank position during Army physical readiness training. (Photo courtesy of MAJ Ian P. Sandall)

(Image courtesy of author)

Practice Notes

FIRE for Effect

Achieving Financial Independence through Military Service

By Major Geoffrey R. Pariza

Financial independence retire early (FIRE) has gained an almost cult-like following in recent years due in large part to internet forums[1] and millennials' dissatisfaction with their current working life.[2] Confronting the challenges of the pandemic and coming to terms with our mortality has only served to accelerate this trend.[3] This article will seek to explain what FIRE is and, conversely, what it is not, and offer some insights on how to leverage military service benefits to achieve it.

What FIRE Is and Is Not

Before discussing what FIRE is, it is easier to start with what it is not. This is important because most of the internet has gotten it wrong. Financial independence retire early is not about yachts and "tendies"[4] where every day is a vacation. It is not a path to conspicuous consumption. It is not even about retiring in the traditional sense of the word. Rather, FIRE is about having the means to achieve your purpose. The first step, achieving financial independence (FI), is having enough wealth to control your time.[5] A multitude of studies has shown that having control over one's life, as much as such a thing is possible, is the biggest predictor of happiness.[6]

What to do with all that time once we no longer need to devote it to paid employment is the second half of the equation: the "retire early" part. Not having a real answer to this question is probably the biggest failing of the online FIRE movement. The FIRE community seems to fall into two broad categories. The first is hell-bent on escaping from their current misery.[7] The second is not necessarily miserable in their current life but dreams of a life of endless vacation.[8]

Neither notion is particularly healthy, helpful, or the actual point of FIRE.[9] Depending on how much is "enough" and how frugal you are willing to be, achieving FI could take decades, and life is not going to remain on pause while you to do that. We "cannot simply numbers-crunch [our] way to emotional well-being and quality of life."[10] Said another way, life is too short to be miserable. The idea that you need to live like a miser for ten or twenty years while being unhappy in a job you hate to obtain some future unknown happiness is not a recipe for the good life. It is not worth it, and it is not going to work.

Your life is happening now. As far as the other camp is concerned, endless vacation sounds great on its face, but if every day were Saturday, it would lose its thrill soon enough. Countless surveys and studies of retirees have shown time and again that it gets boring and expensive quickly.[11] Try this experiment. We will use golf because that is what attorneys supposedly do, but you can substitute your leisure activity of choice. Take a calendar and write down the tee times you would like if you had achieved FI and did not have to work for money any longer. Now look at all the other white space on the calendar. What are you going to do with all that time in-between?

The point of FIRE is not to retire *from* something. It is not an escape from your miserable working life. The point is to retire *to* something. That something is not an endless vacation, but your purpose. Something you want out of your life that gives you a sense of fulfillment and satisfaction. It could be anything, and it is likely different for each of us. It could very well be some semblance of what you are currently doing, with reduced hours to give you more time for golf or family or friends or travel or whatever. To achieve FIRE, you need to figure out what that purpose is. Saving for the sake of some unknown future event is all well and good, but if you do not know what you want out of life you are not really saving for a goal, nor do you know how much is enough to achieve FI.[12]

How to Achieve FI Through Military Service

What your purpose is and how much is enough to achieve it are questions only you can answer, but here are some strategies and benefits that can help you reach that goal. The first and most obvious strategy is to stay in service until you are retirement eligible. A pension is an invaluable resource. It is income for life, backed by the full faith and credit of the United States.[13] It will also allow you to safely chase higher returns in your investment portfolio by having a larger percentage of your allocation in stocks.[14] The present value of an officer pension is well over a million dollars and more than likely approaching two million dollars.[15] That is the amount of money you would need to have invested currently at a certain rate of return in order to generate the income you receive from your pension. The Defense Finance and Accounting Service has calculators that you can employ to see what the present value of your pension is, assuming you remain in service long enough for it to vest.[16]

You may be able to achieve FI with just your pension. You may not. But it makes sense to employ other strategies as well for a host of reasons. In their book, *The Millionaire Next Door*, Drs. Thomas Stanley and William Danko profile what the average American millionaire looks like.[17] What they found was that millionaires were generally self-made and more than likely people of modest means who lived frugally and were prodigious savers.[18] They also found that the majority of millionaires either operated on a budget or used a "pay yourself first" strategy by saving X amount off the top and then spending the rest.[19] This is not surprising. What this tells us is that you, too, can be a millionaire. The path to FI is rather simple, do not allow your income to define your budget. Save more. Spend less.

Know What Money Is and Where It Is Going

You cannot do this if you do not know where your money is going. There are several resources available to assist in this area and fintech[20] has made it easy. Websites and apps like mint.com and youneedabudget.com make tracking spending effortless. Army Community Service (ACS) also offers free financial readiness planning classes and resources at every installation that can assist with budgeting.[21] Moreover, the Chaplaincy often offers funded slots for Dave Ramsey's Financial Peace University course.[22]

If the idea of budgeting makes your skin crawl and you do not like the idea of a "pay yourself first" strategy, Vicki Robin, the mother of FIRE,[23] offers another way. In her 1992 book, *Your Money or Your Life*, Robin counsels achieving FI by redefining what money is.[24] According to Robin, money is not a store of value or something that gives us power or freedom, but rather it is our life energy.[25] It is something for which we trade our most valuable resource: our time.[26] We can transform our relationship with money and curb our spending by determining what our purpose is and what our real hourly wage is. We can then use that information to evaluate our expenditures by asking ourselves if each expense was worth the hours of life it took and whether the expense is in line with our values and in furtherance of our purpose.[27]

Doing this exercise, in and of itself, can change spending habits without having to budget *per se*. Obviously, some expenses, like toothpaste, are going to be neutral, but eliminating others, like coffee shops, may generate significant savings. According to one recent survey, the average millennial spends over $2,000 a year on coffee.[28] Do you know how much you currently spend on coffee a year?

Where to Generate Savings

Two of the biggest expenses we have are housing and transportation.[29] This is an area where we can generate significant savings with millionaires once again offering a recipe for success. A lot of people who live in expensive homes and drive expensive cars have little wealth.[30] We all have a story about the Soldier who used his deployment cash or enlistment bonus to buy a flashy car but can barely afford the insurance.

Officers, despite their higher pay, can often run afoul of similar problems as the pressure to keep up appearances and lifestyle creep cause their expenses to exceed their income. People who have achieved FI, on the other hand, live below their means and often own modestly priced and/or used cars.[31] A car is not an investment. It is a means of transportation and, more importantly, it is a depreciating asset.[32] The

moment you drive your new car off the lot, it has lost somewhere around 10 percent of its value.[33] It loses about 20 percent of its value in the first year and then depreciates another 15 percent a year for the next four years.[34] Many luxury-brand cars fare much worse, losing upwards of 50 percent of their value in the first five years of ownership.[35]

A home may not depreciate like a car, but nonetheless, a home is not an investment.[36] It is where you live, and it is a liability.[37] This is a controversial statement because people have strong feelings about home ownership. Feelings aside, for Soldiers, buying a home is a terrible financial decision in most cases.[38] The transactional costs alone make it a bad idea for people who move every two to three years.[39] You may get tunnel vision and look at the difference between mortgage payments and rent, but you are likely overlooking a myriad of other costs associated with buying, owning, and selling a home.[40] Moreover, houses are not liquid and require constant reinvestment.[41] They also do not appreciate in value in the same manner as securities do.[42] After factoring in inflation, there is on average little appreciation in value if any.[43] A better strategy for achieving FI is to rent, ensuring that your total housing costs come in at or under your BAH at every duty station, thereby allowing fluctuations in income due to changes in your BAH to not derail your budget.[44]

Invest in your Future

The savings gained from employing these strategies can then be invested.[45] If you are in the Blended Retirement System (BRS),[46] the no brainer is to put at least 5 percent of your pay in the Thrift Savings Plan (TSP) because you will get a 5 percent match.[47] That is a guaranteed 100 percent return on investment. It is free money. No investment will ever produce returns that well. If you are not part of the BRS, it does not much matter whether you utilize the TSP or an individual retirement account (IRA). Regardless of which one you choose, the Roth option is generally the best option for a host of reasons.[48]

The TSP's low fees are often touted as the principal reason why you should invest in it.[49] The TSP does have low fees, and fees over the long run can significantly impact your retirement portfolio.[50] Nonetheless,

(Image courtesy of author)

this is not the principal reason you should invest in the TSP as lower fees can be found elsewhere.[51] The principal reason is that it is the only place you can invest up to $22,500 a year and let it grow tax free.[52] If you are deployed, you can contribute even more, up to the annual deferral limit, which is currently $66,000.[53] Currently the maximum contribution limit for an IRA is only $6,500.[54] If you cannot currently contribute more than that, then it does not much matter, but if you can, you should utilize the TSP.

The Benefits of Military Service

Military service offers several additional aids to achieving FI that are often overlooked. A simple way to up your savings rate is to make more money, but the inverse is also true. Soldiers may look at the private sector with envy and believe that if they jumped ship for a civilian job, they would make more money. This is often not in fact the case and the realization can be a rude awakening.

While in the service, a not insignificant portion of your income is not taxed by way of your basic allowance for housing (BAH) and basic allowance for subsistence (BAS).[55] Moreover, a multitude of states that have an income tax do not tax military pay or retirement.[56] If you are currently paying state income tax, it is only a matter of time until you are assigned to a duty station in a state that either has no state income tax or a military exception, and it would be wise to change your state of residency once you are able to. If you leave the military, you will lose these tax benefits.

You will also lose your free insurance. Insurance is not an investment, but it does offer benefits. While you remain in the service, your out-of-pocket healthcare costs are zero, and the out-of-pocket costs, if any, for your Family members are relatively small.[57] The same cannot be said for the private sector. In 2022, the average family contribution to employer-paid healthcare, after taking into account premiums and copays, was $6,106.[58] This amount also may not include dental,[59] orthodontics,[60] and vision[61] insurance, which the military provides to Service members and are available for dependents at reduced costs. Savings on health insurance will continue after retirement as well and is an invaluable benefit for maintaining FI.[62] A recent study estimated that a couple who retired at age sixty-five in 2020 could expect to pay nearly $300,000 in out-of-pocket medical expenses during retirement.[63] Retirees with Tricare, on the other hand, have significantly lower out-of-pocket expenses than the general public.[64]

(Credit: Vitalii Vodolazskyi - stock.adobe.com)

When we think of insurance for ourselves, we often think of only life insurance and health insurance, but disability insurance is arguably just as important. Your chances of becoming disabled in your prime earning years are higher than your chances of dying during the same period.[65] According to the Social Security Administration, more than one-in-four twenty-year-olds will be disabled before reaching the age of retirement.[66] Some private sector employers offer disability plans, but the average personal plan costs between 1-3 percent of an employee's annual salary.[67] Costs can fluctuate wildly depending on: (1) the benefit period, in other words, how long it will pay out; (2) the elimination period, or how long the insured has to wait for benefits after becoming disabled; and (3) how much income it will provide.[68] By virtue of your military service, you are covered by an unbeatable disability plan; not only will you not have to pay for any medical care associated with your disability, but you are guaranteed permanent disability payments and may even be able to remain on active duty until the issue resolves itself.[69]

Along this same vein, military retirees have access to The Federal Long Term Care Insurance Program.[70] Long-term care insurance differs from disability insurance in that it is not intended to replace lost income due to disability, but rather to pay for long-term care that you need as a result of some chronic illness or injury that prevents you from taking care of yourself.[71] Normal health insurance, such as Tricare, does not cover these costs.[72] These plans in the civilian sector have essentially become unaffordable.[73] Due to huge miscalculations in underwriting, premium increases of over 200 percent are not uncommon.[74] Long-term care is prohibitively expensive, hence the premium increases, but purchasing insurance from the Federal Long Term Care Insurance Program may result in significant savings over policies available to the public at large. The less money you spend on healthcare and insurance, the more you have for your purpose.

The same logic applies to childcare costs. The average American family pays over $10,000 a year in childcare costs.[75] Service members, on the other hand, may pay significantly less by utilizing Department of Defense child development programs,[76] which are designed to cost 20-25 percent less than similar civilian childcare.[77] Child development programs (CDP) include both on-post and community-based childcare as well as subsidies for off-post childcare.[78] The amount of money each family is eligible to save over private childcare varies greatly as fees are set annually and are based on total family income,[79] which is defined as all earned income and includes all pay and entitlements, such as BAS and BAH.[80] There are also multiple child discounts, which allow fees to be reduced by up to 20 percent when more than one child receives care at the same facility.[81] In the case of subsidized care, Service members may receive reimbursement of up to $1,700 per child per month for amounts over their total-family-income-associated fee.[82] All in all, the use of CDPs amounts to significant childcare savings for Soldiers, which allows that excess money to be invested in your future.

Leaving the Service Could Cost You

Depending on your family situation and where you live and work after leaving the service, the loss of these benefits could easily require you to earn 25-50 percent or more than you currently do just to break even.[83] This calculation does not include other lost military benefits such as free gym memberships, commissary benefits, and discounts and freebies. If you are seriously considering leaving military service to make more money, it would behoove you to take a hard look at your annual personal statement of military compensation[84] and fill in all those blanks to get an accurate picture of your civilian compensation equivalent.

Conclusion

By employing these strategies (viewing expenditures through the lens of FI and achieving your purpose, living frugally, investing savings, and managing risk by insuring yourself), you can easily achieve FI during a twenty-year military career or even sooner. As far as a roadmap is concerned, how to achieve FI is the easy part, the difficulty lies more in discerning your purpose. Without that piece of the puzzle, real FIRE is not possible. **TAL**

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Notes

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2. *See, e.g.*, Dawn Allcot, *Gen X & Millennials Would Rather Be Unemployed Than Unhappy at Work*, GO Banking (Apr. 6, 2022), https://www.gobankingrates.com/money/jobs/gen-z-millennials-rather-be-unemployed-than-unhappy-work; Peter Economy, *Why Are Millennials So Unhappy at Work?*, Inc. (Feb. 4, 2016), https://www.inc.com/peter-economy/why-are-millennials-so-unhappy-at-work.html.

3. Kevin Roose, *Welcome to the YOLO Economy*, N.Y. Times (Oct. 7, 2022), https://www.nytimes.com/2021/04/21/technology/welcome-to-the-yolo-economy.html.

4. The Wall Street Bets subreddit refers to making lots of money as "tendies," as in chicken tenders that they will be eating once they make it big. *See* Jake Davidson, *Meet the Bros Behind /r/WallStreetBets, Who Lose Hundreds of Thousands of Dollars in a Day—And Brag About It*, Money (Oct. 25, 2018), https://money.com/wall-street-bets.

5. Vicki Robin & Joe Dominguez, Your Money or Your Life: 9 Steps to Transforming Your Relationship with Money and Achieving Financial Independence 153 (3d ed. 2018) (2008).

6. *See* Morgan Housel, The Psychology of Money: Timeless Lessons on Wealth, Greed, and Happiness 83-89 (2020).

7. *See, e.g.*, Terri Bennett, *How I Left a Toxic Job and Discovered Financial Independence*, Fin. Gym Blog (July 21, 2021), https://financialgym.com/blog/2021/7/12/how-i-left-a-toxic-job-and-discovered-financial-independence; Katie Gatti Tassin, *Fighting Burnout with Money*, Money With Katie Blog (July 21, 2021), https://moneywithkatie.com/blog/burnout-why-reaching-financial-independence-is-the-best-thing-for-your-work.

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10. *Id.* at 135.

11. *See id.* at 43-51.

12. *See id.* at 134.

13. *See Retired Pay*, U.S. Army: My Army Benefits (May 24, 2022), https://myarmybenefits.us.army.mil/Benefit-Library/Federal-Benefits/Retired-Pay?serv=128.

14. "The U.S. stock market has long been considered the source of the greatest returns for investors, outperforming all other types of investments including financial securities, real estate, commodities, and art collectibles over the past century." *Which Investments Have the Highest Historical Returns?*, Investopedia (Sept. 29, 2022), https://www.investopedia.com/ask/answers/032415/which-investments-have-highest-historical-returns.asp.

15. The present value of a Service member's pension is wholly dependent on their rank at retirement, years in service, and lifespan. Pensions for enlisted members who retire below the rank of sergeant first class will more than likely not have a present value of $1 million dollars. *See* Ryan Guina, *A Military Retirement is Worth Millions of Dollars*, Mil. Wallet (Feb. 16, 2023), https://themilitarywallet.com/military-retirement-worth-millions.

16. *Military Compensation*, U.S. Dep't of Def., https://militarypay.defense.gov/Calculators.aspx (last visited Apr. 25, 2023) (providing different calculators for the Blended Retirement System, the Legacy High-3 retirement plan, the Final Pay retirement plan, and others).

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19. *Id.* at 41.

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24. Robin & Dominguez, *supra* note 5, at 48.

25. *Id.*

26. *Id.*

27. *See id.* at 114. This calculation is not just hours on the job, but all time and money expenses associated with it. For example, the two hours we spend in the car each day, the money spent on childcare, the uniforms and accoutrements we would not have to purchase if we were not working.

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29. *Housing and Transportation Affordability*, U.S. Dep't of Transp., https://www.transportation.gov/mission/health/housing-and-transportation-affordability (last visited Apr. 26, 2023).

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31. *See id.*

32. Andrew Martins, *Is a Car an Asset?*, Investopedia (Aug. 3, 2022), https://www.investopedia.com/car-asset-5207357.

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34. Rick Popely, *Car Depreciation: How Much It Costs You*, Carfax Blog (Feb. 3, 2021), https://www.carfax.com/blog/car-depreciation.

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38. John Goodall, *Buy or Rent: Revisiting the American Dream*, Army Law., July/Aug. 2018 at 20, 20.

39. *Id.*

40. *See id.* at 20-21.

41. *Id.* at 21.

42. *See* Kathleen Elkins, *Wealth Manager: Buying a Home is 'Usually a Terrible Investment'—Here's Why*, CNBC Small Bus. Playbook (Apr. 24, 2023, 12:09 PM), https://www.cnbc.com/2019/04/18/wealth-manager-buying-a-home-is-usually-a-terrible-investment.html.

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44. Goodall, *supra* note 38, at 21.

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48. For most individuals, the Roth option will generate more income in retirement than the traditional option. *See* Maryalene LaPonsie, *Deciding Between a Roth vs. Traditional IRA*, U.S. News & World Rep. (Mar. 18, 2020, 1:11 PM), https://money.usnews.com/money/retirement/articles/deciding-between-a-roth-vs-traditional-ira. The Roth option also has more favorable withdrawal rules and is not subject to required minimum distributions. *See id.*

49. *See, e.g.*, Lyn Alden, *TSP's Small Fees Add Up Big*, FEDweek (May 15, 2017), https://www.fedweek.com/tsp/tsps-small-fees-add-big ("Overall, the TSP has virtually the lowest fees in the world, and is tax-advantaged similarly to a 401(k) plan.").

50. *See* Sec. and Exch. Comm'n, Off. of Investor Educ. and Advoc., How Fees and Expenses Affect Your Investment Portfolio (2019).

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56. *See* Jim Absher, *State Tax Information for Military Members and Retirees*, Military.com (Mar. 3, 2023), https://www.military.com/money/personal-finance/state-tax-information.html.

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58. Kaiser Fam. Found., Employer Health Benefits: 2022 Annual Survey 91 (2022).

59. U.S. Family Health Plan (USFHP) members may be entitled to free preventative dental care, *see, e.g.*, Johns Hopkins, *Dental, Vision & Additional Discounts*, HopkinsUSFHP.org, https://www.hopkinsusfhp.org/members/my-benefits/dental-vision-and-discounted-services/#dental (last visited May 1, 2023), whereas all others will have to utilize the Tricare Family Dental Plan. *Compare* Rebecca Alwine, *Everything You Need to Know About the Tricare Dental Program*, Military.com (May 2, 2023), https://www.military.com/benefits/tricare/everything-you-need-know-about-tricare-dental-program.html (describing Tricare Family Dental Plan fees and coverage), *with How Much Does Individual Dental Insurance Cost?*, Humana.com, https://www.humana.com/dental-insurance/dental-resources/how-much-is-dental-insurance (last visited June 16, 2023) (examining average costs and coverage for dental insurance). As with all insurance, out-of-pocket costs will depend on copays, deductibles, coinsurance, and annual maximums. *See* Alwine, *supra*.

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80. *Id.* at 64-65 (defining total family income).

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Texas and Rhode Island National Guard Soldiers from the 56th Infantry Brigade Combat Team train alongside partner nations during a crowd riot control training exercise, Operation Bronze Shield, at the Joint Multinational Readiness Center in Hohenfels, Germany, on 14 June 2023. The crowd riot control exercise was one of many training exercises conducted by the joint team. (Credit: SGT Gauret Stearns)

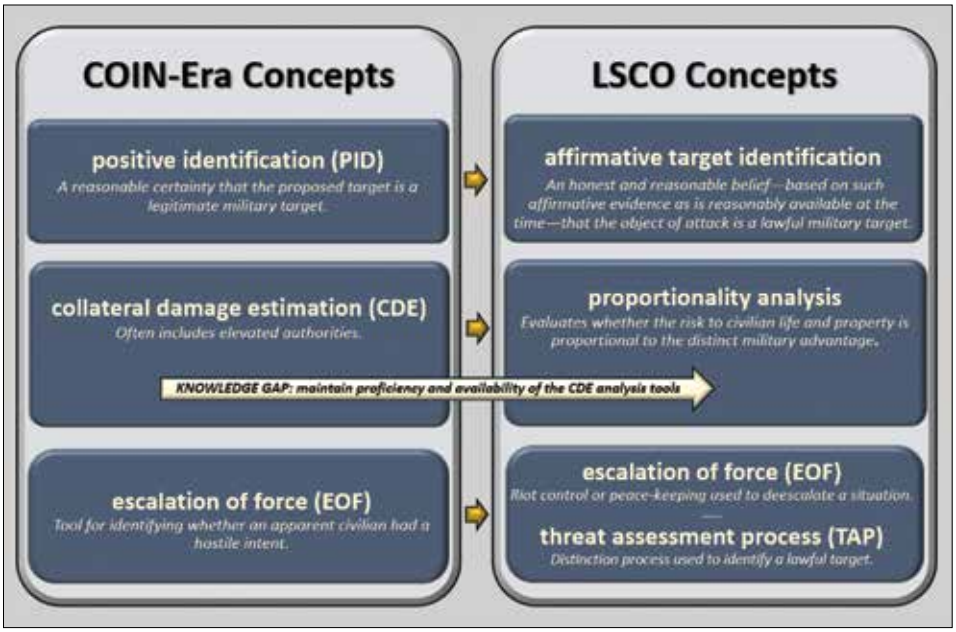
Practice Notes

LOAC Babies and COIN Bathwater

By Major John P. Policastro

In March of 2021, the *Military Review* published an article titled *The Eighteenth Gap*, in which then-Lieutenant General Charles Pede and Colonel (COL) Peter Hayden reiterated the U.S. Army Judge Advocate General's (JAG) Corps priority of preserving legal maneuver space for commanders during the transition away from counter-insurgency (COIN) to large-scale combat operations (LSCO).[1] Overcoming the eighteenth gap requires the JAG Corps to message the difference between law of armed conflict (LOAC) constraints and the extra-legal policy limitations developed during years of COIN. Experience at Warfighter Exercises reveals that the JAG Corps has successfully messaged this need for legal maneuver space to division and corps leadership.[2]

However, as the JAG Corps continues to message against unnecessary constraints from COIN "hangover," it should also ensure that commanders do not throw the baby out with the bathwater. Some commanders still suffer from this COIN hangover, but other commanders and staffs have swung to the opposite end of the pendulum and believe that none of the legal frameworks they learned during COIN are useful.[3] But, commanders and practitioners should not avoid useful tools and analytical frameworks merely because they were emphasized during COIN. This fallacy manifested during recent Warfighter Exercises, when some leaders resisted accurate, LOAC-based legal advice because the attorney used terminology that reminded them of COIN-based analyses.[4]



New terms to describe certain COIN concepts that still apply in LSCO. (Credit: Jani Riley, TJAGLCS)

To assure commanders, NSL practitioners should communicate how to apply LOAC legal standards in LSCO while incorporating every appropriate, useful tool, including those emphasized during COIN. To avoid confusion, this may require coining (pun intended) new terms to describe certain COIN concepts that still apply in LSCO.

Positive Identification and Distinction

One of the concepts that carries significant COIN baggage is "positive identification" (PID).[5] The legal principle of distinction requires an attacker to distinguish "between unprotected and protected objects."[6] Intuitively, to comply with the law and distinguish between unprotected and protected objects, combatants must first identify the object of their attack. A judge advocate's advice in LSCO to positively identify the vehicles as enemy vehicles before you target them is legally accurate.[7] However, commanders may resist this advice because of the connotation between PID and COIN-era heightened identification requirements.[8]

The *Department of Defense Law of War Manual* articulates that 2013 U.S. policy guidance, which required Soldiers to have "near certainty" that an enemy was present and that non-combatants would not be injured, exceeded the legal requirements.[9] As COL Gail Curley and Lieutenant Colonel (LTC) Paul Golden observed in their 2018 *The Army Lawyer* article, "Restrictive positive identification policies assume[] U.S. forces own the sky, which is not realistic in a [high-intensity conflict], particularly against a peer or near-peer enemy that possesses credible offensive air, defensive air, space, and cyber capabilities."[10]

Therefore, although it may be technically legally accurate to use the term "positive identification" in a LSCO distinction discussion, judge advocates should consider using alternative terminology to avoid the perception of a COIN-policy paradigm. Instead, practitioners should focus on clearly describing the minimum legal standard required by LOAC. As the *Law of War Manual* describes, the standard for factually distinguishing between lawful targets and protected objects/persons is "good faith and based on [the decision maker's] assessment of the information available to them at the time."[11]

One possible alternative to PID is to follow COL J. J. Merriam's 2016 proposal in the *Virginia Journal of International Law* to use "affirmative target identification" to describe the minimum legal requirements of distinction.[12] Practitioners typically define PID as "a reasonable certainty that the proposed target is a legitimate military target."[13] In contrast, COL Merriam defined affirmative target identification as "an honest and reasonable belief—based on such affirmative evidence as is reasonably available at the time—that the object of attack is a lawful military target."[14] Colonel Merriam persuasively argued that affirmative target identification meets standards of international law for both the informational and decisional aspects of distinction.[15] Even if practitioners do not adopt affirmative target identification, those who advise commanders on distinction in a LSCO environment should consider describing the legal distinction requirements using LOAC terminology to avoid the negative, policy-based connotation of PID.

Collateral Damage Estimation and Proportionality

Similarly, the term "collateral damage estimation" (CDE) carries significant COIN-policy connotations. Policy considerations led to elevated approval authorities for accepting collateral damage risk during COIN.[16] However, the underlying legal principle of proportionality applies in both COIN and LSCO.[17] The law of armed conflict requires that commanders must determine and articulate "the expected military importance of the target and why the anticipated civilian collateral injury or damage is not expected to be excessive."[18] In order to determine whether the anticipated collateral damage is excessive, the commander must have some method of estimating what collateral damage to anticipate. Therefore, the CDE methodology can help commanders make informed collateral damage risk decisions. However, experience during recent Warfighter Exercises reveals that commanders and staffs associate CDE methodology so heavily with COIN, that they may not even deploy with the Digital Imagery Exploitation Engine software[19] necessary to conduct the CDE analysis in a LSCO setting.[20]

The COIN-based policy requirements to conduct CDE (and the associated elevated authorities) will likely not apply in a LSCO environment.[21] However, staffs preparing to fight in LSCO should not eschew readily available tools that could help their commanders employ fires confidently while avoiding unnecessary risk of strategic disaster.[22] To encourage using all available tools while avoiding the perception of

CPT Javier Diaz, a judge advocate with Headquarters and Headquarters Battalion, 1st Armored Division, does research to solve legal dilemmas during the Command Post Exercise III at Fort Bliss, TX. CPT Diaz analyzes the battle plan and advises the commander regarding LOAC. (Credit: PFC Charlie Duke)

COIN limitations, legal advisors in LSCO should consider replacing the term "CDE" with "proportionality analysis" while also encouraging fellow staff members in the fires cell to maintain proficiency and availability of the CDE analysis tools. Although not required as a method, Digital Imagery Exploitation Engine is an efficient means of evaluating whether the risk to civilian life and property is proportional to the distinct military advantage commanders seek and quickly demonstrating the benefit of potential weaponeering mitigation options.[23]

Ultimately, the precise estimates that CDE methodology provides will enable commanders to use fires *more* permissively since a lack of information would likely lead to unnecessary risk aversion. Research conducted by Carnegie Mellon University's Center for Behavioral Decision Research indicates that decision makers avoid risk when a knowledge gap exists and the knowledge gap is unpleasant to think about.[24] In LSCO, firing into an urban area without the benefit of a CDE creates a knowledge gap for the commanders; they would be uncertain exactly how much civilian damage the strike is likely to produce. In addition to making it practically difficult for the commander to do the proportionality analysis LOAC requires, the atrocious possibilities associated with this knowledge gap would be unpleasant for any commander to contemplate. The Carnegie Mellon research indicates that most commanders will be more likely to avoid the risk by choosing not to fire.[25] Conversely, access to precise collateral damage estimates will lessen the knowledge gap, allowing commanders to make informed decisions to fire when appropriate.

Of course, many targets in an LSCO fight will not allow sufficient time for targeteers to conduct an in-depth estimate,[26] but maintaining the capability to conduct either hasty or deliberate collateral damage estimates, target mensuration, and weaponeering mitigation may enable commanders to accept calculated, well-informed risk and kill the enemy even in an urban environment.

Escalation of Force

Another concept that evokes COIN memories is escalation of force (EOF) procedures.[27] Yet, this popular COIN topic may still be useful in certain LSCO situations. The *Escalation of Force Handbook*, published by the Center for Army Lessons Learned in 2007, defined EOF as "sequential actions that begin with nonlethal force measures (visual signals to include flags, spotlights, lasers, and pyrotechnics) and may graduate to lethal measures (direct action) that include warning, disabling, or deadly shots to defeat a threat and protect the force."[28] It goes on to state that rules of engagement

A U.S. Army advisor assigned to 1st Security Force Assistance Brigade listens to a radio at Fort Irwin, CA. U.S. Army advisors train alongside role players and actual partners to prepare to advise, support, liaise, and assist during LSCO. (Credit: MAJ Jason Elmore)

(ROE) "may limit EOF options"[29] as it often did during COIN operations.[30] Hence, commanders with COIN experience may associate the EOF procedures with the restrictive COIN ROE that accompanied EOF-focused training.

However, EOF procedures can be useful in a LSCO environment with a more permissive ROE. As the Center for Army Lessons Learned recognized, EOF "helps commanders and Soldiers apply . . . self-defense, use of force, military necessity, proportionality, and unnecessary suffering."[31] These principles still matter in LSCO, and EOF can help units apply them in a way that benefits mission accomplishment.

Then-LTC Randy Bagwell's 2008 article, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, recognized two useful roles of EOF.[32] Traditionally, EOF ensures a proportional use of force in self-defense to defuse a threat that is not declared hostile (such as rioting civilians).[33] During COIN, Soldiers began to use EOF procedures as a tool for identifying whether an apparent civilian had a hostile intent.[34] In LOAC terms, EOF became a tool for conducting a distinction analysis in a scenario where the enemy is not readily identified.[35] To avoid confusion, COL Bagwell recommended using two different terms to refer to these two different processes.[36] The traditional riot control or peace-keeping process used to deescalate a situation should still be called EOF, while the distinction process used to identify a hostile intent should be called the "threat assessment process" (TAP).[37] This alternative terminology may also be useful for communicating the benefits of distinguishing between threats and non-threats in a LSCO conflict's contested urban terrain.

In LSCO training scenarios, units focus on engaging large enemy formations with direct and indirect fires,[38] but realistically training these scenarios also includes planning for the effect of displaced persons on route management, non-uniformed armed groups, and special-purpose forces that blend into the local populace.[39] The threat assessment process is essential to managing these parts of the LSCO fight while avoiding civilian casualties or otherwise feeding an adversary's information warfare efforts. Unlike in COIN, protecting the force amidst these ambiguous distinction problems will not be the focus in LSCO.[40] Rather, evaluating threats that may be looming among throngs of fleeing civilians will be an unwelcome distraction from targeting an advancing armored formation.[41] Therefore, commanders should wisely train on every tool, such as TAP, to help their Soldiers efficiently assess

these threats. Practitioners should communicate to commanders that TAP is a useful tool that Soldiers should use when it helps meet LOAC requirements, but that it is not a rigid requirement.

Conclusion

Preserving legal maneuver space for commanders in LSCO requires messaging that many COIN-based policy constraints no longer apply. However, analytical tools developed during COIN are separate from the restrictive policies they helped implement; the analytical tools may still prove useful in LSCO. The community of practitioners should carefully communicate using terms and descriptions that precisely describe commanders' LSCO legal requirements but do not connote overly restrictive COIN policy. Doing so will ensure that commanders and their legal advisors have a shared understanding of the legal framework for the wide array of LSCO threats.

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Notes

1. Lieutenant General Charles Pede & Colonel Peter Hayden, *The Eighteenth Gap: Preserving the Commander's Legal Maneuver Space on "Battlefield Next,"* Mil. Rev., Mar.-Apr. 2021.

2. This assertion is based on the author's recent professional experiences participating in Corps and Division Warfighter Exercises as an Observer Coach Trainer with the Mission Command Training Program from 7 July 2021 to 16 June 2023 [hereinafter Professional Experiences].

3. *Id.*

4. *Id.*

5. Off. of Gen. Couns., U.S. Dep't of Def., Department of Defense Law of War Manual para. 5.4.3.1 n.87 (12 June 2015) (C2, 13 Dec. 2016) [hereinafter DoD LoW Manual].

6. *Id.* para. 2.5.

7. For instance, a judge advocate may advise targeteers to use other collection methods to confirm ground moving target indications of enemy vehicles. *See generally* U.S. Dep't of Army, Field Manual 2-0, Intelligence para. 4-19, tbl.4-2 (6 July 2018) (describing theater intelligence collection capabilities).

8. *See* The White House, Fact Sheet: U.S. policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities (2013) (establishing heightened identification requirements to justify the use of force in counterterrorism operations).

9. DoD LoW Manual, *supra* note 5, para. 5.4.3.1 & n.87.

10. Colonel Gail A. Curley & Lieutenant Colonel Paul E. Golden, Jr., *Back to Basics: The Law of Armed Conflict and the Corrupting Influence of the Counterterrorism Experience*, Army Law., Sept./Oct. 2018, at 23, 24.

11. DoD LoW Manual, *supra* note 5, para. 5.3.2.

12. John J. Merriam, *Affirmative Target Identification: Operationalizing the Principle of Distinction for U.S. Warfighters*, 56 Va. J. Int'l L. 83 (2016).

13. DoD LoW Manual, *supra* note 5, para. 5.4.3.1 & n.87.

14. Merriam, *supra* note 12, at 85.

15. *Id.* at 140-44.

16. *See* Joint Chiefs of Staff, Joint Pub. 3-24, Counterinsurgency, at III-13 (30 Apr. 2021).

17. Nat'l Sec. L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, Operational Law Handbook ch. 3, para. V.C (2022) (describing proportionality as one of the "basic principles of the law of armed conflict").

18. DoD LoW Manual, *supra* note 5, para. 5.10.2.2.

19.

> The Digital Imagery Exploitation Engine (DIEE), a tool that enables users to plan and execute strikes by seamlessly performing the following Advanced Target Development steps: 1) geographically locate and characterize the target, 2) weaponeer the target using JMEM Weaponeering Software (JWS) and perform target coordinate mensuration, 3) estimate collateral damage effects using the Digital Precision Strike Suite Collateral Damage Estimation (DCiDE) tool, and 4) produce output graphics to the appropriate databases.

Dir., Operational Test & Evaluation, FY22 Annual Report 344 (2023).

20. Professional Experiences, *supra* note 2.

21. *See* Pede & Hayden, *supra* note 1, at 6-7.

22. As discussed above, the DIEE is a useful tool for avoiding excessive collateral damage. For further discussion on the negative strategic effects of excessive collateral damage (including loss of domestic support, loss of international legitimacy, and enemy exploitation), see Patrick M. Shaw, Collateral Damage and the United States Air Force (Jan. 6, 1997) (thesis, School of Advanced Airpower Studies, Air University, Maxwell Air Force Base, Alabama), https://apps.dtic.mil/sti/pdfs/ADA391809.pdf.

23. *See* Dir., Operational Test & Evaluation, FY 2016 Annual Report 430 (2016).

24. Russel Golman et al., *Information Gaps for Risk and Ambiguity*, 128 Psych. Rev. 86, 86 (2021).

25. *See id.* at 86, 98 (finding that participants are more averse to risk and ambiguity when the information gaps are unpleasant to contemplate).

26. *See* Pede & Hayden, *supra* note 1, at 7.

27. *See* U.S. Dep't of Army, Field Manual 3-24.2, Tactics in Counterinsurgency para. 5-150 (1 Apr. 2009) ("All forces must understand and adhere to rules of engagement (ROE) and escalation of force (EOF) procedures.").

28. Ctr. for Army Lessons Learned, Escalation of Force Handbook: Tactics, Techniques, and Procedures 1 (2007) [hereinafter EOF Handbook].

29. *Id.*

30. Pede & Hayden, *supra* note 1, at 7.

31. EOF Handbook, *supra* note 28, at 1.

32. Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, Army Law., Apr. 2008, at 5, 5.

33. *Id.*

34. *Id.*

35. *See* DoD LoW Manual, *supra* note 5, para. 2.5.

36. Bagwell, *supra* note 32, at 5.

37. *Id.* at 5, 9.

38. *See generally* U.S. Dep't of Army, Field Manual 3-0, Operations ch. 6 (1 Oct. 2022) (discussing Army operations during large-scale conflict).

39. For instance, consider the impact of these factors on the Ukrainian conflict:

> [M]any of the feared civilian impacts of a Russian invasion have come to pass, with particularly acute consequences for [internally displaced persons]. Finding durable housing solutions is challenging because of the difficulty and danger of moving within areas of active fighting . . . . Indiscriminate shelling and missile attacks have targeted and destroyed critical civilian infrastructure.

Erol Yayboke, Anastasia Strouboulis & Abigail Edwards, *Update on Forced Displacement around Ukraine*, Ctr. For Strategic & Int'l Stud. (Oct. 3, 2022), https://www.csis.org/analysis/update-forced-displacement-around-ukraine. "Spetsnaz missions vary from battlefield reconnaissance and behind-the-lines sabotage to training guerrillas . . . . Spetsnaz forces are especially geared toward 'political warfare' operations, reflecting Moscow's particular interest in integrating conventional military missions with covert 'active measures.'" Mark Galeotti, *Spetsnaz: Operational Intelligence, Political Warfare, and Battlefield Role*, Sec. Insights (Feb. 2020), https://www.marshallcenter.org/en/publications/security-insights/spetsnaz-operational-intelligence-political-warfare-and-battlefield-role-0.

> In the Donbas since 2014, the Spetsnaz have been used for a mix of roles: sometimes battlefield reconnaissance and combat support but often more-political missions. In particular, they (or their counterparts from the Federal Security Service) are widely assumed to have been behind the assassinations of several more-independent-minded or otherwise troublesome local militia commanders, although these deaths are officially blamed on Kyiv.

Id. "'The Wagner Group's first operation was helping Russia annex Crimea in 2014,' says Tracey German, professor of conflict and security at King's College London. In the weeks before Russia's invasion of Ukraine, it is thought Wagner carried out 'false flag' attacks to give the Kremlin a pretext for invading." *What is Russia's Wagner Group of Mercenaries in Ukraine?*, BBC News (June 12, 2023), https://www.bbc.com/news/world-60947877.

40. *See* U.S. Army, Army Multi-Domain Transformation: Ready to Win in Competition and Conflict, Chief of Staff Paper #1, at 5-9 (2021) (describing the challenges of large-scale combat and how the Army will overcome them).

41. *See id.* at 6-7 (outlining the Army's strategy within battlespace).

U.S. Air Force loadmasters and pilots assigned to the 816th Expeditionary Airlift Squadron loaded passengers aboard a U.S. Air Force C-17 Globemaster III in support of the Afghanistan evacuation at Hamid Karzai International Airport, Afghanistan. (Credit: MSgt Donald R. Allen, U.S. Air Force)

Practice Notes

The Afghanistan Non-Combatant Operation

A Fiscal Perspective

By Lieutenant Colonel Nolan T. Koon

On 31 August 2021, at 11:59 p.m. in Kabul, Afghanistan, the last American Soldiers boarded five C-17 Globemaster III aircraft and departed Hamid Karzai International Airport (HKIA), effectively concluding America's longest conflict and marking the end of the twenty-year Global War on Terror.[1] Over the preceding eighteen days, under the direction of U.S. Central Command (CENTCOM), the U.S. military conducted the largest noncombatant evacuation operation (NEO)[2] in history, evacuating more than 124,000 civilians while in contact with the enemy.[3] As part of Operation Allies Welcome (OAW), the inter-agency, including the Department of Defense (DoD), continues to receive, process, vet, medically treat, sustain, and temporarily house Afghan Special Immigrant Visa (SIV) applicants and at-risk Afghans (collectively, Afghan evacuees) at Camp As Sayilyah (CAS), Qatar, a temporary safe haven (TSH), before they are resettled in the United States.[4] The following practitioner's note details the main DoD fiscal authorities underlying this ongoing effort.

The Road to Abbey Gate

By way of background, on 29 February 2020, in Doha, Qatar, the United States agreed to withdraw all forces from Afghanistan, and the Taliban promised to deter al-Qaeda from using Afghanistan as a staging area to threaten the United States.[5] Starting in May 2021, and coinciding with the exodus of U.S. troops, the Taliban launched a lightning offensive against the Government of the Islamic Republic of Afghanistan (GIRoA) and the Afghan National Defense and Security Forces (ANDSF).[6] Although the Taliban made significant territorial gains in the countryside, few could have predicted the rapidity of their military success—and the utter collapse of the GIRoA and the ANDSF.[7] In approximately ten days, from 6 to 15 August 2021, the Taliban captured seventeen provinces, and on the tenth day, they took Kabul with no resistance.[8]

On 14 August 2021, as the Taliban prepared to enter Kabul, the Department of State (DoS) declared an NEO.[9] United States Central Command immediately deployed nearly 6,000 troops to HKIA to reinforce its security posture; to close the embassy; and to commence evacuating American citizens, Third Country Nationals, DoS-designates, and Afghan evacuees.[10] Because the GIRoA and the ANDSF disintegrated within twenty-four hours of the NEO declaration, CENTCOM was required to coordinate with the Taliban to establish a deconfliction mechanism and to assist with the HKIA perimeter security.[11] Although the Taliban had no intention of interfering with the NEO, the Islamic State of Iraq and ash-Sham-Khorasan (ISIS-K), an ISIS-affiliated terrorist group, posed a grave threat.[12] On 26 August 2021, an ISIS-K suicide bomber killed thirteen U.S. Service members and 170 Afghans at the HKIA Abbey Gate entrance.[13] Undeterred by this tragic loss, the U.S. troops on the ground heroically continued the NEO with the assistance of U.S. Transportation Command (TRANSCOM), which dedicated more than 250 aircraft and 500 military aircrews.[14]

Fiscal Authorities

After departing HKIA, TRANSCOM flew Afghan evacuees to various overseas DoD military installations in Bahrain, Germany, and Qatar.[15] Prior to the fall of Kabul, DoS had worked with countries in the CENTCOM area of responsibility (AOR) to identify locations for the establishment of TSHs, where the inter-agency, including DoS and DoD, could fully process and temporarily house the Afghan evacuees.[16] Because DoS lacked the resources, the staffing, and the capacity to operate these TSHs, the DoS requested and received DoD assistance.[17]

While the DoS has primacy to conduct foreign assistance on behalf of the United States, Congress annually appropriates to DoD Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) funds.[18] Pursuant to 10 U.S.C. § 2561, SECDEF may use OHDACA to provide "transportation of humanitarian relief and *other humanitarian purposes worldwide*."[19] Based on this statutory authority, DoD authorized CENTCOM to use OHDACA funds to provide urgent lifesaving assistance to Afghan evacuees, including site preparation, transportation, logistics, services, and humanitarian procurements to support DoS-identified requirements, *on a non-reimbursable basis*.[20]

The cost of this DoD support to DoS was unprecedented and not forecasted as a budgetary requirement. On 24 August 2021, the DoD reprogrammed more than $1.4 billion of the Afghanistan Security Forces Fund and transferred it into the OHDACA account for the massive Afghan resettlement effort. Also, as part of two short-term fiscal year 2022 continuing resolutions, Congress appropriated more than $4.2 billion for OHDACA to support OAW.[21]

Notwithstanding OHDACA's classification as a Title 10 appropriation, the DoS Bureau of Populations, Refugees, and Migration (PRM) had to validate all requirements before spending any OHDACA funds because the DoS was the supported agency.[22] In coordination with DoS/PRM, the DoD, and the Defense Security Cooperation Agency (DSCA), CENTCOM created the Inter-agency Service Request (IASR) process.[23] A DoS/PRM official on CAS would submit a written request for DoD funding and assistance on an IASR form, which was staffed to CENTCOM through U.S. Army Central (ARCENT) for requirements validation.[24] Once approved, CENTCOM would return the IASR to ARCENT for OHDACA funding and contract award.

While DoD, DoS/PRM, and CENTCOM finalized the OHDACA requirements validation process, DoS negotiated and executed a memorandum of understanding with the State of Qatar concerning the use of CAS as a TSH.[25] Its proximity to Al Udeid Air Base, Doha, Qatar, the largest U.S.-used military base in the Middle East,[26] made it an ideal location, though it would require extensive contractor-provided services to make it suitable for the OAW mission, especially since it had just been deactivated months earlier.[27]

Overseas Humanitarian, Disaster, and Civic Aid could be used to fund a base life support contract for the Afghan evacuees. After receiving an approved IASR, ARCENT immediately coordinated with the U.S. Army Contracting Command to place a task order with an OHDACA-funded line of accounting against the Logistics Civil Augmentation Program (LOGCAP) V contract for the CENTCOM AOR.[28]

In addition to the OHDACA appropriation, the DoD leveraged resources that the Presidential Drawdown Authority (PDA) made available to support the TSHs in the U.S. Northern Command, the U.S. European Command, and the CENTCOM AORs.[29] Prior to the DoS NEO declaration, on 23 July 2021, the President delegated the authority to direct the drawdown of up to $200,000,000 in articles and services from the inventory and the resources of all Federal agencies to assist Afghan refugees to the Secretary of State pursuant to section 506 of the Foreign Assistance Act of 1961.[30]

The PDA process requires significant coordination, planning, and time. The Defense Security Cooperation Agency (DSCA) is the DoD lead agency for drawdowns.[31] It is responsible for coordinating with the DoS, the National Security Council, the DoD, the Services, and the combatant commands to identify the articles and the services to be provided under a drawdown.[32] Once the articles and the services are identified, the DSCA will publish an execute order.[33] The purpose of the execute order is two-fold. First, it directs the drawdown to proceed; second, it issues reporting

Afghan Special Immigrants walked through the in-processing building at Camp As Sayliyah, Qatar, on 20 August 2021. Soldiers help process Special Immigration Applicants seeking relocation to the United States. (Credit: SGT Jimmie Baker)

instructions to the Services to ensure they do not exceed the overall drawdown ceiling.

As stated above, OHDACA could only be used for humanitarian assistance requirements, while PDA was limited to the drawdown of articles and services from existing agency inventories. Hypothetically, a DoS request to construct an inter-agency administrative immigration processing center would not qualify as humanitarian assistance; moreover, the DoD may not have the necessary Class IV materials to draw-down from existing stocks. The DoD would only be able to provide this support on a reimbursable basis under the Economy Act.[34]

Pursuant to the Economy Act, the DoS could order supplies and services from the DoD.[35] In order to execute an Economy Act transaction, two Federal agencies must execute a U.S. Department of Treasury interagency agreement, i.e., an FS 7600A form.[36] After the execution of an FS 7600A, one agency can provide reimbursable support to another, and credit monies received to the appropriation or fund that was charged to fill the order or to replenish the depleted stock.[37]

Conclusion

It has been more than two years since the fall of Kabul and those chaotic eighteen days in August 2021. Since the end of the Afghan NEO, the Taliban has allowed commercial flights out of HKIA and Afghan evacuees to leave the country.[38] While many TSHs have shuttered, CENTCOM and ARCENT continue to receive, process, vet, medically treat, sustain, and temporarily house new Afghan evacuees at CAS.[39] In Section 122 of the Fiscal Year 2023 Continuing Resolution, Congress authorized the transfer of up to $3 billion in unobligated funds from OHDACA account to various DoS accounts to continue resettling Afghan evacuees in the United States as part of OAW's successive operation, Operation Enduring Welcome.[40]

The lessons learned for future NEOs are myriad, including the following. First, judge advocates (JAs) should review any NEO memoranda of understanding between DoS and DoD concerning roles and responsibilities. Second, in coordination with their respective resource managers, they should determine whether there will be funding authorities, including if a drawdown is contemplated. Third, if a drawdown is anticipated, JAs should ascertain whether DSCA will issue an execute order with reporting instructions for the Services. Fourth, they should ensure their respective commands understand that an executed FS 7600A is required for any Economy Act transaction. Fifth, while not a JA, or even a DoD, role, TSHs should be established as soon as possible, ideally prior to the DoS-declared NEO. Finally, JAs should understand there is a supporting/supported role between DoD and DoS, respectively, as part of any declared NEO. **TAL**

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Notes

1. Amanda Macias, *U.S. Ends 20-Year War in Afghanistan with Final Evacuation Flights out of Kabul*, CNBC (Aug. 30, 2021, 4:34 PM), https://www.cnbc.com/2021/08/30/afghanistan-update-last-us-troops-leave-kabul-ending-evacuation.html.

2. A noncombatant evacuation operation (NEO) is a departure of American citizens (AMCITs) and U.S. Department of State (DoS)-designated persons, including host nation (HN) and third-country nationals (TCNs), from an overseas, threatened area. Nat'l Sec. L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, Operational Law Handbook ch. 15, paras. I(A)-(C) (2022). While the U.S. Department of Defense (DoD) is responsible for the protection and evacuation of AMCITs, the DoD serves in a supporting role to the DoS. *Id.* The DoS and the chief of mission, who is the President's personal representative to the HN and the lead U.S. Government official, are the supported agency and official, respectively. *Id.* Importantly, the DoD cannot provide evacuation assistance until the Secretary of State requests the same from the Secretary of Defense (SECDEF) or the President. *See id.* at ch. 15, para. II.

3. James C. Kitfield, *Remembering the Largest Non-Combatant Evacuation Operation in US History*, Air & Space Forces Mag. (Aug. 29, 2022), https://www.airandspaceforces.com/remembering-the-largest-non-combatant-evacuation-operation-allies-refuge-in-u-s-history%EF%BF%BC.

4. Camilo Montoya-Galvez, *U.S. Setting Up Expedited Processing Hub in Qatar for Some At-Risk Afghans*, CBS News (Feb. 8, 2022, 4:40 PM), https://www.cbsnews.com/news/afghanistan-us-expedited-processing-hub-qatar.

5. Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan Which Is Not Recognized by the United States as a State and Is Known as the Taliban and the United States of America, U.S.-Islamic Emirate of Afghanistan, Feb. 29, 2020, https://www.state.gov/wp-content/uploads/2020/02/Agreement-For-Bringing-Peace-to-Afghanistan-02.29.20.pdf.

6. *See* Cong. Rsch. Serv., R46879, U.S. Military Withdrawal and Taliban Takeover in Afghanistan: Frequently Asked Questions 10 (2021) [hereinafter CRS R46879].

7. *See id.* at 9, 11-13.

8. *Id.* at 10.

9. Sean W. O'Donnell, U.S. Dep't of Def., FY22 Comprehensive Oversight Plan—Overseas Contingency Operations 46 (2021).

10. *Pentagon Press Secretary John F. Kirby and General Kenneth F. McKenzie Jr. Hold a Press Briefing*, U.S. Dep't of Def. (Aug. 30, 2021), https://www.defense.gov/News/Transcripts/Transcript/Article/2759183/pentagon-press-secretary-john-f-kirby-and-general-kenneth-f-mckenzie-jr-hold-a.

11. *See id.*

12. *See id.*

13. Jim Garamone, *U.S. Central Command Releases Report on August Abbey Gate Attack*, U.S. Dep't of Def. (Feb. 4, 2022), https://www.defense.gov/News/News-Stories/Article/Article/2924398/us-central-command-releases-report-on-august-abbey-gate-attack.

14. *Afghanistan Evacuation Support*, U.S. Trans. Command, https://www.ustranscom.mil/cmd/neo.cfm (last visited June 15, 2023).

15. U.S. Dep't of Homeland Sec., Operation Allies Welcome (2021). Thereafter, they were flown to the United States and housed at eight different military installations in Wisconsin, New Mexico, Texas, Indiana, Virginia, New Jersey, and New Mexico, where they were afforded a range of services, including resettlement assistance. *Id.*

16. Sean W. O'Donnell, Diana Shaw, & Thomas J. Ullom, Operation Freedom's Sentinel: Lead Inspector General Report to the United States Congress 35 (2021).

17. *See DoD Support to Operation Allies Welcome*, U.S. Northern Command, https://www.northcom.mil/OAW (last visited June 15, 2023).

18. *C12 – Overseas Humanitarian, Disaster, and Civic Aid (OHDACA)*, Def. Sec. Cooperation Agency: Sec. Assistance Mgmt. Manual, C12.1.2, https://samm.dsca.mil/chapter/chapter-12 (last visited June 15, 2023).

19. 10 U.S.C. § 2561(a) (emphasis added).

20. *See* Inspector Gen., U.S. Dep't of Def., DoDIG-2022-114, Special Report: Lessons Learned from the Audit of DoD Support for the Relocation of Afghan Nationals 3-4, 22-24 (2022).

21. CRS R46879, *supra* note 6, at 40.

22. This assertion is based on the author's recent professional experiences as the Chief, Fiscal Law for CENTCOM from July 2021 to June 2023 [hereinafter Professional Experiences].

23. *Id.*

24. *Id.*

25. Memorandum of Understanding Between the United States of America and the State of Qatar on Cooperation in Temporary Hosting of Individuals at Risk Due to the Situation in Afghanistan, U.S.-Qatar, Nov. 12, 2021, T.I.A.S. No. 21-1112.

26. *The United States and Qatar: Strategic Partners Advancing Peace and Security*, U.S. Dep't of State (Nov. 20, 2022), https://www.state.gov/the-united-states-and-qatar-strategic-partners-advancing-peace-and-security.

27. *See* Conner Hammett, *Camp As Sayilyah Exchange Rapidly Reopens to Serve Troops Supporting Afghan Guests*, ExchangePost.com, (Sept. 15, 2021), https://publicaffairs-sme.com/FamilyServingFamily/2021/09/15/camp-as-sayliyah-exchange-rapidly-reopens-to-serve-troops-supporting-afghan-guests.

28. Professional Experiences, *supra* note 22.

29. *See Memorandum for the Secretary of State on the Delegation of Authority Under Section 506(a)(2) of the Foreign Assistance Act of* 1961, White House (July 23, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/23/memorandum-for-the-secretary-of-state-on-the-delegation-of-authority-under-section-506a2-of-the-foreign-assistance-act-of-1961.

30. *Id.*; Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151).

31. U.S. Gov't Accountability Off., GAO-17-26, Security Assistance: Guidance Needed for Completing Required Impact Assessments Prior to Presidential Drawdowns at intro. (2016).

32. *See id.* at 4.

33. Memorandum from Assistant Dir. for Strategy, Plans and Policy, Def. Sec. Cooperation Agency to Deputy Assistant Sec'y of Army for Def. Exports and Cooperation et al., subject: Revision to Drawdowns, DSCA Policy 21-04 [E-Change 521] (14 Apr. 2021) (referring to an execute order as an "execution message").

34. 31 U.S.C. § 1535.

35. *See id.*

36. U.S. Dep't of Treasury, Bureau of Fiscal Serv., FS Form 7600A, United States Government Interagency Agreement (IAA): Aggreement Between Federal Agencies (2016).

37. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 11A, ch. 03, para. 1.2.5 (Sept. 2019).

38. *Afghanistan Commercial Flights Resume as U.N. Accuses Taliban of Harassment*, Reuters (Sept. 10, 2021, 12:02 AM), https://www.reuters.com/world/asia-pacific/taliban-interim-government-agrees-let-foreigners-leave-afghanistan-2021-09-09.

39. *See* Akmal Dawi, *US Continues Relocating Afghans Even Under Taliban Rule,* Voice of Am. (Apr. 4, 2023), https://www.voanews.com/a/us-continues-relocating-afghans-even-under-taliban-rule-/7036129.html.

40. Cong. Rsch. Serv., R47283, Overview of Continuing Appropriations for FY2023 (Division A of P.L. 117-180), at 7 (2022).

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Practice Notes

The Army's Legislative Proposal Process

Advancing Army Initiatives through Law

By Michael Jones

This is the second article in a series by Michael Jones concerning legislative affairs. A Primer on the National Defense Authorization Act, *the first piece in the series, can be found in issue 3, 2022.*

For [sixty-one] consecutive years, the House has proven that our collective commitment to U.S. national security can help us rise above partisanship. Instead of focusing on what divides us, each year we choose to pass a defense bill that fulfills Congress' constitutional obligation to 'provide for the common defense' – and we do so by focusing on what we have in common as Americans.[1]

In 2012, as a relatively new major at a combatant command (COCOM) headquarters, I once had a discussion with a flag officer concerning his dissatisfaction with a statutory constraint that I referenced in a legal opinion. Although I do not recall the precise legal issue at hand, I do remember his question to me, which was something to the effect of "why can't we change this law?" I was completely caught off guard by this concept. At the time, the prospect seemed almost ludicrous, like he was asking me to turn lead into gold. Change the law? Was that even possible? How would I even go about doing such a thing? I now know that it is indeed possible, and, in fact, it is something the Army does every year with varying degrees of success.

For example, in 2022, the Department of Defense (DoD) reviewed hundreds of legislative proposals from the military Services, COCOMs, and other components as part of its legislative program.[2] Many of these proposals were submitted for possible inclusion in the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2023.[3] While not all of these proposals were adopted, many were, and they can have a profound impact on the authorities judge advocates (JAs) rely on each day.

Most JAs are at least familiar with the NDAA, the annual defense policy bill that can have significant ramifications on how the military conducts its day-to-day activities.[4] In what often seems like magic to those that do not closely follow the process, it appears at the President's desk ready for signature each autumn or winter.[5] In fact, it is one of the few pieces of legislation that can consistently move through Congress each year, so it has become a popular vehicle for all kinds of legislative priorities, some of which have little or nothing to do with national security or defense.[6]

However, in reality, the NDAA is a product of numerous inputs, hearings, and deliberate engagements, including legislative proposals the Army develops and the DoD submits to Congress for inclusion.[7] It is critical for JAs, those legal practitioners who are often directly impacted by the reforms imposed by the NDAA each year, to understand that mechanisms exist to influence the contents of the NDAA through the legislative proposal process and that they can access those mechanisms to amend or create new law.[8]

Within the DoD, the primary references for preparing and submitting legislative proposals is DoD Directive 5500.01, Preparing, Processing, and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony.[9] This reference, working in conjunction with the Office of Management and Budget (OMB) Circular A-19,[10] largely outlines the process for preparing and staffing legislative proposals that are developed within the DoD. Notably, this directive specifies that it is the DoD's policy that only a "single coordinated DoD position shall be expressed and transmitted to the White House, OMB, and to . . . Congress with respect to each legislative proposal."[11] It further provides that the DoD will not submit proposals "without prior approval of the General Counsel of the Department of Defense (GC DoD), or to . . . Congress without prior approval of the GC DoD, in consultation with the Assistant Secretary of Defense for Legislative Affairs . . . , acting on behalf of the Secretary of Defense."[12] Legislative submissions are tightly controlled to ensure that any proposal ultimately submitted to Congress for consideration is fully vetted and supported by the Department and the Administration, but this should not deter JAs from considering potential changes to existing laws or from seeking to introduce new laws that would enhance or improve our practice and benefit the Army.

For Army JAs seeking to submit a legislative proposal, they should follow the process outlined in Army Regulation (AR) 1-20.[13] This regulation provides the technical guidance on where to send proposals and what a proposal package should contain.[14] The Office of the Judge Advocate General Administrative Law Division can also provide assistance and guidance on staffing, technical drafting, and developing legislative proposals. While the staffing process is important, many considerations must be addressed prior to undertaking an effort to change the law or create new law.[15] Here we will focus on three important factors those making the effort should consider prior to drafting and staffing a new legislative proposal: whether a change in the law is necessary, the type of change we are seeking, and the appropriate congressional committee of jurisdiction.

Is a Change in the Law Necessary?

As most JAs are aware, the Army has broad authority to develop and implement internal policies and regulations with minimal constraints.[16] Such policies and regulatory authorities can be significant. Given the relative ease with which they can be promulgated, especially when compared to the fairly arduous process associated with amending or creating Federal law, it is important to ensure that we have explored all possible, non-statutory options prior to proceeding. Due to the volume of legislative proposals submitted to Congress each year from the various executive branch agencies, OMB and the DoD will sometimes limit the number of total submissions to avoid advancing proposals that are not a true priority.[17] In fact, the annual *Guidelines for Preparation of Legislative Proposals for the DoD Legislative Program* states that legislation should be "used sparingly and only when required to meet specific requirements or goals and, then, only after all other avenues (including administrative avenues) have proven unsuccessful."[18] This means that a legislative proposal should only be submitted after exploring all other possible options for achieving the desired change.

What Type of Legislative Change Are We Seeking?

Once we have determined that a legislative change is in fact necessary, we must then carefully consider the type of change we want to see implemented. Laws, in their most general sense, establish legal relationships.[19] Within the NDAA context, we are mostly focused on "authorizations" that confer legal duties or delegate legal duties to officials within the DoD.[20] Most legislative proposals advanced by the DoD seek to grant new authority to an official, expand a grant of authority that an official already holds, or shift authority to a different official.[21]

For example, a FY 2022 NDAA provision authorized the Secretary of Defense to conduct a pilot program to direct hire military spouses for positions located outside the United States.[22] It illustrates a grant of new authority to an official, in this case the Secretary of Defense, to carry out an activity that was not previously sanctioned. The new authority was permissive in that it delegated authority that "may" be exercised.[23] Judge advocates should attempt to view current law through the lens of "grants of authorities," try to specifically identify if a gap exists, and then try to determine the best way to fill that gap either through a grant of new authority or by modifying the scope of existing authority. Attorneys with experience in legislative drafting and research are useful resources to consult during this phase to help determine the scope of the issue and ensure that other statutory provisions that address the problem do not already exist.[24]

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A recent example of the Army's successful change to the law involves a modification to the statute that controls the type of information that recruiters receive from secondary schools and institutions of higher education.[25] The Army developed and submitted a legislative proposal that would require schools to provide student email addresses in addition to the other information that they are already required to provide.[26] This was a much needed change, incorporated via the NDAA, to reflect the way that potential recruits communicate.[27] Although the change was ultimately a small one, it materially impacted recruiters' ability to engage with potential recruits with just a subtle expansion of existing authority to fill a gap caused by evolving technological norms. Narrowly identifying the "authorities gap" keeps the legislative proposal focused on the key issue and thereby makes it easier to capture the intended legal effect, which should be the primary concern of any legislative drafter.[28]

The Army's legislative proposal process is designed to provide inputs to the NDAA for possible inclusion in the final bill.

What Is the Congressional Committee with Jurisdiction?

At first blush, this may seem like an odd question to address early in the legislative proposal process, but the congressional committee with jurisdiction over the proposed legislation can materially impact the timing, format, and success of a submission. Congressional committees are integral to the legislative process in the United States and each committee is responsible for overseeing a specific policy area.[29] The U.S. Senate currently has twenty-four committees.[30] The U.S. House of Representatives has twenty-six committees.[31] The two committees with primary jurisdiction for oversight of policy issues within the DoD are the Senate Armed Services Committee[32] and the House Armed Services Committee.[33] Given their area of responsibility, most legislative proposals developed within the DoD are referred to these committees for possible inclusion in the annual NDAA because the subject matter pertains to an issue or topic that falls under the jurisdiction of the committee. However, that is not always the case. Both the Senate and the House of Representatives have their own processes for determining to which committee a piece of legislation is referred.

In the Senate, referral is to the committee of "jurisdiction over the subject matter which predominates in such proposed legislation."[34] Accordingly, even if a bill has multiple subjects, the predominate matter is the controlling factor. Referring a bill to more than one committee is permitted in some circumstances, but, ordinarily, bills are referred to the committee with jurisdiction over the main subject addressed.[35] In the House of Representatives, the Speaker refers the measure to committee in such manner as to ensure to the maximum extent feasible that each committee that has jurisdiction has an opportunity to review the matter.[36] When legislation is multiply referred, the Speaker is required to identify the "primary" committee of referral, which is the committee that has jurisdiction over the main subject matter of the bill.[37] Referral to multiple committees is more common in the House of Representatives.[38]

The Army's legislative proposal process is designed to provide inputs to the NDAA for possible inclusion in the final bill.[39] In practice, this means that matters falling within the respective armed services committees' jurisdiction are likely to be received and considered as part of the NDAA process.[40] However, matters that

fall within other committees' jurisdiction face a less certain fate.[41] Accordingly, when developing a proposal concept, shaping it to fall under the jurisdiction of the House and Senate Armed Services Committees increases its chances of eventual inclusion in the NDAA.

Conclusion

While advancing a legislative proposal may not be appropriate in all cases, JAs should be aware that this is a viable option that can be pursued under the right conditions and with the correct levels of coordination and approval. Practitioners in the field often have the most practical and direct experience with the laws that govern the DoD and are best positioned to see how they are being implemented and applied. As a result, they are also able to identify potential gaps in authorities, technical flaws in the way legislation is drafted, or instances where legislation may need to be reshaped to achieve its intended effect.

These matters may not be obvious to practitioners at higher levels. Judicious use of the Army's legislative program is a powerful tool to influence our practice and improve the quality of life, support, and services for Service members across the DoD. While I was not ultimately able to "change the law" for my COCOM client, I have now seen first-hand that the Army is able to successfully advance legislative proposals each year on a range of issues. Hopefully more Army JAs will be aware of the legislative proposal process and apply it to improve processes or advance Army initiatives. **TAL**

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Notes

1. *Democratic-Led House Passes Annual Defense Bill for the 61st Consecutive Year*, House Armed Servs. Comm. (Sept. 23, 2021), https://democrats-armedservices.house.gov/press-releases?ID=A39C9C1F-3CE1-4324-8FCB-3AF91B6BE5F2.

2. This assertion is based on the author's recent professional experiences as the Legislative Attorney, Office of the Judge Advocate General from Aug. 2019 to present [hereinafter Professional Experiences].

3. *Id.*; James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022).

4. *See, e.g.*, John M. Donnelly, *Lawmakers Press for Sweeping Military Justice Changes*, Roll Call (Nov. 30, 2021, 1:01 PM), https://rollcall.com/2021/11/30/lawmakers-press-for-sweeping-military-justice-changes.

5. *See generally* Jim Garamone, *Biden Signs National Defense Authorization Act Into Law,* U.S. Dep't of Def. (Dec. 23, 2022), https://www.defense.gov/News/News-Stories/Article/Article/3252968/biden-signs-national-defense-authorization-act-into-law (discussing the $816.7 billion allotment to the Department of Defense); Kanishka Singh, *U.S. President Biden Signs $770 Billion Defense Bill*, Reuters (Dec. 27, 2021, 4:33 PM), https://www.reuters.com/world/us/us-president-biden-signs-770-billion-defense-bill-2021-12-27 (discussing President Biden's signing of the NDAA).

6. *See, e.g.*, Joe Gould, *Grouse About This: A Funny-Looking Bird Is Holding Up Key National Defense Legislation*, Def. News (Sept. 27, 2016), https://www.defensenews.com/congress/2016/09/28/grouse-about-this-a-funny-looking-bird-is-holding-up-key-national-defense-legislation (discussing how disagreements over whether the NDAA should include a provision barring the placement of the sage grouse on the endangered species list disrupted the NDAA process in 2016).

7. Valerie Heitshusen & Brendan W. McGarry, Cong. Rsch. Serv., IF10515, Defense Primer: The NDAA Process 1 (2021).

8. This article does not address the process for submitting proposals or inputs to the annual appropriations bills that fund defense activities each year. That process is separate and distinct from the legislative program focused on defense policy issues.

9. U.S. Dep't of Def., Dir. 5500.01, Preparing, Processing, and Coordinating Legislation, Executive Orders, Proclamations, Views Letters, and Testimony (15 June 2007) [hereinafter DoDD 5500.01].

10. Off. of Mgmt. & Budget, Exec. Off. of the President, Circular A-19, Legislative Coordination and Clearance (1979) (providing the guidelines by which OMB performs legislative coordination and clearance functions on all legislative proposals that Federal agencies develop (unless otherwise required by law)).

11. DoDD 5500.01, *supra* note 9, para. 3.1.

12. *Id.* para. 3.2.

13. U.S. Dep't of Army, Reg. 1-20, Legislative Liaison (25 Aug. 2021).

14. *Id.* para. 3-2.

15. Professional Experiences, *supra* note 2.

16. *See, e.g.*, 5 U.S.C § 553(a)(1) (providing an exception to the notice and publications requirements of agency rule making for military functions).

17. *See, e.g.*, Complete List of Legislative Proposals in DoD Request for FY 2021 NDAA (Mar. 5, 2020) (unpublished Excel spreadsheet) (on file with author).

18. Off. of Gen. Counsel, Off. of the Sec'y of Def., Guidelines for Preparation of Legislative Proposals for the DoD Legislative Program, para. II(D) (2022) (unpublished guidelines) (on file with author).

19. Arthur J. Rynearson, Legislative Drafting Step-by-Step 4 (2013).

20. *See id.*

21. Professional Experiences, *supra* note 2.

22. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 625, 135 Stat. 1541, 1772-74 (2021).

23. Rynearson, *supra* note 19, at 10.

24. Judge advocates should not be overly concerned with the technical drafting of the proposal at this stage. As part of the legislative proposal process, the Office of the Judge Advocate General will provide the technical drafting assistance necessary to properly format the proposal prior to submission.

25. 10 U.S.C. § § 503, 983.

26. U.S. Dep't of Army, Increased Access to Potential Recruits (2020) (unpublished legislative proposal) (on file with author).

27. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116–283, § 521, 134 Stat. 3388, 3597 (2021).

28. Rynearson, *supra* note 19, at 3.

29. *See The Legislative Branch*, White House, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch (last visited May 15, 2023).

30. *Committees*, U.S. Senate, https://www.senate.gov/committees (last visited Apr. 24, 2023).

31. *Committees*, U.S. House of Representatives, https://www.house.gov/committees (last visited May 15, 2023).

32. *About: History/Jurisdiction*, U.S Senate Comm. on Armed Servs., https://www.armed-services.senate.gov/about/history (last visited May 15, 2023).

33. *About,* House Armed Servs. Comm., https://armed-services.house.gov/about/jurisdiction-and-rules (last visited May 15, 2023).

34. Mark J. Oleszek, Cong. Rsch. Serv., R46815, Committee Jurisdiction and Referral in the Senate 1 (June 10, 2021).

35. *Id.* at 2.

36. Thomas J. Wickham, Constitution Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 115-177, at 627-28 (2019).

37. *Id.*

38. *See* Oleszek, *supra* note 34, at 2.

39. Dianne Smith-Neff, Army FY 2024 NDAA Legislative Proposal Process (Sep 2022–Mar 2024), at slide 1 (Aug. 4, 2021) (unpublished PowerPoint presentation) (on file with author).

40. Professional Experiences, *supra* note 2.

41. *Id.*

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Practice Notes

Successful Motions Practice

Seven Views from the Bench

By Colonel Alyssa S. Adams, Colonel J. Harper Cook, Colonel Charles L. "Jack" Pritchard, Jr., Colonel Robert L. Shuck, Colonel Tyesha L. Smith, Lieutenant Colonel Robert E. Murdough, & Lieutenant Colonel Tiffany D. Pond

Achieving your desired result in court through motions shapes the contours of the case you litigate at trial. Winning motions helps you litigate the case you want to litigate. Successful results from motions can give you time to react and refine your trial strategy. However, many counsel are not dedicating the time and effort to shaping the field of trial by presenting winning motions to the judge.

Most motions look like spaghetti. Counsel present tangled and confusing statements of issues to the judge; provide too many, wrong, or unnecessary facts; provide only the barebones, black letter law; change the relief they want over the course of the motion; and fail to connect all the pieces in a logical fashion. This leaves the judge to untangle the noodles and make sense of them: What does the party really want? What are the issues? What are the important facts? Who really has the burden? And, how does the law dictate a particular result? The chances of achieving the result your motion seeks by making the judge do the work for you are not high. In the words of Judge Jake Bashore, "Submit and litigate a motion with only half-hearted effort, and you will reap the . . . outcome consistent with the effort you put into that motion."[1] Or, more colloquially, "Give me garbage, and you are likely to get a garbage result."[2]

To persuade your audience, be your audience; write the ruling then the motion.

One of the most common issues in motions practice is a disconnect between what counsel present to the judge and what the judge must determine. If counsel want to achieve their desired results, counsel need to approach those results from the decision-maker's perspective. Counsel can then envision the legal issues

the judge must resolve; the conclusions the judge must reach for the moving party to win; the facts the judge must find to reach those conclusions; and the law that forms the boundaries of, and influences, the judge's analysis. Be the judge. Write the ruling. Then format it as a motion. In this way, because you are speaking the judge's language, answering the judge's questions, and effectively handing the judge a ruling, your likelihood of success greatly increases.

This article is intended to help trial practitioners think like the judge when it comes to motions practice. Seven military judges provide their tips to writing a persuasive and helpful brief supported by evidence, and helping the judge reach the party's desired result during a hearing. In five "Steps to Success," the article addresses each component of the motion required by the Rules of Practice before Army Courts-Martial (Rules of Court),[3] provides guidance on persuasive writing, and then discusses the motions hearing. In approaching the steps as a gift—anticipation of the gift, the box for the gift, the wrapping paper for the box, the bow on top, and the presentation of the gift—the Judiciary hopes to receive the gift of better motions practice that leads to more efficient and just rulings.

COL Charles L. "Jack" Pritchard, Jr. (Photo courtesy of author)

Step One to Success: The Anticipation

Introducing the Problem and the Solution: A View from Judge Charles L. "Jack" Pritchard

Would you rather judges groan when they see your motion or be eagerly anticipating resolving the legal issues presented? The top of the first page of your motion can be a persuasive hook, but it usually just shows a desired result. That means the judge is not anticipating your gift, because the judge has to go fishing in the brief to start developing an interest. In the words of Judge Michael Korte,[4] "If the reader is on page two through five before they understand what you want or what your argument is, you're fighting an uphill battle. . . . That first page is valuable real estate."[5]

The "hook" I am referring to is a mental hook. There is a reason we talk about primacy as a persuasion technique. The brain reaches conclusions based on the first information it is presented, and those first impressions tend to stick in the brain.[6] So, use the top of your motion to hook the judge on what the motion is about, what issues the judge must resolve, why the judge must resolve them in a way favorable to your client, and what the judge must ultimately do. You need a concise description of the gift you are giving the judge to show what he or she has to look forward to.

Start with the motion's caption, which should accurately tell the judge which legal box the judge is operating in and the general subject matter of the motion. Many times, the caption is wrong or incomplete. A caption may indicate it is a "Motion for Appropriate Relief" when it is really a motion to dismiss or a motion in limine. A caption may indicate simply that it is a "Motion to Dismiss" without indicating why—the main issue requiring dismissal (such as unlawful command influence). Imprecise or incomplete captions confuse the judge and result in the judge going fishing rather than being hooked. There are three categories of motion: dismiss, in limine,[7] and appropriate relief (anything other than the first two). Pick one category and then add a descriptor of several words that narrows the walls of the box.

Next, request relief, the only part of your introduction the Rules of Court require. A request for relief is not a summary. Keep three things in mind when requesting relief. First, be clear and consistent with the law on which you are relying. For example, if you are moving to compel discovery, do not ask for production of evidence—you are inconsistently relying on Rule for Courts-Martial (RCM) 701 for the motion and seeking relief under RCM 703. If you are moving to compel an expert consultant, do not talk about the expert testifying—expert consultant analysis is different than expert witness analysis.

Second, be consistent throughout your motion. Some motions ask for one thing at the beginning and then seek something different or additional over the course of the motion.

Third, do not ask for something the judge cannot do. For example, trial counsel routinely request the court to order the criminal investigation command (CID) to turn over documents to the defense counsel, but the judge generally does not have the authority to order a third party to do anything—the judge will instead order the trial counsel to make CID turn over the documents.

Now, add a summary. As long as you request relief at the beginning of the motion, the Rules of Court do not prevent you from adding to that section. And unless you add to that section, it will not hook the judge. Include a summary that frames the issues, includes some major facts that give

COL Alyssa S. Adams (Photo courtesy of author)

context to the issues, and briefly explains why the requested result is necessary. Make this a statement of what went "wrong" and how it can be fixed.[8] This should take no more than a quarter to a half page and should paint a picture for the judge—a preview of the wrapped gift. Now, the judge is hooked.

Next, in appropriate cases, clearly define the issues presented by the motion. Add an "Issues Presented" sub-header/paragraph and frame the issues as questions in bullet format, organized in the order in which the judge must answer them. This will do two things. First, it will force you to determine what questions the judge *must* answer. Second, it will provide you (and the judge) structure for the rest of your motion (and the judge's ruling).

Organize your Facts, Law, and Argument sections to answer the issues. Sometimes there is only one issue, making a separate "Issues Presented" section unnecessary and unhelpful. On the other hand, consider a motion to suppress an accused's statement to civilian law enforcement that involves issues of voluntariness: whether civilian law enforcement should have informed the suspect of the rights in Article 31(b), Uniform Code of Military Justice[9] (nexus between civilian and military law enforcement investigations?) and Miranda rights (custodial interrogation?); whether later searches or statements were fruit of the poisonous tree; and whether suppression is an appropriate remedy. Clearly stating at the beginning of your motion each issue in the order in which the judge must answer it will drive how you write the rest of the motion, tell you which facts are important, and compel you to gather specific evidence. It will also lay the spaghetti noodles in neat lines; the judge no longer needs to untangle. The judge can, and will likely, lift the issues presented directly into the ruling.

Finally, tell the judge what to do and who must do it. I share Judge Bashore's views about the "Burdens" paragraph as succinctly set forth in his 2018 article,[10] and they are as apt today as they were five years ago; I commend it to you.

Once you have hooked the judge and determined the issue-centric structure of your motion, you have to prove how you are successful; show the contents of the gift you are giving the judge.

Step Two to Success: The Contents

Writing the Essential Facts and Proving Them: A View from Judge Alyssa Adams

It is my view that, in fact, the *law* is not the most important part of motions practice for trial practitioners. The law, whatever its status at the time a motion is litigated, cannot be changed by counsel or the judge or anyone else at the trial level; it can only be applied. To what can it be applied to? The *facts*! The judge can look up the law, but the judge cannot look up the facts; only counsel can relay those. Most importantly, facts must be supported by *some type of evidence*.[11] Evidence can be, for example, a witness statement, a police report, a stipulation, a text chain, or live testimony. The judge cannot make a finding of fact based solely on counsel's brief or argument. *The judge cannot make a finding of fact based solely on counsel's brief or argument.*[12]

Once you have familiarized yourself with the applicable law, you are ready to write the *essential* facts portion of the ruling.[13] Give careful thought to which *specific* facts you need to make the intended ruling. Do not include every fact that is known in the case. Do keep in mind that if this is the first motion filed, you may need to provide the judge with some context and background. Remember that until motions are filed, the judge generally only has the charge sheet and a few allied papers and has no idea what the case is about. Providing the judge a chronology of events can be helpful. If you are providing facts simply for context, consider giving a header for "Background Facts" and another header for "Essential Facts" that are specific to your motion. The judge needs to know your view of the essential facts for each motion filed. If there are multiple legal issues in one motion, it may also be helpful to organize the facts to support each issue presented.

Take the time to determine which facts you *must* establish to win your motion. In determining which facts are essential, ask yourself, "Do I need to establish this fact for the judge to rule in my favor?" For example, the Government intends to introduce Military Rule of Evidence (MRE) 404(b) evidence that the accused showed pictures on his phone to an alleged victim after the charged offense as a threat to induce her not to report the incident. The Government alleges this shows consciousness of guilt. In a motion to exclude that evidence, is it necessary to establish the dates charges were preferred or referred? No. Is it necessary to establish that the alleged victim actually saw the pictures? Not really. Is it necessary to establish that the accused had a

phone containing compromising pictures of the alleged victim after the charge allegedly occurred? Yes.

I recommend reviewing previous motions and rulings on an issue similar to the one you are raising. Look at the facts laid out by counsel in their briefs, then compare with the judge's findings of fact in the ruling. They are often vastly different. Use that as a compass to get started in the right direction with your essential facts.

Another example: I often receive motions that restate the charges in the case. Unless it is germane to your motion, there is no reason to do that. Speaking of germaneness, if you are filing a motion to dismiss for violation of the RCM 707 right to a speedy trial, do not cut and paste the facts you wrote for your motion to exclude MRE 404(b) evidence as there is likely no overlap.

Once you have established the essential facts required to rule in your favor, put your trial practitioner hat back on and remember that you must provide *evidence* of those facts. Simply stating them in your brief does not allow the judge to consider them as facts. Do not proffer facts that never materialize as evidence, because it may cause the judge to question your case and your competence. Determine how you will offer each fact (for example, through documentary evidence, a stipulation, or through witness testimony).[14] A chart similar to an elements checklist may be useful. Write the fact you need to prove on the left, and write in the evidence you will provide to support it on the right.

Acknowledge the facts that do not support your ruling by indicating why they do not apply or why they do not hold weight. For example, perhaps they are proffered by the opposing party and there is insufficient evidence to support them. You may also realize while writing your legal analysis that you overlooked an essential fact. Be sure to go back and add it to your facts section, and make sure that you offer evidence of it as well. Remember, if you want the judge to rule in your favor, provide the judge with evidence of all the facts required to do so.

After determining the contents of your gift to the judge, you must create the box in which those contents reside.

LTC Robert E. Murdough (Photo courtesy of author)

Step Three to Success: The Box

Writing the Law and Judicial Conclusions. A View from Judge Robert Murdough

To succeed in your motion, you have to convince your judge to make legal conclusions—applications of facts to law—that prove a legal "wrong" or establish a legal entitlement for which the judge should grant relief. The "legal authority" begins to create the box in which your facts reside. It shapes the determination of which facts matter and helps you draft your "Facts" section. But the black letter law is like a box without a lid; the contours of the legal landscape are unfinished. Your legal argument puts the lid on the box and aids your judge in reaching conclusions that achieve the result you seek. Following the "Steps to Success," you should draft the legal conclusions first and ask how the facts can be applied to the law to get you to those conclusions. This will shape your argument. Done well, the "Legal Authority and Argument" section can be "the most important part of your motion."[15] Yet it is often "the most underdeveloped."[16]

(Credit: iced mocha - stock.adobe.com)

Too frequently, the "Legal Authority and Argument" section is too long on the former and too short on the latter. These terms are combined for a reason—one without the other is an unfinished box. Some counsel divide this section into two, which breaks the natural links between "facts," "legal authority," and "argument," creating three disjointed blocks from which your judge has to discern what you want and why you want it. While you should clearly distinguish the law from your arguments about the law, the two can be used more effectively in concert to create the legal box and explain why the judge should reach the conclusions you seek.[17]

An effective "Legal Authority and Analysis" section does two things. First, it goes beyond the bedrock cases and provides your judge with controlling or persuasive authority applicable to your case. You can be confident that your judge already knows the seminal cases. Those cases have their place, but lengthy recitations of the holdings of these cases along with piles of string cites are unnecessary for "legal authority" and insufficient for "argument." Go beyond these and find examples that fit your case. For example, the *Criminal Law Deskbook* provides dozens of situational examples for the application of MRE 404(b).[18] The "Confrontation" section of the Opinion Digest on the Court of Appeals for the Armed Forces (C.A.A.F.) website shows how that court has applied the black letter law to different aspects of scientific reports—an increasingly common form of evidence in military justice.[19] With these and other readily available secondary sources, you will reach a far better position than just the principal cases.

Second, a "Legal Authority and Argument" section shows the path the judge should take to reach the conclusions you want. In law school, you likely learned the "IRAC" framework—issue, rule, analysis, and conclusion—which is an effective technique. Yet, judges read many motions that are simply issue, rule, and conclusion, with little or no analysis. For example, almost every defense motion seeking to admit evidence under MRE 412 includes some version of this sentence: "The right to cross-examination has traditionally included the right 'to impeach, i.e. discredit the witness.' *Olden v. Kentucky*, 488 U.S. 227, 231 (1998) (cleaned up)." Then the Government typically responds with, "An accused is not simply allowed 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (cleaned up)." Every judge has read these sentences countless times. Yet we almost never see "*Olden, supra*" or "*Van Arsdall, supra*" in the argument to explain how the defense is (or is not) deprived of effective cross examination without the proffered evidence *in this case*. Instead, counsel skip straight to the conclusion with a terse: "This evidence is constitutionally required because it is relevant, material, and the probative value outweighs the dangers of unfair prejudice" (or, in the Government's case, the inverse).

Do more than just race to your conclusion; apply your research to your facts and show your work. The path to

your conclusion is paved with facts, not legal citations. As Judge Adams states above, "the judge can look up the law, but the judge cannot look up the facts." For example, if the last prong or factor in the applicable legal test is an MRE 403 balancing test, explain the probative value of your evidence; cite back to your facts and show how they fit into the rest of your evidence along with the case you found, which shows that such evidence in a similar situation was close enough in time or similar enough in substance to survive the balancing test. *Why* is the evidence probative? *How* probative is it? Are there *any* dangers of unfair prejudice? *What* are they? Do not just dash off with: "The clear probative value of this evidence is extraordinarily high and greatly outweighs any minimally residual danger of unfair prejudice."[20] Like argument without authority, authority without application is wasted effort because it provides the judge an incomplete box. The judge must show their work to the appellate courts. Do the work for the judge, and you are one step closer to success.

Many times, counsel get lost in their argument and forget or add facts, confuse the law, ask for new relief, and skip major legal issues. After you write this section, check for internal consistency with the rest of your motion. Does your argument mirror the "relief sought" section at the top of your brief, or did you seek new or different relief in your argument? Maybe you argued that you need an expert consultant to do three things; did you list all three in your introduction or just two of them? Is there a fact in your argument that you did not mention in your "Facts" section? If so, go back and add it and list the evidence for it in your "Witnesses/Evidence" section. Is there something in your "Facts" section you did not mention in your argument? If so, is it an essential fact? Did you end your argument with an explicit statement of how the facts and the law lead to the specific relief you want, or did you leave it up to the judge to infer that connection? Perhaps most importantly, did you answer the issues you presented?

If your "Legal Authority and Argument" section defines the contours of the law, elucidates the essential facts, draws conclusions relevant to the presented issues, and demonstrates a persuasive and logical application of the facts to the law, your motion will present the judge a complete box with contents. To make it look like an enticing gift, you must wrap it accordingly.

Step Four to Success: The Wrapping

Writing Persuasively: A View from Judge Tiffany Pond

Be clear; be precise; be brief. These should be your watchwords in preparing pleadings for the court. Clarity, precision, and brevity will make your writing more persuasive. You can give the judge a gift box with the right contents, but if the whole thing looks a mess the judge will not want to unwrap it. Here are some general principles to help you write more persuasively.[21]

Be Clear

You cannot persuade the court if the judge does not understand what you wrote. A judge should not have to read a sentence more than once to understand it. First, no one enjoys feeling like an idiot, which is how I feel when I must re-read something to understand it. Second, a judge handling a busy docket will not appreciate time wasted deciphering a poorly written motion. A pleading, therefore, like any good writing, should be easily understood in a single read.[22] Writing clearly is also a means to help you understand the issues and clean up your thinking.[23] If you do not understand the law or how it applies to the facts of the case, your writing will show it. Writing ultimately is "thinking at its hardest."[24] You can make your writing clearer by improving both form and substance.

Establish a schedule for the work and include time to think. Writing is a process. A good motion will rarely, if ever, come fully formed from the first keystroke. Good writing takes time, effort, and a lot of revision. Chances are, if it was easy to read, it was *not* easy to write. Give yourself enough time to do the work. To write clearly, you must know exactly what you must say. So, before you begin writing, you need to have a firm grasp of the applicable law. This will also help you determine what facts you need to include or further investigate. The writing process has different stages: developing and generating ideas, outlining the argument, writing, and revising. Set deadlines for these different stages of work and afford time to think. The mind has fascinating ways of forming ideas while walking the dog, driving to work, or brushing one's teeth. "Good briefing is the product of lengthy thought."[25] The earlier you begin, the more time you will have to ponder, discuss the issues, and refine your argument. If the only deadline you use is the filing deadline, your work will suffer.

Clear writing requires a logical, coherent framework. To give your argument structure, start with an outline. It will serve as a roadmap that enables the judge to follow the argument's reasoning without getting lost. An outline also helps you organize your thoughts, identifies gaps in supporting evidence and law, ensures you address all essential points and issues, and will make writing easier and faster. Begin and end your outline with your strongest points. Look for weaknesses in the facts, law, or logic, and try to identify potential counterarguments. Address potential weaknesses in the middle of the outline. If you are the respondent, consider addressing your opponent's most compelling argument first.

Use headings, subheadings, and signposting to enhance readability. Headings and subheadings serve as signposts that make the argument's outline visible and explicit. They can also help explain and advance the argument. For example, rather than stating, "The second prong of the *Reynolds* test," a subheading might read, "Evidence of the accused's prior drug use is not probative of a material issue other than character."[26] You can also add other signposts to let the reader know where the argument is going. For example, begin with: "Opposing counsel's argument fails for three reasons." Then use the markers of "first," "second," and "third" to explain the three reasons in detail.[27] Just like an introductory paragraph, described above by Judge Pritchard, signposts show the reader what to expect, which allows the judge to better incorporate facts and ideas as they appear on the page.

Write like a person, not a lawyer. Use plain English, and wherever possible, eliminate the legalese. It will make the prose clearer and more persuasive. For example, which of the following sentences is more descriptive: "The accused committed an assault upon the alleged victim," or, "The accused struck his fellow Soldier with a tire iron"? Plain language is often stronger, easier to understand, and, therefore, more persuasive. Jettison the "heretofore" and "hereinafter" as well as the *ab initio* and *sui generis.* Some legal, Latin phrases, like mens rea, have both colloquial and specialized legal meanings. But do not assume that traditional legal phrases are legally necessary.[28] Using gratuitous legalese does not make you sound more skillful and may do just the opposite. Instead, try writing sentences you can easily speak.[29]

Limit acronyms that are not commonly known. If the only hospital involved is the Fort Belvoir Community Hospital, then instead of using "FBCH" throughout the motion, you can just write "hospital."[30] Some acronyms are commonly understood, such as FBI and IRS, or DFAS and CID within the military. Those are fine. But avoid creating new acronyms or using acronyms that are not commonly known.

Use the form to elevate the substance. Use indents, spacing, and paragraphs as visual breaks. Break up long paragraphs if possible. Each paragraph should be its own independent idea with an introductory topic sentence. Aim for an average of twenty words per sentence.[31] Shorter sentences help make the best parts stand out but varying the sentence lengths gives the prose some rhythm and keeps the reader engaged. Within sentences, order phrases and clauses to put old or familiar information at the beginning of the sentence and new or unfamiliar information at the end.[32] Familiar information serves as a scaffold or frame to support the new information, thereby aiding the judge's transition from each thought seamlessly.[33]

Be Precise

You must be scrupulously accurate in your recitation of the facts and the law. Imprecision—whether from carelessness or intention—results in a loss of credibility. Your credibility is not confined to one case. And when lost, it will be a challenge to rebuild. You should appear reasonable, rational, and credible before the court. Justice Scalia wrote that counsel's objective in every argument is to show themselves "worthy of trust and affection."[34] One way to achieve this is through precision with the facts, the law, and language.

Be precise with the facts. Never exaggerate, overstate, or distort the facts.[35] Even a careless misstatement can cause a judge to question other things you say. So, scrupulously fact-check. Be careful not to draw conclusions or characterize events, facts, or people or inadvertently argue.[36] A well-written "Fact" section will half-argue your case all on its own. Endeavor to use strong nouns and verbs and minimize adjectives.[37] Allow the facts to speak for themselves. Judges do not like being told what to think; so, show them. Avoid editorializing and adding adverbs in the fact section—*interestingly, tellingly, therefore, thus, so.* These types of words insert your opinion. Facts, not opinions, persuade the court.

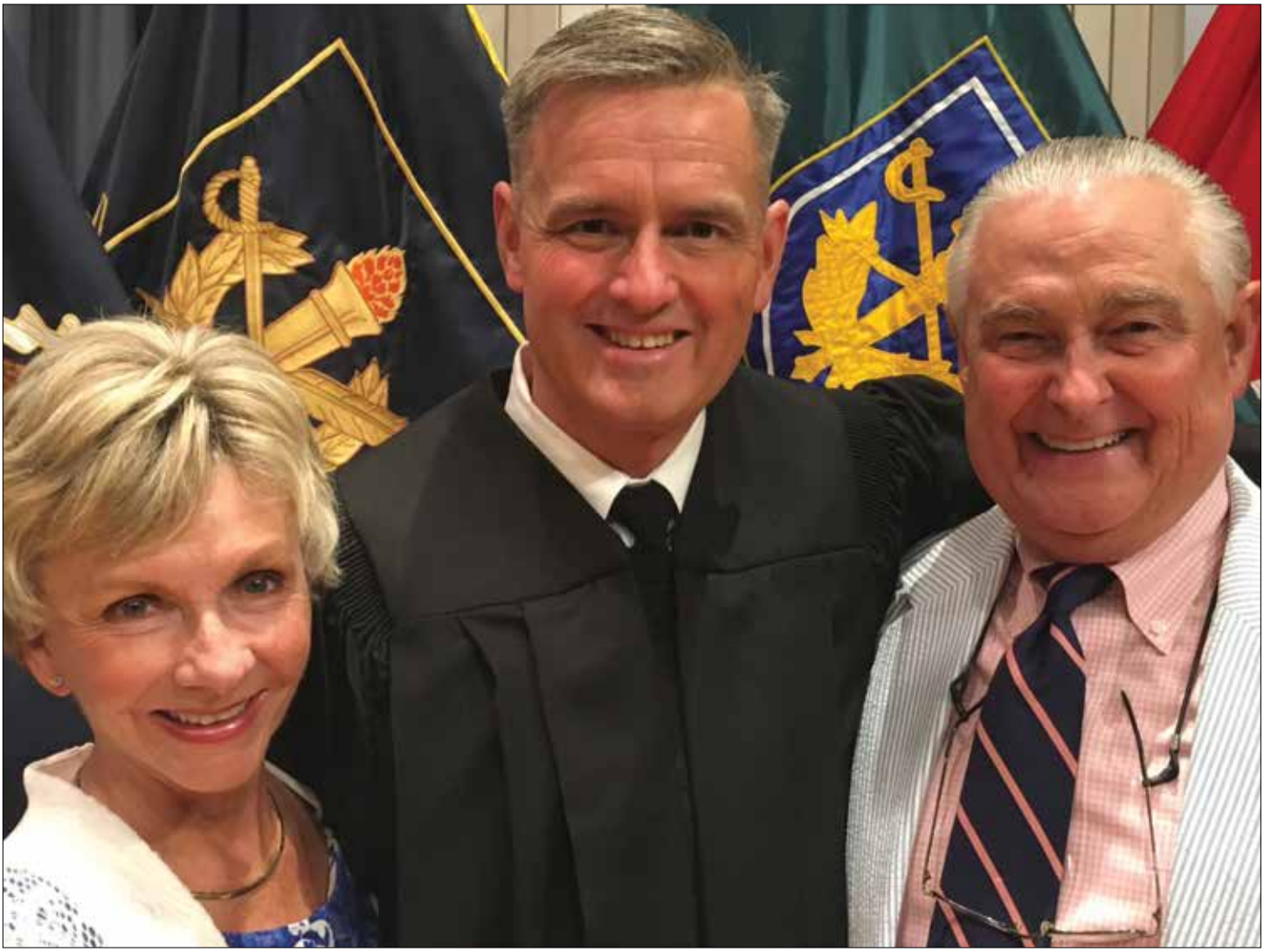
Be precise with the law. Never distort case law to fit your facts. If a case is not completely on point but the reasoning is helpful or persuasive, then say so. Never quote a case you have not read, and Shepardize your citations. A quick way to lose credibility is to cite an Army Court of Criminal Appeals (A.C.C.A.) decision that C.A.A.F. subsequently overturned on the grounds for which you used it. Understand the order of precedence and focus your attention on binding decisions when they exist. Sister Service court opinions, unpublished A.C.C.A. opinions, and Federal circuit opinions can be persuasive but are not binding. If you cite an unpublished case, ensure you reflect that in your pleading.

Be precise with language. Refrain from overstatements and absolutes; they undermine credibility. When you write "always" or "never" or that something is the best, worst, most, or greatest, you are throwing down a gauntlet and challenging the judge to find an exception, which almost always exists. Dispense with adverbs ending in –ly, such as *clearly*, *obviously*, *outrageously*, *unbelievably.* These words "protest too much" and paradoxically signal weakness.[38] Try removing these words from a sentence and see how much stronger it is. Refrain from using hyperbole ("the other side's argument is ridiculous") as well as personal attacks ("opposing counsel is ridiculous"). Neither win you any favors. If you are on the receiving end, responding with civility and courtesy—rather than mutual mudslinging—can turn the attacks to your advantage. Calmly pointing out misstatements while focusing on the issues allows you to show the upper hand and strengthen your reputation with the court.

Being precise includes dealing with the hard stuff—the bad facts, the unfavorable law, and opposing counsel's *really* good argument. Deliberate or careless omissions hurt your credibility, while acknowledging and addressing the hard stuff enhances it. If there is unfavorable law, seek to distinguish the facts and explain why the law is inapplicable or why the reasoning is flawed. If opposing counsel has a strong argument, ignoring it risks conceding the point or failing to contest a fact. If the fact or law is indisputable *and* is not dispositive, acknowledge it openly and then explain why other factors outweigh it. You can strengthen your argument by addressing the "bad" facts or unfavorable law up front rather than letting your opponents use them to their advantage. "Rarely will all the points, both of fact and of law, be in your favor."[39] You should not yield ground unnecessarily; but when the ground is indefensible, conceding the fact or legal point builds credibility with the court and allows counsel to direct their efforts to the more significant, contested issues.[40]

Be Brief

Judges prize brevity. In the early 2000s, Professor Kristen K. Robbins surveyed all sitting Federal judges, on the Supreme, circuit, and district court levels about their views on the way lawyers write and what they consider good legal writing.[41] Of the 355 judges (45 percent) who responded, the advice that appeared most often was "the need to be *concise* and clear."[42] Brevity



COL J. Harper Cook with his parents, Pam Cook (L) and Robert Cook (R). (Photo courtesy of author)

enhances clarity. A judge is more likely to understand a motion that is succinct and to the point than a motion that is long and circuitous. Your goal is simplicity. Yet, you must avoid oversimplifying. The aim is to convey an idea accurately and completely with the fewest words possible. Concise writing also ensures the judge reads the brief with full attention. "A judge who realizes that a brief is wordy will skim it; one who finds a brief terse and concise will read every word."[43] You should not overly worry about brevity while writing the first draft. Just get the argument on paper. Work on being concise later through editing.

Before revising, let the draft cool. Whenever possible, set the draft aside before you revise. The longer, the better. If a filing deadline is weeks away, complete the draft a week before it is due. If less time, let the writing cool overnight before reviewing. Even under severe time constraints, an hour or two can be beneficial. We are often our own worst editors, skipping over errors and seeing only what we intended to write. Delaying editing will allow you to return with fresh eyes, new ideas, and a different perspective. Before sending the draft to a supervisor or friend, try reading it aloud. This will force you to hear what you wrote rather than what you meant to write.

Make every word count. Strong, dynamic writing is concise.[44] So, omit unessential facts and law. They will bog down your argument. Omit unessential words, which bog down your prose. For example, remove unnecessary introductory clauses, such as "it is important to note that" or "the facts show that" or "it is evident that" or "there is" or "there are." The sentence, "It is evident that the proffered character trait is neither relevant nor admissible under MRE 404(a)" can be revised to a cleaner, "The proffered character trait is neither relevant nor admissible under MRE 404(a)." Replace multiword prepositions with single-word prepositions.[45] These substitutions will make your writing crisp and succinct.

Remove the passive voice, unless you have good reason to use it. Passive voice uses more words and yet still manages to lack the clarity of active voice, because omitting the doer or subject creates ambiguity.[46] "An agreement was made."

Who made the agreement? "Evidence was lost." Who or what lost the evidence? If you can tack on "by zombies" to the end of a sentence, it is likely passive voice.[47] But not all passive voice omits the doer or subject, so the unfailing test is to look for a *be*-verb such as *is*, *are*, *am*, *was*, *were*, *been*. For example, "The rulings denying the requested relief *were* issued by the Court." Notice, even when the actor is included, the passive voice is less clear because it subverts the normal word order, which makes it harder to process the information. In contrast, "The Court denied the requested relief" is easier to understand in a single read.[48] So, avoid the passive voice, *unless* it serves a purpose. For instance, you might use it if the actor is unknown or irrelevant or you want to emphasize the subject. Passive voice has a time and a place. Just use it sparingly.

Minimize block quotes. Be honest. How often do your eyes skip over a block quote when you see it on the page? Coming across one feels like running into a wall. The natural inclination is to just go around it. Quotes can be powerful, especially when setting forth the major premise of the motion because our legal system is based on precedent. But a quote's effect "is inversely proportional to its length."[49] Rather than using a block of text, consider weaving the quote into your motion with paraphrasing to keep it stitched together, paraphrasing the holding and then following with quoted language, or dropping the quote in a footnote.

Accurately rephrasing the legal principle is work but pays dividends. First, by rewriting the quote into your own words, you gain a better understanding of the legal principles.[50] Second, when done correctly, you enhance your credibility with the court. Third, where a quote is wordy and dense, your rewrite can make both the quote and the motion more readable. But if you want or need to use a block quote, you can increase the chances the judge will read it if you use a good lead-in rather than the boring, unhelpful "the Court stated . . ."[51] A good lead-in tells the judge why the quote is relevant and why it should be read.[52] It also ensures the judge still follows your outline even if the judge skims or skips the block quote.

Be a ruthless editor, but not too ruthless. Brevity persuades to the extent it promotes clarity. When you omit too much, clarity can be lost. When editing, focus on removing only the unessential. Remember, as Judge Adams said above, judges know very little, if anything, about the case other than what you present to the court. And the judge should not have to sift through the evidence to make sense of the facts, the issues, and your argument. Aim to not use "so many words that the heart of the argument is lost" but also not "so few words that the argument omits critical assumptions or connections."[53] When you achieve this balance, your writing will be more persuasive.

Once you have wrapped the legal box and its contents in a way that draws the judge in and leads the judge easily through your brief, you have only one step left—tie up the gift with a neat bow.

Step Five to Success: The Bow

The Art of Litigating at the Hearing: A View from Judge J. Harper Cook

The Big Picture

Put yourself in my robe for a moment.

I am "responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources."[54] Done right, and with engaged counsel, the motions session is a great opportunity for me to do just that—and more.

Of course, the express purpose of the session is to resolve interlocutory questions and questions of law.[55] In so doing, my rulings help the parties shape the battlefield for trial. And I can, at least in theory, set the conditions for trial on the merits to proceed with fewer interruptions. But as discussed below, the motions session can serve other purposes as well if counsel avail themselves of the opportunity to make the most of the session.

How I prepare for the session and what that means for your preparation. Remember where we are in the process. After arraignment, but before counsel have filed any motions, all I know about the case is what is contained on the charge sheet. But the case begins to come to life when I read your motions. Before I start that session, you can expect that *I have developed questions for you about*:

(1) The facts as you view them. I first attempt to synthesize your evidence. This comes from reading your documentary evidence and, if offered, any digital evidence you presented. That is, I start to form a big-picture understanding of what this case is about, who the key players are, what the broad timeline is, and what legal theories will be advanced at trial. From there, I drill into the specific facts you advanced in your motion.

(2) Conflicting, omitted, or editorialized facts. The ruling will rise and fall based on the court's findings of fact as applied to the relevant law. I circle your adverbs and adjectives and ask myself, "How much work are these words doing here?"

(3) Conflicting or omitted evidence in support of your facts.[56] If your documentary or digital evidence does not support a fact, then you need to present evidence at the session. Usually, that is in the form of witness testimony.[57]

(4) The law. I will read unfamiliar case cites and will conduct additional research as required.

(5) Agreement or concessions. If both sides agree to an issue, or to a fact, or to a point of law, I will seize upon it. In many cases, the responding party simply states, "The Government agrees with the defense's statement of facts, except paragraphs X and Y, and adds the following facts." This practice is encouraged by Rule 6.5 of the Rules of Court,[58] will save you time, and will focus the litigation on the facts at issue. Many judges treat this as a concession to those facts solely to resolve the motion. Other judges may confirm or test the concession during the motions hearing to make sure there is knowing agreement. This is another point where it is good to know your judge.

(6) Your logic. My ruling must be fair, balanced, and legally correct. As an advocate, you are not constrained to being "balanced," but I will take note where your brief crosses the line into hyperbole or completely fails to address unfavorable facts, unfavorable law, or the other side's logic.

What does all this mean to you? In my view, it means you should come to the session prepared not only to highlight why you should prevail, but to *engage with me in a conversation about my questions.*[59] To prepare for that conversation, you should, of course, know your facts, the law, and why your logic should carry the day. But you should also expect that my questions and your opponent's presentation will reveal apparent weaknesses in your position. The expert advocate will find a way to anticipate what the judge may see as apparent weaknesses and be prepared to respond in kind. If you have followed the "Secret to Success," you have written the ruling and therefore know the weaknesses in both parties' positions that you, as the judge, want to probe during the hearing. This is an advanced skill that requires you to see beyond your own position. But it is a critical skill worth mastering.[60]

Conducting the Session

Many judges begin by reading the exhibit markings of your pleadings into the record. Many judges then clarify which side has the burden of persuasion and will invite additional evidence, if any, from both sides. After the parties have presented evidence, the judge will invite argument, first from the party with the burden, followed by the opposing party.[61]

During argument, highlight the strongest, salient points from your brief. Not everything in your brief is important; stick with the hard bits. Pay attention to the judge as you do so, for at some point the judge may be ready to question you about your argument. You should encourage and look forward to those questions; they will reveal the matters the judge cares about. Answer those questions then and there as directly as you can.

You may discover that the judge has simply misunderstood your position or misread your brief. Clean up the issue directly and professionally. The judge may ask, "Where in the record will I find support for 'X' fact?" Take the time to get the judge a pinpoint location to the document or media in support of the fact. The judge may ask if you are conceding a point. Do not cave-in to every invitation to concede, but be open to conceding obvious points or losing arguments for the sake of your credibility. The judge may zero in on conflicting legal authority. Either acknowledge the conflict or distinguish it from the issue before the court. The judge may test an apparent flaw in your logic. Persuade the judge that your logic is sound. The judge may play one side against the other, testing the strength of your position against your opponent's position. Acknowledge the good-faith arguments of opposing counsel, then explain why you should prevail. The questions you may face are limited only by the imagination—and sometimes the preparedness—of your judge. Arrive prepared, stay flexible, and remain confident.

If you find you are repeating yourself or simply rehashing your brief, wrap it up, end with your strongest points, hand over the podium to your opponent, and prepare for rebuttal.

A savvy opponent may have a slight advocacy advantage because she can focus on the judge's questions from the outset. But you would be wise not to interpret the judge's "hostile" questions to your opponent as the judge siding with you; you are likely to receive equally "hostile" questions when it is your turn to argue. Remember that the judge is not making an argument or stating a position; rather, the judge is testing your arguments. At times, you may encounter a judge who poses a hypothetical to test your logic. Endeavor to engage with the judge on the hypothetical rather than evading it or by sparring with the judge about its applicability.

Other Purposes for the Hearing

Bear in mind that the hearing is not the main event. The main event is the trial itself. Whether you prevail or not on your pretrial motions, you should view the motions session as a great opportunity to advance other goals.

First, establish your credibility with the court as a prepared, professional, and competent advocate. You may lose today's motion, but your credibility can carry through to the trial itself where it could matter to an issue in the future. Depending on the forum elected, you may find yourself arguing before the very same judge to decide the merits of the case or what sentence is appropriate.

Second, in the context of the issues raised, you can begin to see blind spots in your case. If you are wed to the brilliance of your case, this may sting; but it is better to discover it at the hearing rather than mid-trial.

Third, if defense counsel and the accused are still wrestling with a forum election, they can take this opportunity to observe the judge interact with counsel about matters of import to the case. You never know, but even the most poker-faced judge may say something, react in a certain way to evidence, or interact with counsel in a way that may influence that decision.

Finally

Oral arguments help judges clarify core issues in your motions, clear up confusion about your pleadings, and test the logic of your claims, all with a goal of rendering the correct result to an interlocutory issue. Take advantage of this opportunity to engage with your judge, to persuade the judge to your position, and to capitalize on the other opportunities the hearing provides.

A View from Judge Robert Shuck

Reading me your brief is not persuasive. When you do, I fight the urge to stop you and ask you to also read me the ever-present (and unpersuasive) archaic language typically found at the start of any brief, "COMES NOW THE [UNITED STATES OF AMERICA / THE DEFENSE] BY AND THROUGH COUNSEL . . ."[62] Instead, focus your efforts[63] on how to make the biggest impact.

Conducting a Premortem

Read your brief, go over your evidence, review your opponent's brief and evidence, and ask yourself before the hearing, "The judge just ruled against me, why did I lose?" Even better, have someone unfamiliar with the case review the briefs and evidence and ask them why you (hypothetically) lost. Businesses use these premortem thought exercises to identify failures ahead of time.[64] Advocates can adapt this process to assist their own preparation.[65] I am always surprised at counsel who could not see an adverse ruling coming.

COL Tyesha L. Smith (Credit: Billie Suttles, TJAGLCS)

Spend Time in Argument on the Evidence Presented

Too often, counsel want to treat the hearing as an appellate argument and focus only on the law, sometimes without ever mentioning the facts of the case. For most preliminary issues, MRE 104(a) allows military judges considerable evidentiary leeway with regard to motions sessions.[66] However, just because you can rely only on a CID agent's field notes, for example, as the sole evidence for your argument does not mean you should. You must convince the judge your version of the facts belongs in the court's findings of fact. The hearing gives you an opportunity to drive the essential facts home with the judge.

Argue Why Your Evidence Is Better

Use the *Military Judge's Benchbook* instruction on credibility of witnesses for inspiration.[67] For instance, you could highlight to the judge that the court should use your evidence in its findings because your evidence came from the testimony of a neutral eyewitness, who testified under oath, who was subject to cross-examination, who had an unobstructed view at the time she witnessed the event, and whose testimony was corroborated by other evidence you presented during the hearing. You could then contrast this with your opponent who only offered a photocopy of a CID agent's field notes, which simply referenced a statement from a witness whose knowledge about the incident came second-hand.

Think Outside Your Own Mouth

Many counsel use audiovisuals when presenting closing arguments to panel members. Consider using them to supplement your verbal argument during the hearing. Does the case involve complicated familial relationships? Make and use a family tree. Is the timing of events crucial to your case? Show a timeline. Does the judge need to apply a multi-factored test for determining admissibility? Display a chart that links the evidence to each factor. Is a key moment during an accused's videotaped statement to law enforcement important? Play that portion of the interview for the court or publish a transcript of it. Is a physical location important? Print out a satellite image or publish photographs. Is there complicated testimony? Use a demonstrative. Is your judge hesitant to wait for you to set up the technology for the hearing? Print out the slides and have the judge follow along. Use creativity and imagination to persuade the judge.

Fight to Train

A significant amount of litigation effort is spent on motions practice. It seems that counsel do not view motions hearings as significant events. Litigation supervisors rarely attend them. Often the gallery is entirely empty except for a paralegal or two. Nonetheless, a quick review of most records of trial reveals the sheer volume of significant litigation accomplished during these ignored sessions. Contrast this with

closing arguments on the merits or findings when the courtroom is usually standing room only. The result is motions practice is an area long neglected and in need of disruption and innovation.

Improving your motions advocacy means you must raise the prominence of motions in your litigation toolkit. You can do so by demanding training focused on motions advocacy. If your judge conducts Bridging-the-Gap sessions, ask if the judge would be willing to provide feedback on your advocacy at the motions hearing. Some judges may even be willing to conduct training focused entirely on this area. Supervisors should not only regularly attend these hearings but also actively critique their counsel's oral and written advocacy. In turn, this could generate data necessary for them to further identify targeted training requirements for their counsel.

Some Final Thoughts: A View from Judge Tyesha Smith

What a wonderful gift these six judges have now given you—secrets to success in your motions practice. If wisely followed, your motions practice will not only improve, but you will receive one of the best gifts of all: greater, more productive use of your *time*. Ideally, you will achieve greater results with improved efficiency in your advocacy.

Your time, as well as the court's time, is precious and finite. In fiscal year 2022, Army courts spent 1,661 hours in just Article 39(a) sessions.[68] Think about the gift that has been extended to you: a step-by-step process by the actual audience that you are trying to persuade. But a gift is not a gift unless it is received. This unique gift, if not only received but diligently used, will lead to better motions practice, which in turn will be an exquisite gift to the judiciary and one that will lead to more efficient and just rulings.

On behalf of the Trial Judiciary, we look forward to your success as a trial practitioner. See you in court! **TAL**

COL Adams is the U.S. Army Reserve Chief Trial Judge and Commander of the 150th Legal Operations Detachment in Alexandria, Virginia.

COL Cook is a Circuit Judge in the Second Judicial Circuit at Fort Liberty, North Carolina.

COL Pritchard is the Chief Circuit Judge for the Fifth Judicial Circuit at the Kleber Law Center in Kaiserslautern, Germany.

COL Shuck is the Chief Circuit Judge for the Fourth Judicial Circuit at Fort Bliss, Texas.

COL Smith is the Chief Trial Judge, U.S. Army Trial Judiciary at Fort Belvoir, Virginia.

LTC Murdough is a Circuit Judge in the 4th Judicial Circuit at Joint Base Lewis-McChord, Washington.

LTC Pond is a Circuit Judge in the Third Judicial Circuit at Fort Cavazos, Texas.

Notes

1. Lieutenant Colonel Jacob Bashore, *A View from the Bench: Maximizing the Effect of Your Motions Practice*, Army Law., Jan. 2018, at 3, 3. When Judge Bashore wrote the article, he was a Circuit Judge in the 3d Judicial Circuit at Fort Hood, Texas. *Id.*

2. Colonel Charles L. "Jack" Pritchard, Jr., Chief Circuit Judge, 5th Judicial Circuit, Kaiserslautern, Germany, Remarks During Trial Practitioner Training on Motions Practice in Europe and Kuwait (Oct. 13, 2022).

3. U.S. Army Trial Judiciary, Rules of Practice Before Army Courts-Martial (7 Apr. 2023) [hereinafter Rules of Court].

4. Lieutenant Colonel Michael Korte is a Circuit Judge in the 4th Judicial Circuit at Schofield Barracks, Hawaii.

5. Lieutenant Colonel Michael E. Korte, Bridging the Gap: U.S. Army, Microsoft Teams (Mar. 9, 2022).

6. "Anchoring bias" is "the tendency, in forming perceptions or making quantitative judgment under conditions of uncertainty, to give excessive weight to the starting value (or anchor), based on the first received information or one's initial judgment, and not to modify this anchor sufficiently in light of later information." *Anchoring Bias*, Am. Psych. Ass'n, Dictionary of Psych., https://dictionary.apa.org/anchoring-bias (last visited May 10, 2023).

7. A motion in limine is a request for the judge to resolve an evidentiary issue before trial. This is listed as one of the possible motions for appropriate relief in the Rules for Courts-Martial. Manual for Courts Martial, United States, R.C.M. 906 (2019) [hereinafter MCM]. You could caption this as a "Motion for Appropriate Relief – Preliminary Ruling on Admissibility of Evidence," but a more straightforward and specific caption is, for example, a "Motion in Limine – Exclude M.R.E. 404(b) Evidence."

8. For an example of a summary paragraph, see Bashore, *supra* note 1, at 5.

9. UCMJ art. 31(b) (2016).

10. Bashore, *supra* note 1, at 5-6.

11. MCM, *supra* note 7, R.C.M. 905(c) (establishing that the burden of proof for factual issues in motions practice is by a preponderance of the evidence); Rules of Court, *supra* note 3, r. 6.1, 6.2.

12. Rules of Court, *supra* note 3, r. 19.8 ("Offers of proof are not evidence. A judge's essential findings cannot be based on offers of proof.").

13. MCM, *supra* note 7, R.C.M. 905(d) ("Where factual issues are involved in determining a motion, the military judge shall state the essential findings on the record.").

14. If offering documentary evidence, be sure to mark it as a separate appellate exhibit in accordance with the Rules of Court and provide a reference to it in your facts section. *See* Rules of Court, *supra* note 3, r. 6.1.1.

15. Bashore, *supra* note 1, at 7.

16. *Id.*

17. Judges divide their written rulings with separate "principles of law" and "conclusions of law" sections. This is so we can make a clear record and show what legal principles we applied to the facts of the case in order to aid others in reviewing our decisions. However, you write for a different purpose.

18. Crim. L. Dep't., The Judge Advoc. Gen.'s Legal Ctr & Sch., U.S. Army, Criminal Law Deskbook, ch. 24, § VII (2022).

19. *First Principles: Constitutional Matters: Confrontation,* U.S. Ct. of App. for the Armed Forces, https://www.armfor.uscourts.gov/digest/IB3.htm (last visited May 26, 2023).

20. As a general rule, adverbs are usually not helpful.

21. This guidance is greatly influenced by Antonin Scalia & Bryan A. Garner, Making Your Case: The Art of Persuading Judges (2008); Bryan A. Garner, The Winning Brief (3d ed., Oxford Univ. Press 2014) (1999); Fed. Judicial Ctr., Judicial Writing Manual: A Pocket Guide for Judges (2d ed. 2013).

22. Brigadier General Charles N. Pede, *Communication Is the Key—Tips for the Judge Advocate, Staff Officer, and Leader*, Army Law., June 2016, at 4, 6. ("Knowing your audience is imperative, but the axiom remains the same: easily understood in a single reading.").

23. "Clear thinking becomes clear writing; one can't exist without the other." William Zinsser, On Writing Well 8 (7th ed., HarperCollins Pub. 2006) (1976).

24. Roger Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 218 (1957).

25. Scalia & Garner, *supra* note 21, at 69.

26. *See also* Bashore, *supra* note 1, at 7 (providing a wonderful example of signposting).

27. Joseph Kimble, *Redlines: The Importance of Signposting – and Following Through*, Judicature, no. 3, 2021-22, at 8, 8.

28. Bryan A. Garner, The Elements of Legal Style 193 (2d ed., Oxford Univ. Press 2002) (1991).

29. *See also* Joseph Kimble, Lifting the Fog of Legalese 7-13 (2006) (remarking that a majority of judges surveyed in Michigan, Florida, Louisiana, and Texas favored plain language over "legalese").

30. Acronyms "are a prime example of false economy. Rather than speed the reader along, they create a bumpy road, as the reader takes a split second to remember what each one stands for." Joseph Kimble, *Redlines: Another Plea to Hold the Acronyms*, Judicature, no. 2, 2022, at 82, 82.

31. Garner, *supra* note 28, at 231-33. To illustrate this point, Garner uses an example from then-Deputy Solicitor General Frank Easterbrook. The brief's longest sentence had thirty-one words and the shortest had five, for an average length of fifteen words.

32. *See, e.g.*, Stephen V. Armstrong & Timothy P. Terrell, Thinking Like a Writer 186 (3d ed., Prac. L. Inst. 2009).

33. For example, the following paragraph can be revised from this:

> The preferral of charges or the imposition of restraint triggers a Service member's speedy trial protections under the Sixth Amendment. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013). Courts consider the following four factors from *Barker v. Wingo*, 407 U.S. 514 (1972) [new], to determine whether those protections have been denied [old] . . .

To this:

> The preferral of charges or the imposition of restraint triggers a Service member's speedy trial protections under the Sixth Amendment. *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2013). To determine whether those protections have been denied [old], courts consider the following four factors from *Barker v. Wingo*, 407 U.S. 514 (1972) [new] . . .

34. Scalia & Garner, *supra* note 22, at xxiii.

35. *See also* U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers r. 3-3 (28 June 2018) ("Candor Toward the Tribunal").

36. For instance, if an alleged victim wrote in his sworn statement to CID that he was stone-cold sober during the incident but later told a friend he was blind drunk, the argument (not the fact) is that he lied. "He lied" should not be in your Statement of Facts.

37. In the novel, *To Kill a Mockingbird*, Scout says, "Atticus told me to delete the adjectives and I'd have the facts." Harper Lee, To Kill a Mockingbird 67 (1995). This is not bad advice.

38. Garner, *supra* note 28, at 521.

39. Scalia & Garner, *supra* note 21, at 20.

40. *See id.* at 20-21.

41. Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 Legal Writing 257 (2002).

42. *Id.* at 261-64 (emphasis added). "From the judges' perspective, conciseness is not aspirational, it is essential. Seventy-three of the 355 judges volunteered that the best briefs are concise; 70 said that the worst briefs fail to be concise; and 118 said that conciseness should be taught in law school writing courses." *Id.* at 279. Three other themes emerged from the survey, including (1) counsel's inability to use controlling case law effectively; (2) the value of a "well-organized, tightly constructed brief"; and (3) an appreciation for tone, style, and proper grammar and English usage. *Id.* at 264.

43. Scalia & Garner, *supra* note 21, at 81.

44. William Strunk, Jr. & E.B. White, The Elements of Style 23 (4th ed., Allyn & Bacon 2000) (1959).

45. For instance, "with regard to" becomes "about"; "subsequent to" becomes "after"; and "for the purpose of" becomes "for." Joseph Kimble, *Redlines: Zap Multiword Prepositions Please*, Judicature, no. 2, 2018, at 80, 80.

46. Richard C. Wydick & Amy E. Sloan- Plain English for Lawyers 29 (6th ed., Carolina Acad. Press 2019) (2005).

47. Benjamin Dreyer, Dreyer's English: An Utterly Correct Guide to Clarity and Style 14 (2019).

48. For other examples of passive versus active voice, *see* Strunk & White, *supra* note 44, at 18; U.S. Dep't of Def., 5110.04, Manual for Written Material: Correspondence Management, vol. 1, 28-29 (16 June 2020).

49. Fed. Judicial Ctr., *supra* note 21, at 18.

50. *See, e.g.*, Peter C. Brown, Henry L. Roediger III, & Mark A. McDaniel, Make it Stick: The Science of Successful Learning (2014). The authors, who include two psychology professors, write that one of the cognitive activities that leads to stronger learning is generation—rephrasing key ideas into your own words. *Id.* at 88.

51. Other than quoting case law, you may need to quote a regulation, rule, or statute verbatim, in which case a block quote may be necessary.

52. For example, a lead-in to a block quote might begin with: "The Court recently addressed this specific issue, determining trial judges have unfettered discretion to bang their gavels, in *United States v. Pond*:"

53. Julie A. Oseid, *The Power of Brevity: Adopt Abraham Lincoln's Habits*, 6 J. of Ass'n of Legal Writing Dirs. 28, 29-30 (2009).

54. MCM, *supra* note 7, R.C.M. 801(a), Discussion.

55. *See* MCM, *supra* note 7, R.C.M. 801(e).

56. *See, e.g.*, United States v. Stubbs, 23 M.J. 188, 195 (C.M.A. 1987) ("[T]rial judges should not let the litigants lapse into a procedure whereby the moving party will state the motion and then launch right into argument without presenting any proof but buttressing his/her argument with the assertion that so and so would testify as indicated, if called.").

57. Remember that under M.R.E. 104(a), which governs preliminary questions, "[T]he military judge is not bound by evidence rules, except those on privilege." MCM, *supra* note 7, M.R.E. 104(a). In this way, evidence at a motions session is not *per se* excludable on grounds of hearsay, authentication, relevance, and other common trial rules of evidence. Regarding relevance, however, focus your witness on matters relevant to the motion at issue only. Your judge will cut you off if it looks like you are treating the moment as an opportunity to conduct an impromptu deposition or discovery. As well, if the court considers hearsay or something unauthenticated, either side may comment on the reliability of the evidence.

58. Rules of Court, *supra* note 3, r. 6.5.

59. Admittedly, I am a hot bench during a motions session. Unlike at trial, where I try to sit back and let you try your case, I like to take advantage of my ability to question counsel during motions argument. I find this helps me understand and test the strength of your position. Other judges may take a more passive role during motions sessions. You should, therefore, know your judge.

60. Counsel would do well to ask themselves these questions throughout the course of a case: (1) Do I have blind spots?; (2) When do I want to discover them?; and (3) How will I find them? I will help you with the first two questions. First, as much as you love your case, you have blind spots. We all do, especially the more you are entrenched into the details of your case. Second, the answer is, "As early as possible." If you can do so before your motions session, great! Discovering them at your motions session is less great. It is still less great to discover them at trial, upon announcement of the verdict or sentence. As to the third question, find someone to run issues by—not only for your motions arguments but also for all aspects of your case. Try this: "Hey [chief of justice with defense experience], can I run my argument by you?"; "Hey [senior defense counsel with trial counsel experience], would you read my brief?"; "Hey, [disinterested NCO], will you let me run my *voir dire* questions past you?" In so doing, be open to constructive criticism and invite your mentor to help you find the weaknesses in your position.

61. You may have a judge who invites the parties to give uninterrupted oral argument, you may have a judge who immediately starts questioning the parties, or you may have a judge who does something in between. If you know your judge, you will not be surprised when your carefully scripted oral argument gets re-routed.

62. "Traditionally the standard commencements in pleadings, these phrases are fallen into long-overdue disuse." Bryan A. Garner, Garner's Dictionary of Legal Usage 176 (3d ed., Oxford Univ. Press 2011) (1987). These archaic phrases still plague pleadings in courts-martial proceedings. Please help stop this practice.

63. To get to the point, some military judges allow you to lead your witnesses during Article 39(a) sessions when the court is resolving certain issues. Ask your military judges their stance on this practice during Gateways to Practice or during pretrial conferences.

64. *See, e.g.*, Gary Klein, *Performing a Project Premortem*, Harv. Bus. Rev., Sept. 2007, at 18.

65. *See, e.g.*, Lieutenant Colonel Robert E. Murdough, *Using Red Team Techniques to Improve Trial Advocacy*, Army Law., no. 1, 2021, at 90, 91.

66. MCM, *supra* note 7, M.R.E 104(a) ("[T]he military judge is not bound by evidence rules, except those on privilege.").

67. U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 7-7-1 (29 Feb. 2020).

68. Data available on file at the Army Court of Criminal Appeals.

AROUND THE CORPS

SPC Jared Dimarco, TDS Paralegal Specialist, attended the "ready range" at Joint Base Lewis-McChord, WA. The range was SPC Dimarco's last requirement needed to be eligible to attend the E-5 promotion board. He was able to go on and off the range with a successful scorecard on his first attempt because of the support of the NSL team. (Photo courtesy of MAJ Ian P. Sandall)

(Credit: Audrey Burmakin - stock.adobe.com)

No. 1

Mitigation Matters

Investigating and Presenting your Client's Life Story

By Major Allyson J. Montgomery

My job is to tell my client's story, and to do that I really have to get to know them.[1]

You are a newly assigned defense counsel in the Army's Trial Defense Service (TDS). One of your first clients is charged with physically abusing her baby so severely that the child has broken bones and brain hemorrhaging. After meeting with the client several times to discuss the facts of the case, she makes an off-hand comment about being the victim of childhood trauma. Something in the back of your mind clicks, and you ask the client to tell you more about the abuse she suffered. This conversation turns into an hours-long discussion in which you uncover more information about her life than in all the previous meetings. After the client leaves, you sit at your desk and ponder several questions. Does the information she shared with you fall into the definition of "matters in extenuation and mitigation?"[2] If it does, what other information should you gather, and in what form? After you collect more information, how do you present this evidence at the presentencing hearing?

To answer these questions, military defense counsel should follow the investigative techniques found in capital sentencing practice. As discussed below, the social history method of investigating mitigation evidence leads to the most robust evidence to use during the presentencing hearing. Similarly, military defense counsel should follow the advice of capital practitioners and advocacy experts when presenting mitigation evidence at the presentencing hearing to ensure the information is palatable to the sentencing authority.

As a starting point when thinking about mitigation, presenting information to the sentencing authority about a client's life, background, and character is vital to reduce the client's culpability, which may decrease their sentence.[3] Such information falls within "matter[s] in mitigation" according to Rule for Courts-Martial (R.C.M.) 1001(d)(1)(B).[4] Even after reading the rule, defense counsel may not know how to start preparing a defense sentencing case. The definition of matters in mitigation is vast, and counsel's imagination is the only limiting factor when looking for mitigation evidence.[5]

A new defense counsel may believe mitigation is only about whether their client showed up to formation on time or received perfect scores on physical fitness tests. Without training and experience, attorneys may not understand how to investigate mitigation evidence without a mitigation specialist's assistance.[6] Moreover, law schools generally fail to train lawyers to "listen to a client's pain, fear, anger or despair"[7]—a requirement for discovering mitigation evidence. As well, military defense counsel have no shortage of work. Defense counsel must find the time to review pretrial discovery, conduct merits investigations, and develop presentencing cases for court-martial clients, while at the same time advising clients on non-judicial punishment and separation actions. Nevertheless, with a bit of time, organization, and ingenuity, defense counsel can effectively investigate and present mitigation evidence in non-capital cases without expert assistance.

By leveraging empirical research and jurisprudence from death penalty mitigation practice, this article provides the defense practitioner a primer on two interrelated topics: conducting a capital-style social history investigation to gather mitigation evidence and effectively presenting mitigation evidence during the presentencing hearing. First, the article discusses the definition of mitigation evidence, explains why it matters, and provides examples of successful mitigation cases. Next, this article teaches counsel how to conduct a social history investigation to find mitigation evidence, including strategies to collect relevant records and interview witnesses. Lastly, this article addresses trial advocacy techniques defense counsel should use to present meaningful sentencing cases. By the end of this article, defense counsel will have a foundational understanding of how mitigation evidence can positively impact a case and be able to put this information into practice.

What Is Mitigation Evidence and Why Does It Matter?

Many definitions of mitigation evidence exist, from the flowery to the regulatory. Every definition of mitigation evidence includes those things that make each person unique and includes good and bad life experiences that led to the commission of a criminal offense.[8] Scholars mostly study the impact of mitigation on capital cases, with countless texts and studies on the topic.[9] For example:

> The diverse frailties bestow the kinship of humanity. We all have them, to varying degrees, but, for most of us, the protective supports of family and society along with our individual strengths offset those frailties. For many capital clients, the frailties are overwhelming, and the supports are absent. Eighth Amendment jurisprudence confers compensatory protection to allow life-and-death decision makers to extend compassion on an individual basis.[10]

Mitigation is so paramount to death penalty sentencing that the American Bar Association guidelines require capital defense teams to present mitigation evidence.[11] As such, capital defense counsel prepare for the sentencing phase of the trial as soon as they receive the case file.[12] The reason is simple: "Mitigation works. It is all too often the difference between life and death."[13] However, the benefits of mitigation are not exclusive to capital sentencing, and non-capital defense teams should also prepare for the presentencing hearing as soon as possible.[14]

Non-capital mitigation jurisprudence is not as developed nor widespread as capital mitigation jurisprudence.[15] Still, scholars and practitioners have made a recent push for counsel to utilize capital mitigation techniques for non-capital cases because using mitigation evidence in non-capital cases will benefit defendants.[16] Non-capital defendants may share the same "human frailties" as capital defendants, with histories of trauma, mental illness, and addiction.[17] Likewise, individualized sentencing, to include consideration of mitigation, is "highly relevant—if not essential—to the selection of an appropriate sentence."[18] Notably, military defense counsel have a unique advantage because the R.C.M. expressly permit the presentation of robust mitigation evidence in every court-martial.[19]

Defining Mitigation in Military Jurisprudence

Military jurisprudence permits the sentencing authority to consider mitigation evidence to determine an appropriate sentence.[20] According to R.C.M. 1001(d)(1), defense counsel may offer evidence in extenuation and mitigation during the presentencing proceeding.[21] Rule for Courts-Martial 1001(d)(1)(B) defines matters in mitigation as evidence unrelated to the crime "introduced to lessen the punishment to be adjudged by the court-martial, or to furnish grounds for a recommendation of clemency."[22] Examples of matters in mitigation include prior non-judicial punishment for the same offense, acts of good conduct or bravery, and evidence that the accused has a "reputation . . . for efficiency, fidelity, subordination, temperance, courage, or any other trait that is desirable in a [Service member]."[23] Additionally, the accused may make a sworn or unsworn statement for the purpose of mitigation.[24]

Case law expands the definition of mitigation evidence to include the value of retirement benefits lost if the accused is discharged,[25] prior punishment by a civilian court for the same offense,[26] and certain medical conditions.[27] After *United States v. Wheeler*, the drafters of the *Military Judges' Benchbook* wrote a panel instruction regarding the non-exhaustive list of matters to consider when rendering a sentence.[28] The "*Wheeler* factors" include things such as the accused's age, good military character, family and financial difficulties, past performance in the Army, and character evidence.[29]

To summarize, R.C.M. 1001(d)(1)(B), R.C.M. 1001(d)(2), and case law provide defense practitioners with a nearly limitless definition of what constitutes matters in mitigation. The sentencing authority may consider both positive and negative life experiences as well as the accused's character traits. With a firm grasp on the definition of mitigation evidence, the next consideration is how mitigation evidence has positively impacted real cases.

"Mitigation Matters"[30]

Mitigation evidence positively impacts sentences because it humanizes a defendant who has been found guilty of violating our social norms.[31] Further, the benefits of presenting mitigation evidence exist regardless of the crime.[32] In capital cases, mitigation can mean the difference between life and death.[33] In non-capital cases, it may mean the difference between the maximum and lesser prison sentence or the difference between a dishonorable discharge and retention.[34] There is no way to conclusively determine how mitigation evidence may impact any particular case or sentence.[35] However, research highlights what types of mitigation evidence may positively or negatively affect future cases.[36] One primary source of research is the Capital Jury Project, which collects data from jurors who served on capital cases.[37] Scholars have studied this data and written extensively about what evidence was most persuasive to jurors and how mitigation evidence can backfire if misused.[38]

Empirical examples abound where mitigation evidence convinced juries to spare capital defendants' lives.[39] Take the case of

(Credit: wutzkoh - stock.adobe.com)

Mr. Juan Quintero, who was charged with murdering respected police officer, Mr. Rodney Johnson.[40] The facts of the case disfavored Mr. Quintero: he shot Mr. Johnson during a routine traffic stop, he had a prior conviction for sexually assaulting a child, he was a Mexican immigrant without a visa to live in the United States.[41] Mr. Quintero's defense team spent countless hours with their client, reviewed social history records, and interviewed witnesses.[42] The attorneys learned Mr. Quintero suffered a head injury as a child that left him with a seizure disorder and diminished brain function.[43] Also, Mr. Quintero's father physically and emotionally abused him.[44] Despite these facts, Mr. Quintero loved his family, and jurors viewed that as a strength.[45] The defense team presented this evidence to the jury, who determined Mr. Quintero's life was worth saving.[46]

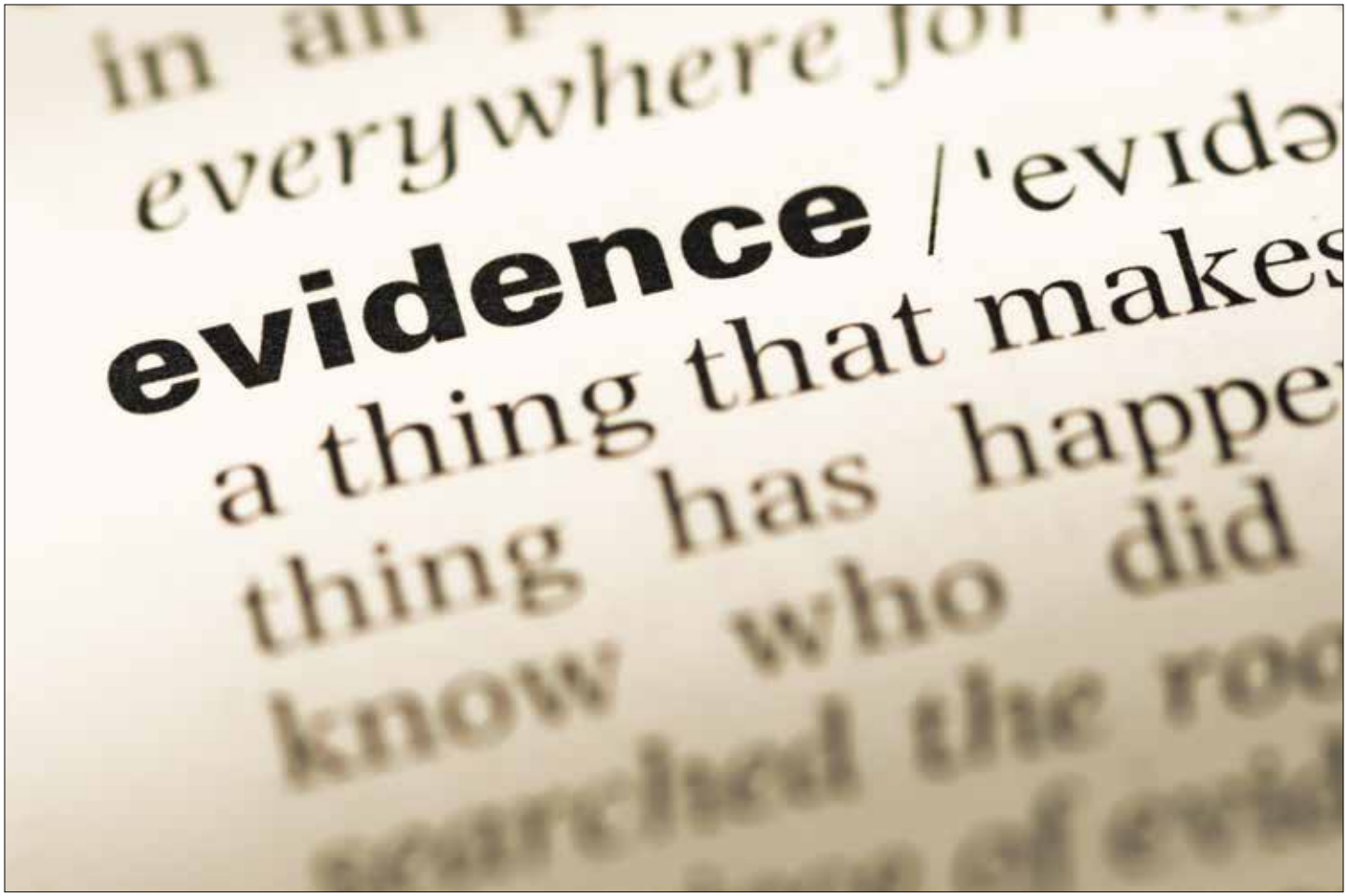
Stories of the positive impact of mitigation evidence exist in non-capital military cases as well. If asked, any current or former defense counsel could recount a memory of a successful mitigation-driven sentencing case, such as a Soldier who joined the Army to leave a broken home or one who developed a substance abuse problem after multiple deployments.[47] The positive result occurred in these cases because the defense counsel investigated the client's life history, which is the starting point to develop the defense sentencing case.[48]

Investigating Mitigation Evidence

Finding mitigation evidence takes time and significant effort.[49] But, defense counsel's time spent investigating mitigation evidence will reap rewards, as evidenced in capital cases in which defendants receive life sentences.[50] The mitigation investigation is separate and different from the inquiry done in preparation for the merits portion of the trial, as the focus of the mitigation investigation is the client's life and not the crime.[51] Defense counsel should follow the general procedures for conducting the investigation, called a social history investigation, found in reference texts.[52] The framework of a social history investigation includes multiple interviews with the client and witnesses and the collection of records.[53]

Client-Centered Representation

No social history investigation will be successful unless defense counsel embrace the tenets of client-centered representation.[54] This standard requires defense counsel to establish rapport with the client by listening to and meeting regularly with the client.[55] These efforts will build a strong relationship and develop the trust necessary for the client to share details about the crime and their life history.[56] Gaining a client's trust takes time, patience, empathy, and the desire to learn.[57] Some, or all, clients may not be wholly honest and may feel uncom-



(Credit: Tung Cheung - stock.adobe.com)

fortable with their attorney interviewing family, friends, or coworkers.[58] Despite these barriers, counsel must forge a strong relationship with each client.[59] "You may not know exactly how the relationship you have painstakingly built with the client will bear fruit, but it will."[60]

Social History Investigation

"The social history investigation starts with the client."[61] Defense counsel's initial interviews with the client will provide a framework for conducting the social history investigation.[62] Defense counsel must validate all information provided by the client because clients may not provide accurate details, for one reason or another.[63] Defense counsel must also use the information provided by the client to expand the scope of the investigation.[64] Client interviews should not be the beginning and end of the defense counsel's social history investigation.[65] After collecting social history information from the client, defense counsel must begin the arduous journey of collecting information from other sources and interviewing potential presentencing witnesses.[66]

Client Interview

Social history interviews with the client are different from the interviews defense counsel conduct to learn facts about the alleged crime for the merits portion of the trial.[67] Defense counsel's focus during the social history interview should be on discovering information that may convince the sentencing authority to sentence less than the maximum.[68] This information may include sensitive topics, like abuse, neglect, and poverty, and clients may not be open to sharing this information.[69] Clients are more likely to share these types of details about their lives if they understand the purpose of the social history investigation.[70] To that end, defense counsel should use early client meetings to explain the presentencing proceeding and what categories of information are admissible.[71] Setting the stage at the initial meetings gives defense counsel the best opportunity to build a successful mitigation case.[72]

During the social history interviews with the client, defense counsel should request details about information admissible under R.C.M. 1101(d)(1) and the *Wheeler* factors. Defense counsel should inquire into the client's age, childhood, upbringing, family history, education, work history, traumatic experiences, combat history, and medical and mental health conditions.[73] Determining whether a client has a mental health disorder must occur as early as possible, as a diagnosis can affect not only the social history investigation but also the merits investigation if an R.C.M. 706 inquiry is necessary.[74] Defense counsel should consider providing the client with the *Wheeler* factors checklist contained in DA Pamphlet 27-9 before the first substantive meeting.[75]

Defense counsel should also collect contact details for potential social history witnesses and identify records to collect from schools, employers, family members, or medical providers.[76]

How defense counsel conducts the social history interview also differs from how they conduct interviews for the merits portion of the trial.[77] Defense counsel should conduct client history interviews in a comfortable space where the client and attorney are equally situated.[78] The TDS conference room or empty waiting area may be more conducive to open dialogue than the counsel's office with counsel behind a desk.[79] "A mitigation interview aims to put the witness in a position of power."[80] To accomplish this task, counsel should ask open-ended questions about general topics.[81] Every client will have a unique story, so counsel should guide the conversation to relevant subjects but be open to topics the client desires to discuss.[82] Counsel should ask the client for "factual narratives and descriptions" instead of asking the client whether he or she has been "abused" or has a mental health condition.[83] This interview method will increase the possibility of information exchange because clients may not identify or feel comfortable with the labels attorneys use to describe trauma, life events, or mental health diagnoses.[84] Defense counsel should be engaged during the interview, which means minimal note-taking.[85] Note-taking is essential, but the primary note-taker should be a paralegal or co-counsel rather than the attorney conducting the interview. The techniques described above carry-over to the interviews conducted of potential presentencing witnesses, with a few differences.

Witness Interviews

In the death penalty context, defense teams employ mitigation specialists to interview social history witnesses and collect information for the penalty phase of the trial.[86] Military defense counsel are unlikely to receive the support of a mitigation specialist for non-capital cases.[87] As such, defense counsel[88] are responsible for interviewing social history witnesses.[89] When interviewing social history witnesses, defense counsel will employ many of the techniques described above, such as active listening, open-ended questioning, and using a comfortable space for the interview.[90]

In determining whom to interview, defense counsel should begin with family members, friends, mental health providers,[91] and coworkers.[92] However, the client's life experiences will dictate whether defense counsel should interview civilian supervisors, teachers, coaches, clergy members, or confinement facility staff.[93] For example, a senior client may not benefit from interviewing his high school teachers, whereas a new Soldier with few military contacts would. The goal is to "obtain a cross-section of data" about the client's life to corroborate the client's testimony or offer new information to the sentencing authority.[94]

Next, counsel must prepare for and conduct the interviews.[95] Ideally, counsel should conduct mitigation interviews in-person.[96] Defense counsel should explain to witnesses the military presentencing process and the role of mitigation evidence.[97] Defense counsel may need to interview some witnesses several times to review sensitive issues, like abuse or neglect.[98] During the substantive portion of the interview, defense counsel should guide the witness to specific topics and use open-ended questions to elicit answers.[99] The goal is to gather stories to make the mitigating characteristic real to the sentencing authority.[100] "A specific story of a particular horrific instance of abuse, for example, resonates with jurors more than general assertions that the defendant was abused."[101] Defense counsel should not audio record the interview because of discovery concerns and because it may alienate the witness.[102] Instead, defense counsel should rely on a paralegal or co-counsel's assistance for note-taking.[103]

Defense counsel should inquire about the positive and negative aspects of the following topics during social history interviews: birth and childhood development, family relationships, education, school performance, extracurricular activities, religion, the family's socio-economic status, trauma and abuse, work performance, parenting style, major life events, mental health diagnoses, and behavior post-allegation.[104] Appendix A includes a topic list to use in preparation for social history interviews.

Record Collection

Records may be the best mitigating evidence because they appear "less biased and susceptible to error than a witness's testimony."[105] The process of collecting social history records is different from normal discovery practice.[106] Instead of relying on the prosecution to collect social history records, defense counsel may desire to collect this evidence without the prosecution's assistance to preserve client confidentiality.[107] In addition, the spectrum of information gathered is broad and should include all aspects of the client's life before and after the criminal allegation.[108] Finally, the goal of mitigation records is different, as these records are collected to help form the basis for a reduced sentence.[109]

The road to success for record collection is threefold: request the records, review the records, and organize the records. Generally, defense counsel should search for and request education, medical, mental health, employment, court, prison, and military records.[110] Defense counsel should collect social history records as soon as possible to ensure adequate time for the custodian to respond.[111] As well, locating one record may necessitate supplemental record requests, so this process can become lengthy.[112] Appendix B provides a non-exhaustive checklist for defense practitioners to use during record collection.

Defense counsel[113] should ask record custodians whether the request for records must follow a specific format and whether the custodian requires client permission to release the documents.[114] If the agency charges a fee for record production, counsel may either allow the client to pay or request the Government to produce the record.[115] Defense counsel may not pay for record production.[116] Before submitting the request, defense counsel should consider asking the records custodian to complete a business record affidavit.[117] A business record affidavit is necessary to admit the records at the presentencing hearing if the defense counsel does not plan to call the records custodian as a witness or relax the rules of evidence.[118]

Next, defense counsel must review all social history records in search of information that may be mitigating.[119] Whether information is mitigating is defendant-spe-

cific and case-specific.[120] While the social history records may not be mitigating standing alone, they may support lay or expert witness testimony—thereby making the testimony stronger.[121] Defense counsel must analyze the records and incorporate the information into the sentencing case.[122] After reviewing the records, defense counsel[123] should organize and make copies of the records for use during subsequent interviews and later at trial.[124] No perfect organization framework exists, but the earlier counsel begins organizing, the easier it is to stay on top of mitigation records.[125]

Presentation of Mitigation Evidence

"Some of the most experienced public defenders specializing in capital cases have presented mitigating evidence only a handful of times over their long careers."[126] In comparison, a TDS counsel may present mitigation evidence at her first trial as a practicing attorney.[127] Despite the uniqueness of mitigation practice, defense counsel can excel in sentencing advocacy by following the core principles of trial advocacy, plus the sentencing-specific suggestions discussed below.

Advocacy During the Presentencing Hearing

Before covering the mitigation-specific aspects of sentencing advocacy, three tenets of trial advocacy bear mention: authenticity, competency, and credibility.[128] These three principles are tied to an attorney's persuasiveness and remain vital during the presentencing hearing.[129] Authenticity in trial practice is being "true to one's own personality, spirit, or character."[130] Trial advocates must come to know themselves before entering the well of the courtroom and should not don a fake identity made for the courtroom.[131] Competency is knowledge of the case and evidentiary rules as well as confidence and comfort in the courtroom.[132] Credibility is a combination of trustworthiness, expertise, bearing, confidence, and knowledge about the case.[133] Trial advocates earn credibility from the jury through their in-court behavior.[134] These essential principles, along with theme and story, are as important during the presentencing phase of the trial as they are for the guilt-innocence phase.

Building a Mitigation-Centric Sentencing Case

Storytelling in Sentencing

> Storytelling is the most effective means of persuasion. No other skill so elegantly or completely combines a lawyer's ability to think, organize, write, and speak. This is why, everything else being equal, a credible lawyer capable of telling a well-reasoned story that moves the listener will always beat the lawyer who cannot.[135]

The defense sentencing case, and in particular, the mitigation aspect of sentencing, is based on the story of the client's life.[136] Attorneys use stories not only to organize and share information but also because stories appeal to both judges and juries.[137] Material for compelling mitigation stories exists in every case because mitigation is "potentially infinite."[138] Moreover, Soldiers facing court-martial come from varied backgrounds. Some Soldiers choose military service to flee poverty while others serve to continue a family's military tradition.[139] All of these facts can combine to create emotionally moving mitigation stories that deserve to be told.

Many authors have written about legal storytelling and offer advice about using stories in courtroom practice.[140] Defense counsel crafting sentencing stories should consider Jonathan Shapiro's "Five Rules for Storytelling."[141] Mr. Shapiro, a former prosecutor, provides five rules for creating a compelling story. First, have a point.[142] As described above, the point of the mitigation story is to humanize the client. Second, use Aristotle's rhetorical triangle: ethos, logos, and pathos.[143] Ethos appeals to the speaker's credibility, logos uses reason, and pathos draws on emotion, beliefs, and values.[144] The rhetorical triangle is useful because it connects facts with emotion in a logical manner.[145] Third, write the script.[146] "Unlike writers, lawyers are more limited by the story elements they are given."[147] No matter the "material" of the client's story, counsel should write the script in a sequenced plot that builds momentum to keep the audience's attention.[148] Fourth, counsel must edit the script.[149] Defense counsel must rework the sentencing "script" the same way counsel revises the trial plan.[150] Mr. Shapiro's final rule is to rehearse the performance.[151] Rehearsing the performance allows counsel to perfect the story, tempo, and delivery to connect with the audience.[152]

Practically, defense counsel should tell the client's sentencing story as a narrative through witness testimony, the accused's testimony, and documentary evidence that counsel ultimately ties together during the sentencing argument.[153] To help meet this goal, defense counsel must develop a theme that ties together the entire sentencing case and makes the evidence relevant to the sentencing authority.[154]

Mitigation Themes: The Good, the Bad, and the Ugly

During the mitigation investigation, counsel will learn that "most clients possess strengths alongside weaknesses."[155] The sentencing theme should account for this realization.[156] The best theme for the case may be universal or one derived from the client's background.[157] No recipe exists for a perfect theme, but advocacy scholars offer countless ideas for creating the best theme possible.[158] Before discussing how to create a theme, a brief note on how the theme relates to mitigation evidence. "All mitigation [evidence] has the potential to backfire if the evidence demonizes or portrays the defendant as broken or beyond repair. Mitigation evidence can also be converted into aggravating evidence if it is presented without context . . . ."[159] This quote emphasizes the importance of using a theme throughout the sentencing case that explains why the evidence mitigates rather than aggravates the sentence.

The goal of theme development is to blend the good with the bad, appeal to common sense and morality,[160] and motivate the sentencing authority to find in the client's favor.[161] When developing the sentencing theme, counsel should start with the client's life experiences that may have contributed to commission of the crime.[162] These life experiences are often negative and may include a history of abuse, neglect, extreme poverty, substance abuse, or mental health diagnosis.[163] The Capital Jury Project suggests that jurors may find evidence about

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such experiences mitigating.[164] An example theme incorporating negative life experience could explain how being hit with a belt as a child influenced how the accused "disciplined" his or her children.

Next, counsel should consider the client's demonstrated positive character traits and good acts.[165] The *Wheeler* factors allow the sentencing authority to assign mitigation value to deployment history, acts of heroism, family and spiritual support, and positive attributes such as honesty and strong work ethic.[166] Research suggests that a clean criminal record and post-offense good behavior in jail may be mitigating.[167] Sample jurors also assigned mitigation value to the otherwise negative fact of drug addiction when the defendant sought help for the condition.[168] An example theme incorporating positive character traits could show the accused as a hardworking Soldier who joined the Army to flee a life of poverty and abuse.

In sum, combining the client's negative life experience with positive character traits and good acts can result in an impactful, motivating theme. Defense counsel should strive to create and use a theme that "shows [the accused] as a human being, one who has done good and bad, and is sorry for the bad, one who loves and is loved, someone for whom hope is still possible."[169]

Bringing Mitigation to Life at the Presentencing Hearing

Defense counsel's job does not end after the social history investigation concludes or once crafting the perfect sentencing theme for a case is complete. For the mitigation evidence to work, defense counsel must present logical and trustworthy evidence.[170] "Being the most competent trial lawyer in the courtroom is not enough. It takes more than oratorical skills and courtroom savvy to convince decision-makers to decide in favor of your client. To win a case, the substance of your presentation must be compelling, meaningful, and inspiring."[171] Witness testimony, documentary evidence, and the accused's testimony are the three opportunities for counsel to convince the sentencing authority to find in the client's favor.[172]

Witness Testimony

The interviews done during the social history investigation will reveal an incredible amount of information.[173] Before the trial begins, defense counsel must turn these interviews into testimony and develop the presentencing plan.[174] Every

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presentencing "witness should contribute to the larger narrative of the client's life."[175] Defense counsel should consider presenting mitigation evidence in the form of stories told by witnesses during the presentencing hearing.[176] These stories may depict negative or positive life experiences.[177] Experts recommend using narrative testimony because it is often more compelling than testimony about the act or character trait.[178] Additionally, defense counsel should consider ordering witness testimony to make the most significant impact.[179] Defense counsel should also think about using documentary, photo, or video evidence during witness testimony to bring the client's story to life.[180]

Mitigation experts suggest defense counsel meet with expert consultants and consider using expert testimony in the presentencing case.[181] Expert assistance is not limited to psychologists or psychiatrists and may include social workers, pediatricians, teachers, or mitigation specialists.[182] Whereas the client and lay witnesses tell the client's life story, expert witnesses can interpret the client's life experiences for the sentencing authority.[183] For that reason, expert testimony should relate to the factual testimony offered by family, friends, or coworkers.[184] Just as lay witnesses should use narratives when testifying, expert witnesses should testify about client stories from their interviews with family members or the client.[185] Despite the importance of expert testimony in certain cases, research indicates jury skepticism of paid experts.[186] To alleviate this concern, defense counsel should consider consulting unpaid experts[187] or experts from the Department of Defense, if available and beneficial to the case.

Documentary Evidence and Visual Aids

Advocacy experts suggest using visual aids and documentary evidence during the trial because they reinforce testimony and help the sentencing authority remember facts.[188] Also, some information may only exist in the form of documentary evidence.[189] The best use of documentary evidence occurs when the exhibit or demonstrative aid nests within witness testimony, thereby supporting the credibility of the witness and cementing the idea in the sentencing authority's mind.[190] An example of this nesting technique would be using the Good Solider Book[191] during witness testimony to highlight positive aspects of the client's military career.[192] Other creative uses of demonstrative aids include showing videos of the client's childhood home, playing recordings of jailhouse calls between the client and family members, and showing a video clip of the accused performing in a church choir.[193] In close, "Jurors are more likely to sense the humanity of the defendant if they are brought into his world through various manners of presentation."[194]

The Accused's Allocution

Rule for Courts-Martial 1001(d)(2) permits the accused to provide sworn or unsworn testimony at the presentencing hearing regarding extenuation, mitigation, or to rebut statements of fact contained in the crime victim's sentencing testimony.[195] This testimony, referred to as an allocution, is historically meant "as a plea for mercy."[196] The right to allocution allows the accused broad, but not complete, freedom to testify about the crime, the accused's life, and plans

after the trial concludes.[197] An accused's allocution can be emotionally moving if the defense counsel prepares the client for the difficult job of testifying.[198]

Preparing the Client to Testify

Preparing a client to testify at the presentencing hearing is hard, as many clients avoid thinking about presentencing.[199] The prospect of a guilty verdict is appalling to most clients, and no one wants to discuss intimate life experiences in a public hearing.[200] Despite these hurdles, defense counsel must prepare the client to discuss the mitigation topics uncovered during the social history investigation, develop testimony that will humanize the client to the sentencing authority, and evoke remorse from the client.[201]

An accused may testify sworn or unsworn, submit a written unsworn statement, or have defense counsel read a statement to the court on his or her behalf.[202] This paper does not cover the strategic benefits or downsides of each method, but defense counsel must have that discussion with each client to ensure the client makes an informed decision. As part of that discussion, defense counsel must address the possibility of the sentencing authority perceiving the accused's statement as insincere.[203] After the client decides as to the form of testimony, the defense counsel must prepare the client to testify at what is likely the hardest moment of the client's life.[204]

Taking the Stand

The accused's performance on the stand matters whether the accused begs forgiveness or internally disagrees with the verdict.[205] Research from the Capital Jury Project confirms that jurors value remorse as highly mitigating and find defendants more likable when they demonstrate genuine regret for the crime.[206] A client who acknowledges guilt has the opportunity during allocution to take responsibility, apologize for the wrongdoing, and request mercy.[207] An accused who testifies remorsefully may convince the sentencing authority to adjudge a lighter sentence by repenting, resolving to learn from the transgression, and atoning for the harm done.[208]

The more precarious situation exists when the accused maintains innocence after the verdict and wants to testify as such.[209] Regardless of whether permissible or not, allocutions in which the client maintains innocence may backfire.[210] The sentencing authority is unlikely to welcome a story of innocence after finding the accused guilty mere hours before.[211] Such testimony may also run afoul of military jurisprudence, which prohibits the accused from impeaching the verdict during presentencing testimony.[212] Research concludes that remorse matters to the sentencing authority, regardless of whether the accused accepts the verdict.[213] With that in mind, defense counsel must discuss with the client any possible ramifications of testifying at the presentencing hearing.

Putting it All Together

The opportunity to discover and tell the client's story is a privilege. As historian Edward Herndon remarked in his Lincoln biography, *The True Story of a Great Life*, "If one is in search of stories of fraud, deceit, cruelty, broken promises, blasted homes, there is no better place to learn them than a law office."[214] Client stories are wrought with the good, the bad, and the ugly; each story a patchwork quilt deserving to be told during the presentencing hearing. Further, capital jurisprudence and research prove that mitigation evidence matters to the sentencing authority.[215] By putting together capital-style mitigation practices with the expansive nature of the military presentencing proceeding, defense counsel can present thorough, reasoned, and emotionally moving mitigation stories.

The first step toward this goal is for military defense counsel to incorporate capital-style mitigation investigatory practices into their representation of non-capital clients. The easiest, and most effective way to do that is through the social history method of investigation. For defense counsel unfamiliar with mitigation evidence, the social history method of investigation can serve as a model for all counsel to follow, regardless of experience level. Counsel who use this method and place priority on mitigation may experience better client relations[216] and will more thoroughly prepare for the presentencing hearing.

The final step toward this goal is to heed the advice of advocacy experts and members of the capital-defense community regarding presentation of mitigation evidence. As discussed above, presenting mitigation evidence is nuanced and may have the opposite effect if not given proper context.[217] Defense counsel can properly frame mitigation evidence for the sentencing authority through the use of story and theme.[218] Similarly, counsel can bring the client's story to life by using narrative testimony, nesting demonstrative aids or exhibits into witness testimony, and preparing the client to testify.[219] In close, military defense counsel are in the unique position to present powerful mitigation cases based on our broad definition of mitigation, and capital jurisprudence offers myriad reasons to present this evidence at the presentencing hearing. It is just up to them to do it. **TAL**

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Notes

1. Jonathan Mahler, *Commander Swift Objects*, N.Y. Times (June 13, 2004), https://www.nytimes.com/2004/06/13/magazine/commander-swift-objects.html.

2. Manual for Courts-Martial, United States, R.C.M. 1001(d)(1) (2019) [hereinafter MCM]. While important, a discussion of extenuation evidence is purposely absent from this article. Defense counsel must familiarize themselves with the definition of extenuation in Rule for Courts-Martial 1001(d)(1)(A) and seek-out extenuation evidence during the investigation into the alleged crime.

3. *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (explaining that evidence of a disadvantaged background or mental health problems may show reduced criminal culpability in capital cases).

4. MCM, *supra* note 2, R.C.M. 1001(d)(1)(B).

5. *See id.*

6. *See Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 680 (2008) (discussing the role of a mitigation specialist).

7. Laurie Shanks, *Whose Story Is It, Anyway? – Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 Clinical L. Rev. 509, 509 (2008).

8. *See* Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases 22-29 (Edward Monahan & James Clark eds., 2017) [hereinafter Tell the Client's Story].

9. *See, e.g.*, Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L. Rev. 1035 (2008).

10. Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 Univ. Pa. J.L. & Soc. Change 237, 241 (2008) (explaining that mitigation evidence is tied to the individual defendant's unique life experiences that led to commission of the crime).

11. *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1055–56 (2003) [hereinafter *ABA Guidelines*].

12. Tell the Client's Story, *supra* note 8, at 259.

13. *Id.* at 20.

14. *See* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 Am. J. Crim. L. 41, 41 (2013).

15. *Id.*

16. *Id.*

17. *Id.* at 46.

18. *See* Pepper v. United States, 562 U.S. 476, 489 (2011) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

19. *See* MCM, *supra* note 2, R.C.M. 1001(d)(1)(B).

20. *See id.* R.C.M. 1001(a)(1).

21. *Id.* R.C.M. 1001(d)(1).

22. *Id.* R.C.M. 1001(d)(1)(B).

23. *Id.*

24. *Id.* R.C.M. 1001(d)(2).

25. *E.g.*, United States v. Washington, 55 M.J. 441 (C.A.A.F. 2001).

26. United States v. Simmons, 48 M.J. 193 (C.A.A.F. 1998).

27. United States v. Bray, 49 M.J. 300, 303 (C.A.A.F. 1998) (finding that poisoning-caused psychotic episode is mitigation).

28. United States v. Wheeler, 38 C.M.R. 72 (1967); *see* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook para. 2-6-11 (29 Feb. 2020) [hereinafter DA Pam. 27-9].

29. DA Pam. 27-9, *supra* note 28, para. 2-6-11.

30. Tell the Client's Story, *supra* note 8, at 19.

31. *See* Julie Schroeder et. al., *Mitigating Circumstances in Death Penalty Decisions: Using Evidence-Based Research to Inform Social Work Practice in Capital Trials*, 51 Soc. Work 355, 359 (2006).

32. Lisa B. Holleran, *Mitigation Evidence and the Ethical Role of a Defense Attorney in a Capital Case*, 36 Crim. Just. Ethics, 97, 103 (2017).

33. Tell the Client's Story, *supra* note 8, at 20.

34. This assertion is based on the author's professional experience as a defense counsel and training officer for Trial Defense Service from June 2015 to June 2019 [hereinafter Professional Experience].

35. *See* Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 29-30 (2000) [hereinafter *Emotional Economy*].

36. *Id.*

37. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1538 (1998) [hereinafter *What Do Jurors Think?*].

38. *See, e.g.,* Blume et al., *supra* note 9.

39. *E.g.*, Jeffrey Toobin, *The Mitigator: A New Way of Looking at the Death Penalty*, New Yorker (May 9, 2011), https://www.newyorker.com/magazine/2011/05/09/the-mitigator.

40. Tell the Client's Story, *supra* note 8, at 19.

41. *Id.*

42. *Id.*

43. *Id.* at 19–20.

44. *Id.* at 20.

45. *Id.*

46. *Id.*

47. Professional Experience, *supra* note 34.

48. *Id.*

49. Jan Dowling, Ind. Pub. Def. Council, The Social History Investigation: Tools & Strategies for Obtaining a Life Sentence 2 (2001).

50. Tell the Client's Story, *supra* note 8, at 19–20.

51. *See* Jose B. Ashford & Melissa Kupferberg, Death Penalty Mitigation: A Handbook for Mitigation Specialists, Investigators, Social Scientists, and Lawyers 45 (2013).

52. *See, e.g.* Dowling, *supra* note 49.

53. *See* Ashford & Kupferberg, *supra* note 51, at 45.

54. *See* Dowling, *supra* note 49, at 2.

55. Tell the Client's Story, *supra* note 8, at 240–41.

56. *Id.*

57. *Id.* at 240.

58. Cornell Ctr. on Death Penalty Worldwide, Representing Individuals Facing the Death Penalty: A Best Practices Manual 15 (2d ed. 2017) [hereinafter Best Practices Manual].

59. *See* U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers, r. 1.1–1.4 (28 June 2018) [hereinafter AR 27-26].

60. Tell the Client's Story, *supra* note 8, at 246.

61. Dowling, *supra* note 49, at 2.

62. *Id.*

63. *See* Tell the Client's Story, *supra* note 8, at 243.

64. *See id.*

65. *See id.*

66. Dowling, *supra* note 49, at 3–8.

67. Betsy Wilson & Amanda Myers, *Accepting Miller's Invitation: Conducting a Capital-Style Mitigation Investigation in Juvenile-Life-Without-Parole Cases*, The Champion, Apr. 2014, at 18, 19.

68. *See* Best Practices Manual, *supra* note 58, at 30–31.

69. Tell the Client's Story, *supra* note 8, at 248.

70. *See* Dowling, *supra* note 49, at 2.

71. *See id.*

72. *See id.*

73. MCM, *supra* note 2, R.C.M. 1001(d)(1); DA Pam. 27-9, *supra* note 28, para. 2-6-11.

74. *See* Ashford & Kupferberg, *supra* note 51, at 75; MCM, *supra* note 2, R.C.M. 706.

75. DA Pam. 27-9, *supra* note 28, para. 2-6-11.

76. *See* Dowling, *supra* note 49, at 2.

77. *See* Wilson & Myers, *supra* note 67, at 19.

78. *See id.*

79. *See id.*

80. *Id.* at 20.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.* at 20-21.

85. *Id.* at 20.

86. *ABA Guidelines*, *supra* note 11, at 952–60.

87. Professional Experience, *supra* note 34.

88. Defense counsel should train paralegals to interview presentencing witnesses. Not only is this training beneficial to a paralegal's development, but it can free-up time for defense counsel to focus on other tasks.

89. U.S. Dep't of Army, Reg. 27-10, Military Justice, para. 6-10(b)(2) (20 Nov. 2020) ("[C]ounsel have a positive duty to exercise independent judgment in control of the case.").

90. *See* Dowling, *supra* note 49, at 9.

91. Defense counsel must discuss any implications of waiving the M.R.E. 513 privilege with the client. MCM, *supra* note 2, M.R.E. 513 (2019) ("Psychotherapist—patient privilege").

92. *See* Ashford & Kupferberg, *supra* note 51, at 78.

93. Best Practices Manual, *supra* note 58, at 30.

94. Ashford & Kupferberg, *supra* note 51, at 79.

95. *See* Wilson & Myers, *supra* note 68, at 21.

96. *Id.* at 19–20.

97. Dowling, *supra* note 49, at 3.

98. *Id.*

99. *Id.* at 9–10.

100. Blume et al., *supra* note 9, at 1040.

101. *Id.*

102. Dowling, *supra* note 49, at 9.

103. Professional Experience, *supra* note 34.

104. Tell the Client's Story, *supra* note 8, 278–79.

105. Wilson & Myers, *supra* note 67, at 21.

106. Tell the Client's Story, *supra* note 8, at 273.

107. Wilson & Myers, *supra* note 67, at 21.

108. *See* Tell the Client's Story, *supra* note 8, at 226–27.

109. *See id.* at 195.

110. *See* Dowling, *supra* note 49, at 5-7.

111. *Id.* at 3.

112. Wilson & Myers, *supra* note 67, at 21.

113. Defense counsel should train paralegals to search for and collect social history records, contact record custodians, follow-up on requests, and organize the records for review. This training leads to better case preparation, develops defense counsel as leaders, and provides paralegals with skills for future positions.

114. Professional Experience, *supra* note 35.

115. *See* AR 27-26, *supra* note 59, r. 1.8, r. 1.8 cmt. (describing specific rules and limitations surrounding business transactions between lawyers and clients).

116. *See id.* r. 1.8(e)

117. Dowling, *supra* note 49, at 3.

118. MCM, *supra* note 2, R.C.M. 1001(d)(3) (permitting defense counsel to request to relax the rules of evidence for matters in extenuation and mitigation).

119. *See* Tell the Client's Story, *supra* note 8, at 225–26; AR 27-26, *supra* note 59, r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

120. *See* Tell the Client's Story, *supra* note 8, at 106 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998)).

121. *See* Tell the Client's Story, *supra* note 8, at 226–27.

122. *Id.* at 201.

123. Defense counsel should train paralegals to create and manage records trackers for the social history investigation and even review the records to highlight material for defense counsel to review further. Professional Experience, *supra* note 34.

124. *See* Dowling, *supra* note 49, at 4.

125. *See id.*

126. Stetler, *supra* note 10, at 237.

127. Professional Experience, *supra* note 35.

128. *See, e.g.*, Jessica D. Findley & Bruce D. Sales, The Science of Attorney Advocacy 21-47 (1st ed. 2012).

129. *See id.* at 20.

130. *Authenticity*, Merriam-Webster, www.merriam-webster.com/dictionary/authenticity (last visited June 7, 2023).

131. *See* Gerry Spence, How to Argue and Win Every Time 17 (1996).

132. Findley & Sales, *supra* note 129, at 20.

133. *See* Richard C. Waites, Courtroom Psychology and Trial Advocacy 26–28 (2003).

134. *See id.* at 500.

135. Jonathan Shapiro, Lawyers, Liars, and the Art of Storytelling 7 (2016).

136. Tell the Client's Story, *supra* note 8, at 317.

137. *See* Allan Kanner & Tibor L. Nagy, *Legal Strategy, Storytelling and Complex Litigation*, 30 Am. J. Trial Advoc. 1, 12-22 (2006).

138. Tell the Client's Story, *supra* note 8, at 22.

139. Professional Experience, *supra* note 34.

140. *See, e.g.*, Shapiro, *supra* note 135.

141. *Id.* at 17–18.

142. *Id.*

143. *Id.*

144. Jaclyn Lutzke & Mary F. Henggeler, Ind. Univ. Sch. of Liberal Arts, The Rhetorical Triangle: Understanding and Using Logos, Ethos, and Pathos (2019).

145. Shapiro, *supra* note 135, at 53.

146. *Id.* at 17–18.

147. *Id.* at 126.

148. *See id.* at 131.

149. *Id.* at 17–18.

150. *Id.*

151. *Id.*

152. *See id.* at 187.

153. *See id.* at 7; Kanner & Nagy, *supra* note 137, at 21–25. For a discussion of sentencing argument every defense counsel should review, see Lieutenant Colonel Charles L. Pritchard, Jr., *"Punished as a Court-Martial May Direct": Making Meaningful Sentence Requests*, Army Law., Dec. 2015, at 33.

154. *See* Kanner & Nagy, *supra* note 137, at 15–20.

155. Tell the Client's Story, *supra* note 8, at 240.

156. *See id.* at 330.

157. *Id.*

158. *See, e.g.*, Kanner & Nagy, *supra* note 137, at 14–19.

159. Tell the Client's Story, *supra* note 8, at 108.

160. *See* Terre Rushton, *Everyone Has a Storyteller Inside Them*, NITA Monthly Theme Blog (Oct. 4, 2018), https://www.nita.org/blogs/monthly-theme-storytelling-part-one.

161. Waites, *supra* note 133, at 140.

162. *See* Holleran, *supra* note 32, at 103.

163. *See* Stetler, *supra* note 10, at 237.

164. *What Do Jurors Think?, supra* note 37, at 1565.

165. *See* Holleran, *supra* note 32, at 103.

166. United States v. Wheeler, 38 C.M.R. 72 (1967); DA Pam. 27-9, *supra* note 28, para. 2-6-11.

167. *What Do Jurors Think?, supra* note 37, at 1560.

168. *Id.* at 1565.

169. Blume et al., *supra* note 9, at 1053.

170. *See* Tell the Client's Story, *supra* note 8, at 106.

171. Waites, *supra* note 133, at 7.

172. *See* MCM, *supra* note 2, R.C.M. 1001(d).

173. Personal Experience, *supra* note 34.

174. *See* Tell the Client's Story, *supra* note 8, at 107.

175. *Id.*

176. Blume et al., *supra* note 9, at 1040.

177. Tell the Client's Story, *supra* note 8, at 240.

178. *See* Blume et al., *supra* note 9, at 1040.

179. Tell the Client's Story, *supra* note 8, at 107.

180. *Id.*

181. *Id.* at 106–07.

182. *See* Schroeder et al., *supra* note 31, at 355–63.

183. Stetler, *supra* note 10, at 260.

184. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1140–44 (1997).

185. Tell the Client's Story, *supra* note 8, at 108.

186. *See What Do Jurors Think?, supra* note 37, at 1544.

187. Defense counsel should discuss the use of unpaid experts with the Trial Defense Service supervisory chain before accepting unpaid expert assistance. Often, there is no problem with the client accepting these services. However, issues can arise if the expert becomes unavailable for trial or seeks payment later. Professional Experience, *supra* note 34.

188. *See* Waites, *supra* note 133, at 349.

189. *See* Best Practices Manual, *supra* note 58, at 55–56.

190. *See id.* at 55.

191. The Good Soldier Book, which is commonly presented at the presentencing hearing, contains photos, awards, training certificates, evaluations, and other military accolades. Professional Experience, *supra* note 34.

192. Professional Experience, *supra* note 34.

193. Tell the Client's Story, *supra* note 8, at 107–08.

194. *Id.* at 108.

195. MCM, *supra* note 2, R.C.M. 1001(d)(2).

196. Rachel Cunliffe, *Defendants Encountering Victims in the Courtroom: Challenges and Opportunities of Allocution in Capital Trials for Doing Restorative Justice*, 21 Contemp. Just. Rev. 396, 412 (2018).

197. *See* United States v. Grill, 48 M.J. 131, 133 (C.A.A.F. 1998).

198. *See* Cunliffe, *supra* note 196, at 417.

199. Professional Experience, *supra* note 34.

200. *See* Cunliffe, *supra* note 196, at 406.

201. *See* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 Fordham L. Rev. 2641, 2644 (2007); Theodore Eisenberg et. al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 Cornell L. Rev. 1599, 1631 (1998).

202. MCM, *supra* note 2, R.C.M. 1001(d)(2).

203. *See* Michael Brick, *A Halting Plea for Mercy, Heavily Edited*, N.Y. Times (Jan. 25, 2007), https://www.nytimes.com/2007/01/25/nyregion/25trial.html.

204. Professional Experience, *supra* note 34.

205. *See* Cunliffe, *supra* note 196, at 416.

206. *Emotional Economy, supra* note 35, at 58.

207. Cunliffe, *supra* note 196, at 412.

208. Jeffrie G. Murphy, Getting Even: Forgiveness and Its Limits 41 (2003).

209. *See* Thomas, *supra* note 201, at 2664.

210. *Id.* (citing United States v. Li, 115 F.3d 125, 135 (2d Cir. 1997)).

211. *Id.* at 2662.

212. United States v. Johnson, 62 M.J. 31, 37 (C.A.A.F. 2005).

213. *See* Eisenberg et al., *supra* note 201, at 1631.

214. 2 William H. Herndon & Jesse W. Weik, Abraham Lincoln: The True Story of a Great Life 1 (D. Appleton and Co. 1900) (1888).

215. *See, e.g.*, Tell the Client's Story, *supra* note 8.

216. *See* Dowling, *supra* note 49, at 2.

217. *See* Tell the Client's Story, *supra* note 8, at 155.

218. *See* Rushton, *supra* note 160; Waites, *supra* note 133, at 140.

219. Blume et al., *supra* note 9, at 1040; Best Practices Manual, *supra* note 58, at 55; Thomas, *supra* note 201, at 2644.

Appendix A: Sample Mitigation Interview Topic List[1]

Instructions: Defense counsel should review the topics below with the client during the substantive social history interview(s). Later, defense counsel should review the same topics with social history witnesses to gather additional and corroborating information.	
TOPIC[2]	SUBTOPICS
Early Life (0 – 6 Years Old)	Birthplace Information about parents (post-partum depression, health issues, access to health care during pregnancy, abuse during pregnancy, etc.) Who lived at home? Primary caregiver information (daycare, family, friends, etc.) Socioeconomic status Instances of abuse or neglect or involvement of children's services Physical, mental, educational milestone information
School Age (7 – 18 Years Old)	Who lived at home? Education information (schools, grades, friends, disciplinary issues) Extracurricular activities Socio-economic status Instances of abuse or neglect or involvement of children's services Physical, mental, educational milestone information Religious affiliation and involvement Work history during high school Did client complete high school education?
Working Age (18 – Current Age)	Client departure from the family home Work history (jobs, references, duties, disciplinary actions, etc.) Continuing education (college, trade school, etc.) Military service (reason for service, promotions, demotions, disciplinary actions, awards, deployments, duties, retirement eligibility, injuries, summary of duties for each position held, etc.) Criminal record Significant romantic relationships (marriage, divorce, etc.) Starting a family (birth of children, miscarriages, etc.) Instances of abuse and neglect Mental health and substance abuse (diagnoses, treatment, recurring issues, etc.) Physical ailments (hearing loss, vision loss, etc.) Information about family members, friends, coworkers, supervisors, etc. Religious affiliation Volunteer work
Post-Investigation Conduct	Interaction with investigation Mental and physical health Job performance and attitude at work Treatment by fellow Soldiers and leadership Subsequent allegations of misconduct Pretrial confinement (treatment, behavior, education, duration, issues, etc.) Jail house visits (in-person or telephonic) Relationship with family, friends, and coworkers Future plans and goals (employment, education, place to live, support, etc.)

1. For a thorough guide on suggested topics and questions for the social history investigation, defense counsel should review Jan Dowling, Ind. Pub. Def. Council, The Social History Investigation: Tools & Strategies for Obtaining a Life Sentence 9 (2001). For an example of a completed social history report, defense counsel should review Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases 434 (Edward Monahan & James Clark eds., 2017).

2. Jan Dowling, Ind. Pub. Def. Council, The Social History Investigation: Tools & Strategies for Obtaining a Life Sentence 2 (2001).

Appendix B: Social History Records Checklist[1]

Instructions: Defense counsel should initially review this checklist with the client and make note of the existence and possible location of the category of records below. Defense counsel should consider using this checklist during interviews with the client's family, friends, and coworkers who may know about additional records or have more accurate information about the location of records.

Medical Records

Requests for medical records should include entire medical files, including imaging and lab results, diagnoses, prescription history, and follow-up care. Defense counsel should consider requesting the client's family medical records if there is a history of a genetic condition or substance abuse history.

☐ **Prenatal & Birth Records** Notes:	☐ **Pediatric & Well Child Records** Notes:
☐ **Records of Injury & Hospitalization** Notes:	☐ **Adult Medical Records** Notes:
☐ **Mental Health Records** Notes:	☐ **Substance Abuse Treatment Records** Notes:
☐ **Family Medical & Genetic Records** Notes:	☐ **Dental Records** Notes:

Education Records

Requests for education records should include disciplinary records, notes from teachers, transcripts, and graduation or completion certificates.

☐ **Pre-K or "Headstart" Records** Notes:	☐ **High School Records** Notes:
☐ **Elementary School Records** Notes:	☐ **College and Trade School Records** Notes:

[1] Jan Dowling, Ind. Pub. Def. Council, The Social History Investigation: Tools & Strategies for Obtaining a Life Sentence 2 (2001); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677, 682 (2008); Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases 278–79 (Edward Monahan & James Clark eds., 2017).

Employment & Related Records

Requests for employment and related records should include the client's complete employment history and personnel files. Related records may include proof of the client's payment of alimony and child support to show family reliance on client.

☐ **Hiring & Departure Records** Notes:	☐ **Disciplinary Records** Notes:
☐ **Promotion Records** Notes:	☐ **Awards** Notes:
☐ **Social Security Earnings Records** Notes:	☐ **Credit History** Notes:
☐ **Tax Records** Notes:	☐ **Child Support & Alimony Records** Notes:

Military Records

Requests for military records should include the client's entire personnel file. Defense counsel should review the personnel file to ensure all records are included, as the client may have additional records or the personnel file may be incomplete.

☐ **Enlistment & Commissioning Records** Notes:	☐ **Evaluations** Notes:
☐ **Awards** Notes:	☐ **Disciplinary Records** Notes:
☐ **Promotions & Demotions** Notes:	☐ **Discharge Records** Notes:
☐ **Deployment Records** Notes:	☐ **VA or DFAS Records** Notes:

Family & Home Life Records

Requests for family and home life records should include the client's records in these categories as well as the client's parents and possibly children's records in these categories, as applicable to the case.

☐ **Abuse & Neglect Records** Notes:	☐ **Social Service Records** Notes:
☐ **Family Photos** Notes:	☐ **Extracurricular Activity Records** Notes:
☐ **Volunteer Records** Notes:	☐ **Religious Affiliation Records** Notes:
☐ **Cultural & Community Records** Notes:	☐ **Marriage, Divorce, Adoption Records** Notes:

Criminal & Civil Court Records

Requests for court records should include records where the client is listed as both the victim and suspect and should include transcripts of the accused's testimony, if applicable.

☐ **Juvenile Records** Notes:	☐ **Adult Records** Notes:
☐ **Civil Court Case Records** Notes:	

Appendix C: Sample Mitigation Records Tracker

Instructions: Defense counsel should use a tracker to monitor record locations, points of contact, dates, and even whether copies of records have been made for trial. The tracker below is but one example. Defense counsel and paralegals should work together to create a tracking system for individual cases or for the TDS office, generally.				
Name of Record	**Location**	**Point of Contact**	**Date Requested**	**Date Received**
Alcohol Abuse Treatment Records	Treatment Center, 123 Sesame Place, Sunnyfield, OH, 00000	Mr. Oscar D. Grouch (record custodian) Business Affidavit requested	1 January 2018 1 January 2018	31 March 2018 Pending
K-12 Education Records	Multiple Client will provide NLT 1 February 2018	Unknown	Pending	Pending

SAMPLE

AROUND THE CORPS

CPT Jordan M. Robertson, NSL Attorney from OSJA at I Corps, JBLM, participates in the qualifications range with an M4. Qualifying on assigned weapons annually helps Soldiers stay ready to defend themselves in combat. (Photo courtesy of MAJ Ian P. Sandall)

(Credit: nyul–stock.adobe.com)

No. 2

Working 9 to 5 and No More

A Guide to Preventing Suffered and Permitted Overtime Claims

By Ms. Jennifer D. Talley

Working 9 to 5, what a way to make a living
Barely getting by, it's all taking and no giving
They just use your mind and they never give you credit
It's enough to drive you crazy if you let it
9 to 5, for service and devotion
You would think that I would deserve a fair promotion
Want to move ahead but the boss won't seem to let me
I swear sometimes that man is out to get me.[1]

The Army's mission is "to deploy, fight, and win our Nation's wars by providing ready, prompt, and sustained land dominance by Army forces across the full spectrum of conflict as part of the Joint Force."[2] Any obstacle to the Army's ability to pursue its mission warrants careful analysis and efforts to eliminate it. The obstacle this paper focuses on is the cost of grievances, judgments, and settlements for labor and employment actions.

"Expenses are the costs incurred to operate and maintain the [Army], such as personal services, supplies, and utilities."[3] To the extent possible, the Army should only incur those expenses necessary to accomplish the mission. Like most industries, labor costs represent one of the most substantial costs to the Department of Defense service components.[4] Further, the Army, more so than the Navy or Air Force, spends a larger proportion of its annual budget on personnel vice procurement.[5] Therefore, the potential cost of labor mismanagement is substantial.

Importantly, the Army must record any settlement, a claim payable under the law, as an obligation, which comes out of current available operating funds.[6] Necessarily, any settlement in a particular fiscal year will also affect the Army's ability to fund other expenses and projects vital to its mission success.

A handful of settlements over the last decade underscore the impact that litigation and corresponding settlements, particularly with respect to Fair Labor Standards Act (FLSA or the Act)[7] grievances, have on Federal agencies. In 2015, the Laborers' International Union of North America announced an $80 million settlement for an FLSA grievance it filed against Indian Health Service, an agency of the U.S. Department of Health and Human Services.[8] In 2014, the American Federation of Government Em-

The FLSA, enacted by Congress in 1938, provides minimum standards for wage and compensation, including overtime compensation for employees. (Credit: Vitalii Vodolazskyi–stock.adobe.com)

ployees (AFGE), Council 238, announced a $35 million settlement with the Environmental Protection Agency for a variety of alleged FLSA claims.[9] In 2008, AFGE, Council 222 and the National Federation of Federal Employees (NFFE) advertised a $24 million settlement with the Department of Housing and Urban Development.[10]

To date, the Department of the Army has not settled any FLSA grievances of this magnitude. However, there are eleven similar grievances pending Army-wide.[11] These grievances cross command lines and implicate Installation Management Command, Training and Doctrine Command, Forces Command, Army Corps of Engineers, Medical Command, and Army Materiel Command.[12] Some of these grievances have been pending for thirteen years.[13]

Because of the potential cost they represent, a cost that would take money from training and equipping Soldiers needed to fight and win our Nation's wars, FLSA grievances represent a real threat to mission readiness. It is vital that commanders and supervisors understand the law with respect to the FLSA, with particular attention to suffered and permitted overtime. Implementing preventative best practices within an organization will preempt or mitigate suffered and permitted overtime claims, which will significantly reduce command exposure and potential monetary damages.

This article provides a brief history of the FLSA and its evolution to cover Federal employees. Next, the article examines suffered and permitted overtime and the legal requirements for compensation. Then, the article identifies common problem areas in which suffered and permitted overtime generally arises and explains the impact these complaints have on the mission from a fiscal and readiness perspective. Finally, the article arms commanders and supervisors with best practice tips to prevent these types of grievances from occurring.

Historical Background

The FLSA, enacted by Congress in 1938, provides minimum standards for wage and compensation, including overtime compensation for employees.[14] The impetus in passing the FLSA was to even out the bargaining power between employer and employee and protect those employees without sufficient means to secure a minimum livable wage,[15] particularly because of the effects from the Great Depression.[16] In 1974, Congress substantially modified the FLSA by including Federal employees within its coverage.[17] Congress had previously cited opposition to the inclusion of Federal employees within the FLSA because Federal employees received the protection of Title 5, U.S. Code pay provisions.[18] Nevertheless, with the passage of the 1974 amendments,

millions of Federal employees received its protections. Currently, approximately 2,850,000 civilian employees work in the Federal Government, the largest employer in the world.[19] As such, it is vital to understand how these rules apply to the workforce and ensure proper implementation of the same.

Compensable Work

Certain Federal employees remain statutorily exempt from the FLSA, even though Federal employees came under the purview of the FLSA due to the 1974 Amendments.[20] This distinction is critically important. If an employee is exempt from the FLSA, they are not entitled to FLSA overtime pay.[21] A non-exempt employee, however, is subject to the FLSA's protections and must receive overtime pay for all hours of work that "are in excess of 8 [hours] in a day or 40 [hours] in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay."[22] Important to this compensation determination and calculation is first, necessarily, defining a non-exempt employee's hours of work.

As the agency that administers the FLSA for Federal employees,[23] the Office of Personnel Management (OPM) defines "hours of work" as "[a]ll time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency."[24] The OPM expressly includes "suffered or permitted work" as hours of work,[25] which are compensable.[26] Suffered or permitted work is defined as "[1] any work performed by an employee for the benefit of the agency, whether requested or not, [2] provided the employee's supervisor knows or has reason to believe that the work is being performed and [3] has an opportunity to prevent the work from being performed."[27] Finally, OPM regulations require an agency to compensate an employee in quarter of an hour increments for irregular or occasional overtime work.[28] The OPM goes on to distinguish between (1) principal; (2) preparatory or concluding activities; and (3) preliminary or postliminary activities,[29] which is an important step in determining compensation for a non-exempt employee.

Principal Activities

Principal activities are those activities that the "employee is employed to perform" and are compensable.[30] *Dunlop v. City Electric Inc.* defined "principal" as part of the work the employee performs "in the ordinary course of business."[31] The Supreme Court, in *Steiner v. Mitchell*, defined "principal" as work that is "an integral and indispensable part of the principal activities for which covered workmen are employed."[32] A classic example of a principal activity is the time spent by battery plant workers changing into clothes at the beginning of their shift and showering at the end of their shift (in facilities that state law requires the employer to provide).[33] The time spent changing into clothes and showering is integral to these employees' principal activities because their jobs entail using toxic materials that could be hazardous to health and safety.[34]

Preparatory and Concluding Activities

A preparatory activity is pre-shift work that an employee performs prior to the start of his or her principal activities.[35] A concluding activity is post-shift work performed after the end of his or her principal activities.[36] Importantly, if a preparatory or concluding activity is "closely related to an employee's principal activities, and is indispensable to the performance of the principal activities, and that the total time spent in that activity is more than [ten] minutes per daily tour of duty" the employer must treat the activity as hours of work.[37] Of course, this may result in the employee receiving overtime pay.[38]

In *Integrity Staffing Solutions*, the Supreme Court held that the time spent waiting to undergo and undergoing security screenings for warehouse workers was *not* preparatory and, therefore, not compensable.[39] Important to the Court's decision was the fact the company did not employ the workers to undergo security screenings, but rather to "retrieve products from warehouse shelves and package those products for shipment to Amazon customers."[40]

Contrast this scenario, which focused on a security screening unrelated to the warehouse employees' actual job duties, with one in which warehouse employees grieved an issue related to the time spent checking out or picking up the supplies necessary to perform the packaging of the products to Amazon customers. If the supplies are necessary to perform the job, then the employee could not perform the job without them, making this potential scenario one in which the time could be compensable.[41] In the context of Federal employees in the Army, it is likely that the process of using a common access card to log in and out of the computer system is a preparatory activity. There are very few scenarios in which a Federal employee does not require access to Government email and networks, which are available to the employee through their common access card.

Preliminary and Postliminary Activities

It is important to distinguish preparatory or concluding activities from preliminary and postliminary activities. Activities that are preliminary or postliminary, those performed prior to or just after an employee's principal activities (that are not preparatory and concluding activities either), are not principal activities and are not part of an employee's hours of work.[42] As such, these activities are not compensable.[43] The FLSA excludes these activities from the minimum wage requirements to prevent compensation for activities that are for an employee's own benefit and not those for which the agency would obtain a benefit.[44]

For instance, an employer is not required to compensate employees who report to work early for their own convenience.[45] There are many reasons an employee may arrive to work for their own convenience. Most commonly, a person may leave their home earlier than necessary to avoid rush hour traffic. An employee's claim for suffered and permitted overtime would likely be without merit if they engaged in activities such as drinking coffee, socializing, and conducting other non-work-related activities after they arrived early to the worksite.[46]

Typically, an employer should not compensate an employee for changing into clothes when they arrive to work either.[47] However, an employer must compensate employees for the time it takes to change in and out of specialized protective gear.[48] Although the Federal Labor Relations Authority (the Authority) has not directly addressed whether changing into or out

of standard clothing is a preliminary or postliminary activity, the Authority has ruled that "[t]he donning of protective gear is generally compensable only if it is specialized or unique, rather than generic."[49] Similarly, waiting to change into clothes is not compensable.[50]

De Minimis Exception

As discussed above, OPM regulations state that a preparatory or concluding activity must take more than ten minutes per day to be compensable.[51] Employees are not entitled to overtime compensation for fractional hours of irregular or occasional overtime work.[52] Having outlined what work is compensable and what work is not, it is now appropriate to examine suffered and permitted overtime in those contexts.

Suffered or Permitted Work

It should be clear to all employers that they must pay employees for doing their jobs and for the activities that are directly related, or indispensable, to their jobs during their regular tours of duty. Similarly, it is probably quite clear that an employer should pay its employees for regularly scheduled overtime ordered and approved by a supervisor. However, questions and issues begin to arise when one carefully examines the other type of overtime for which employers must provide compensation for non-exempt employees: suffered and permitted overtime.

Suffered and permitted overtime is compensable work if it meets the following three-prong test: "[1] any work performed by an employee for the benefit of the agency, whether requested or not, [2] provided the employee's supervisor knows or has reason to believe that the work is being performed and [3] has an opportunity to prevent the work from being performed."[53] Further, the above discussion sheds some light on what is work that is "for the benefit" of the agency to meet the first prong of the test.[54]

However, work that is merely for the benefit of the agency is not automatically compensable. As outlined in the test, even if the work is for the benefit of the agency, the employee's supervisor must also know or have reason to believe that the employee is performing the work.[55] This is constructive knowledge—whether the supervisor should have known—not whether the supervisor could have known.[56]

Importantly, it is the employee's burden to prove supervisory knowledge.[57] The Authority has gone so far as to deny claims for suffered or permitted overtime even when supervisors admitted to seeing employees at their desks during lunch.[58] The mere fact that a supervisor may have seen employees at their desks during lunch did not meet the union's burden in proving that the supervisor knew or should have been aware that employees were working during lunch breaks.[59] Similarly, agency access to electronic patient records, computer login information, and other information that may show when employees are working does not establish supervisory knowledge on its own.[60] The ultimate determination of constructive knowledge of subordinate work turns on the "reasonable diligence" of supervisors.[61]

However, the fact that the burden is on the employee or union to prove supervisory knowledge does not give supervisors carte blanche to ignore this potential issue.[62] In fact, the opposite is true. In order to reduce command exposure and potential damages, supervisors must implement best practices to prevent these claims from occurring. It is not enough for employers to hope there may be a good defense if an employee files a grievance.

Common Problem Areas and Impact on the Command

Before addressing best practices, it is important to consider where FLSA issues commonly arise so that commanders and supervisors can spot these problems proactively. Certain organizations may be more susceptible to FLSA grievances due to the nature of the work performed. It is common to see FLSA complaints arise when an organization has daily or weekly meetings, formations, or pre-shift meetings before the start of the duty day.[63] In organizations with twenty-four-hour operations, FLSA grievances may arise when there is (or is not) a hand-off to the incoming shift.[64] For law enforcement organizations, grievances may arise when employees draw a weapon at the start of their shift.[65] In the medical field, jobs associated directly with patient care can lead to FLSA grievances.[66] For instance, it is common to see complaints arise from those in a surgical unit that stay past their stated tour of duty to finish a particular procedure and later allege that they did not receive compensation for that work.

If the union files a grievance that eventually goes to arbitration, the Army may spend close to $10,000 a week in costs related to arbitrator and court reporter fees.[67] As indicated above, some of these arbitrations, though they include breaks in time, have been ongoing for over a decade.[68] The Army pays for these expenses with operation and maintenance funds.[69] As such, the impact to the mission can be significant, both monetarily and from a resourcing perspective.

Aside from costs to pay for the arbitration itself, settlement remains a huge issue as well. The Army must record a settlement as an obligation, which comes out of current available operating funds.[70] To appreciate how a settlement that the Army will pay from current funds may affect a particular organization's budget and plans, it is helpful to illustrate the steps with an example. The average cost for parts, supplies, and so forth to send a brigade combat team to a rotation at the National Training Center for annual training could reasonably, and likely, cost upwards of $80 million.[71]

As referenced above, other Federal agencies have settled FLSA group grievances for tens of millions of dollars.[72] If the Army had not programmed or accounted for this settlement, which it likely would not, it would come directly out of mission funds and significantly affect mission readiness, perhaps thwarting necessary training or equipment required to complete the Army's military mission.[73] As such, the need to implement best practices to prevent these types of claims is clear. The following section provides concrete suggestions to avoid common pitfalls and preserve a unit's already-programmed operating funds.

Best Practices[74]

Time and Attendance Policies and Enforcement

Every office should implement a written time and attendance policy that emphasizes regular duty hours with appropriate breaks. Additionally, supervisors should note com-

OPM regulations state that a preparatory or concluding activity must take more than ten minutes per day to be compensable. (Credit: Postmodern Studio—stock.adobe.com)

pliance with time and attendance policies on an employee's yearly counseling and discuss these issues during midpoint and end-of-year performance reviews. It may be appropriate to limit employees' access to work spaces before and after duty hours. Perhaps a supervisor needs to open the office doors for employees in the morning rather than allow free access to the facilities at all times.[75]

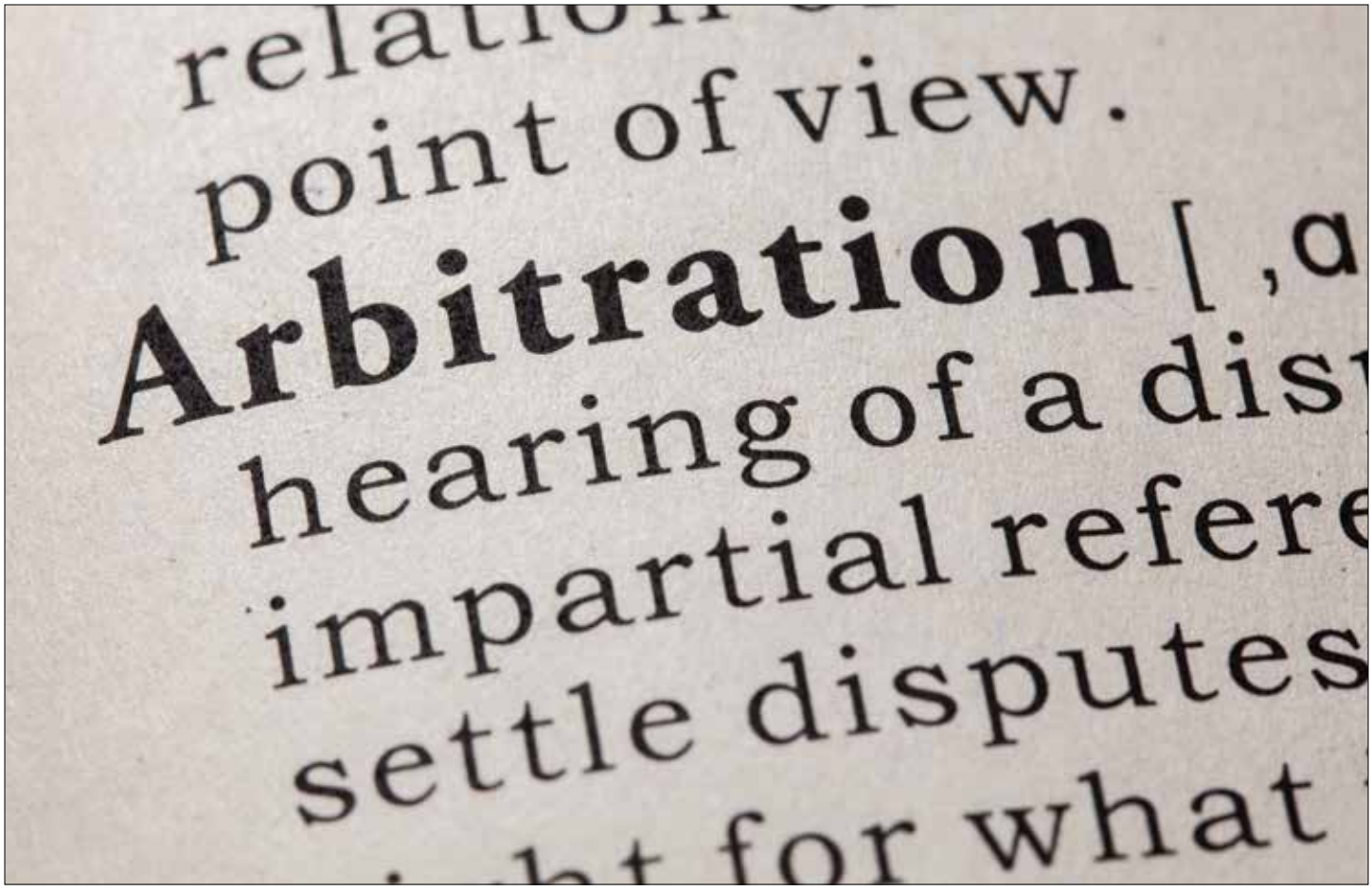
Moreover, if there is a particular task that employees believe they need to come in early to perform, but is not actually necessary, management should consider issuing an instruction explicitly stating that employees do not need to (or should not) come in to perform the task.[76] An instruction alone would not establish that an employer did not suffer or permit work, but an instruction may relieve management from liability if the work could have been performed during regular hours and management did not pressure the employees to work overtime.[77]

To the extent that an employee violates the stated time and attendance policy or an explicit instruction that the supervisor has given regarding performance of work, supervisors should consider discipline, if warranted. One possible option for management is to issue a formal reprimand for the employee's failure to follow a supervisory instruction.[78] While the issuance of instructions would not relieve liability for FLSA, as explained in *Lindow*,[79] it provides a mechanism for supervisors to hold employees accountable and enforce the standards to prevent further non-compliance.

Pre-Shift Meetings, Shift Changes, Pre-Shift Work

Case law suggests that pre-shift preparatory activities, such as back briefs or a hand-off of duties to the incoming shift, are preparatory (not principal) and only compensable if the Federal employee performs them for more than ten minutes per workday.[80] Very brief interactions between incoming and outgoing shifts is probably permissible, but management must proceed with caution. To the extent these briefings or exchanges become longer, or are, in fact, principal activities, supervisors must compensate the employee.

Further, as noted above, case law suggests that the signing in and out of weapons and other equipment might constitute preparatory and concluding activities if it is closely related to the employees' principal activities.[81] Additionally, time spent traveling to a designated area or location to check out or return equipment is compensable.[82] Commanders and supervisors in the Department of Emergency Services on an installation should take particular note of this issue. Best practice dictates



If the union files a grievance that eventually goes to arbitration, the Army may spend close to $10,000 a week in costs related to arbitrator and court reporter fees. (Credit: Feng Yu–stock.adobe.com)

that if employees need to check out or pick up equipment at the beginning of their shifts, time to do so, including reasonable travel time, should be contemplated when scheduling shifts.[83] Additionally, an agency may consider staggering shift start and stop times to ensure a quicker and more efficient transition between shifts, if necessary.[84]

Sweeps

As mentioned above, constructive knowledge of overtime work is enough to establish liability under the FLSA if a supervisor should have learned of the overtime work through "reasonable diligence."[85] Constructive knowledge of overtime work and what is reasonable in terms of supervisory knowledge, will necessarily depend on the specific mission and configuration of a particular office or unit. In an office or cubicle setting, it may be advisable to discuss the idea of supervisory "sweeps" at the end of the duty day. For example, a supervisor may want to check in or walk the halls to ensure that employees are appropriately wrapping up their duties and will depart on time at the end of their duty day. This helps enforce the standard that should already be set forth in policy, in individual employee documents (such as appraisals, counselings, and telework agreements) and provides the supervisor vital information as to the work habits of their employees and if there is compliance.

Government Equipment and Telework

Government Equipment

It is incredibly difficult to envision a scenario in which a non-exempt employee, not on any telework agreement, should have access to a government mobile phone or government remote equipment that the employee would use while not in the workplace. Barring some much-nuanced scenario, best practice would be to bar issuance of government mobile devices to non-exempt employees. The risk of overtime violations is too great and there is virtually no reason for a supervisor to contact a non-exempt employee while outside of the workplace and outside of regular working hours.

Telework

Every employee, regardless of whether the telework is regular and recurring or situational, must have a written telework agreement.[86] As such, if an employee does not have an executed telework agreement, the employee must never perform work from home. Just as yearly counselings should definitively state that employees shall comply with time and attendance protocols, telework agreements should also include a provision that states that overtime is not permitted without supervisory approval.[87]

If an employee does have a valid telework agreement, OPM recommends

that supervisors clearly outline expectations for telework in the telework agreement.[88] When considering the FLSA issues that may arise, supervisors must contemplate the type of technology the employee uses and when it is permissible for them to use it.

As discussed above, a non-exempt employee who does not telework should not have access to remote government technology. However, a supervisor may authorize a non-exempt employee to telework either situationally or on a recurring basis. As such, management should explicitly delineate, in writing, that employees must only utilize remote technology during authorized work hours.

Management should also regularly communicate expectations for use of remote technology to all employees who are teleworking. The definition of "regularly" in this context will depend on factors such as the number of employees teleworking, whether the telework is full-time or situational, and how the office operates generally. However, overcommunicating, while remaining consistent in messaging to all employees, is preferred.

Impact of COVID-19 on Telework

Due to the COVID-19 pandemic, on 12 March, 2020, the Office of Management and Budget encouraged all Federal Executive Branch departments and agencies to "maximize telework flexibilities to eligible workers within those populations that the Centers for Disease Control and Prevention (CDC) has identified as being at higher risk for serious complications from COVID-19 . . . and to CDC-identified special populations including pregnant women."[89] Additionally, OPM stated that an agency may adjust its policies to allow for Federal employee telework if there are "young children or other persons requiring care and supervision" at home.[90] For several years, a majority of the Federal workplace shifted to an entirely virtual environment. This shift invariably impacted literal supervisor visibility on employee work hours and presented additional challenges in supervision.

However, on 15 May 2023, OPM removed the COVID-19 governmentwide operating status announcement.[91] That announcement stated that the Federal Government should operate "Open with Maximum Telework Flexibilities to all Current Telework Eligible Employees, Pursuant to Direction from Agency Heads."[92] Based on the fact that COVID-19 "is not driving decisions regarding how Federal agencies work and serve the public as it was at the outset of the pandemic,"[93] the Government removed that guidance. This change will reimplement the previous rule that all teleworkers report to their duty station twice a pay period.[94]

Telework, while perhaps not as prolific now as it was during the height of the pandemic, is here to stay in some fashion. It is imperative that supervisors and commanders remain vigilant in tracking employee work whether it be fully in person, fully remote, or hybrid. In fact, a hybrid telework model may present additional challenges for which supervisors will need to contend.

To address these concerns, certain directorates have been able to leverage the systems already in place for their operations to track productivity and maintain accountability of employees in a largely virtual environment.[95] For example, certain branches of the Network Enterprise Center (NEC) have always relied on ticketing systems to track work orders and work product.[96] Now, supervisors utilize the ticketing system, along with daily accountability reports from employees, to more closely track hours worked and productivity.[97] Further, employees in other branches of the NEC must log in to separate networks to perform their jobs.[98] Supervisors are now using reports of this login information to confirm and spot check when employees are performing work to ensure compliance with the FLSA.[99]

While not every job will be as easy to track as some of the jobs within the NEC, there are certainly ways almost all supervisors can implement or improve upon accountability in this virtual, or hybrid-virtual environment. Supervisors should take note of when employees send emails. To the extent employees are sending emails outside of their duty hours, supervisors should investigate and discuss with the employee. An employee should be advised that this practice cannot continue without authorization and approval. It is more important than ever for commanders and supervisors to ensure that their employees, particularly their non-exempt employees, are adhering to the time and attendance policies in place as well as all FLSA guidelines.

Conclusion

Fair Labor Standards Act grievances are a threat to mission readiness. Multi-million dollar settlements paid from current operating funds compromise the Army's ability to fund budgeted trainings and operations. Fortunately, commanders and supervisors can prevent, or at the least significantly mitigate, FLSA grievances through aggressive best practices within their organizations.

The FLSA is a nuanced law. Managers must understand OPM's implementing regulations and institute best practices within their organizations to prevent FLSA grievances. With a little effort, supervisors and employees alike can happily pour themselves a "cup of ambition"[100] along with Dolly Parton and ensure both that employees receive proper compensation and that the Army spends its resources on its planned missions. **TAL**

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Notes

1. Dolly Parton, *9 to 5, on* 9 to 5 and Odd Jobs (RCA Studios 1980).

2. U.S. Army, The Army People Strategy 2 (2019).

3. U.S. Dep't of Def., 7000.14-R, DoD Financial Management Regulation vol. 2A, para. 2.1.2.1 (Oct. 2008) [hereinafter DoD FMR].

4. Katherine Blakeley, Ctr. Of Strategic and Budgetary Assessments, More Money on the Horizon? Analysis of the FY 2018 Defense Budget Request 37 (2017) ("The costs of pay and benefits for the Pentagon's military and civilian personnel make up the single largest category of costs in the DoD budget.").

5. *Id.* at 46 ("[A]s the largest Service with the least procurement funding, the Army devotes 37 percent of its overall budget to [the cost of military personnel pay and benefits (MILPERS)]," whereas MILPERS only account for 20 percent of the Air Force's budget and 27 percent of the Navy's budget.).

6. 3 DoD FMR, *supra* note 3, para. 081308 (defining a claim); 3 U.S. Gen. Acct. Off., Principles of Federal Appropriations Law 14-45 (3d ed. 2008) [hereinafter GAO Principles] ("For the Department of Defense and the military departments, claims payable from agency funds are paid from Operation and Maintenance (O&M) appropriations in accordance with 10 U.S.C. § 2732.").

7. 29 U.S.C. §§ 201–219 (2020).

8. *LiUNA, NFFE and AFGE Local 3601 Win $80 Million Fair Labor Standards Act Union Grievance for Indian Health Service Employees*, LiUNA! Feel the Power (May 27, 2015), https://www.liuna.org/news/story/liuna-nffe-and-afge-local-3601-win-80-million-fair-labor-standards-act-union-grievance [hereinafter *LiUNA*].

9. *American Federation of Government Employees (AFGE) v. Environmental Protection Agency,* Snider & Assocs., LLC, https://www.sniderlaw.com/case_results_class/american-federation-of-government-employees-afge-v-environmental -protection-agency (last visited June 16, 2023).

10. Press Release, Nat'l Council of HUD Locals, HUD, AFGE Council 222 Settle Fair Labor Standards Act Case, (Mar. 6, 2008), http://afgecouncil222.com/E/mar62008flsasettle.pdf.

11. Email from Melissa Heindselman, Att'y/Fair Labor Standards Act (FLSA) Team Lead, Off. of the Judge Advoc. Gen. (OTJAG), to author (Dec. 15, 2020, 10:36 EST) (on file with author) [hereinafter December 2020 Heindselman Email]; Email from Melissa Heindselman, Att'y/Fair Labor Standards Act (FLSA) Team Lead, OTJAG, to author (June 14, 2023, 10:34 EST) (on file with author). Grievances are pending at the following Army installations: Fort Sill, Aberdeen Proving Ground, Red River Army Depot, Redstone Arsenal, White Sands Missile Range, Letterkenny Army Depot, Fort Stewart, and Fort Irwin. *Id.* Grievances are pending at the following U.S. Army Corps of Engineers districts: Walla Walla, Portland, and Baltimore. *Id.*

12. *Id.*

13. *See* Riva Parker, *The FLSA Team Is Working*, Army Law., 2020, no. 1, at 106, 107.

14. 29 U.S.C. §§ 201–219 (2020).

15. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060. *See* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706 (1945) ("The legislative history of [the Act] shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce."). The *Brooklyn Sav. Bank* court also cites to the legislative debates, noting that "the prime purpose of [the Act] was to aid the unprotected, unorganized and lowest paid of the [N]ation's working population." *Id.* at 707 n.18.

16. *See* Lawrence E. Henke, *Is the Fair Labor Standards Act Really Fair? Gov't Abuse or Financial Necessity: An Analysis of the Fair Labor Standards Act 1974 Amendment—The 207(k) Exemption*, 52 SMU L. Rev. 1847, 1851 (1999).

17. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified as amended at 29 U.S.C. §§ 201–219).

18. D. Aaron Lacy, *The Disenfranchisement of the Federal Employee: Why the Federal Government Does Not Follow the Fair Labor Standards Act*, 15 St. Thomas L. Rev. 403, 408 (2002) (citing Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55) (codified as amended at 29 U.S.C. § 207). In general, an agency must pay Title 5 overtime for work officially ordered or approved in "excess of 8 hours in a day or in excess of 40 hours in an administrative work week." 5 C.F.R. § 550.111(a) (2023). Specific overtime rates depend on the exempt employee's rate of basic pay. 5 U.S.C. § 5542(a)(1)–(2). This paper will not address the nuances of Title 5 overtime. However, it is worth noting that, prior to the 1974 Amendments, Federal employees received Title 5 overtime, and current Federal employees who are exempt from the Fair Labor Standards Act (FLSA) receive Title 5 overtime. *Id.* § 5542.

19. *Databases, Tables & Calculators by Subject: Employment*, U.S. Bureau of Lab. Stat., https://www.bls.gov/data/#employment (last visited May 15, 2023).

20. Regan C. Rowan, *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. Pa. J. Lab. & Emp. L. 119, 119 (2004) (noting that, historically, "white-collar" employees were generally exempted from the overtime protections provided by the FLSA because these individuals had decision-making authority, were closer to management, and received a livable wage). Now, the Office of Personnel Management (OPM) administers the FLSA for Federal employees. *See* 5 C.F.R. §§ 551.101–551.102 (2023). The OPM regulations state that a Federal agency must only designate an employee as exempt when the agency correctly determines that the employee's position meets particular exemption criteria. *See* 5 C.F.R. §§ 551.201–551.202 (2023). Some examples of typically exempt employees in the Federal sector are executives (supervisors and managers); professionals (doctors and lawyers); and computer professionals (computer programmers and software engineers). *See generally* 5 C.F.R. §§ 551.205–551.210 (2023) (setting forth the categories of jobs that are exempt from the FLSA). This paper will not address exemption status determination, as that topic alone is worthy of extensive analysis. This paper starts with the premise that an employee is, in fact, non-exempt.

21. See 5 U.S.C. § 5541 and 5 C.F.R. § 550 (2023) for applicable rules for calculation of overtime for exempt employees.

22. 5 C.F.R. § 551.501(a) (2023).

23. *See* 5 C.F.R. §§ 551.101–551.102 (2023).

24. 5 C.F.R. § 551.401(a) (2023).

25. 5 C.F.R. § 551.401(a)(2) (2023).

26. 5 C.F.R. §§ 551.401, 551.501 (2023).

27. 5 C.F.R. § 551.104 (2023).

28. 5 C.F.R. § 550.112(a)(2) (2023); *cf.* 5 C.F.R. § 550.112(a)(1) (2023) (stating that "[a]n employee shall be compensated for *every minute* of *regular* overtime work" (emphasis added)). Suffered and permitted overtime work is captured in 5 C.F.R. § 550.112(a)(2) as irregular or occasional overtime work. By definition, suffered and permitted work is not scheduled and approved in advance, and, therefore, is not regular and is not compensated by the minute, but by quarter of an hour increment. *See* 5 C.F.R. § 550.112(a)(2) (2023).

29. 5 C.F.R. § 551.412 (2023).

30. 5 C.F.R. § 550.112(a) (2023).

31. Dunlop v. City Elec., Inc., 527 F.2d 394, 401 (5th Cir. 1976).

32. Steiner v. Mitchell, 350 U.S. 247, 256 (1956).

33. *Id.*

34. *Id.*

35. 5 C.F.R. § 550.112(b) (2023).

36. *Id.*

37. *Id.* § 550.112(b)(1)(i).

38. 5 C.F.R. § 550.501(a) (2023) ("An agency shall compensate an employee who is not exempt . . . for all hours of work in excess of 8 in a day or 40 in a workweek at a rate equal to one and one-half times the employee's hourly regular rate of pay . . . .").

39. Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27, 29 (2014).

40. *Id.* at 35.

41. *Id.*

42. 5 C.F.R. § 550.112(b)(2) (2023). Preliminary or postliminary activities are expressly prohibited from compensation under the FLSA. 29 U.S.C. § 254(a) ("[N]o employer shall be subject to any liability or punishment under the [FLSA] . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such an employee . . . (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.").

43. 5 C.F.R. § 550.112(b)(2) (2023).

44. Dunlop v. City Elec., Inc., 527 F.2d 394, 398-99 (5th Cir. 1976).

45. Lindow v. United States, 738 F.2d 1057, 1061 (9th Cir. 1984).

46. *Id.*

47. IBP, Inc. v. Alvarez, 546 U.S. 21, 30 (2005).

48. Steiner v. Mitchell, 350 U.S. 247, 248 (1956); *IBP, Inc.*, 546 U.S. at 30.

49. U.S. Dep't of Just., Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa. and Am. Fed'n of Gov't Emps., Local 4047, Council of Prison Locals, Council 33, 65 F.L.R.A. 996, 1000 (2011).

50. IBP, Inc., 546 U.S. at 40.

51. 5 C.F.R. § 551.412(a)(1) (2023); Bull v. United States, 68 Fed. Cl. 212, 226 (2005) (citing 5 C.F.R. § 551.412(a)(1)) ("OPM limits the application of the *de minimis* doctrine to periods of 10 minutes or less per day.").

52. 5 C.F.R. §§ 551.501, 551.521 (2023).

53. 5 C.F.R. § 551.104 (2023).

54. *See supra* Sections titled "Principal Activities," "Preparatory and Concluding Activities," and "Preliminary and Postliminary Activities."

55. 5 C.F.R. § 551.104 (2023).

56. Hertz v. Woodbury Cnty., 566 F.3d 775, 782 (8th Cir. 2009) (finding that it is not reasonable to require an employer to "weed through non-payroll . . . records to determine whether or not its employees were working beyond their scheduled hours"). *Cf.* Brennan v. Gen. Motors Acceptance Corp., 482 F.2d 825, 827 (5th Cir. 1973) (reasoning that the employer should have known about the overtime worked because in the several years prior to the litigation, the employees had consistently been working thirteen hours of overtime each week); Reich v. Ala. Dept. of Conserv. & Natural Res., 28 F.3d 1076, 1083–84 (11th Cir. 1994) (finding constructive knowledge of overtime worked when supervisors were "specifically instructed" to "closely monitor" hours to ensure compliance with policy).

57. *See* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 686–87 (1946); Soc. Sec. Admin. and Am. Fed'n of Gov't Emps. Local 3512, 23 F.L.R.A. 325, 325 (1986)

(holding that the supervisor "did not request that she work overtime and the grievant did not seek permission of her supervisor to work overtime").

58. NFFE Local 858 and Dep't of Agric., Risk Mgmt. Agency, 66 F.L.R.A. 152, 154–55 (2011).

59. *Id.* at 153.

60. *Hertz*, 566 F.3d at 781–82.

61. *Id.* at 783.

62. *Id.* ("We do not foreclose the possibility that another case may lend itself to a finding that access to records would provide constructive knowledge of unpaid overtime work.").

63. *See, e.g.*, Gallagher v. Lackawanna Cnty., 2010 U.S. Dist. LEXIS 31841, at *1 (M.D. Pa. Mar. 31, 2010) (wherein corrections officers alleged that they should have been compensated for their attendance at a mandatory pre-shift meeting each day).

64. *See, e.g.*, White v. Baptist Mem'l Health Care Corp., 699 F.3d 869, 872 (6th Cir. 2012) (wherein a nurse alleged that she did not have a regularly scheduled meal break due to the nature of her job in providing patient care in the emergency department); U.S. Dep't of Just., Fed. Bureau of Prisons, Fed. Corr. Inst. and Am. Fed'n of Gov't Emps. Local 1570, 68 F.L.R.A. 863, 863 (2015).

> The prison is staffed in three shifts—morning, day, and evening—by officers who work in the Agency's correctional-services department. The morning shift is from 12:00 a.m. to 8:00 a.m.; the day shift is from 7:45 a.m. to 4:15 p.m.; the evening shift is from 4:00 p.m. to 12:00 a.m. Although officers on each shift 'follow . . . the same procedures,' the morning and evening shifts do not have a fifteen-minute overlap—the evening shift ends at, and the morning shift begins at, 12:00 a.m.

68 F.L.R.A. at 863. Therefore, the union alleged that the agency violated the FLSA by requiring the officers in the morning and evening shifts to perform preparatory or concluding activities without proper compensation.

65. *See* Gen. Servs. Admin. and Am. Fed'n of Gov't Emps. Council 236, 37 F.L.R.A. 481, 484–85 (1990); U.S. Dep't of Just., Med. Ctr. for Fed. Prisoners and Am. Fed'n of Gov't Emps. Local 1612, 11 F.L.R.A. 29, 30 (1983); U.S. Dep't of Just., Fed. Bureau of Prisons and Am. Fed'n of Gov't Emps. Local 919, 59 F.L.R.A. 593, 600 (2004).

66. *See, e.g.*, Am. Fed'n of Gov't Emps. Local 2145 and U.S. Dep't of Veterans Affs. Med. Ctr., 70 F.L.R.A. 873, 873 (2018) (discussing how the union alleged that clinical social workers were required to work past the end of their shift if a patient arrived near the end of the employee's tour of duty if it was necessary to provide needed care, such as an urgent mental-health issue). It is worth noting the case reaffirmed that these particular employees should be FLSA-exempt due to the fact that they are covered by the Federal Employees Pay Act. *See id.* Nevertheless, the proposition that medical personnel can be caught in these types of situations remains.

67. December 2020 Heindselman Email, *supra* note 11.

68. Parker, *supra* note 13, at 106.

69. *See* 2A DoD FMR, *supra* note 3, para. 2.1.2.1.

70. 3 DoD FMR, *supra* note 3, para. 081308; *see also* 3 GAO Principles, *supra* note 6, at 14-45.

71. Microsoft Teams Interview with Brigadier General Omuso D. George, Director of Resource Management, G8, U.S. Army Installation Management Command (Nov. 3, 2020) [hereinafter George Interview].

72. *See, e.g.*, *LiUNA*, *supra* note 8.

73. George Interview, *supra* note 71.

74. The best practices suggested here are based on the first-hand and collective experiences of the author with input from the OTJAG's FLSA team. The FLSA team currently consists of five attorneys whose practice is to defend against FLSA group grievances.

75. Of course, labor attorneys should proceed with caution in recommending a change like this and consider the facts and history of a particular office or directorate. An analysis as to whether a decision such as this could change working conditions or even conditions of employment may be necessary. Proper steps to comply with any notification to the union as well as any impact and implementation bargaining may be necessary. Those issues are outside of the scope of this paper but are worth noting for the practitioner's awareness.

76. *See* Lindow v. United States, 738 F.2d 1057, 1061 n.3 (9th Cir. 1984) ("If, however, the employees could have performed the work during regular hours and the employer did not pressure the employees to work overtime, an instruction relieves the employer from liability for overtime compensation.").

77. *Id.*

78. *See* Hamilton v. U.S. Postal Serv., 71 M.S.P.R. 547, 556 (1996) ("An agency may prove the charge by establishing that proper instructions were given to an employee and that the employee failed to follow them, without regard to whether the failure was intentional or unintentional.").

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

80. U.S. Dep't of Just. Fed. Bureau of Prisons, U.S. Penitentiary, Bryan, Tex. and Am. Fed'n of Gov't Emps. Local 3978, 70 F.L.R.A. 707, 707 (2018) (overturning an arbitrator's award that found the information exchanges between outgoing and incoming shifts were not principal activities, and even if they were, this failed to meet the ten-minute rule for compensation under the FLSA).

81. Gen. Servs. Admin. and Am. Fed'n of Gov't Emps. Council 236, 37 F.L.R.A. 481, 484–85 (1990) (holding that for Federal protection officers, "the signing in and out of weapons and other equipment at a controlled equipment room constitutes compensable preparatory and concluding activities").

82. U.S. Dep't of Just., Med. Ctr. for Fed. Prisoners and Am. Fed'n of Gov't Emps. Local 1612, 11 F.L.R.A. 29, 30 (1983) (finding that both the time spent checking the equipment out and the time spent traveling to and from the designated location constituted hours of work).

83. *See* U.S. Dep't of Just., Fed. Bureau of Prisons and Am. Fed'n of Gov't Emps. Local 919, 59 F.L.R.A. 593, 600 (2004) (discussing the agency's human resource management manual, which stated that "employees who pick-up equipment at the control center, shall have their shifts scheduled to include reasonable time to travel from the control center to their assigned duty post and return (at the end of the shift)").

84. *Id.*

85. Hertz v. Woodbury Cnty., 566 F.3d 775, 781 (8th Cir. 2009).

86. Telework Enhancement Act of 2010, Pub. L. No. 111-292, 124 Stat. 3165 (2010) (codified as amended at 5 U.S.C. §§ 6501–6506).

87. *See* Anjali Patel, Prevent FLSA Violations Involving Teleworkers (July 27, 2011) (internal cyberFEDS publication) (on file with author).

88. U.S. Off. of Pers. Mgmt., 2021 Guide to Telework and Remote Work in the Federal Government 18 (2021).

89. Memorandum from Off. of Mgmt. and Budget, Exec. Off. of the President to the Heads of Dep'ts and Agencies, subject: Updated Guidance for the National Capital Region on Telework Flexibilities in Response to Coronavirus (15 Mar. 2020).

90. Memorandum from U.S. Off. of Pers. Mgmt. to the Heads of Exec. Dep'ts and Agencies, subject: Coronavirus Disease 2019 (COVID-19): Additional Guidance, encl. at 2 (7 Mar. 2020).

91. Memorandum from U.S. Off. of Pers. Mgmt. to Chief Human Capital Officers, subject: Removal of the COVID-19 Governmentwide Operating Status Announcement (Apr. 18, 2023).

92. *Id.*

93. *Id.*

94. 5 C.F.R. § 531.605(d) (2022).

95. Telephone Interview with Lyndsay Lujan, Attorney/FLSA Team, OTJAG (Dec. 15, 2020) [hereinafter Lujan Interview].

96. *Id. See generally What is an IT ticketing system?*, servicenow, https://www.servicenow.com/products/itsm/what-is-it-ticketing-system.html (last visited June 16, 2023).

> Effective IT ticketing systems incorporate many different components. These may include the following: A centralized requests repository; 24/7 accessibility; Ticket creation via web, mobile, virtual agents, service portals, and more; Automated responses and updates; Communications tracking between employees and agents; Employee visibility into status of requests; Data for analytics and reporting." In sum, ticketing systems provide "real-time data for reporting and analytics.

Id.

97. Lujan Interview, *supra* note 95.

98. *Id.*

99. *Id.* This is a fairly new practice in response to suffered and permitted overtime concerns. *Id.*

100. Parton, *supra* note 1.

Closing Argument

Why Leaders Still Talk about Dignity and Respect

By Regimental Command Sergeant Major Michael J. Bostic

How many times have you heard the phrase, "Treat people with dignity and respect"? Have you ever thought about what it really means? Have you stopped to consider why we repeat it so much in our laws, regulations, policies, and leadership initiatives? I invite you to reflect on these and a few more questions.

Call me old-fashioned, courteous, respectful, or whatever you choose—but good order and discipline, healthy relationships, positive workplace environments, and fair societies all require the fundamental human values of dignity and respect. Every human has worth and value that must be appreciated no matter their abilities or attributes. We all must be considerate of everyone's feelings, rights, freedoms, and purpose.

Dignity and respect are fundamental to everything we do as mentors, as leaders, as an Army, and as a Corps. They are necessary for the discipline and obedience that allow the Army to accomplish its mission of fighting and winning the Nation's wars.[1] In an organization such as ours, we expect leaders to treat people with dignity and respect both up and down the organizational chain based on the shared understanding of what it means to serve, what it means to be disciplined, to embody a concept bigger than oneself. Essential at every level, supervisors must recognize the worth and human value in their teammates, so we can build and sustain cohesion among our formations.

Our doctrine and regulations are full of references to dignity and respect.[2] However, dignity and respect are not just lifeless letters on a page. They are living concepts that find life in our day-to-day interactions. We are all leaders, so I charge you to ask yourselves, how do you treat others? Do you actively listen and remain attentive when someone is talking to you? Do you find yourself listening the same way when the office's new paralegal is speaking to you as when the staff judge advocate is? Or when a private renders a salute—that physical symbol of courtesy and one of our Army's oldest customs, do you ensure you return it crisply and with the appropriate greeting? Do you make the on-the-spot correction when one of your teammates returns that salute with a phone or a cigarette in hand? Do you interrupt subordinates when they are speaking because you are in charge and must get your point across? Do you consider the language you use with your teammates, always ensuring that it is courteous and not judgmental or derogatory? These small moments, these personal interactions, are the substance of dignity and respect.

We can show dignity and respect for our teammates in other ways as well. Do you seek and value mentorship and feedback from your teammates, regardless of their rank or position? Dignity and respect also mean we understand and value our teammates' family situations and consider how we manage the team's time. Be considerate of your Soldiers and Civilians' time with their Family and friends and avoid practices that would cause them to miss out. The choice between scheduling a meeting late in the week or duty day is also a matter of dignity and respect.

Dignity and respect start with the individual and end with a resilient, effective, and winning team. They are tremendously powerful concepts. But, in practice, I believe it is simple. Treat everyone with dignity and respect—how you want to be treated—or as Ms. Kristin Damigella, Director, Office of Diversity, Equity, & Inclusion, puts it—how *they* want to be treated. Each of you reading this is someone's son, daughter, Family member, or friend. Each of your teammates is too. They are worthy of dignity and respect. Life, especially military life, is challenging enough without having to struggle with issues of dignity and respect. It must be non-negotiable. I challenge each of you as leaders to *Be All You Can Be* and treat each of your teammates with the dignity and respect they deserve.

Ready Now!

Leader Advocate Warrior! **TAL**

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Notes

1.

> The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an army . . . . He who feels the respect which is due to others cannot fail to inspire in them regard for himself; while he who feels, and hence manifests, disrespect toward others, especially his subordinates, cannot fail to inspire hatred against himself.

John M. Schofield, Major General, U.S. Army, Address to the Corps of Cadets, U.S. Military Academy (Aug. 11, 1879).

2. *See, e.g.,* U.S. Dep't of Def., Instr. 1350.02, DoD Military Equal Opportunity Program para. 1.c (4 Sept. 2020) (C1, 20 Dec. 2022); U.S. Dep't of Def., Instr. 1020.04, Harassment Prevention and Responses for DoD Civilian Employees para. 1.2 (30 June 2020); U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 1-6c (24 July 2020); U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 1-122 (31 July 2019) (C1, 25 Nov. 2019); U.S. Dep't of Army, Reg. 600-100, Army Profession and Leadership Policy para. 1-11 (5 Apr. 2017); U.S. Dep't of Army, Reg. 27-10, Military Justice paras. 7-7(c), 17-11.a.(8) (20 Nov. 2020).

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