Army Lawyer

U.S. Army Judge Advocate General's Corps
Issue 3 ▪ 2021

AROUND THE CORPS

Major General Stuart Risch (left), Lieutenant General Charles Pede (center), and Command Sergeant Major Osvaldo Martinez Jr. (right) kick off The Judge Advocate General's fun run around the National Mall in Washington, D.C., in July 2021. (Credit: Jason Wilkerson/TJAGLCS)

AROUND THE CORPS

Brigadier General Alison Martin passes the colors to Command Sergeant Major Joshua Quinton at The Judge Advocate General's Legal Center and School Change of Responsibility ceremony in August 2021. Command Sergeant Major Michael Bostic was the previous command sergeant major and went on to assume his duties as the Regimental Command Sergeant Major. (Credit: Jason Wilkerson/TJAGLCS)

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Editorial Board

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On the cover: The 47th Judge Advocate General of the U.S. Army, Lieutenant General Charles N. Pede, addresses the 69th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

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Lieutenant Colonel Charles N. Pede (left) and Colonel Dick Gordon (right) at Bagram, Afghanistan, in 2002. (Photo courtesy of Dick Gordon)

Court Is Assembled

Building JAG Corps Friendships That Endure

By Richard "Dick" Gordon

On 24 July 2021, as the Honorary Regimental Colonel of the Judge Advocate General's (JAG) Corps, I will proudly drink a toast to the 40th anniversary of the men and women of the 96th Basic Course of the JAG School where I started my career as an Army lawyer. Over the years, and even now as a retired judge advocate (JA), I am constantly amazed at how service in the JAG Corps produces so many lifelong friendships that endure the test of time, professional association, and geography.

In July 1981, the legendary Major (MAJ) James H. "Rosey" Rosenblatt, Chief of Captains' Assignments at the JAG Corps's Office of Personnel, Plans, and Training, greeted our class as the "Fighting" 96th Basic Course. I did not realize at the time that MAJ Rosenblatt was subtly referencing the "Fighting 69th Irish Brigade" from New York City that fought in virtually every war since the Civil War (including Operation IRAQI FREEDOM). Major Rosenblatt helped bring 104 captains into the JAG Corps that month, and I saw him many times in Charlottesville or at the Pentagon. Major Rosenblatt served our Corps for thirty years and is now the Dean Emeritus and Professor of Law at the Mississippi College of Law in Jackson, Mississippi.

The 96th Basic Course did not do any real fighting, but we bonded together playing a great deal of softball and basketball at the University of Virginia North Grounds athletic facilities. In addition, our class produced the first female active duty general officer in JAG Corps history, Brigadier General Melinda Dunn, as well as Immigration and Naturalization Judge, Dan Trimble.

I was approached by *The Army Lawyer* shortly after Thanksgiving 2020 to write this article focusing on how the JAG Corps produces lifelong relationships that endure the test of time, professional association, and geography. This includes both our active duty members and those who have moved on from service. Or, as one former mentor told me years ago, "Remember, everyone leaves the Army and the JAG Corps at some point. For many, it is after three years and, for others, thirty years."

A couple of weeks later, my wife and I were writing our Christmas cards when it dawned on me how our lives for the past forty years have indeed been connected with those who we served with—some for three years and some for thirty. When we finished our ninety Christmas cards, I counted over forty that we sent to former JAs I had served with—including six members of my Basic Course.

Following Christmas, I reached out to active duty, retired, and former JAs I knew and asked them for assistance in writing this article. I hope their thoughts and memories can help explain why our shared relationships and values remain so strong over the years.

My former boss at Fort Drum, and longtime friend, Colonel (COL) (Retired) John Smith explained that former JAs have unique shared experiences. Many times, they are unique to their time in service. For instance, how many of our counterparts tried cases within months of passing the bar? How many argued appellate cases that really mattered, learned how to fire automatic weapons, or parachute as a part of a job? He even reminded me that we invented the unique game of snowshoe baseball at Fort Drum one winter. In John's opinion, the hallmarks of military service include camaraderie, teamwork, and leadership at all levels of service. In many instances, we stand (or low crawl) with our future clients.

These shared experiences lead to unique—and often lifetime—friendships. John explained how, at Fort Bragg, one

method to help integrate new JAs into the legal office—and also into Fort Bragg—was to break the monotony of daily 0600 physical training by bringing the newer JAs on "crime tours." They ran around Fort Bragg and visited the crime scenes of recent or historical cases. Some locations included the home of then-Captain (CPT) Jeffrey MacDonald, who was convicted of killing his wife and two daughters; a phone booth where a multi-victim shooting occurred; and a drop zone where a paratrooper died because someone tampered with his parachutes. These experiences create vivid memories. The trial and conviction of CPT MacDonald, for example, was extremely controversial and was the subject of the book and TV miniseries entitled *Fatal Vision*.[1]

My friend COL Chuck Poché explained how he and then-CPT Mary Card became lifelong friends from their experience as captains in the 1st Armored Division. During a Division Warfighter/Mission Rehearsal Exercise at Hohenfels, Germany, both were on duty after midnight in separate locations and working the *Stars and Stripes* crossword puzzle. Apparently, CPT Card knew immediately the answer to a four-letter word ending in "U" for a shade of pantyhose. "Ecru" was the correct response.

It was Chuck's first assignment as a JA, and he was able to share his operational knowledge as a former Armor officer with CPT Card's legal experience during a deployment to Kosovo. Their friendship included asking CPT Card to serve as a proxy "godmother" at his daughter's baptism. Another longtime friend, then-CPT Paula Schasberger, drove Chuck's wife Renee to the Landstuhl Regional Medical Center for his daughter's birth.

Colonel Poché's relationship with CPT Card included assignments at Fort Hood, Texas, and Iraq. Their families bonded over Thai food and continue to remain close to this day. Chuck's daughter, Madeleine, served as a flower girl at CPT Card's wedding. When the time came for Chuck to transition to civilian life, Mary linked him up with a network of retired active duty and reserve JAs to help him adjust to post-Army life. Chuck believes in the wisdom of an old poem by Joseph Parry:

> Make new friends, but keep the old;
> Those are silver, these are gold.[2]

Chuck Poché's experience with CPT Card is not singular or unusual. Numerous individuals have told me how they bonded with colleagues while assigned to Germany or Korea. Many lifelong friends served as stand-ins at baptisms, confirmations, and other similar events for relatives back in the states. More than one person told me their relationship with their Army proxy was actually better than with their actual relative. In addition, for good or bad reasons, we all remember our sponsors who were assigned to take care of us and our families until we integrated into our new units in Germany or Korea.

Shortly after we arrived in Germany in 1981, my sponsor told my wife and me to meet him at the Schweinfurt Bahnhof (train station) on a Saturday morning in early December because we were going to take the train to the Nuremberg Christkindlesmarkt (Christmas Market). We didn't know what a Christkindlesmarkt was, but, from what I recall, the experience certainly sparked a lifelong love of glühwein, Nuremberg brats, and German Christmas tree ornaments.

One recent avenue for retired JAs to stay engaged was initiated by retired Major General (MG) and former Deputy Judge Advocate General Butch Tate. He, General Dunn, and others have organized a monthly meeting on Zoom to celebrate "happy hour" and to stay abreast of current Corps events. Major General Stu Risch has briefed this group, as well as three former Regimental Colonels. General Tate usually selects discussion topics that have included 1) the latest book individuals have read, 2) famous, infamous, or humorous people, or 3) events from our careers.

Another organization that promotes continued JAG Corps fellowship after retirement is the Retired Army Judge Advocates Association (RAJA). It was formed in 1976 as a social organization for Army JAG retirees who wished to stay in contact with each other. The organization currently has over 300 members, and the current president is COL (Retired) Mike Chapman. Each year, RAJA holds membership meetings in various locations across the United States. At each meeting, The Judge Advocate General, Deputy Judge Advocate General, or other member of the JAG leadership team gives the members an update on current JAG issues. The Retired Army Judge Advocates Association has met every year since 1977—except for 2020 and 2021 due to COVID-19. The next membership meeting is scheduled for early June 2022 in Charlottesville, Virginia. If interested, there is more information about RAJA online.[3]

A smaller group of retired Army JAs from the Washington, D.C., metropolitan area meets twice a year for an organized luncheon in downtown D.C. The group is affectionately called the "Old Fuds." It started in the 1960s as an occasional luncheon of judges on the U.S. Army Court of Military Review. Later, in the 1990s, this informal gathering developed into the current biannual event. Each luncheon includes a guest speaker. Colonel (Retired) Don Deline and MG (Retired) Bill Suter became the president and treasurer. Major General (Retired) John Altenburg and COL (Retired) Mike Chapman are the current officers.

Today, you can see lifelong relationships being built—even with first-term captains. At Fort Benning, they call themselves the "Captains Mafia."[4] Until the Office of the Staff Judge Advocate (SJA) moved to newer facilities, the Mafia would eat lunch every day together in the second floor administrative law classroom. I always found it amusing that they were discussing and complaining about subjects that young captains have complained about forever. Subjects like how jacked up the office physical training program is; how screwed up the assignments process is; how the office noncommissioned officer-in-charge ignores captains; and how the warrant officer tells the Deputy SJA or the SJA all the secrets of the office.

Finally, lifelong bonding and friendship with our former friends, superiors, and subordinates continues despite years—maybe decades—of physical separation. How many of our retired senior JAs are still asked for career advice by junior members, or for recommendations for individuals leaving military service? We all do it gladly.

I remember a captain who worked for me who was applying for a job with Highmark Health in Pittsburgh—one of the largest non-profit health care corporations

Captain Dick Gordon (left), Captain Jim Berl (center), and Captain Tom Kirwin (right) in Berlin, Germany, in 1983. (Photo courtesy of Dick Gordon)

in the country. He asked me to review his resume, and I noticed he omitted his assignment as a Special Assistant U.S. Attorney. I remember telling him that the hiring team might not know what the position of Chief of Claims at Fort Benning entailed; but I was sure they knew what a U.S. Attorney was, even if it only involved prosecuting shoplifters at the on-post store and alcohol and drug offenses. He changed his resume and was hired. I am sure it helped that he had a Bachelor of Science Degree in Industrial Engineering and a law degree from the University of Pittsburgh.

And, sometimes, our advice to former subordinates can be hard. It is often difficult when asked to tell a friend, maybe someone you served in combat with, that promotion to a higher grade is probably not in the cards.

Former Regimental Colonel Gil Fegley told me that (in his opinion) lifelong relationships with JAs start with shared values. It also includes trust in a higher being, ethics, honesty, hard work, respect for others, and loyalty to our nation. He believes that people with these common values are naturally drawn to one another and to military service; he believes they want to stay engaged with one another.

Recently, Lieutenant General Charles N. Pede celebrated the 40th Anniversary of the founding of the Trial Defense Service (TDS) by providing comments to the JAG Corps. He recalled one event where he and three fellow TDS captains sang at the annual U.S. Army Europe JAG Corps Ball, which was held in Heidelberg every spring. He fondly remembered his singing group, the "Leavenworth Four," a name coined from his own shared experiences in the Mannheim TDS Office in Germany. In conclusion, I am proud to say that in December—after more than thirty years—I received Christmas cards from two members of the Leavenworth Four who sang at that event. Relationships in the JAG Corps have the unique ability to endure well past a member's re-entry into civilian life; it is these relationships that allow members of our Corps to help one another throughout our lives. I would not be who I am today without them. **TAL**

Mr. Gordon is the Honorary Regimental Colonel of the Judge Advocate General's Corps. He retired after twenty-seven years of active duty service.

Notes

1. *See* Joe McGinniss, Fatal Vision: A True Crime Classic (Signet 2012) (1983). *See also Fatal Vision* (NBC Studios Nov. 18–19, 1984) (This was a two-part miniseries.).

2. Joseph Parry, *New Friends and Old Friends*, PoetryNook, https://www.poetrynook.com/poem/new-friends-and-old-friends (last visited June 25, 2021).

3. *See RAJA: Retired Army Judge Advocates Association*, RAJA, www.rajaassn.org (last visited June 25, 2021).

4. The author served as the Chief of Administrative and Civil Law at the Maneuver Center of Excellence, Fort Benning, Georgia for eleven years.

Lieutenant General Charles Pede and his wife, Anne, at the Army Ball in 2019. (Photo courtesy of LTG Charles Pede)

TJAG Farewell

My Closing Argument

By Lieutenant General Charles N. Pede, The 40th Judge Advocate General

"Counsel will now make argument.

Captain Pede, are you ready to proceed?"

"Yes, Your Honor."

And so it would begin. It may be true that some trial attorneys can remember every closing argument. I cannot. But I do remember many—and I remember my hours of preparation, the tortured phrasings, and the rehearsals. I remember the recognition that I had little time to adjust my planned argument after the facts that *actually* came out at trial didn't quite match the eloquent argument I had prepared.

And so life goes, no?

Your plans never quite match reality. Life happens.

And what a blessing that is—that your personal script is barely an outline of what will happen.

If someone, anyone, had said in 1984 when my father, Brigadier General Gus Pede, administered my first oath of office that I would one day serve as the Army's Judge Advocate General (TJAG), I'm sure I would have said, "What is a TJAG?"

When Anne and I started this journey, it was an adventure mainly—albeit one of

Major Keith Hodges, Regional Defense Counsel, presides over First Lieutenant Pede's promotion to captain with his wife, Anne, as Major Denise Vowell, Senior Defense Counsel, reads the orders (1988). (Photo courtesy of LTG Charles Pede)

service: Anne the teacher, Chuck the Soldier. We were committed to doing something greater than both of us—for someone else—*at least for a time.* And we also did it because it seemed an adventure—something different and out of step with what all our friends were doing, and, as for so many of us, because our parents had served and we followed their worthy example. And while we only intended a short "adventure in green," like so many, we stayed because of the people and the shared purpose.

As I step out of formation for the last time, I hope for each of you a spirit infused with service, fun, and purpose. Our nation's days are too-filled with division and ad hominem attacks, narcissism, and a polarization in the body politic that, by my personal yardstick, I have never experienced.

In the midst of these dark currents, I am convinced that *our*, and I mean *our*—shared spirit of service is not only the better course—it is the premier overmatch for the weaknesses and foibles of the human condition.

We simply need to keep our focus and continue to set the example. And in that—our focus and example—our Judge Advocate General's (JAG) Corps, is preeminent.

We are none of us perfect. *None of us.* We all have our weaknesses, our vices, and our faults. But with a focus on that which ennobles us—both collectively and individually—I am utterly convinced that we can maintain the high ground—even possessing such faults as we do. We are, as we are fond of saying, *better together.*

As the old adage goes, "In matters of style, swim with the current; in matters of principle, stand like a rock."[1]

While your script will change by the minute, have your compass set to north. Our Corps's Constants endure: Principled Counsel, Mastery of the Law, Stewardship of your Army and Corps, and Servant Leadership. Let them endure as your guideposts in times of good and bad.

Never negotiate your integrity—it is all you have in the end, and what allows for those around you to trust you.

Maintain your perspective on everything with a healthy sense of humor and an abiding devotion to history—not only because it is an interesting narrative of some life or event, but because it gives the present its priceless context and meaning.

Rudyard Kipling's charge to "keep your head when all about you [a]re losing theirs and blaming it on you,"[2] reminds us to keep calm amidst adversity so that your team and your family will look to you for answers and strength.

Kipling also reminds us to meet with triumph and disaster by treating these "impostors" as twins.[3] What brilliance is such a life lesson. And then to the ethic of our profession—to "fill the unforgiving minute [w]ith sixty seconds' worth of distance run."[4] There is no better adage for a Soldier intent on doing what is right, and making the most of every minute of opportunity.

So much wisdom surrounds us if only we've opened our ears, our minds, and our hearts.

And so I close my time in formation with each of you—proud to have served with you. Thankful for the many opportunities to lead and follow. And ever grateful that our JAG Corps will remain, *because of each of you*, the best, most powerful, most consequential law firm in the world. Carry the torch proudly.

And in so doing, "dar[e] greatly, so that [you] shall never be with those cold and timid souls who know neither victory nor defeat."[5] **TAL**

Be Ready!

LTG Charles Pede

The 40th Judge Advocate General

Notes

1. *See* Elizabeth Huff, *Thomas Jefferson Encyclopedia*, Monticello.org (June 8, 2011), https://www.monticello.org/site/research-and-collections/matters-style-swim-currentspurious-quotation.

2. Rudyard Kipling, *If*, Poetry Found., https://www.poetryfoundation.org/poems/46473/if--- (last visited June 1, 2021).

3. *Id.*

4. *Id.*

5. Theodore Roosevelt, U.S. President, The Man in the Arena (Apr. 23, 1910), https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/Culture-and-Society/Man-in-the-Arena.aspx.

CSM Martinez speaks to NCOs at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

RCSM Farewell

From Yonkers to the Army's People First Task Force

Regimental Command Sergeant Major Osvaldo Martinez Jr.

Interview by Chief Warrant Officer 3 Jessica Marrisette

Born in Yonkers, New York, in 1975, following in the footsteps of his father and grandfather who served in the Army, Command Sergeant Major (CSM) Osvaldo Martinez Jr., the 13th Regimental Command Sergeant Major of the Judge Advocate General's (JAG) Corps and Command Sergeant Major of the U.S. Army Legal Services Agency (USALSA) at Fort Belvoir, Virginia, enlisted in the U.S. Army in June 1993 from Leesville, Louisiana. He completed both Basic Training and Advanced Individual Training at Fort Jackson, South Carolina. He served in various positions throughout his legal career, including Professional Development Noncommissioned Officer (NCO), Human Resources Command, Alexandria, Virginia; Course Developer for the Afghan Sergeants Major Academy and Afghan JAG School, Kabul, Afghanistan; Chief Paralegal NCO, 1st Army, Fort Gillem, Georgia; First Sergeant, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; Command Paralegal NCO, 2d Infantry Division, Republic of Korea; Command Paralegal NCO, 1st Armored Division and Fort Bliss, Fort Bliss, Texas; and Command Paralegal NCO, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina. While CSM Martinez is stepping away from his position as the Regimental CSM for the JAG Corps, he is leaning into his new role as the Sergeant Major (SGM) for the Army's People First Task Force (PFTF) after being hand-selected by the Sergeant Major of the Army for the position. Chief Warrant Officer 3 Jessica Marrisette interviewed CSM Martinez as he concludes his time as the Regimental CSM of the U.S. Army JAG Corps.

Let's start from the beginning. How did this journey of service start for you?
Well, it started well before I ever joined. I was born in Yonkers, New York—do I need to specify the year?

That's unnecessary, Sergeant Major. We all know you were at least 18 and, if we add in your 28+ years of service, we will settle for you having been born sometime in the 70s . . . .
The truth is, I was 17 years old when I left home for basic training, so when you do the math, I was born in 1975.

Ok, so I was correct. And your journey?
My dad, then serving in the New York National Guard, decided to go active duty shortly after my birth. My entire childhood was surrounded by the Army after that, and I knew early on that I was going to join the Army. I looked up to my dad, and I wanted to be like him. As a kid, I'd wear uniforms and even had my own set of TA-50. While in high school I enjoyed music and wanted to pursue studies in music; however, my thoughts about what I wanted to do with my life changed a little. A girl had come into the picture, and I figured that if I wanted to marry her, I needed a job, so I enlisted.

Did you ever see yourself staying around this long?
I actually didn't. I came in with the idea that I would do my twenty years and retire. There were points in my career that I wanted to quit, especially as a young specialist and junior NCO. After my first son was born though, I was sold on the Army and knew that I was staying, but twenty-eight years never crossed my mind—it happened so fast.

In those twenty-eight years, what would you say was your hardest day in the Army thus far?
(Referring to the death of a deployed teammate who was killed by an IED explosion in Afghanistan) Simple, 20 May 2009. Life is short.

CSM Martinez and his dad, a U.S. Army Veteran. (Photo courtesy of CSM Martinez)

What about one of your best memories?
There are so many, but one that is at the top has to be completing the Jumpmaster Course—it's something that I've always wanted to do but didn't get a chance to do it until I was a sergeant major. Completing the course is at the top of the list of my best memories, not because of anything I did, but more so because of those who helped make me successful. So many folks helped get me through the course, and even after completing the course, the entire JAG Community on Fort Bragg continued to support me while I "chased" my Senior Parachutist Badge. I had only about three months to complete all of the requirements for the badge after completing the course and before reporting to the Office of The Judge Advocate General (OTJAG). On my last jump, I had the privilege of serving as the Primary Jumpmaster for an aircraft full of JAG jumpers—all there to support me.

That's phenomenal. A great example of setting goals and knocking them out, no matter how delayed they may seem. The time is always NOW.

Speaking of goals, you've been holding down three full-time positions over the last few months—what is your secret? How did you handle it without giving up on yourself, or the mission?
There have been challenges in holding down the different positions, but the teams around me have been the secret. Everyone has been understanding and done more, collectively, so that I could do more individually. The teams at OTJAG, USALSA, and PFTF have been instrumental during this time.

Congratulations again on being selected for the position in PFTF—that's a pretty big deal. What exactly does this new responsibility entail?
Well, the PFTF "[i]ntegrates HQDA-wide response, reform, and implementation of policy, programs, and directives to ensure the safety, health, and well-being of its People."[1] So, as the sergeant major, I will be charged with serving as the advisor for the Army's senior leaders, leaders in the field, and for the Director of the PFTF. As the task force develops plans for the way ahead, I will be part of ensuring that Soldiers and junior leaders are not forgotten and that they get what they need in order to ensure they can meet Army senior leaders' desire with what "People First" means.

If you could go back in time and tell Private Martinez, or even a young Lieutenant Martinez, three things he should know about how to be successful in the Army and/or JAG Corps, what would you say?
I would definitely share the following:

1. Work hard every single day. When your feet hit the ground in the morning, tell yourself, "I'm going to be better today than I was yesterday." If that's your approach, we all win;
2. Find something good about everyone you work with, even the challenging ones. If you can focus on their good, your work environment will be better; and
3. Never forget that it's a privilege to wear the uniform. Focus on serving and not being served and honor those who came before you. And last, never allow your integrity to be called into question.

I can't let you leave without asking if you want to give any shout-outs or thank-yous to anyone who contributed to your success or played a part in your reason to stay.
Chief, this is hard. There have been so many folks out there who have contributed to my success, and I don't want to leave anyone out. I'll do it this way:

If we've worked together at any point, thank you for allowing me to serve alongside you. Know that each of you have contributed to me becoming who I am today. It has been my honor to stand in formation with you.

To my leaders, thank you for seeing beyond my faults and forcing me to always do more, and to do better.

To my family, wife, kids, and parents, thank you for your support and for allowing me to serve freely. Thank you for always being proud of my accomplishments and for being there during my failures and helping me to get back up.

To God, thank you for your mercy and blessings. There is only one way a kid from the projects of Yonkers, New York, who calls Leesville, Louisiana, home, could make it to the E-Ring of the Pentagon—His blessings. **TAL**

Notes
1. *People First*, U.S. Army (Mar. 26, 2021), https://www.army.mil/standto/archive/2021/03/26/.

News & Notes

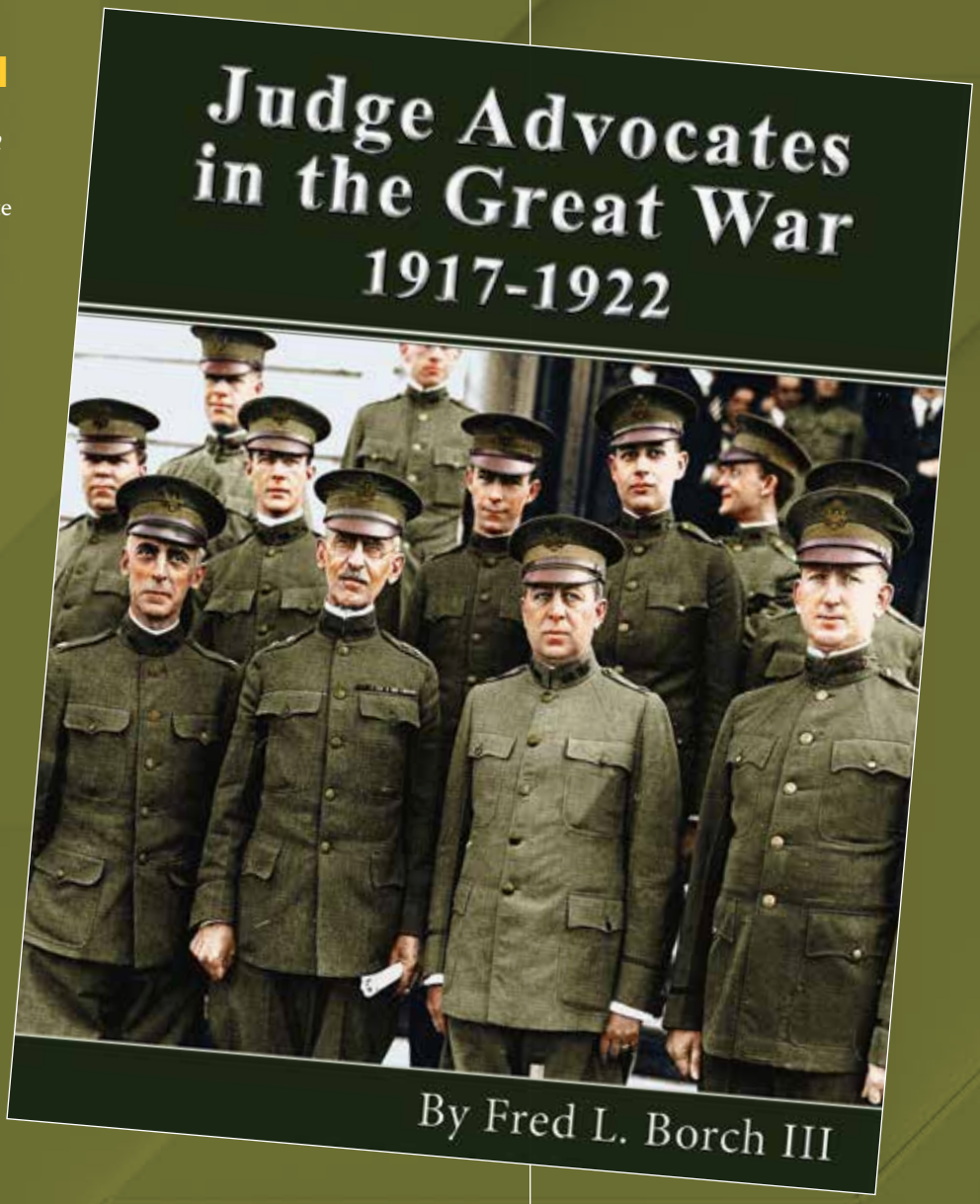
Photo 1
Judge advocates, including the Republic of Korea Judge Advocate General (BG Park) and staff from U.S. Forces Korea/Eighth Army/2d Infantry Division/19th Expeditionary Sustainment Command and the Republic of Korea Army came together at U.S. Army Garrison Humphreys for the Law Day 2021 Symposium. The event at the Morning Calm Center provided an ideal venue for lawyers and staff from the two armies to meet and discuss legal issues and topics that affect the Korean peninsula.

Photo 2
The Army National Guard Trial Defense Service returned to in-person training with Defense Counsel/Paralegal 101 training in Tucson, Arizona.

Photo 3
LTG Charles Pede, The Judge Advocate General, congratulated U.S. Recruiting Command's newest captain, CPT Priscila Barron Sanchez, during her promotion ceremony. LTG Pede visited Fort Knox, KY, and its many commands as part of an Article 6 visit.

Photo 4
On 6 May 2021, between 0030 and 0500, members of the 7th Special Forces Group (Airborne) legal team successfully completed the 18.6-mile Norwegian Foot March at Camp "Bull" Simons, Eglin Air Force Base, Florida. Despite high humidity and miles of thick mud due to recent storms, the Red Empire's judge advocates and paralegals lived the 7th SFG(A) motto of "*Lo Que Sea, Cuando Sea, Donde Sea*" ("Anything, Anytime, Anywhere") and finished well under the required 4.5-hour limit. Pictured from left to right are an exhausted SSG Harry Wagner, CPT Ellis Cortez, MAJ Brandon Bergmann, CPT Christina Johnson, MAJ Atina Stavropoulos, SGT(P) Andrew Pena, CPT Tolulope Akinsanya, and SGT Nathan Jones.

New Book Explores History of Army Lawyers in World War I



Judge Advocates in the Great War, 1917–1922 has just been published and is being distributed throughout the Judge Advocate General's Corps to Active, Reserve, and Army National Guard units. The 275-page hard-cover monograph examines what Army lawyers did in the United States, England, France, Germany, North Russia, and Siberia between early 1917, when Congress declared war on the Central Powers, and late 1922, when the last Army lawyer departed occupied Germany for the United States.

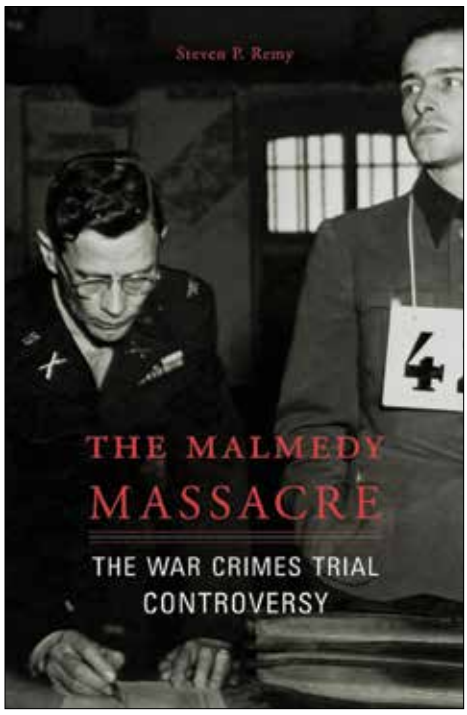
In telling the story of the Judge Advocate General's Department (as the Corps was then known) on American soil, the book focuses on the Office of the Judge Advocate General in Washington, D.C.; the infamous court-martial arising out of the Houston Riot in 1917; and the resulting controversy over the future of military justice that pitted Judge Advocate General Enoch Crowder against his colleague—Acting Judge Advocate General Samuel Ansell.

As for overseas legal operations, *Judge Advocates in the Great War* details the experiences of Army lawyers in the American Expeditionary Forces in England, France, North Russia, and Siberia between 1917 and 1920, and in the American Forces Germany during the post-war occupation of some 2,500 square miles of Germany between 1918 and 1922.

Topics addressed both in the United States and overseas include the organization of legal operations, criminal law, administrative law, international law, contract and fiscal law, and legal assistance—and who did what, how they did it, and where they did it.

The work also contains biographical sketches of every single lawyer—more than 425 individuals—who served in the Judge Advocate General's Department between 1917 and 1922. The book also provides details on legal clerks known to have been on duty with the Department. This feature makes the book unique in both JAG Corps and Army history, in that no other branch has published biographical details on every single officer who served in that branch in World War I.

Additional copies of *Judge Advocates in the Great War* may be obtained by contacting Mr. Fred Borch, Regimental Historian and Archivist, at TJAGLCS, at frederic.l.borch.civ@army.mil; 434-971-3249



Book Review

The Malmedy Massacre

Reviewed by Major Alexander Morningstar

It beats the hell out of me . . . why everyone tries so hard to show that the prosecution were [sic] insidious, underhanded, unethical, immoral and God knows what monsters, that unfairly convicted a group of whiskerless Sunday school boys. What motivates you authors? I think that my staff did a hell of a great job. We didn't have available the information that researchers have today, not even a small part of it, but still we came up with the hard evidence that satisfied the trial court that they were all guilty.[1]

In *The Malmedy Massacre*, Steven Remy reaches different conclusions than many historians regarding the true nature of the events surrounding the "Malmedy Massacre." He persuades readers that an "apologetic narrative"[2] was responsible for wrongfully convincing many that America mishandled war crimes trials. On 17 December 1944, at a crossroads in Baugnez near the Belgian town of Malmedy, eighty-four U.S. Soldiers were executed in the largest war crime perpetrated against U.S. forces in the European Theater of World War II.[3] This incident became known as the "Malmedy Massacre."

The American public was outraged and demanded justice.[4] The perpetrators were captured and tried for committing war crimes in the case of *United States v. Valentin Bersin, et al.* (Malmedy Trial).[5] Based on overwhelming evidence, mostly confessions, seventy-three German soldiers[6] were convicted and received sentences ranging from ten years' confinement to death.[7] Subsequently, the defendants alleged that their confessions had been coerced through torture and physical abuse. Therefore, multiple investigations, review boards, and congressional hearings were tasked with reviewing the pretrial investigation into the Malmedy Massacre and the resulting trial.

For many historians, the Malmedy Massacre is a story of abusive U.S. interrogators, whose actions were compared to those employed by the Nazis.[8] Remy paints a different picture—one of sensational news stories and an amnesty campaign in the form of a multi-front assault on the validity of U.S. war crimes trials in Europe that would eventually result in the release of all the Malmedy Trial defendants.[9] Throughout the book, Remy's purpose becomes evident: to prove that the "apologetic narrative"[10] was false, and the allegations of torture and abuse were fabricated. The "amnesty campaign,"[11] consisting primarily of members of the defense, the media, and the German clergy, pressed this narrative. Readers feel the author's frustration that the facts were mischaracterized, and Remy is determined to set the record straight. He expertly lays out the entire sequence of events for readers in a well-researched and objective manner that leads them to the same conclusion.

The Amnesty Campaign & the "Apologetic Narrative"

Although the title of the book suggests otherwise, the focus of the book is not on the Malmedy Massacre itself. Remy devotes only one chapter to the massacre at the Baugnez crossroads, while the remainder of the book focuses on subsequent events—to include the pretrial investigation, trial, and aftermath.[12] The vast swing of public opinion as to the legitimacy of the investigation and trial are the true heart of the Malmedy Massacre affair.

Remy expertly organizes the book to help readers understand the multitude of variables influencing the Malmedy affair, primarily focused on the multiple players involved. These players spread the defendants' stories of forced confessions through physical abuse and torture, promoting what the author refers to as the "apologetic narrative." The apologetic narrative is the perception that the judicial process was fundamentally unfair and "un-American"[13] and, therefore, eroded the legitimacy of the trial and its verdicts. Remy categorizes the individuals involved into three general groups. These groups each influenced one another and, together, distorted the facts to become a powerful force discrediting the trials.

The Defense: Colonel Willis Everett

The first instrumental player was Colonel Willis Everett, the chief defense counsel for the defendants.[14] The author is more interested in Everett's involvement and actions following the trial than during the trial itself. Unsatisfied with the guilty verdict for the defendants, Everett immediately set out to petition anyone who would listen that the SS (*Schutzstaffel*) soldiers deserved a retrial.[15] Remy paints Everett as a strong sympathizer for the defendants, not for the victims of the massacre or their families.[16] However, Remy is a historian, not an attorney. What Remy and many readers may interpret as sympathizing might instead be zealous advocacy by an attorney on behalf of his clients. Everett was appointed to advocate for the defendants, regardless of his personal opinions. This is a perspective that perhaps only an attorney may appreciate.

Although Everett may not be the villain—or even the sympathizer—that Remy paints him to be, he is not without blame.

Unsatisfied with the appellate process, Everett threatened to go to the press with his clients' story of alleged abuse and coerced confessions.[17] Although zealous advocacy is admirable, it is not a justification for subverting the judicial process. Everett's actions to wield the "sword of public opinion"[18] to gain a retrial look more like extortion than advocacy, and his willingness to distort[19] facts regarding alleged abuse during the pretrial investigation make him at least complicit in creating the "apologetic narrative."

The Press: 'The Sword of Public Opinion'[20]

After the Malmedy Massacre, the predominant public viewpoint favored the perpetrators being brought to justice.[21] Articles about the Malmedy Massacre appeared in popular American periodicals, and the American people were outraged.[22] However, Remy's so-called "sword of public opinion" would shift against the Malmedy Trial in the coming years. In early 1949, major publications began running stories discrediting the trial, focusing on allegations of abuse during the pretrial investigation.[23] Here, one of the author's major themes takes shape: the press was largely responsible for creating an "apologetic narrative" by failing to check facts and spreading false information.[24] Yet, Remy shows that it was an article in the liberal periodical *The Progressive*[25] that would serve as the turning point in public opinion.[26]

In early 1949, *The Progressive* published an article entitled *American Atrocities in Germany*.[27] Remy articulates that this article was powerful in shaping public opinion due to the byline of Edward Leroy Van Roden, a Pennsylvania county judge.[28] During the aftermath of the Malmedy affair, the Simpson Commission was one of several investigations conducted to review the proceedings.[29] Van Roden's status as one of three members of the commission provided credibility and influence to his statements. Like many other post-trial investigations, the Simpson Commission determined that the Army's war crimes trials, to include the Malmedy Trial, were "essentially fair."[30] Nevertheless, Van Roden provided sensationalized statements of abuse to the media, which also influenced *The Progressive* article. He described the "Standard Operating Procedure [of] our American investigators"[31] as having blood-soaked hoods used for interrogations,[32] prisoners who had their teeth knocked out,[33] and that "all but two of the Germans . . . had been kicked in the testicles beyond repair."[34]

However, Van Roden would later admit that he never spoke with any individuals having a firsthand account of physical abuse during the pretrial investigation,[35] nor did he "have a single scrap of evidence."[36] His unprofessional reporting of the facts and the lending of his byline to *The Progressive* article would wield the "sword of public opinion" to skewer the reputation of the Malmedy Trial. Remy glosses over the fact that Van Roden was not a journalist; he was a judge and member of the legal profession and should have understood the consequences of his impropriety. Yet, readers sense Remy's disdain for Van Roden's role in the affair, particularly by noting Remy's inclusion of the harsh criticisms the congressional subcommittee aimed at Van Roden: "Those citizens of the United States who have accepted and published these allegations as truth . . . without attempting to secure verification of the facts, have done their country a great disservice."[37] Remy convincingly places Van Roden as a primary culprit for what would become the "apologetic narrative."

Remy credits much of the "apologetic narrative," and the fact that so many historians reached the wrong conclusions about the Malmedy affair, to the sensationalism of the media. Readers may draw a parallel to some of the unscrupulous media outlets of today that run with sensational headlines and biased articles instead of conducting thorough, neutral reporting of the facts. For readers, this creates a sense of foreshadowing that—if society is not careful—tomorrow's historians may draw the wrong conclusions about the events of today.

The Clergy

The German clergy was the final group involved in creating Remy's "apologetic narrative." In 1945, at the end of the war in Europe, prominent members of the Catholic and Protestant Churches in Germany made public statements of collective guilt regarding the atrocities committed by Nazi Germany.[38] However, much like the American press during that time, the churches' viewpoints shifted; influential members of the clergy began speaking out against the war crimes trials, to include the Malmedy Trial.[39] There are parallels between the author's recount of the German clergy's role in the amnesty campaign and the role of Everett and the press. However, after devoting an entire chapter to the clergy's influence and their addition of "an aura of respectability"[40] to the campaign to discredit the war crimes trials, Remy draws a lukewarm conclusion regarding the culpability of the German clergy. Although the clergy appears as complicit as the media, Remy wavers—either unconvinced of any ill intent or uncomfortable with such a critical conclusion. He considers that the clergy may have been deceived while tending to their congregations, the German people, and defendants. Regardless, it is clear to readers that the clergy played a significant role in the amnesty campaign that would eventually undermine the trial.

The Prevalence of Anti-Semitism

The final piece of Remy's "apologetic narrative" is not a group of people, but an idea. Although *The Malmedy Massacre* contains several themes that readers may find disconcerting, the prevalence of anti-Semitism in both post-war Germany and the United States is the most alarming. After the war, thousands of German-born Jews became naturalized American citizens and participated in U.S. post-war efforts in Germany.[41] Although Remy did not directly state it, Jews once again became the scapegoat because leaders in government, the church, and society began to blame them for many perceived shortcomings in post-war efforts. The author artfully weaves this issue throughout the book, noting that individuals from high-ranking clergymen to prominent U.S. politicians used terms such as "vengeful Jews,"[42] "avenging angels,"[43] and other disparaging terms to refer to Jewish immigrants. Remy astonishes readers with the realization that anti-Semitism did not die with Adolf Hitler and the Nazi party, but was a key component of the "apologetic narrative."

Lessons Learned from the Malmedy Affair

As dual professionals, judge advocates can learn many lessons from Remy's *The*

Malmedy Massacre. The most important lesson that applies to both the profession of arms and the legal profession is the need for transparency. The trial team acknowledged legal methods used to solicit statements and confessions from the Malmedy defendants, to include the use of the "psychological approach"[44] and "mock trials,"[45] which were spun into salacious stories of abuse in the press. There was no real effort by the Army or the U.S. Government to provide adequate information to the public to counter those stories. They failed to control the narrative and, therefore, lost the information campaign.[46] It is imperative that the U.S. Army, and specifically judge advocates, ensure fair and transparent handling of investigations and judicial matters. This is true whether investigating an alleged strike on a hospital in Afghanistan[47] or trying sexual assault cases. Transparency is necessary to ensure that the American and global public remains confident in our military justice system.

Conclusion

The Malmedy Massacre is a must-read for every Army leader and judge advocate. Remy's conclusions differ from many historians regarding the true nature of the events surrounding the Malmedy Massacre.[48] Readers rely on Remy to portray the facts accurately—not as he saw them, but as they truly were; otherwise, Remy himself is complicit in furthering the distortion of the Malmedy affair. Although, at times, readers may feel lost in the myriad of facts and individuals involved, Remy's extensive research convinces them that the Malmedy affair has been greatly misconstrued by history. **TAL**

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Notes

1. Steven P. Remy, The Malmedy Massacre: The War Crimes Trial Controversy 275 (2017).

2. The "apologetic narrative" is a perception that the judicial process was fundamentally unfair and "un-American," therefore eroding the legitimacy of the "Malmedy Trial" and its verdicts. *See id.* at 274, 277.

3. *Id.* at 2. The engagement took place in the Ardennes region of Belgium during the German counter-offensive into Belgium and Luxembourg commonly known as the "Battle of the Bulge." *Id.*

4. *See id.* at 37.

5. *Id.* at 127.

6. The German unit responsible for the alleged war crimes was a *Waffen Schutzstafell* (*Waffen SS*) battalion from the First SS Panzer Division "*Leibstandarte SS Adolf Hitler*" ("Personal Standard SS Adolf Hitler") led by Lieutenant Colonel Joachim Peiper. *See generally id.* at 5–19.

7. *Id.* at 124. Forty-three defendants—including the unit's leader, Lieutenant Colonel Peiper—were sentenced to death. Twenty-two were given life sentences, and eight were sentenced to anywhere from ten to twenty years. *Id.*

8. *See id.* at 84.

9. *See id.* at 247.

10. *See id.* at 274, 277.

11. *See generally id.* at 143.

12. Hereinafter, the "Malmedy Massacre" will refer to the massacre itself, whereas the "Malmedy affair" will refer to the entire chain of events to include the massacre, investigation, trial, and aftermath.

13. *See id.* at 92, 274, 277. The Malmedy Trial was not tried as part of the International Military Tribunal, nor as part of the Nuremburg Military Tribunals. Although it did not follow the procedures of a U.S. civilian court, it was tried by a military commission in accordance with military justice precedent. *See id.* at 91–92.

14. *Id.* at 82–83. Everett, a general law practitioner, initially considered himself unqualified for the task as he had no courtroom experience; however, he did his best to be a zealous advocate on his clients' behalf, making requests for additional time for preparation and arguing passionately at trial. *Id.*

15. *See generally id.* at 128–42. Everett even went so far as to submit a writ petition to the U.S. Supreme Court, laying out his alleged grievances about the pretrial investigation and trial process. The Court denied his request in a close vote of 4-to-4. *Id.* at 146–47.

16. *Id.* at 130.

17. *See id.* at 136.

18. *See id.* at 135.

19. *See id.* at 149. The Administration of Justice Review Board (AJRB) was directed by the American Military Governor, General Lucius Clay, to review the Malmedy proceedings. The AJRB concluded that Everett "had at the very least distorted the circumstances of the investigation at Schwäbisch Hall." *Id.*

20. *See generally id.* at 143–60.

21. *See id.* at 37.

22. *See id.* at 33–37. Articles about the massacre were published in *Yank*, *Stars and Stripes*, and *Life*. *Id.* nn.24–27.

23. *Id.* at 156–57. Articles were published in the *Chicago Daily Tribune* and *Time* magazine. *Id.* nn.38–39.

24. *See generally id.* at 156–59.

25. *The Progressive* was a magazine published by a Quaker organization that opposed American entry into World War II called the National Council for Prevention of War (NCPW). *See id.* at 153–54.

26. *See generally id.* at 155.

27. *See id.* at 155.

28. *Id.* The article was actually written by James Finucane, a member of the NCPW, based on Van Roden's speeches about the Malmedy affair. With Van Roden's permission, Finucane ghostwrote the article for *The Progressive* under Van Roden's byline. *Id.*

29. *See id.* at 149. The Simpson Commission was appointed by the Secretary of the Army, Kenneth Royall. Members included judge advocate Charles Lawrence; Pennsylvania county judge Edward Van Roden; and the member for whom the Commission was named, Texas Supreme Court Justice Gordon Simpson. *Id.*

30. *Id.* at 150. The Simpson Commission did, however, note that the use of certain methods during the interrogations—specifically the use of mock trials—were "highly questionable" and could not be "condoned." *Id.*

31. *Id.* at 154. Gordon Simpson, the head of the Simpson Commission, contradicted Van Roden's account, stating that they had "bent over backwards to give fair trials to the Nazis." *Id.* at 156.

32. *Id.* at 126.

33. *Id.* at 126, 153.

34. *Id.* at 126, 154.

35. *See id.* at 230.

36. *Id.* at 156.

37. *Id.* at 245.

38. *See id.* at 182. The German Catholic bishops met in Fulda in August 1945. A few months later, a council of Protestant Church leaders met in Stuttgart and penned the Stuttgart Declaration of Guilt stating "we not only know that we are with our people in a large community of suffering, but also in a solidarity of guilt." *Id.*

39. *See id.* at 204–05. Numerous influential clergymen made statements both publicly and to members of the U.S. Government regarding "vengeful Jews" being largely responsible for corruption of the war crimes trials. *Id.*

40. *Id.* at 209.

41. *Id.* at 132.

42. *Id.* at 133, 137, 205.

43. *Id.* at 152. Many of the interrogators who were accused of abuse were Jewish, to include William Perl, Joseph Kirschbaum, Morris Elowitz, and Harry Thon. They were often referred to as "avenging angels" to be less obviously offensive. *Id.* at 152, 156.

44. *Id.* at 59.

45. *Id.* at 102. At trial, Lead Prosecutor Major Burton Ellis called one of the interrogators as his first witness. The witness described in detail the "psychological approach" the interrogation methods used to gain confessions—including the "tricks, ruses and stratagems" as well as the use of "mock trials." *Id.*

46. *See generally* Joint Chiefs of Staff, Joint Pub. 3-61, Public Affairs I-11 (17 Nov. 2015) (C1, 19 Aug. 2016) (discussing information operations and the importance of the narrative).

47. *See* Matthew Rosenberg, *Pentagon Details Chain of Errors in Strike on Afghan Hospital*, N.Y. Times, (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/world/asia/afghanistan-doctors-without-borders-hospital-strike.html.

48. Remy cites to other well-respected historians and authors, such as Rick Atkinson and Peter Caddick-Adams, who came to very different conclusions about the Malmedy incident. Remy, *supra* note 1, at 277.

(Credit: Victor Moussa – stock.adobe.com)

Azimuth Check

The Hazards of Excessive Political Party Loyalty

By Colonel Jerrett W. Dunlap Jr.

As a lifelong Raiders fan, I am intimately familiar with the potential hazards of excessive loyalty to a team. I grew up in northern California when the Oakland Raiders were one of the most dominant teams in the National Football League. I remained loyal to them when they moved to Los Angeles and won their third Super Bowl in eight years.[1] As a loyal Raiders fan, I felt obligated to root against rival teams, like the Kansas City Chiefs or Denver Broncos. My loyalty seemed to require me to root against the rivals, even if I had previously admired their players or coaches. Of course, a committed fan remains loyal not just during winning seasons; loyalty to your team continues through losing seasons, heartbreaking losses, and shifting locations (such as moving back to Oakland and then to Las Vegas). This is not unique to being a Raiders fan, but can apply to any team. Motivated by a seemingly tribalistic need for identity and belonging,[2] loyalty to a team can cloud our good judgment, objectivity, and acceptance of other teams' successes. I have learned that unchecked—or blind—loyalty to a team is a perilous road.

As I have passively observed the increasingly contentious party politics in the United States over the last two election cycles, many Americans seem to have become ensnared by party loyalty in the same way that I may have been ensnared by Raiders loyalty. Unfortunately, excessive party loyalty is much more perilous to the Army and the Nation than unchecked

loyalty to a sports team. I recommend that all Army professionals, particularly those of us in the Judge Advocate General's Corps family, carefully check our loyalty to political parties to ensure we avoid the often unseen or unappreciated snares of unchecked party loyalty.

The Army Ethic, described as "the Heart of the Army," sets the standard for Army professionals.[3] This standard explains the source of our identity and where our loyalty should be directed. "Living the Army ethic inspires our shared identity as *trusted Army professionals* with distinctive roles as *honorable servants*, *Army experts*, and *stewards of the profession.*"[4] Trust is an integral part of the Army Ethic, and loyalty is the first of the Army Values. The Army Value of *loyalty* means to "bear true faith and allegiance to the Constitution of the United States, the Army, your unit, and other Soldiers."[5] As Army professionals, we should take great care to ensure that loyalty to a political party does not overshadow or interfere with our loyalty to our Army team.

Army professionals must safeguard relationships with teammates by ensuring party politics do not erode trust within the team. There are clear rules that establish the boundaries for political speech within the Army workplace.[6] Army professionals should also be aware that expressing or displaying loyalty to a political party can degrade trust of subordinates, peers, and even senior leaders. As with rival sports teams, opposing political parties can easily develop into a rivalry that undermines cohesiveness and trust within an office or unit. Once eroded, that trust can cause rifts in relationships, which can be difficult to repair.

In addition to discussions and displays in the workplace, Army professionals should be aware that political social media posts and other partisan expressions in public forums can easily erode trust and create friction within an Army team. Partisan posts in social media have been a concern for years.[7] Unfortunately, this trend seems to be a continuing concern for the Army.[8] All Soldiers and Army Civilians have the duty to be leaders, followers, and stewards of the Army profession, accountable to each other and to the American people.[9] We should ensure that loyalty to a political party does not interfere with that duty.

Every Service member is free to associate with political parties within the limits of law, regulation, and policy.[10] Army professionals should be well-informed of the political environment to ensure they understand the impact of policies on the Army's mission. Nevertheless, we can be well-informed without being viewed as active partisans in a political fight.[11] It is important to recognize that restraint often has real value, as exercising the full degree of our rights has the potential to cause significant damage to an Army team. In his farewell address, the first Commander in Chief, President George Washington, warned "against the baneful effects of the Spirit of Party, generally."[12] President Washington said the spirit of party "agitates the Community with ill-founded jealousies and false alarms, kindles the animosity of one party against the other, [and] foments occasionally riot & insurrection."[13] He charged it is "the interest and the duty of a wise People to discourage and restrain [the spirit of party]."[14]

Several years ago, while I was a student at the Command and General Staff College, an Army senior leader described how General Dwight D. Eisenhower refrained from partisan politics during his Army career. Inspired, I decided to make a concerted effort to step back from loyalty to any political party. After a short while, I found my patience and ability to listen to all sides of a political issue grew, my objectivity seemed to increase, and my focus shifted from the good of my team to the good of the Nation. Temperance, it turns out, increases a person's tolerance for considering opposing viewpoints. The empathy gained from stepping away from blind loyalty is invaluable for a successful leader because fervent loyalty tends to leave little room for considering the "other"—whether it is a different sports team or varying political views.

As Army professionals, let us focus our loyalty less on political parties and more on the Constitution of the United States, the Army, our units, and our Army teams. The Army Ethic teaches us that Army professionals "accomplish the mission with mutual trust as a cohesive team of Soldiers and Army civilians, collectively demonstrating the characteristics of their profession and earning the trust of their fellow citizens."[15] Prudently focused loyalty can reinforce a culture of trust and build stronger Army teams. From now on, I will try to apply these lessons so I can avoid the perils of excessive loyalty to the Raiders—lest I undermine trust with the Chiefs fans on my Army team.[16] **TAL**

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Notes

1. *Timeline—Raiders Historical Highlights*, Las Vegas Raiders, https://www.raiders.com/history/timeline (last visited June 29, 2021).

2. *See* Donald Green et al., Partisan Hearts and Minds: Political Parties and the Social Identities of Voters 24–26 (2002) (discussing party identification).

3. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership fig.1-2 (1 Aug. 2019) (C1, 1 Nov. 2019) [hereinafter ADP 6-22].

4. *Id.*

5. *Id.* para. 1-71.

6. *See* U.S. Dep't of Def., Dir. 1344.10, Political Activities by Members of the Armed Forces (19 Feb. 2008) (governing political activities of Service members); The Hatch Act, 5 U.S.C. §§ 7321–7326 (governing political activities of Federal employees). *See also 2020 Political Activities Training: What You Need to Know for the Upcoming Election*, The Judge Advoc. Gen.'s Legal Ctr. & Sch. (27 July 2020), https://tjaglcspublic.army.mil/2020-political-activities-training.

7. *See* Dianna Cahn & Meredith Tibbetts, *Army Officer Under Fire for Inflammatory Social Media Posts*, Stars & Stripes (Sept. 28, 2017), https://www.stripes.com/news/us/army-officer-under-fire-for-inflammatory-social-media-posts-1.490206.

8. *See, e.g.*, Davis Winkie, *Army Battalion Commander Under Investigation for Political Social Media Posts*, Army Times (Oct. 22, 2020), https://www.armytimes.com/news/your-army/2020/10/22/army-battalion-commander-under-investigation-for-political-social-media-posts/.

9. ADP 6-22, *supra* note 3, para. 1-71.

10. *See supra* note 6.

11. *Cf.* Lieutenant Colonel Jess R. Rankin, *Officers Should Vote Early and Often*, Army Law., no. 3, 2019, at 87 (arguing Army professionals will more effectively defend the Constitution if they participate in the political process).

12. George Washington, U.S. President, Farewell Address (Sept. 19, 1796), https://founders.archives.gov/documents/Washington/05-20-02-0440-0002.

13. *Id.*

14. *Id.*

15. ADP 6–22, *supra* note 3, para. 1-71.

16. *See, e.g.*, Sergeant Major Manuel Ortiz III, Command Paralegal, V Corps, Fort Knox, Kentucky.

Major General Robert H. McCaw (right), TAJAG, 1961–1964, and Major General Charles Decker, TJAG. (Photo courtesy of Fred L. Borch III)

Lore of the Corps

A History of the No. 2 Army Lawyer in the Corps

By Fred L. Borch III

While every member of the Corps knows that the Deputy Judge Advocate General is the No. 2 lawyer in the organization, few know the history of this important position, much less that it did not exist in its present form until after World War II.

Origins

The first mention of an assistant to the Judge Advocate General, then-abbreviated as "tJAG," occurs in June 1864, when William McKee Dunn, was appointed the "Assistant Judge Advocate General" (AJAG) with the rank of lieutenant colonel; he would serve as AJAG from 1875 to 1881.[1] That position was abolished in 1874, but then resurrected by the Act of July 5, 1884, when Congress created the Judge Advocate General's Department (JAGD) and decreed that it would consist of one JAG with the rank of brigadier general, one "assistant JAG" with the rank of colonel, and three Deputy JAGs with the rank of major.[2] Since the entire JAGD consisted of five uniformed lawyers, being the "assistant JAG" certainly did not involve much supervision.

As the Army entered the 20th century, the size of the JAGD increased slightly. In the Act of February 2, 1901, Congress provided for a JAGD consisting of one brigadier general (tJAG), two colonels, three lieutenant colonels, and six majors. Since the Department was only authorized one general officer, any assistant JAG was a colonel. This was not, however, a position authorized by either statute or regulation.[3]

In the 1920s and 1930s, the top lawyer in the JAGD was a major general (tJAG), having gone from one to two stars during World War I, but there were no other general officers in the JAGD. In this regard, the Act of 1920 authorized an Army legal department consisting of 114 officers in the grades of captain to colonel—but no authorization for any of these officers to serve as an assistant JAG.[4]

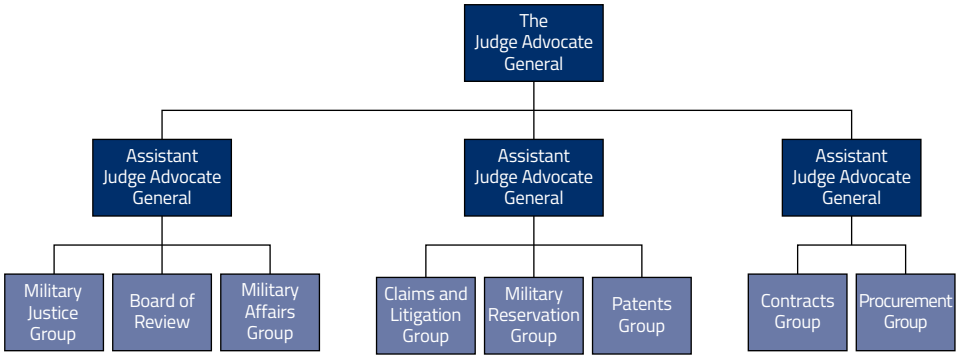
Near the end of World War II, the JAGD had a major general as TJAG (Major General (MG) Myron C. Cramer) and four "Assistant Judge Advocates General (AJAG)"—three of whom were brigadier generals. Brigadier General Thomas H. Green had a very large portfolio, as he was AJAG for Claims, Contracts, Litigation, Military Affairs, Military Reservations, Patents, Tax, and Legal Assistance. Brigadier General (BG) John Weir was the Executive Officer and had responsibility for the War Plans Division. Brigadier General James E. Morrisette was in charge of military justice matters and supervised the five Boards of Review and the Military Justice Division. Finally, Colonel (COL) Robert M. Springer had responsibility for the Military Personnel and Training Division, Special Assignments, and all field installations.[5]

In the rapid demobilization that followed the end of hostilities with Japan, however, the JAGD lost hundreds of officers; by mid-1946, it appeared that MG Thomas H. Green, who had been serving as TJAG since 1 December 1945, would soon be the only general officer in the JAGD. In May 1946, recognizing that he needed

more judge advocate (JA) general officers, Green proposed that the Secretary of War promote a JA colonel to brigadier general. According to Green, this person would serve as "Deputy or First Assistant in the Office of The Judge Advocate General."[6] Figure 1 is a diagram depicting the Office of The Judge Advocate General (OTJAG), JAGD in January 1947; note that the only general officer in the JAGD was TJAG.

On 2 February 1947, TJAG Green finally got his brigadier general and Deputy/First Assistant: Hubert D. Hoover. The JAGD now had two general officers, but only the TJAG position had any formal recognition in the War Department.[7]

Figure 1. OTJAG Organization, 1947



Congress Authorizes the "Assistant Judge Advocate General"

In June 1948, Congress enacted legislation that changed the name of The Judge Advocate General's Department to The Judge Advocate General's Corps. This same legislation also provided that the newly-designated Corps now officially would have one "Assistant Judge Advocate General" with the rank of major general. This was the first time in the 20th century that a statute had identified an Assistant with a capital "A" to TJAG and the first time this No. 2 position was given two-star rank.[8] As a result of this statute, The Assistant Judge Advocate General soon became known by the acronym "TAJAG."

Wire diagrams showing the place of TAJAG in the Corps in 1963 and 1983 are at Figures 2 and 3.[9] Note that in 1963, there was a TAJAG and three Assistant JAGs (all brigadier generals). In 1983, however, there were three one-star Assistant JAGs plus a one-star JA in U.S. Army, Europe.

"TAJAG" Becomes The Deputy Judge Advocate General

In 2008, Congress enacted legislation that provided that the Army, Navy, and Air Force TJAGs would be elevated from two-star to three-star rank. Section 543 of the National Defense Authorization Act for Fiscal Year 2008 also provided that the Army's TAJAG would now be known as the "Deputy Judge Advocate General." This so-called "re-designation" was cosmetic—in that the new Deputy now known as DJAG had the same authority and responsibilities as the old TAJAG, but the change in name brought the Army in line with the Navy and the Air Force, as those branches already had a Deputy and not an Assistant Judge Advocate General.[10]

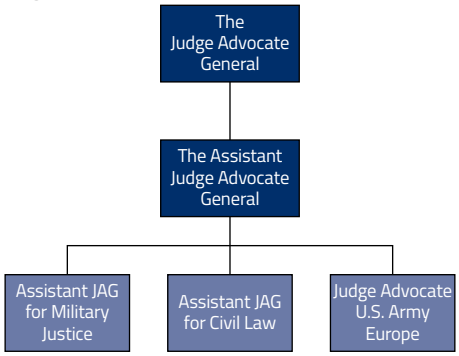
Major General Daniel V. "Dan" Wright became the first DJAG in 2008—with the position now the only two-star billet in the Corps. A wire diagram showing the place of the DJAG in the current Corps general officer structure is at Figure 4.[11]

Duties and Responsibilities of the TAJAG/DJAG

When TJAG Thomas H. Green requested the appointment of a "Deputy" or "First Assistant Judge Advocate General" in 1946, he explained that he needed an assistant because the "responsibilities and duties" of TJAG were "beyond the capacities of one officer . . . and a great part of the responsibilities and duties involving the administration and rendition of legal opinions must be delegated to a Deputy or Assistant."[12] According to Green, in the absence of TJAG, "his Deputy or Assistant" must be able to "furnish legal services without interruption . . . to the various War Department agencies, members of Congress, and the public."[13] Green's vision of what a TAJAG should do is certainly what seems to have occurred in the case of MG Hoover; Hoover's first Efficiency Report as TAJAG states that Hoover "performed duties substantially similar to those performed by the Judge Advocate General" and that Hoover "[a]cted as First Assistant."[14]

Since TAJAG Hoover's era, the No. 2 lawyer in our Corps has continued to perform as an assistant to TJAG, with his duties very much determined by TJAG. For example, when MG William K. Suter was

Figure 2. JAGC General Officer Organization, 1963



TAJAG from 1985 to 1989, he supervised The Judge Advocate General's School, U.S. Army (TJAGSA), the U.S. Army Legal Services Agency, and the U.S. Army Claims Service. Major General Overholt, then serving as TJAG, also put Suter in charge of developing "JAG policies." Finally, Suter was in charge of "overall force structure" for the Corps and "personnel management," which included TAJAG Suter being the president of Selective Early Retirement Boards for JA lieutenant colonels and colonels. Major General Suter believes that the "great working relationship" he had with TJAG Overholt resulted from the two men having been faculty at TJAGSA at the same time and because Suter previously had worked for Overholt in the Personnel, Plans, and Training Office.[15]

Ten years later, when MG Michael Marchand was serving as TAJAG, the TJAG, MG Thomas Romig, wanted Marchand to "be an alter ego" for him as TJAG. Romig also tasked Marchand with overseeing the "day-to-day running of the OTJAG staff" and made Marchand "responsible for USALSA and the Claims Service."[16]

Figure 3. JAGC General Officer Organization, 1983

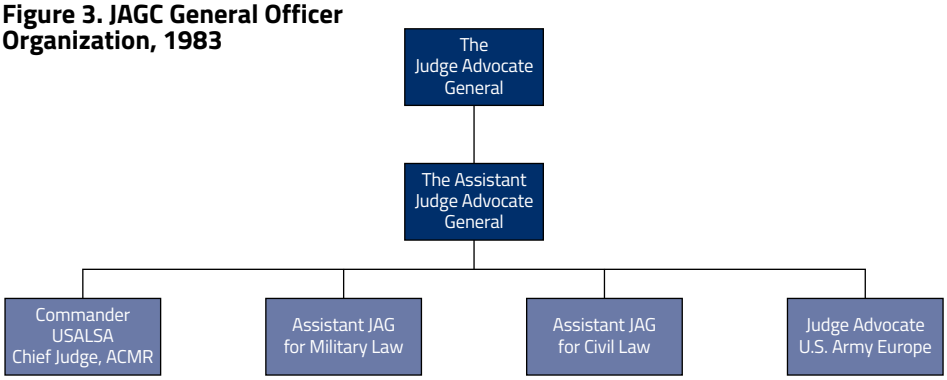
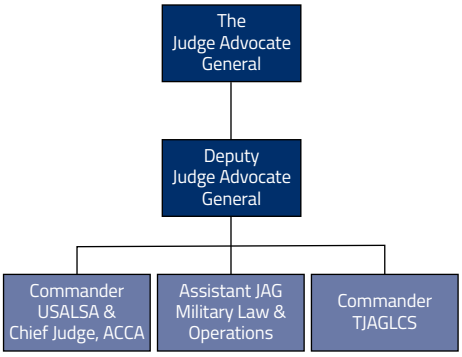


Figure 4. JAGC General Officer Organization, 2010



More recently, MG Thomas "Tom" Ayres, who served as DJAG under TJAG Flora Darpino, had the following "significant duties and responsibilities":

> Principal Assistant to The Judge Advocate General. Assist TJAG in supervising over 9,500 legal professionals worldwide, and performs the duties of TJAG in her absence. Supervises The Judge Advocate General's Legal Center and School, the US Army Legal Services Agency, to include direct supervision of the Army Court of Criminal Appeals, the US Army Claims Service, the Office of the Judge Advocate General, to include all functions of the Personnel, Plans and Training Office, and the Professional Responsibility Branch. Responsible for the proficiency of all military and civilian attorneys in the active and reserve components. Serve as the Chief Information Officer of the JAG Corps. Primary responsibility for the execution of an $82 million budget.[17]

There is little doubt that future DJAGs will have responsibilities similar to those given to DJAG Ayres, bearing in mind that the No. 2 lawyer in the Corps also always will have duties as assigned by TJAG.

TAJAGs and DJAGs in History

Major General Hubert D. Hoover

The first TAJAG was MG Hubert D. Hoover, who served from February 1949 to November 1949. Prior to his elevation to the No. 2 position in the Corps, then-COL Hoover had been AJAG in charge of the Branch Office of The Judge Advocate General, Mediterranean Theater of Operations from 1943 to 1945.[18] When he returned to the United States in June 1945, Hoover served as the AJAG in Charge of Civil Matters. He then served as the AJAG in Charge of Military Justice Matters from July 1947 to May 1948.[19] Hoover was a brigadier general when he was promoted to major general on 1 June 1948 and appointed as the first The Assistant Judge Advocate General.

Major General Franklin P. Shaw

After Hoover's retirement, MG Franklin P. Shaw served as TAJAG from January 1950 to December 1953. Born in Kentucky in 1891, Shaw earned his law degree from the McDonald Education Institute in 1914 and served as an Infantry officer in World War I. He entered the JAGD in 1920 and served in a variety of assignments, including duty with U.S. Army Troops in Tientsin, China. As he was the Judge Advocate of the Air Materiel Command at Wright Field in Dayton, Ohio, Shaw spent all of World War II in the United States. After the war, however, then-COL Shaw was overseas as the Judge Advocate, Pacific Air Command, with duty in Manila and Tokyo; he ultimately served on General Douglas MacArthur's staff as the Judge Advocate General Headquarters, Far East Command, in Tokyo, Japan.[20]

Major General Hubert D. Hoover, TAJAG, 1949, (Photo courtesy of Fred L. Borch III)

Major General Claude B. Mickelwait

Major General Claude B. Mickelwait was TAJAG from July 1954 to November 1956. Born in Iowa, he obtained his Bachelor of Science degree from the University of Idaho in 1916 and was detailed to the JAGD in 1930, after which he earned a law degree at the University of California. During World War II, Mickelwait was the Chief, Military Affairs Division, at the Office of the Judge Advocate General, before deploying to Italy, where then-COL Mickelwait served as the Fifth Army judge advocate. He was responsible for establishing courts-martial in key geographic locations and training court personnel so that there would be "prompt and efficient disposition of military offenses."[21] Mickelwait also anticipated "many problems of occupation" in Italy regarding civil courts, law and order, and operation of the Allied Military Government on the Italian peninsula.[22]

Major General George Hickman

Major General George Hickman followed Mickelwait as TAJAG on 1 August 1956. At

Major General Claude B. Mickelwait, TAJAG, 1954-1956. (Photo courtesy of Fred L. Borch III)

Major General George Hickman, TAJAG, 1956. (Photo courtesy of Fred L. Borch III)

Major General Harry J. Engel, TAJAG, 1964-1967. (Photo courtesy of Fred L. Borch III)

the time, TJAG Eugene Caffey was expected to serve as the top Army lawyer until 1958, but his unexpected—and early—retirement explains why Hickman moved up to be TJAG on 2 January 1957.[23] Major General Hickman's elevation from TAJAG to TJAG was a first in history, since all previous TAJAGs had retired from the position. Note that he served only five months as TAJAG—the shortest tenure for a No. 2 in history.

A 1926 graduate of West Point, Hickman served as an Infantry officer until 1940, when he entered Harvard Law School. After the Japanese attack on Pearl Harbor, Hickman left Harvard to return to the Army. He subsequently served as the Staff Judge Advocate (SJA), 98th Infantry Division and XII Corps. At the end of World War II, then-COL Hickman was the Executive Officer, OSJA, Far East Command, in Tokyo.

Hickman returned to Harvard Law School to complete his law studies, graduated in 1948, and then was re-assigned to Japan. He was in Tokyo when the North Koreans attacked American and South Korean forces in June 1950. Colonel Hickman was the SJA, United Nations Command, during the first years of the conflict. He retired as TJAG in 1961.

Major General Stanley W. Jones

Hickman was followed by MG Stanley W. Jones, who served from January 1957 to January 1961. Born in 1907 in Brooklyn, New York, Jones graduated from the U.S. Military Academy in 1929. He served as an Infantry officer until 1939, when he entered the University of Virginia's law school. After graduating in 1942, Jones served in Europe with the 85th Division and XII Corps. Major General Jones is one of the few JA general officers to continue on active duty after leaving the Corps, serving as the Commander, Army Audit Agency from 1962 to 1965. In this position, he oversaw that agency's audits of Army installations and military assistance programs.[24]

Major General Robert H. McCaw

Major General Robert H. McCaw became TAJAG in January 1961 and served in that position until February 1964, when he moved up to be TJAG. Born in Boone, Iowa, in 1907, McCaw earned his law degree from Creighton University in 1931. He was in private practice until 1942, when he entered the JAGD. After a tour of duty as the SJA, 78th Infantry Division, McCaw was ordered to the European Theater of Operations. He subsequently served as Task Force Judge Advocate with the 1st Airborne Task Force and as Army Judge Advocate with the 1st Allied Airborne Army. During this period, McCaw took part in the Rome–Arno, Southern France, Rhineland, and Central European campaigns.[25]

After World War II, then-COL McCaw served as SJA, Berlin District, and Theater Judge Advocate, Caribbean Command. He was the Judge Advocate, Army Forces in the Far East and Eighth U.S. Army prior to becoming TAJAG in 1961.[26]

Major General Harry J. Engel

When MG McCaw was elevated to TJAG in February 1964, MG Harry J. Engel succeeded him as TAJAG. Engel served from February 1964 to January 1967. Born in April 1908 in Brooklyn, New York, Engel earned his law degree from St. John's College in 1930. When World War II began, he was inducted into the Army as a private. He completed Officer Candidate School and was commissioned as an Infantry officer in 1943.[27]

In 1946, Engel was detailed to the JAGD from Infantry and served in variety of assignments and locations, including: SJA, 10th Infantry Division, Fort Riley, Kansas; SJA, 7th Infantry Division, Korea; SJA, Army Communications Zone, France; SJA, U.S. Continental Command; and Judge Advocate, U.S. Army, Europe. He was confirmed as TAJAG in February 1964 and served until January 1967, when he retired from active duty.[28]

Major General Lawrence J. Fuller

Major General Lawrence J. Fuller followed Engel and served from July 1967 to June 1971. Born in Everett, Washington, in 1914, Fuller graduated from West Point in 1940. He served as a combat engineer in World War II and then attended law school at the University of Michigan, from which he graduated in 1951. Fuller then served in various locations, including Korea, where he was the SJA, Eighth U.S. Army. After completing his tour of duty as TAJAG in 1971, MG Fuller became the Deputy Director, Defense Intelligence Agency (DIA). His move to DIA after his service as TAJAG makes sense, as Fuller was fluent in Chinese. He had a masters in Chinese Studies from Stanford University and had "translated three volumes of Chinese law into English."[29] Major General Fuller retired from active duty in 1974.

Major General Harold E. Parker

Harold E. Parker served as TAJAG from July 1971 to June 1975. Born in 1918 in New York, Parker served as a Field Artillery officer in World War II and was serving on the War Department General Staff when he was selected to attend Stanford Law School at Army expense. After graduating in 1951, Parker transferred to the JAG Corps and served in a number of locations and assignments, including: Assistant SJA, Seventh Army Headquarters and 2d Armored Division, Germany; SJA, 1st Infantry Division, also in Germany; Criminal Law Division, Office of The Judge Advocate General; and SJA, U.S. Army, Berlin. Prior to being appointed as TAJAG in 1971, then-Brigadier General Parker served as Assistant Judge Advocate General for Military Law. He left active duty in June 1975.[30]

Major General Lawrence Williams

Parker was followed by MG Lawrence "Larry" Williams, who served from July 1975 to July 1979. Born in 1922 in Massachusetts, Williams served as a navigator in World War II. He saw duty in North Africa, Italy, France, and England and flew twenty-six combat missions. Afterwards, he became the lead navigator for the 9th Troop Carrier Command on 6 June 1944, which dropped paratroopers over Normandy in the early hours of D-Day.[31]

Major General Lawrence Williams, TAJAG, 1975–1979. (Photo courtesy of Fred L. Borch III)

Major General Hugh R. Overholt, TAJAG, 1981-1985, and TJAG, 1985-1989. (Photo courtesy of Fred L. Borch III)

After the war, Williams left active duty, earned a law degree from the University of Colorado, and returned to the Army as a judge advocate. He served as an administrative law instructor at TJAGSA and also as the SJA and G-1, 3d Armored Division, Frankfurt, Germany. From 1967 to 1969, then-COL Williams served as the SJA, III Corps and Fort Hood; then, he served as the SJA, Military Assistance Command, Vietnam, from 1969 to 1970. He was promoted to brigadier general in July 1971 and became TAJAG on 1 July 1975. Major General Williams retired from active duty in July 1979.[32]

Major General Hugh J. Clausen

Hugh J. Clausen followed Williams as TAJAG; he served from July 1979 to the summer of 1981, when he became TJAG. Born in Mobile, Alabama, on Christmas Day 1926, Clausen served briefly as an enlisted sailor in the Navy before returning to civilian life. He earned his law degree from the University of Alabama in 1950 and was a member of the 7th Judge Advocate Officer Basic Course—which was the first basic course held at the newly-established TJAGSA in Charlottesville.[33]

After the basic class, Clausen served in Germany at V Corps and U.S. Army, Europe. After completing the 7th Career Course (today's Graduate Course), then-Major Clausen taught criminal law in TJAGSA's Military Justice Division. In 1961, he was sent to study Korean at the Presidio of Monterey as preparation for a tour as Chief, International Affairs Division, Eighth U.S. Army. Clausen subsequently served as the SJA, 1st Infantry Division, Vietnam, and SJA, III Corps and Fort Hood, before being promoted to brigadier general in 1976. He was promoted to major general and assumed duties as TAJAG on 1 July 1979.[34]

Major General Hugh R. Overholt

When MG Alton Harvey retired after only two years as TJAG, Hugh Clausen moved up from the No. 2 job to be the top uniformed lawyer in the Army. Clausen's elevation meant that there was a new TAJAG on 1 August 1981: Hugh R. Overholt. A native of Arkansas, Overholt earned his undergraduate and law degrees from the University of Arkansas and entered the JAG Corps in 1957. For the next several decades, Overholt served in various assignments, including: SJA, 7th Infantry Division, Korea; Chief, Criminal Law Division, TJAGSA; Chief, Personnel, Plans, and Training Office, OTJAG; and SJA, XVIII Airborne Corps. Major General Overholt served as TAJAG until July 1985, when he became TJAG.[35]

Major General William K. "Bill" Suter, TAJAG, 1985-1989, and acting TJAG, 1989-1991. (Photo courtesy of Fred L. Borch III)

Major General Kenneth Darnell Gray, TAJAG, 1993–1997. (Photo courtesy of Fred L. Borch III)

Major General Daniel V. Wright, TAJAG and DJAG, 2005–2009. (Photo courtesy of Fred L. Borch III)

Major General William K. "Bill" Suter

William K. "Bill" Suter followed MG Overholt as TAJAG, and served from 1985 until 1991, when he retired from active duty. Suter had been nominated to be TJAG when General Overholt retired in 1989, but the Senate never confirmed Suter for this position, so he served as Acting TJAG from 1989 to 1991. In this regard, while Suter was Acting TJAG, there was no TAJAG.[36]

After receiving his law degree from Tulane University in New Orleans, Bill Suter entered the Corps in September 1962. He served as an instructor at TJAGSA, as the SJA, U.S. Army Support, Thailand, and as the Deputy SJA, U.S. Army, Vietnam, prior to becoming the SJA, 101st Airborne Division. Then-COL Suter was the Commandant, TJAGSA, before his promotion to brigadier general in July 1984. After leaving active duty in 1991, MG Suter was selected by Chief Justice William D. Rehnquist to be the Clerk of the Supreme Court of the United States. Suter retired from that position in 2013.[37]

Major General Robert Murray

Major General Robert "Bob" Murray served as TAJAG from 1991 to 1993. He entered the JAG Corps in 1962 and, after completing TJAGSA's "Special Course" (as the Judge Advocate Office Basic Course was then called), Bob Murray served in various locations in the United States, Germany, Italy, Korea and Vietnam. Major General Murray's assignments included: SJA, 1st Armored Division; Judge Advocate, Headquarters, United Nations Command/Eighth U.S. Army, Korea; and Commandant, TJAGSA. Murray was followed by MG Kenneth Gray, the first Black officer to reach flag rank in the Corps.

Major General Kenneth Darnell Gray

Born in West Virginia, Kenneth Darnell Gray was commissioned through Army ROTC at West Virginia State College and earned his law degree at West Virginia University in 1969. After joining the JAG Corps, then-Captain Gray served a year in Vietnam before returning to the United States where he received an assignment that would affect the future of African-Americans in the Corps: he was tasked with creating and implementing the newly-created Minority Lawyer Recruiting Program. Gray's mission was to bring more Black and female lawyers into an organization that was predominantly White and male.[38]

After completing this assignment in the Pentagon, Ken Gray served in a variety of locations and positions, including SJA, 2d Armored Division, and SJA, III Corps. He was the first African-American JA to serve as the top lawyer in a numbered division and at an Army corps. Prior to becoming TAJAG in 1993, then-BG Gray was the USALSA Commander and the Chief Judge, U.S. Army Court of Military Review.[39]

Major General John D. Altenburg

John D. Altenburg followed Gray as TAJAG, serving from 1997 to 2001. After serving as a noncommissioned officer in Vietnam, MG Altenberg earned a law degree from the University of Cincinnati. He entered the JAG Corps in 1973 and subsequently served in a variety of assignments, including SJA, 1st Armored Division, and SJA, XVIII Airborne Corps. Major General Altenburg was the first JA to earn the Army's Scuba Diver Badge while serving as a JA at 5th Special Forces Group, Fort Bragg, in 1977.[40]

Major General Michael J. Marchand

Michael J. Marchand served as TAJAG from 2001 to 2005. After being commissioned through Army ROTC in June 1970, Marchand received his law degree from the University of Minnesota. He subsequently taught contract law at TJAGSA, served as the Deputy SJA, Fort Eustis, Virginia, and was the SJA, 6th Infantry Division (Light) and Fort Polk, Louisiana. Then-COL Marchand was the Executive to TJAG prior to his promotion to brigadier general in 1997. As a one-star general, Marchand

served as the Assistant JAG for Civil Law and Litigation and as the Commander, USALSA and Chief Judge, Army Court of Criminal Appeals. Major General Mike Marchand retired in 2005.[41]

Major General Daniel V. Wright

Marchand's successor was MG Daniel V. Wright—the last TAJAG and the first DJAG in Corps history. A United States Military Academy graduate, Dan Wright served in key assignments at the 75th Ranger Regiment, Joint Special Operations Command, Southern European Task Force, and XVIII Airborne Corps. During his years as an Army lawyer, he deployed overseas to Somalia, Haiti, Italy, Rwanda, and the Congo. Major General Wright retired from the Army after nearly thirty-seven years of military service.[42]

Major General Clyde J. "Butch" Tate II

Major General Clyde J. "Butch" Tate II followed Wright as DJAG. An ROTC graduate of the University of Kansas, from which he also received his law degree, MG Tate entered the JAG Corps in 1982. He had multiple tours at Fort Bragg: two at the 82d Airborne Division (one as the division SJA) and one at U.S. Army Special Forces Command. Tate also served in Germany with the 1st Infantry Division during the Cold War era. While the SJA, III Corps and Fort Hood in 2004, then-COL Tate deployed to Iraq as the SJA, Multi-National Corps–Iraq. He was promoted to brigadier general in 2006 and served as the Commanding General and Commandant, TJAGSA; the Commander, USALSA; and, prior to his elevation to be DJAG in January 2010, the Chief Judge, U.S. Army Court of Criminal Appeals.[43]

Major General Thomas Ayres

Major General Ayres served as DJAG from 2013 to 2017. After graduating from the United States Military Academy in 1984, Ayres served as an airborne rifle platoon leader and executive officer in Italy before attending law school at the University of Pennsylvania on the Funded Legal Education Program. Highlights of his career included being the SJA, 82d Airborne Division, XVIII Airborne Corps, and Multi-National Corps–Iraq. Ayres also served as the DSJA at both the 82d Airborne Division and XVIII Airborne Corps. After his promotion to brigadier general, Tom Ayres served as Commander and Commandant The Judge Advocate General's Legal Center and School (TJAGLCS); Commander, U.S. Army Legal Services Agency; and Chief Judge, U.S. Army Court of Criminal Appeals. After retiring from active duty, MG Ayres continued in government service as the General Counsel for the U.S. Air Force. He left that position in 2021.[44]

Major General Stuart W. "Stu" Risch

Major General Stuart W. "Stu" Risch succeeded Ayres as DJAG in August 2017. Commissioned through the Army ROTC, and a Seton Hall University School of Law graduate, Risch entered the JAG Corps in 1988. He subsequently served three tours at Fort Hood, Texas: Trial Counsel and Chief of Military Justice, 1st Cavalry Division; Deputy SJA, 4th Infantry Division (Mechanized); and SJA, III Corps. Major General Risch also was the SJA at both the 1st Infantry Division, Fort Riley, Kansas, and Fort Sill, Oklahoma. He is a veteran of Operations DESERT SHIELD/DESERT STORM, IRAQI FREEDOM, and NEW DAWN. In 2021, MG Risch was promoted to lieutenant general and assumed duties as TJAG.[45]

Major General Joseph B. Berger

At the time this article was written, the DJAG was Major General Joseph B. Berger. A 1992 graduate of the United States Military Academy, Berger began his career in the Military Police Corps before attending law school on the Funded Legal Education Program. Since entering the Corps, MG Berger has served in various assignments, including: Regimental Judge Advocate, 160th Special Operations Aviation Regiment; SJA, Joint Special Operations Command; and SJA, U.S. Army Cyber Command. Prior to assuming duties as the twenty-second DJAG, Berger was the Commanding General and Commandant, TJAGLCS.[46]

Conclusion

While the position of DJAG has existed for fewer than fifteen years, the idea of an "Assistant" to TJAG has a much longer history. The first formal recognition that the top uniformed lawyer in the Army needed an assistant originated in the 19th century, but it was not until the JAGD became a Corps that Congress formally authorized an assistant by legislation. For many years, this assistant held the same rank as TJAG—which meant that the Corps had two major generals at the same time. Since 2008, however, DJAG has been the only two-star officer in the Army's legal branch.

Finally, while it might seem otherwise, the elevation of TAJAG or DJAG to TJAG has not been unique in Army history. Major General George Hickman served briefly as TAJAG before becoming TJAG in 1957; Major General Robert McCaw served three years in the No. 2 spot before being elevated to TJAG; and, in the 1980s, both Hugh Clausen and Hugh Overholt served as TAJAG before being appointed as TJAG. The appointment of MG Stuart Risch as TJAG, however, is the first time that an elevation from the No. 2 spot to the top position in the Corps has brought with it a promotion to a rank of three-stars. **TAL**

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. Judge Advoc. Gen.'s Corps, The Army Lawyer: A History of The Judge Advocate General's Corps, 1775–1975, at 73 (1975). It was not until January 1924 that "the Judge Advocate General" or "tJAG" became "The Judge Advocate General" or "TJAG." *Id.* at 139.

2. *Id.* at 84.

3. *Id.* at 90–91. Recognizing that the Army likely would need more judge advocates than authorized, Congress did provide that line officers could be appointed as "acting judge advocates"; however, it was with the rank and pay of captain for "each geographic department or tactical division" that did not have a member of the JAGD assigned to it. *Id.*

4. *Id.* at 138.

5. *Washington News and Views: Four Assistants JAG,* Judge Advoc. J., June 1944, at 30.

6. Memorandum from Major General Thomas H. Green, The Judge Advoc. Gen., to Assistant Chief of Staff, G-1, War Dep't Gen. Staff, subject: Recommendation for Promotion (May 20, 1946) (on file with author) [hereinafter Recommendation for Promotion Memorandum].

7. Press Release, Off. of Pub. Info. Press Branch, Major General Hubert Don Hoover (15 Dec. 1949) (on file with author).

8. Selective Service Act of 1948, ch. 625, 62 Stat. 604 (1948). The legislation also provided that the Corps would have three general officers in the rank of brigadier general, and it stated that the number of judge advocates would be no less than one-and-one-half percent of the authorized strength of the regular Army. *Id.*

9. Fred Borch, 1963 Wire Diagram (illustration) (on file with author); Fred Borch, 1983 Wire Diagram (illustration) (on file with author).

10. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 543(a), 122 Stat. 3, 114 (2008).

11. Fred Borch, 2010 Wire Diagram (illustration) (on file with author).

12. Recommendation for Promotion Memorandum, *supra* note 6.

13. *Id.*

14. *Id. See also* War Department Adjutant General's Form 67-1, Efficiency Report, Hubert D. Hoover, 1 June 1948 to 31 May 1949, 3 July 1949.

15. Email from Major General (Retired) William K. Suter to author (Apr. 30, 2021, 10:04 AM) (on file with author).

16. Telephone interview with Major General (Retired) Thomas J. Romig (Apr. 30, 2021).

17. U.S. Dep't of the Army, DA Form 67-9-1, Officer Evaluation Report Support Form, Ayres, Thomas E. (Oct. 2011) (on file with author); email from Lieutenant Colonel Shay Stanford to author (May 5, 2021) (on file with author).

18.Major Cicero C. Sessions, *The Branch Offices: Two Years of Achievement in MTO*, Judge Advoc. J., Mar. 1945, at 46.

19. Memorandum from Major General Thomas H. Green to Dir., Pers. & Admin., War Dep't Gen. Staff, subject: Recommendation for Promotion (Aug. 16, 1946) (on file with author).

20. *General Promotions—JAG—Army: Major General Franklin P. Shaw*, Judge Advoc. J., Jan. 1950, at 3, 3–4.

21. *Honor Roll: Legion of Merit*, Judge Advoc. J., Sept. 15, 1944, at 59.

22. *Id.*

23. Major General Caffey was forced to retire for his outspoken endorsement of racial segregation. For more on Caffey and his career, see Fred L. Borch, *The Remarkable—and Tempestuous—Career of a Judge Advocate General: Eugene Mead Caffey*, Army Law., May 2014, at 1, 1–6.

24. *Stanley W. Jones Dies*, Wash. Post (Dec. 3, 1982), https://www.washingtonpost.com/archive/local/1982/12/03/stanley-w-jones-dies/072cd471-2e80-4604-8760-218de8af4137/.

25. Judge Advoc. Gen.'s Corps, *supra* note 1, at 238–39.

26. *Id.*

27. U.S. Dep't of Army, Pam. 27-101-150, Appointment of The Assistant Judge Advocate General (1964); *Harry J. Engel*, U.S. Army Off. Candidate Sch. Alumni Ass'n: Hall of Fame, https://ocsalumni.org/at_biz_dir/harry-j-engel/ (last visited June 4, 2021).

28. *Supra* note 27.

29. *Obituaries*, Wash. Post, https://www.washingtonpost.com/archive/local/1998/08/23/obituaries/8d437bf5-4585-42a2-8cda-ffaf5ae66ed2/ (last visited June 4, 2021).

30. Major Percival D. Park, *The Army Judge Advocate General's Corps, 1975–1982*, 96 Mil. L. Rev. 5, 14 (1982).

31. *Id.* at 11.

32. *Id.* at 12–13.

33. The first six judge advocate basic classes were held at TJAGSA on South Post, Fort Myer, Virginia.

34. *Id.*

35. *Id.* at 16–17.

36. *Resumes of Retired Officers*, Gen. Officer Mgmt. Off., https://www.gomo.army.mil/ext/portal/Officer/MasterPrint.aspx (last visited June 4, 2021) (login is required to access this website; MG Suter's resume can be found by searching under the retired officers with last names starting with "S").

37. *Clerk of the Supreme Court of the United States*, Wikipedia, https://en.wikipedia.org/wiki/Clerk_of_the_Supreme_Court_of_the_United_States (Jan. 24, 2021).

38. *Resumes of Retired Officers*, *supra* note 36 (MG Gray's resume can be found by searching under the retired officers with last names starting with "G"). *See also* Fred L. Borch III, *A Brief History of African Americans in the JAG Corps*, Army Law., no. 5, 2019, at 14.

39. Borch, *supra* note 38, at 14.

40. *Resumes of Retired Officers*, *supra* note 36 (MG Altenburg's resume can be found by searching under the retired officers with last names starting with "A").

41. *Id.*

42. *Id.* (MG Wright's resume can be found by searching under the retired officers with last names starting with "W").

43. *Resumes of Retired Officers*, *supra* note 36 (MG Tate's resume can be found by searching under the retired officers with last names starting with "T").

44. *Id.*

45. *Resumes of Active Officers*, Gen. Officer. Mgmt. Off., https://www.gomo.army.mil/ext/portal/Officer/MasterPrint.aspx (last visited June 22, 2021) (MG Risch's resume can be found by searching under the active officers with last names starting with "R").

46. *Id.*

(Credit: moodboard – stock.adobe.com)

Practice Notes

Judge-Alone Special Courts-Martial

A Tool and an Opportunity

By Colonel Christopher E. Martin

The implementation of the Military Justice Act of 2016 (MJA 2016) brought with it the first completely new court-martial forum in over fifty years: the judge-alone special court-martial (JA-SPCM).[1] As the Army approaches its 100th JA-SPCM since the forum came to life on 1 January 2019, now is the perfect time to examine how it has been put to use. By early indications, JA-SPCMs have potential both as a means for commanders to exercise expedient justice, and as a forum that is especially suited to allowing Soldiers who have committed minor misconduct to demonstrate rehabilitative potential.

The Old History Behind a New Type of Court-Martial

The Military Justice Review Group (MJRG) was the high-level group of military justice experts behind many of the recommendations that worked their way into the MJA 2016.[2] Creating a JA-SPCM was among the group's specific proposals for strengthening the structure of the military justice system.[3] The idea was to "incorporate[e] a practice used in U.S. district courts—the judge-alone trial with a punishment cap of six months confinement," in support of the "key principle" of "discipline in the armed forces."[4] The end state was that commanders would have an efficient option to adjudicate

"low-level, misdemeanor offenses"[5] in a forum that was "less burdensome on the command than a special court-martial, but without the option [for the accused] to refuse as in summary courts-martial and non-judicial punishment."[6] The JA-SPCM, in the eyes of the recommenders, could be "particularly useful" in courts-martial that originated from Article 15 turn-downs and summary court-martial refusals, or in deployed environments where it could be difficult to assemble a panel.[7]

The other factor that drove the creation of the JA-SPCM was the increasing experience with judge-alone trials.[8] Prior to 1968, trial by judge-alone was not even an option in courts-martial. General courts-martial were presided over by a law officer,[9] and special courts-martial by the panel president,[10] but in both cases the results and the sentence were deliberated on and voted on by members.[11] The Military Justice Act of 1968 created the statutory role of military judge.[12] With this change, military judges presided over all general courts-martial and special courts-martial authorized to adjudge a bad-conduct discharge,[13] and the accused had the option to elect trial by members or trial by military judge alone. A special court-martial could also be convened without a military judge presiding (referred to as a "straight special"), but punishment was limited to forfeitures and confinement for six months or less, and no punitive discharge.[14] Finally, summary courts-martial could be convened without a military judge.[15] These remained the four types of courts-martial available from 1968 through 2018.

Effective 1 January 2019, the MJA 2016 did away with "straight special" courts-martial and added in something new: the JA-SPCM. Like a straight special, the maximum punishment at a JA-SPCM is limited to six months' forfeitures, six months' confinement, and no punitive discharge.[16] Unlike a straight special, a JA-SPCM must be presided over by a military judge.[17] Although not delineated by statute, under the Rules for Court-Martial, an accused may object to trial by JA-SPCM if the applicable specification alleges (1) an offense for which the maximum authorized confinement would be greater than two years if tried at a general court-martial, except for wrongful use or possession, or attempts thereof, of a controlled substance under Article 112a(b), UCMJ; or (2) an offense for which sex offender notification would be required.[18] Typically, the accused does not have a right to object to a JA-SPCM, because the types of offenses most often referred to this forum allow for a maximum punishment of less than two years. This includes offenses like absence without leave;[19] disrespect;[20] assault consummated by a battery;[21] drunk driving;[22] and drunk and disorderly conduct;[23] in addition to the specific exception for drug use and possession offenses. So, from 2019 to the present, the four types of courts-martial now available to commanders include general courts-martial, special courts-martial empowered to adjudge a bad-conduct discharge, JA-SPCMs, and summary courts-martial. Only summary courts-martial may be conducted without a military judge.

The Beginning of Something New

Judge-alone special courts-martial started off slowly as military justice practitioners tiptoed into the massive changes of MJA 2016, but have been on a steady uptick ever since. In the Army, the first JA-SPCM was tried on 21 March 2019, and a total of nineteen JA-SPCMs were completed in 2019 out of just over 800 total courts-martial.[24] Sixty-two more JA-SPCMs were completed in 2020.[25] As of April 2021, a total 97 JA-SPCMs have been completed in the Army so far.[26]

What do early statistics reveal about the role of JA-SPCMs? First, they span the ranks: the lowest-ranking accused was an E-1; the highest ranking was an O-6.[27] Second, they are capable of facilitating expedient justice under certain circumstances. The author's own trial judge experience with JA-SPCMs may not be entirely representative, but is one snapshot of how the forum has been used so far in two jurisdictions, one in the continental United States and one outside the continental United States. Out of fourteen JA-SPCMs presided over by the author, twelve were directly referred as JA-SPCMs, and two were originally referred as special courts-martial, only to be re-referred as JA-SPCMs pursuant to plea agreements. Twelve of these JA-SPCMs involved plea agreements, either at the time of referral or shortly thereafter, and two were contests. Eleven of the JA-SPCMs were not subject to objection because no specification alleged an offense authorizing confinement greater than two years; the remaining three JA-SPCMs did include objectionable offenses, but the objections were waived. The average time from preferral of charges to completion of trial through sentencing was thirty-nine days when accounting for the twelve guilty-plea cases[28] and twenty-nine days when accounting for only the ten of those that were sent directly to a JA-SPCM. The quickest resolution was twelve days from preferral of charges through completion of trial and sentencing. When using referral as the metric, the quickest resolution was two days from referral to a completed trial (with an Article 35 waiver);[29] three more cases took just five days from referral to a completed trial.

These examples are only part of the picture. A JA-SPCM is fully a court-martial and, depending on the circumstances, may or may not be more expedient than other forums. All of the usual rules apply, including those for production of witnesses and evidence. While a JA-SPCM, by consent or by operation of law, does away with the need to assemble a panel, there may still be a need to produce witnesses from out of the area to conduct trial. So whether a JA-SPCM is more expeditious than other types of courts-martial is always case-specific.

One more aspect of JA-SPCMs that may contribute to expedient justice is their lower level of disposition. Judge-alone special courts-martial are typically convened by special courts-martial convening authorities,[30] often a brigade commander or an O-6 convening authority in an equivalent position. This makes the JA-SPCM the lowest-level court-martial in front of a military judge that can be convened without forwarding the case to a general court-martial convening authority.[31] On the whole, the ability of JA-SPCMs to expediently resolve low-level offenses is consistent with the idea behind courts-martial jurisdiction in the first place, to provide a "prompt, ready-at-hand means of compelling obedience and order,"[32] or discipline. The potential for military magistrates to preside over JA-SPCMs could contribute to even quicker resolution of JA-SPCMs, as

magistrates—unlike military judges—would not have to juggle other caseloads to get JA-SPCMs tried quickly.[33]

An Opportunity for the Accused, Too

In all fairness, it is doubtful that many accused view going to court-martial as an "opportunity." That being said, a JA-SPCM offers potential advantages to the accused that may not be as readily available in other court-martial forums. First, referral to a JA-SPCM means that a punitive discharge is off the table. It is only logical then to assume that "the potential of the accused for rehabilitation and continued service" is a factor behind the decision to refer the case to a JA-SPCM.[34] While rehabilitation is a sentencing consideration in any court-martial,[35] the very fact that punishments are limited and that a punitive discharge is prohibited in a JA-SPCM is an opportunity for the accused to make rehabilitation a more central factor of their sentencing case. Of course, a JA-SPCM also still affords an accused every right and opportunity to plead "not guilty" and to seek a full acquittal, if the accused wishes to do so.

Another aspect not unique to JA-SPCMs, but that may play out especially effectively in this forum, is the possibility for suspended sentences. Suspending all or part of a sentence is wholly within the discretion of the convening authority,[36] but a military judge may recommend suspension upon request of counsel, or *sua sponte*. Consistent with the policy that charges should be disposed of at the "lowest appropriate level,"[37] a brigade-level commander who convenes a JA-SPCM is typically that much closer to the accused's unit and situation when deciding whether to suspend all or part of a sentence. Of the fourteen JA-SPCMs adjudicated by the author, five resulted in recommendations for partial suspension of the sentence, several of which were approved by the respective convening authorities. Each judge makes their own decision as to recommending suspension, and the advent of the JA-SPCM does not necessarily mean that suspension recommendations, or suspended sentences, will be more frequent. But in cases where the military judge is convinced, for example, that a partially-suspended sentence may incentivize the accused to rehabilitate themselves and avoid future misconduct, an appropriately-articulated suspension recommendation can provide useful information to the convening authority when acting on the sentence.[38]

The typically rapid post-trial disposition of JA-SPCMs is another benefit of the forum, which potentially serves the interests of the command, the accused, and the justice process all at once.

Also not unique to JA-SPCMs, but perhaps particularly suited to the rehabilitative aspect of the forum, is the opportunity for the military judge to articulate the reasons for his sentence. Although no explanation is required or perhaps commonly given for court-martial sentences, the Supreme Court in relation to the federal requirement called it "sound judicial practice" to state the reasons for a sentence in open court.[39] Explaining the reasons for a sentence, when constrained to evidence that is available on the record, can help all participants and the accused understand the sentence. When rehabilitation is an appropriate consideration, it can also serve a "salutary purpose" [40] for the military judge to directly address the accused, and hopefully encourage the accused to avoid future misconduct. The task of the trial court is never to lecture or reprimand the accused. But a court-martial is likely a significant event in the accused's life. If the judge can say anything to an accused, based on the evidence presented, that will motivate them to overcome their wrong or to improve their behavior, then the accused, the unit, the Army, and ultimately society stand to benefit.[41]

The typically rapid post-trial disposition of JA-SPCMs is another benefit of the forum, which potentially serves the interests of the command, the accused, and the justice process all at once. In the author's experience, the time from completion of trial to entry of judgment for a JA-SPCM is typically a matter of days, not weeks; the quickest time between these two milestones was five days. The quickest total post-trial disposition, from completion of trial to authentication of the record, was thirteen days. While "fast" is not always an end in and of itself, these examples show that JA-SPCMs are indeed capable of meeting their intended role as an efficient means to resolve low-level offenses.

Finally, the after-the-fact implications of a JA-SPCM conviction and sentence may play out differently for an accused than they would for a special or general court-martial conviction and sentence. Though the way in which a federal or state jurisdiction treats a JA-SPCM conviction and sentence is not an issue for consideration by the military judge,[42] it may be a consideration for the accused and convening authority when negotiating or deciding a case disposition.[43] Overall, the JA-SPCM appears situated to occupy the useful middle ground between alleged offenses that are "serious" enough to warrant a court-martial, but still "petty" enough that felony-level penalties are not warranted.

Conclusion

While still a new forum and with relatively few cases to date, early indications are that JA-SPCMs are capable of serving their intended purpose, as an efficient means to resolve low-level offenses, while also allowing the accused to have their day in court in a way that preserves the accused's rights and interests. Where the JA-SPCM goes from here remains to be seen, but it appears to be an innovation of MJA 2016 with room to grow. **TAL**

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Notes

1. Formally referred to by statute as a "special court-martial consisting of a military judge alone." *See* UCMJ art. 16(c)(2) (2017); UCMJ art. 19(b) (2016).

2. The MJRG, headed by the Honorable Andrew Effron, former Chief Judge of the Court of Appeals for the Armed Forces (CAAF), was directed by then-Secretary of Defense Chuck Hagel to conduct a holistic review of the Uniform Code of Military Justice (UCMJ) under "guiding principles" that included reassessing the existing UCMJ, examine to what extent the practices of U.S. District Courts could be implemented

into court-martial practice, and to apply the UCMJ as uniformly across the services as possible. *See* Mil. Just. Rev. Grp., Report of the Military Justice Review Group, Part I: UCMJ Recommendations 14 (2015) [hereinafter MJRG Report]. The MJRG completed its substantive report in December 2015. *Id.* at 5.

3. MJRG Report, *supra* note 2, at 6.

4. *Id.* at 222. The U.S. Code defines a "petty offense" as a Class B misdemeanor, a Class C misdemeanor, or an infraction. 18 U.S.C. § 19. The most serious of these, a Class B misdemeanor, is classified for sentencing purposes as an offense for which the maximum term of imprisonment authorized is six months or less. 18 U.S.C. § 3559. Under federal rules, a defendant has the right to a jury trial "unless the charge is a petty offense." Fed. R. Crim. P. 58(b)(2)(F).

5. MJRG Report, *supra* note 2, at 1218.

6. *Id.* at 222.

7. *Id.*

8. *Id.* at 221.

9. Manual for Courts-Martial, United States ¶ 39 (1951).

10. *Id.* ¶ 40.

11. *Id.* ¶ 41.b.

12. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

13. UCMJ art. 19 (2016).

14. *Id.*

15. UCMJ art. 16(3) (2017).

16. UCMJ art. 19(b) (2016). Although the statutory amendments that created the JA-SPCM only specifically refer to the prohibition of a "bad-conduct discharge," which would apply to enlisted personnel, no type of special court-martial is authorized to adjudge a dismissal for an officer. *See* Manual for Courts-Martial, United States, R.C.M. 201(f)(2)(B) (2019) [hereinafter MCM].

17. Unless both parties consent to a military magistrate presiding.

18. MCM, *supra* note 16, R.C.M. 201(f)(2)(E).

19. MCM, *supra* note 16, pt. IV, ¶ 10.d.

20. *E.g., id.* ¶ 15.d(1)-(2).

21. *Id.* ¶ 77.d(2).

22. *Id.* ¶ 51.d.

23. *Id.* ¶ 98.d.

24. This data is drawn from the Army Court-Martial Information System (ACMIS) on JAGCnet, https://www.jagcnet.army.mil/Sites/JAGC.nsf (last visited May 17, 2021). The ACMIS, which is accessible to clerks of court and military judges via login, is a web-based management tool developed by the OTJAG Information Technology Division to monitor and track courts-martial using Court-Martial Case Reports (CMCRs). The CMCR reports case details and triggers the Army's tracking system for post-trial processing. *See* U.S. Army Trial Judiciary, Standing Operating Procedures (12 Feb. 2018) (on file with author).

25. *Id.* The total of 81 JA-SPCMs through 2020 excludes cases for two individuals that were "double reported," which happens, for example, when a case is withdrawn after arraignment and then re-referred.

26. *Id.*

27. Since summary courts-martial may not try officers, a JA-SPCM is the most limited court-martial forum which can be referred for an officer accused. See MCM, *supra* note 16, R.C.M. 1301(c)(1). And for any accused, a summary court-martial is not a criminal forum and a finding in a summary court-martial is not a criminal conviction, making the JA-SPCM the lowest level of a truly criminal court-martial forum. *Id.* R.C.M. 1301(a).

28. Data is still pending for the two contests.

29. *See* UCMJ art. 35 (2016); MCM, *supra* note 16, R.C.M. 602(b)(1)(B) (no person may be brought to trial in a special court-martial "from the time of service of charges…through the third day after the date of service," unless the accused waives any objection).

30. General court-martial convening authorities (GCMCAs) may of course convene any lower level court-martial, including JA-SPCMs, as sometimes happens due to the GCMCA's withholding policy. *See* MCM, *supra* note 16, R.C.M. 407(a)(4).

31. Subject to any withholding by higher authority pursuant to R.C.M. 401(a), or jurisdictional limitations such as those applicable to certain sexual offenses. *See* MCM, *supra* note 16, R.C.M. 201(f)(1)(D).

32. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

33. Article 19(c), UCMJ, allows for properly-designated military magistrates, with the consent of both parties, to preside over JA-SPCMs, a practice not yet implemented in the Army.

34. MCM, *supra* note 16, app. 2.1, sec. 2.5f.

35. See UCMJ art. 56(c)(1)(C)(vi) (2019) (discussing, among other sentencing considerations, the need for the court-martial sentence to "rehabilitate the accused.").

36. See MCM, *supra* note 16, R.C.M. 1107.

37. *Id.* R.C.M. 306(b).

38. There is nothing in the UCMJ, Rules for Courts-Martial, or other guidance that requires a judge to articulate the reasons for a suspension recommendation in a JA-SPCM. *See, e.g.,* MCM, *supra* note 16, R.C.M. 1109(f) (requiring a recommendation of a military judge in order for the convening authority to suspend a sentence to a punitive discharge or confinement in excess of six months—sentences not applicable in a JA-SPCM). On the other hand, nothing prohibits a military judge from articulating the reasons for his sentence recommendation. When recommending a sentence suspension in a JA-SPCM, the author finds it helpful to articulate the evidence-based reasons on the record, and in blocks 25-28 of the Statement of Trial Results (STR). *See* MCM, *supra* note 16, R.C.M. 1101(a)(5) (describing the requirements for a suspension recommendation in the STR).

39. Rita v. United States, 551 U.S. 338, 356 (2007).

40. *Id.* As the Court in *Rita* recognized, "often at sentencing a judge will speak at length to a defendant, and this practice may indeed serve a salutary purpose." *Id.* at 357.

41. *See, e.g.*, United States v. Green, 64 M.J. 289, 291-92 (C.A.A.F. 2007) (explaining that even though the 1951 *MCM* provision that authorized the court-martial to provide "a brief statement of the reasons for the sentence" was removed in later revisions, the removal "was not intended to preclude the military judge, in a bench trial, from setting forth reasons for the judge's decision."). In *Green*, the CAAF took no issue per se when the sentencing military judge addressed the accused to explain "why I think the sentence is appropriate for you," with reference to basic sentencing principles and the evidence presented in the case, including the harm to the accused's victims, his family, and the Army. *Id.* at 292. The issue of discussion in *Green* was the military judge's use of religious references, which prompted the Court to note (but not find error in the case) that "[a] military judge may not interject his or her personal beliefs into the sentencing process." *Id.* at 293. As long as a trial judge sticks to evidence introduced at trial, and resists bringing in personal thoughts or references from outside of the record, no appellate court is likely to find error in addressing the accused.

42. *See, e.g.*, UCMJ art. 56(c)(1) (2017) (laying out permissible sentencing considerations); United States v. Talkington, 73 M.J. 212, 215 (C.A.A.F. 2014) ("The general rule concerning collateral consequences is that 'courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.'") (internal citations omitted).

43. How a JA-SPCM conviction and sentence are classified in a federal or state jurisdiction could, for example, affect a subsequent sentence in the unfortunate event that the accused ever finds himself in federal or state court. *See, e.g.*, U.S. Sent'g Comm'n, Guidelines Manual § 4A1.2 (2018) (explaining that a "prior sentence" when computing "criminal history" status generally includes sentences by a special court-martial, but that certain offenses such as reckless driving or disorderly conduct may be excluded if the sentence to confinement was less than thirty days, and the prior offense is dissimilar to the currently-charged offense); State v. Reed, 2000 Kan. App. Unpub. LEXIS 694 (Ct. App. Kan. 2000) (discussing how, under Kansas state, prior military convictions are classified as felonies or misdemeanors, and how military convictions are determined to be one or more "counts" of the offense at issue); *In re* **Nelson**, 87 Va. Cir. 203 (Cir. Ct. Fairfax Cnty. 2013) (classifying a special court-martial conviction as a misdemeanor conviction under Virginia state law). Again, none of this directly involves the trial court at the JA-SPCM; the intent here is just to point out that how a JA-SPCM conviction plays out might be worth exploring by counsel.

Members of the JAG Corps's DEI Council discuss the way ahead via MS Teams. (Credit: CW3 Jessica Marrisette)

Practice Notes

The JAG Corps's DEI Council Established

By Karen H. Carlisle, Chief Warrant Officer 5 Ron E. Prescott, & Chief Warrant Officer 3 Jessica P. Marrisette

The Judge Advocate General's (JAG) Corps's Council on Diversity, Equity, and Inclusion (DEI) ("the Council") has been going full tilt since its inception in July 2020. The twenty Council members appointed by The Judge Advocate General (TJAG) represent a diverse pool, reflective of our Corps's population across race, gender, rank, and component. The Council aims to ensure our Corps is best postured for maximum talent management of every single member of our Judge Advocate Legal Services (JALS) family, ensuring we are educated and aware of DEI-related considerations at every possible turn. This article shares with the Corps some of the initiatives and engagement the Council has been involved in over the past year.

Establishment of the Office of Diversity, Equity, and Inclusion (ODEI)

On 25 March 2021, TJAG established the ODEI, led by Colonel (COL) Luis Rodriguez. The ODEI's mission is to provide leadership and guidance in the formulation, execution, and management of policies and practices that foster a diverse, equitable, and inclusive environment consistent with the core values of the JALS. To accomplish this mission, the ODEI's charter includes data analysis and metrics, policy review and development, training, advisory support, and diversity recruiting (equal opportunity and sexual harassment/assault response and prevention are beyond the scope of the DEI's charter). The ODEI will accomplish its mission through mutually-supportive engagements with all JALS activities that are primari-

ly responsible for the missions of recruiting, retaining, and developing JALS personnel. We are excited to put COL Rodriguez to work.

Survey to the Field

The Judge Advocate General provided an opportunity for JALS members to identify issues related to DEI via survey in fall 2020. There were 1,801 responses. Respondents overwhelmingly believe that the JAG Corps does extremely well with issues of sexual assault, sexual harassment, and discrimination.[1] Success is attributed to the fact that, as a Corps, we are, in part, responsible for delivering justice, and providing support to victims.[2] Success was also attributed to JAG Corps leaders who strongly denounce behaviors which fall short of Army and JAG Corps values.[3]

Some survey comments reveal, however, that within the JAG Corps there are perceptions of personnel being discriminated against and reports of actual discrimination, or exclusion based on race, gender, ethnicity, or sexual orientation.[4] There were relatively few instances where respondents reported that an organization's culture was blatantly racist, or that they overheard racially-insensitive comments. Most respondents who expressed concerns about racial discrimination were worried that implicit bias could impact career success or influence assignment decisions.[5] The survey revealed a lack of trust and transparency regarding how decisions that impact minorities are made.[6] This sentiment was most pronounced in the ethnic minority female population who conveyed a feeling of being unwelcomed in the Corps.[7] Respondents were also cautious about sharing concerns with their leadership based on fears of reprisal.[8] The survey gave senior leaders and the ODEI insight into JALS members' daily experiences that are not frequently discussed, and the results provided a baseline that reveals where to focus future initiatives and against which to measure growth and success.

Listening Sessions

Since 29 October 2020, over 200 people across the globe participated in one of the five DEI listening sessions. A report of the comments and recommendations from these virtual sessions is being compiled for use by the Council in advising TJAG. The open and frank dialogue of these sessions was invaluable in giving the Council a broader understanding of the concerns and issues that exist across our Corps. We are very proud of all of the participants for their willingness to share their fears, challenges, and experiences—both positive and negative. Everyone's voice matters!

Field Boards

The DEI Council has established nine field boards representing all ranks and levels of military members and Civilian employees. The boards will discuss and analyze a specific line of effort every two months. The first line of effort is recruiting. The chief of the Judge Advocate Recruiting Office (JARO) briefed the field boards on our recruiting efforts, and the boards have met virtually since April 2021. The field boards provided their analysis and recommendations to the DEI Council at the end of May 2021. The boards will then be given a new topic to address. Talk with field board members near you to hear about what they are doing.[9]

Naming of the Regimental Reading Room at TJAGLCS

With the recent passing of Sergeant Major (SGM) John H. Nolan, our first Regimental Sergeant Major and a trailblazer in our Corps, naming a room at our Regimental home honors his impact on our Corps and his dual legacy. Before becoming a legal clerk, SGM Nolan enlisted as an 11B Infantryman and then went to Officer Candidate School and became an officer. He eventually returned to the active duty enlisted ranks as a legal clerk.[10] The Regimental Reading Room adjacent to the library and Noncommissioned Officer Academy at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia, has been renamed the SGM Nolan Regimental Reading Room. The renaming perfectly captures his dual legacy as both an officer and noncommissioned officer because the location of the room physically unites the Academy's area of operations to an area of the building frequented by officer students.

Conclusion

The Council wants to hear from you! Submit comments or recommendations to be considered in future DEI initiatives to the Council at usarmy.pentagon.hqda-otjag.mbx.jagc-diversity-inclusion@mail.mil. You can also keep up with the Council on MilSuite at https://www.milsuite.mil/book/community/spaces/armyjag/council-on-diversity-equity-inclusion and JAGCNet at https://www.jagcnet2.army.mil/Sites/DivInc.nsf/home.xsp. **TAL**

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Notes

1. Office of The Judge Advocate General, Defense Organizational Climate Survey, 6 Oct. 2020–6 Nov. 2020.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *JAG Corps Diversity, Equity & Inclusion Council Field Board Member Roster*, JAGCnet, https://www.jagcnet2.army.mil/Sites/DivInc.nsf/0/77212AE41FC44337852587030051C159/%24File/JAGC%20DEIC%20Field%20Board%20Member%20Roster.pdf (last visited July 13, 2021) (Field Board member assignments are available via login to Department of Defense members).

10. For more on Sergeant Major Nolan's career, see Fred L. Borch III, *In Memoriam*, Army Law., no. 1, 2021, at 17, 21–22.

(Credit: Syda Productions – stock.adobe.com)

Practice Notes

Understanding the Proper Response and Mitigating Civil Liability for DV Incidents

A Primer for JAs

By Major Richard J. Connaroe II

A Texas civilian plaintiff's attorney glares at the witness and questions, "If you had done your job as a commander, Mrs. Giffa would be alive today, wouldn't she, Major Miller?" In federal civil court in Austin, Texas, a former company commander sits on the stand for hours, defending her response to a domestic violence (DV) incident years earlier between a Soldier and his spouse.[1] It is clear that she cared deeply for her Soldiers and their Families, and this case haunts her. After four grueling hours of testimony, the plaintiff's attorney asks, "After you let Specialist Giffa return home from the no-contact order, how long do you think it was before he killed everybody?" It is a commander's worst nightmare—having to defend their actions to a federal judge and being second-guessed by civilian attorneys who have never spent a day in the Army. How did the commander get here, in federal civilian court?

This ordeal began four years before the civil trial. On 22 February 2015, during a Sunday evening in Killeen, Texas—just two days after his commander lifted his no-contact order, Specialist (SPC) Giffa (a 92A logistical specialist with the 69th Air Defense Artillery Brigade) went to his neighbor's home, where his wife was staying. He asked her to come home, but she refused. He left and returned

to his neighbor's home carrying the pistol he bought the day before. He then shot and killed two of his neighbors inside their home. He dragged his wife onto the front lawn and savagely beat her. When a neighbor confronted him, he shot her twice. He then dragged his wife across the lawn into their home and killed her; moments later, with his arms around her, he killed himself.

The grieving families of SPC Giffa's victims filed a civil suit against the United States, seeking $61 million in compensation. They were not the only ones shocked by this tragic loss. Specialist Giffa's chain of command was also stunned and confused. Less than two weeks before this believed-to-be quiet Soldier's homicidal rampage, the Killeen Police determined that SPC Giffa was the victim of his wife's physical abuse in a DV incident.

However, in their suit, the victims alleged that the Army—specifically SPC Giffa's command—failed to protect Mrs. Giffa and the neighbors; they also argued that the command failed to follow Army regulations. Although a nine-day trial proved otherwise, defending this case required the testimony of the then-company, battalion, and garrison commanders. The Chief of Staff of III Corps spent two days in a federal courthouse waiting to provide testimony that was ultimately never requested. This is an ordeal that no command wants to go through. This article seeks to prevent it from occurring again.

Commanders and legal advisors want to take care of Soldiers and their Families, especially regarding DV; but, often, they are not familiar with procedures and policies applicable for DV responses. There is no uniform procedure enshrined in Army regulations, which means DV policies are often a patchwork of the rules and regulations for both Army and local authorities and are informed with state-specific laws as well. It is likely that DV incidents will rise in the next few months.[2] The Coronavirus Disease (COVID)-19 pandemic has been financially and emotionally stressful and full of uncertainty, and domestic violence rates are on the rise.[3] Tragic events sometimes result in civil lawsuits, and courts are increasingly likely to closely examine the Army's actions and words in determining liability for a breach of duty—or assumed duty.

Commanders and legal advisors want to take care of Soldiers and their Families, especially regarding DV; but, often, they are not familiar with procedures and policies applicable for DV responses.

To enable consistency in applying Army policy, which mitigates the occurrence of future federal civil litigation, this article provides a basic understanding of a commander's duties in responding to domestic violence and the Army's potential tort liability for their actions. To do so, this article uses the tragic case of SPC Giffa as a guide. First, it discusses the Army's potential civil liability for its response to DV through the Federal Tort Claims Act (FTCA). Next, it discusses exceptions to the FTCA which provide immunity to liability. Then, it focuses on the exceptions to the FTCA that provide immunity from liability and are part of the framework to guide command policies for DV. Obviously, the primary focus for DV response should be ensuring allegations of domestic violence are treated seriously, are investigated, and that victims are offered appropriate services consistent with existing policy. Finally, this article provides a standard operating procedure of consolidated mandatory and recommended actions in response to DV. It also provides a sample installation policy regarding DV response.

Liability for Domestic Violence Response Through the FTCA

An overview of civil litigation and the FTCA is critical to understanding how to limit the Army's liability and prevent commanders from potentially testifying at a federal civil trial. While civil litigation should never drive policy, as the command's focus should always be reporting instances of DV, understanding civil liability and how to minimize litigation risk is an important consideration for the attorneys that advise them.

As a sovereign, the United States may not be sued without its consent.[4] For a court to have jurisdiction and allow citizens to sue the federal government, a plaintiff must show that one of the limited waivers of sovereign immunity applies.[5] One such waiver of sovereign immunity is for injury or damages caused by the negligence of federal employees acting within the scope of their employment under the FTCA.[6]

The FTCA makes the federal government liable for its tortious acts to the same extent as a private person would be.[7] Through the FTCA, an injured party can file a civil lawsuit and establish the United States 1) had a duty, 2) breached that duty, and 3) caused the harm which resulted in 4) damages.[8] Therefore, victims of DV could—and in fact do—file lawsuits, alleging the Army violated its duties which resulted in the DV incident. As they potentially testify in a federal court about their decisions, actions, and inactions, this litigation subjects commanders to national scrutiny and exposes the Army to litigation costs and possible damages.

FTCA Exceptions Provide Liability Immunity and Can Inform Policy and Training

Having explored the basics of the FTCA, it is time to turn toward its applicable statutory exceptions in the context of domestic violence response. A brief discussion of the two exceptions most applicable to DV response—the intentional tort and discretionary function exceptions—is required to inform brigade judge advocates (BJAs) and staff judge advocates (SJAs) when advising commanders and drafting local DV response policies. This will ensure the command's response comports with Army regulations, which minimizes the risk for future civil litigation.

The Intentional Tort Exception: Immunity from the Criminal Acts of Service Members

Though the federal government is generally treated like a private person under the FTCA, the government enjoys additional protections from civil suit.[9] The FTCA

carves out several broad exceptions to the waiver of sovereign immunity, such as when federal employees exercise discretion in their decision-making.[10] Notably, the government is also not liable for the criminal actions of federal employees that constitute intentional torts—specifically, assault, battery, false imprisonment, false arrest, abuse of process, libel, and slander.[11] The United States can invoke an exception by filing a motion to dismiss at the outset of litigation, asserting sovereign immunity remains and that the court must dismiss for a lack of jurisdiction.[12] This invocation for lack of jurisdiction terminates the litigation without either discovery or a trial—a tremendously powerful tool for the United States.

Courts, however, are increasingly likely to delay dismissing a case outright. They continue the analysis and thoroughly consider whether the Army had a duty to protect people—by policy or its assurances—independent of the intentional tort exception, and will seek to determine whether the Army breached its duties.[13] Specifically, courts consider the words of commanders to determine whether the Army assumed a duty to protect a DV victim. While the Army generally has neither a duty nor the ability to protect an individual from future violence, a sympathetic commander might erroneously assure a victim safety—thereby assuming a duty. Therefore, to ensure through discovery (and even trial) that the victim does not have a cognizable claim of liability for negligence of the assumed duty (despite immunity for intentional torts), courts are less likely to grant a motion to dismiss at the outset of litigation.

In the case of the Giffa murders, while his actions clearly constituted intentional criminal acts, the court's analysis did not end with the intentional tort exception to the FTCA. Since the victims alleged in their lawsuit that—through its policies and commanders' actions—the Army undertook a duty and thereafter failed to protect Mrs. Giffa, the litigation continued through trial and the subsequent appeal.[14] After over four years of litigation, and a nine-day civil trial—which included testimony of the then-company, battalion, and garrison commanders—the court held that the Army owed no duty to the neighbors and dismissed their claims with prejudice pursuant to the intentional tort exception. The court, however, declined to rule on the close question as to whether the Army owed a duty to Mrs. Giffa because it could dismiss on another exception to the FTCA—the discretionary function exception.

The Discretionary Function Exception: Immunity for Decision-Making

Because the FTCA provides immunity when federal employees exercise discretion in their decision-making, generally, the Army cannot be liable for the discretionary actions of its federal employees.[15] With the discretionary function exception to the FTCA, Congress intended to prevent "judicial second-guessing" of legislative and administrative decisions and litigation of policy through tort.[16] The Supreme Court has provided a two-part test for determining whether a federal employee's conduct qualifies as a discretionary function.[17]

First, the conduct must be a matter of choice, meaning neither state statute nor federal regulation binds the employee to act in a particular manner.[18] This leaves the decisions of when and how to act to the employee's discretion.[19] If the conduct was mandatory, which is often signaled with the words "must," "shall," or "will," the discretionary function does not apply. If, however, the conduct was discretionary, the court next considers whether the discretionary function exception was meant to shield this type of judgment from judicial second-guessing.[20] Existence of a regulation or policy that does not direct specific action creates the strong presumption of agency consideration and intentional promulgation of discretion.[21]

In the case of the Giffa murders, the court found that the Army had mandatory duties to Mrs. Giffa but not the neighbors; in other words, the discretionary function exception applied. Specifically, the court found that the company commander took Mrs. Giffa's allegations seriously and exercised reasonable care; it further found that the victims did not rely on the Army.[22] The Fifth Circuit Court of Appeals affirmed two years later; but the plaintiffs may petition the Supreme Court of the United States for certiorari, and the appellate process may span years—possibly resulting in a new trial with the commanders all testifying again.[23]

Looking forward, the best way to limit commander testimony and judicial second-guessing of command decisions is to consistently comply with mandatory policies and procedures. In addition, commanders, informed by legal advice, should frame local policies with discretion (when appropriate), and, when local policies create additional mandatory duties, do so deliberately. To best understand how to respond to domestic violence, the standard operating procedure (SOP) in Appendix A consolidates the mandatory actions commanders must take; these actions are labeled as "Mandatory Action" only when necessary to distinguish them from non-mandatory actions. The SOP also delineates discretionary actions from regulations and recommended actions that commanders may take. Further, the sample policy for DV response in Appendix B models appropriate discretion. Brigade judge advocates and SJAs may incorporate these policies into their local regulations.

Sample Installation Policy on Response to DV

Many installations have policies on response to DV, but there is little uniformity.[24] The sample policy in Appendix B seeks to remedy that by consolidating mandatory policies while providing subordinate commanders the maximum amount of discretion. Consistently following mandatory policies not only protects victims, but it also lowers the risk of civil litigation. Further, the more discretion a policy provides to subordinate leaders, the more efficiently the subordinate leader is able to address that particular situation, which means the litigation risk lowers. Rather than draconian policies, the best recourse to prevent DV is training.

When reviewing these policies, legal advisors should consider whether the installation commander intends for company, battalion, and brigade commanders to exercise their best judgement—their discretion—or whether the installation commander wants to make a mandatory, more stringent policy than the requirements of Army Regulation 608-18, *The Army Family Advocacy Program*.[25] For example, a mandatory, 72-hour no-contact order does not allow subordinate commanders to permit passing

of the custody of children or discussion of finances, property matters, or even family emergencies.[26] When drafting a policy, it is best practice to explicitly afford company and battalion commanders discretion in the written policy memorandum. By prudently assuming risk in delegating decision-making to the lowest level, the Army actually responds more appropriately to domestic matters and decreases the risk of future civil litigation. When commanders exercise their discretion and judgment, they are able to make common sense decisions to take care of Soldiers and Families, and the Army is shielded from liability.

Conclusion

Commanders and their legal advisors must be familiar with their duties to effectively respond to DV incidents. However, they must also be mindful not to assume duties, especially a duty to investigate or to protect, that they cannot execute. Just as commanders may make the situation more dangerous and less predictable by assuming a duty, installation commanders may hamstring subordinate commanders by creating additional mandatory duties in local policies. Commanders must remember that they are taking care of their people when they understand what actions they are required to take and when they enable law enforcement and Family Advocacy Program personnel to perform their roles.

This may be more important now than ever, as the stress and uncertainty of the COVID-19 pandemic will likely exacerbate DV incidents. With increased DV incidents, the risk also arises that—particularly if commanders make inappropriate assurances of protection to victims—a chain of command will have to sit through a nine-day trial with civilian attorneys questioning their character and judgment four years from the date of the incident.

The SOP and sample policy letter can help reduce the risk of judicial second-guessing at civil trials, thereby ensuring commanders and Soldiers are kept out of the courtroom and remain in the field—ready to fight and win the Nation's wars.[27] **TAL**

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Notes

1. *See* Kristensen v. United States, 372 F. Supp. 3d 461 (W.D. Tex. 2019) (a nine-day civil trial in September 2019 regarding a triple homicide-suicide that occurred four years prior, on 22 February 2015, in Killeen, Texas).

2. *See* Kyle Rempfer, *Army Green Beret Colonel, I Corps Chief of Staff Arrested for Domestic Violence Allegations*, Army Times (Dec. 28, 2020), https://www.armytimes.com/news/your-army/2020/12/28/army-green-beret-colonel-i-corps-chief-of-staff-arrested-for-domestic-violence/.

3. *See generally* Andrew M. Campbell, *An Increasing Risk of Family Violence during the Covid-19 Pandemic: Strengthening Community Collaborations to Save Lives*, 2 Forensic Sci. Int'l Reports art. no. 100089 (Apr. 2, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7152912/. *See also* Tess Cagle, *Domestic Violence Statistics are Surging During the COVID-19 Pandemic*, Nautilus (Sept. 23, 2020, 4:06 PM), https://coronavirus.nautil.us/domestic-violence-statistics/ (stating spiking statistics of domestic violence during the pandemic); *but see* Megan L. Evans et al., *A Pandemic Within a Pandemic—Intimate Partner Violence During Covid-19*, New Eng. J. Med. (Sept. 16, 2020), https://www.nejm.org/doi/full/10.1056/NEJMp2024046 (stating many organizations saw a decrease in domestic violence calls during the pandemic and reasoning that victims are dependent on their abusers and cannot seek help).

4. United States v. Sherwood, 312 U.S. 584 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* at 586 (citations omitted).

5. United States v. Mitchell, 463 U.S. 206, 212 (1983).

6. Definition of Tort Claims Procedure, 28 U.S.C. § 171 (2006).

7. United States as Defendant, 28 U.S.C. § 1346(b)(1); United States v. Orleans, 425 U.S. 807 (1976).

8. Liability of United States, 28 U.S.C. § 2674 (allowing the United States to be liable "in the same manner and to the same extent as a private individual in like circumstances"). *See also* Firestone Steel Prod. Co. v. Barajas, 927 S.W.2d 608, 613 (Tex. 1996) (stating the elements of negligence); Hoffstatter v. City of Seattle, 20 P.3d 1003 (Wash. Ct. App. 2001); Castellon v. U.S. Bancorp, 163 Cal. Rptr. 3d 637 (Cal. App. 2013).

9. Exceptions to Tort Claims Procedure, 28 U.S.C. § 2680.

10. *Id.*

11. 28 U.S.C. § 2680(h).

12. Aviles v. Lutz, 887 F.2d 1046 (10th Cir. 1989).

13. *See* Wilburn v. United States, 616 F. App'x 848 (6th Cir. 2015); Kristensen v. United States, 372 F. Supp. 3d 461 (W.D. Tex. 2019); Cuadrado-Concepcion v. United States, 2020 U.S. Dist. LEXIS 143040 (Ga. S.D.C. 2020).

14. *See* Kristensen v. United States, 372 F. Supp. 3d 461 (W.D. Tex. W.D. 2019); Kristensen v. United States, 993 F.3d 363 (5th Cir. 2021).

15. 28 U.S.C. § 2680(h).

16. Berkovitz v. United States, 486 U.S. 531, 537 (1988).

17. *Id.* at 536.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Kristensen v. United States, 372 F. Supp. 3d 461 (W.D. Tex. 2019).

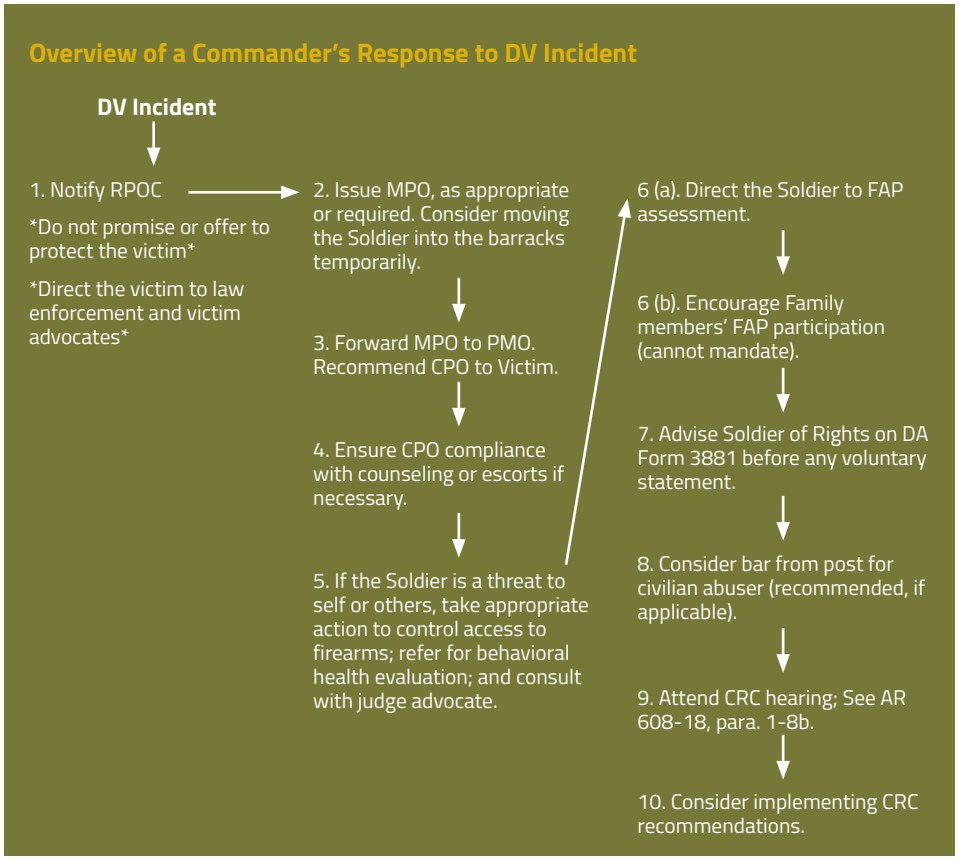
23. Kristensen v. United States, 993 F.3d 363 (5th Cir. 2021) (affirming the lower court's dismissal of the case, holding that the plaintiffs failed to show that the Army's negligence caused the deaths).

24. *See, e.g.*, Memorandum from Commander, U.S. Army Garrison Fort Bragg, subject: Installation Policy Letter #40—Command Response to Incidents of Domestic Violence (15 Nov. 2019); Memorandum from Commander, III Corps and Fort Hood, subject: Army Family Advocacy Program (AFAP) (23 Aug. 2017); Memorandum from Commander, U.S. Army Garrison Fort Bragg, subject: Garrison Policy Letter #10—Family Advocacy Program (FAP) (14 Jan. 2020); Memorandum from Commander, I Corps and Joint Base Lewis-McChord, subject: Policy on Domestic Violence (1 Jun. 2017); First Armor Division and Fort Bliss, Reg. 27-10, Military Justice para. 5-1 (18 Nov. 2016); Memorandum from Commander, 101st Airborne Division (Air Assault) and Fort Campbell, subject: Policy Letter 7—Command Response to Incidents of Domestic Violence (1 Apr. 2019); Memorandum from Commander, 1st Infantry Division and Fort Riley, subject: Family Advocacy Program (FAP) Policy (31 Aug. 2020); Memorandum from Commander, U.S. Army Maneuver Center of Excellence, subject: Physically Separating Parties Involved in Domestic Violence (23 Sept. 2020).

25. *See generally* U.S. Dep't of Army, Reg. 608-18, The Army Family Advocacy Program (30 Oct. 2007).

26. *Id.* para. 1-8b.

27. U.S. Army Litig. Div., *Lit Div Vision*, JAGCnet (Sept. 12, 2013, 10:32 AM), https://www.jagcnet2.army.mil/Sites/litigationdivision.nsf/homeContent.xsp?documentId=9C6C6CD80B6B552885257BE4004FEB80 (stating the mission of the Litigation Division, U.S. Army Legal Services Agency: "Keeping Soldiers in the field—and out of the courtroom!").



Appendix A

Sample DV Response Standard Operating Procedure[1]

1. Pre-DV Incident: Mandatory Commander Training

a. Commander. Within 45 days of assuming command, commanders must attend spouse and child abuse commander education programs.[2]

b. Unit. Commanders must also schedule awareness briefings by Family Advocacy Program (FAP) personnel for their Soldiers.[3]

2. Pre- and Post-DV Incident: Encourage Victim Reporting

a. Installation. Commanders must encourage Soldiers and Family members to report suspected spouse or child abuse to law enforcement.[4]

b. Abusers. Commanders must encourage abusers to seek services from FAP counseling personnel.[5] However, regarding questioning abusers, see paragraph 14. Also, see paragraph 5 regarding law enforcement investigating instances of DV, not commanders.

3. Mandatory and Immediate Notification of Alleged DV to the Report Point of Contact (RPOC)

a. Whether the incident was on- or off-post, the commander must notify the installation's designated 24-hour RPOC of suspected spouse and child abuse.[6] While the RPOC for most installations is the military police (MP) desk, other installations, like Fort Hood, Texas, designate a dedicated, 24-hour hotline as their RPOC.[7] The RPOC will notify law enforcement and Child Protective Services, as appropriate.[8]

b. Many, if not all, brigades and divisions have mandatory serious incident report (SIR) reporting requirements, and instances of DV are usually reportable. Brigade judge advocates and SJAs should ensure that those SIRs for DV are forwarded to the RPOC as well, usually via email, which may reduce the need for multiple reports and better guarantees appropriate reporting. Further, BJAs should ensure the reports appropriately frame facts as known to the command at the time of the report.

4. Submit SIR

a. Initial SIR. The commander should send an SIR to the next higher commander until it is passed to the installation's operation center, which will send a copy to the provost marshal office (PMO).[9] An SIR should have all pertinent information known at the time of reporting.[10] (Discretionary Action).

b. Supplemental SIR. If the commander later learns significant facts omitted from or incorrect in the original SIR, the commander should send a supplemental report, including the reason for the inaccuracy in the initial report, e.g., it was the dependent spouse's version of events.[11] (Discretionary Action).

5. Criminal Investigation by Law Enforcement

a. Law enforcement investigates all allegations involving spouse or child abuse.[12] (Mandatory Action). If a commander perceives that law enforcement inadequately investigated the allegation of on-post DV, the commander must resist the urge to appoint an investigating officer.[13] The commander should, instead, consult with the servicing judge advocate to address the allegations with a multi-functional team, including FAP, victim advocates, and the Directorate of Emergency Services. (Recommended Action). While commanders should not feel forced into helpless inactivity, they must be careful not to overstep their authority and role and accidently affect the situation.[14] Unit-level investigations do considerably more harm than good when an investigating officer does not have the appropriate training, maturity, or competency to handle the complexities of investigating DV.

b. On-Post. The military police investigate on-post allegations.[15]

c. Off-Post. Local law enforcement investigates off-post allegations, and the PMO coordinates with local law enforcement regarding those investigations.[16]

c. Commanders cannot assume a duty to investigate DV; leave it to professional investigators. While commanders have a duty to maintain good order and discipline, law enforcement investigates allegations of DV; commanders do not.[17] (Mandatory Action). Agreeing to investigate DV or alleged theft of a cellphone or passport among family members may hinder the

proper law enforcement investigation and may be perceived as assuming the duty of mediating between the Soldier and the spouse. This assumed duty could later be characterized as a negligent undertaking and result in government liability in the event the Soldier commits a criminal act. Instead, the commander should consult the servicing judge advocate regarding available multi-functional resources. (Recommended Action). Further, if discussing the matter with the Soldier is absolutely necessary out of concern for their welfare, see paragraph 14 regarding use of DA Form 3881 and waiver of Article 31 rights. (Mandatory Action).

d. Mental Health Treatment and Risk Assessment by Medical and Social Work Services Personnel. Under the supervision of the medical treatment facility (MTF) commander, FAP conducts assessments of alleged DV victims and abusers.[18] Those assessments, which have aspirational timelines, provide guidance to the case review committee (CRC) and the Soldier's command.[19] See paragraph 12 on mandatory Soldier assessment.

6. Issue a Clear, Written MPO and the "Cooling Off Period"

a. Written. Consider whether a no-contact order in the form of a military protective order (MPO) is appropriate under the circumstances or mandatory by installation policy for a cooling off period.[20] If so, the commander must provide a no-contact order.[21] (Mandatory Action). Any verbal no-contact order should be put into writing using a DD Form 2873 as soon as possible.[22] (Discretionary Action).

b. Provide a Barracks Room. If, as a result of the no-contact order or MPO, the Soldier will not be able to stay at the residence with the spouse, consider providing the Soldier a barracks room, if appropriate based on the Soldier's rank, facilities available, and the circumstances. (Recommended Action).

c. Home Escort. If the Soldier must return to a home where an alleged victim resides to retrieve personal items, and if returning to the home does not violate a civilian protective order (CPO), ensure the Soldier has an escort and coordinate with the alleged victim, preferably so the alleged victim is not present. (Recommended, Discretionary Action).

7. Forward the MPO to the MPs. Upon issuing an MPO, the commander must immediately forward a copy of the order to the PMO, provide a copy to the protected individual within 24 hours, and notify the protected individual of any subsequent changes or termination.[23] The PMO submits the information to a national database.[24] (Mandatory Action).

8. Encourage Victims to Seek a CPO in State Court. If the commander is speaking directly with an alleged victim who lives off post, encourage the alleged victim to consider seeking a CPO and to consult a victim advocate. (Recommended, Discretionary Action). The best practice is to provide the victim advocate with the alleged victim's contact information. See paragraph 20 regarding not assuring protection. (Discretionary Action).

9. Ensure Service Members Comply with Applicable CPOs. The commander must take "other actions as appropriate" to ensure compliance with a CPO.[25] (Mandatory Action). This may include directing the Soldier to comply with the CPO, modifying the MPO to include terms of the CPO, rescinding the Soldier's pass privileges off-post or outside the unit area, assigning personnel to watch over the Soldier, or ensuring compliance regarding a specific family situation. (Discretionary Action).

10. Confront Threat to Self or Others—Control Firearms. If a commander comes to the reasoned conclusion, based on direct observation or reports from friends, family, or health care providers, that a Soldier is a threat to self or others, the commander should take action to control the Soldier's access to privately-owned firearms.[26] (Discretionary Action). However, commanders should consult the servicing judge advocate regarding restricting access to off-post, privately-owned weapons, as this is a complex issue and requires separate legal analysis. (Recommended Action).

a. On-Post Firearms. If a Soldier resides on post, a commander must ask Soldiers about any privately-owned firearms stored on post.[27] (Mandatory Action). If the commander reasonably concludes the Soldier is a threat to self or others, the commander may order any weapon be stored in the unit's arms room.[28] (Discretionary Action).

b. Off-Post Firearms. Generally, commanders are prohibited by law from infringing on a Soldier's individual rights by inquiring about their possession of privately-owned firearms stored off-post.[29] However, in the case that the commander reasonably concludes the Soldier is a threat to self or others, the commander may ask the Soldier whether they possess any privately-owned weapons that are kept off post.[30] If the Soldier has privately-owned weapons stored off-post, the commander may request the Soldier store the weapons in the arms room.[31] The commander may not order the Soldier to store the weapons in the arms room.[32] If the Soldier declines, the commander may order the Soldier to temporarily be restricted to post.[33] (Discretionary Action).

c. Mental Health and Risk-to-Self/Others Evaluation. If a commander concludes that a Soldier is a threat to self or others, the commander should also initiate a command-directed behavioral health evaluation and consult with the servicing judge advocate.[34] (Discretionary Action).

11. Initiate Flag. If the PMO identifies a Soldier as a possible subject of an investigation or a suspect, the commander must initiate a suspension of favorable personnel actions (Flag).[35] (Mandatory Acton). The effective date of the Flag should be the date of the offense, if known, or the date of initiation of the investigation.[36] See paragraph 18 regarding the requirement to complete a DA Form 4833, *Commander's Report of Disciplinary or Administrative Action*, following the investigation.

12. Direct FAP Participation. The commander must contact FAP, request a FAP assessment, and direct the Soldier to participate in the FAP assessment.[37] (Mandatory Action). Consider sending an escort with the Soldier to all initial FAP assessments. (Recommended Action).

13. Encourage Family Participation. The commander must encourage civilian Family members to participate in FAP treatment programs.[38] (Mandatory Action).

14. Ensure Appropriate Rights Advisement

a. Remember—Law Enforcement Investigates. Commanders are not investi-

gators of DV incidents.[39] Law enforcement officers receive specialized training in investigating DV.[40] A commander attempting to investigate may hinder the law enforcement investigation and be perceived as assuming the duty of an investigator. This could later be characterized as a negligent undertaking or negligent protection of a victim, resulting in bodily harm to the victim and civil liability for the government, especially in the event the Soldier commits a preventable criminal act. Since commanders have a duty to maintain good order and discipline, if law enforcement fails to adequately investigate, the commander should consult their judge advocate to discuss options.[41] See paragraph 5 above regarding law enforcement investigations and the commander's options if the law enforcement investigation is inadequate.

b. Article 31 Rights Waiver. Soldiers may choose to speak with their command about a DV incident—for which commanders are not investigators. Soldiers must participate in a FAP assessment only after their commander ensures they are properly advised of their Article 31(b), Uniform Code of Military Justice, rights against self-incrimination and on how to use a DA Form 3881, *Rights Warning Procedure/ Waiver Certificate*.[42]

15. Consider a Bar from Post for Civilian Abusers. If the alleged abuser is a civilian and the alleged victim lives on post, commanders should consult their servicing judge advocate in considering whether to request that the garrison commander bar the alleged abuser from post. The installation commander has the inherent authority to permanently or temporarily bar any individual from entering the installation, which includes the basis that the individual's continued presence on the installation represents a threat to the safety of any adult or child living on the installation.[43] (Recommended Action).

16. Attend the CRC. Commanders must attend the CRC case presentations and comply with CRC recommendations or otherwise provide written nonoccurrence through the chain of command to the MTF commander.[44]

17. Consult the Servicing JA. The commander should discuss the alleged DV with the servicing military justice advisor, especially when the Soldier was convicted in a civilian court or at a general or special court-martial, triggering implications under the Lautenberg Amendment to the Gun Control Act of 1968.[45] (Discretionary Action).

18. Complete DA Form 4833. At the conclusion of law enforcement investigations, the PMO initiates a DA Form 4833 and transmits it to the commander.[46] The commander must complete the form listing the action taken against the Soldier, if any.[47] The PMO submits the information to a national database.[48]

19. Comply with Local Policy. In addition to the mandatory duties stated in Army Regulation (AR) 608-18, the commander must also comply with all mandatory directives in applicable local policy regarding DV.[49]

20. Inappropriate Actions Which Increase Litigation and Liability Risk

a. Do Not Respond to the Scene in Place of Law Enforcement. Commanders are not investigators of DV allegations.[50] Responding to the scene may hinder a proper law enforcement investigation and may be perceived as assuming a duty and later be characterized as a negligent undertaking. The commander should contact law enforcement.

b. Do Not Assure Victims the Command Will Protect Them from Harm. A spouse may be scared and upset, but it is inappropriate for a commander to assure the spouse, "We'll protect you. My sergeants will ensure that your spouse does not come near you until he receives counseling." Assuring protection may be perceived as assuming the duty of protecting the spouse, which could later be characterized as a negligent undertaking and result in government liability in the event the Soldier commits a criminal act.[51] Further, the commander's assurances to the spouse could provide a false sense of security which the commander has no plausible, legal way to effectuate, short of restraint or confinement.

c. Do Not Ignore Intentions of DV. If a Soldier makes an offhanded remark about killing their spouse, the commander should take these remarks seriously and direct the Soldier to undergo a behavioral health assessment immediately. The commander should also immediately consult with their judge advocate. Dismissing these remarks as "just blowing off steam" could be seen as having notice of a premeditated criminal act and failing to report or take reasonable action to prevent the harm could result in government liability.[52]

d. Do Not Assume an Allegation of DV Is Accurate. Soldiers must be proven guilty prior to any punishment.[53]

e. Do Not Assume an Allegation of DV Is Inaccurate. Follow mandatory policies contained in this standard operating procedure.

Notes

1. Sources are provided for practitioners' reference.

2. U.S. Dep't of Army, Reg. 608-18, The Army Family Advocacy Program para. 1-8b(1) (30 Oct 2007) (RAR 13 Sept. 2011) [hereinafter AR 608-18]; U.S. Dep't of Def., Instr. 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel para. 6.1.1.3. (21 Aug. 2007) (C4, 26 May 2017) [hereinafter DoDI 6400.06].

3. AR 608-18, *supra* note 2, para. 1-8b(2).

4. *Id.* paras. 1-8, 3-4. Recommend this encouragement be implemented through command policy letters. However, recommend brigade judge advocates/staff judge advocates review those letters to ensure they do not assume additional duties or present a civil litigation risk.

5. *Id.* para. 3-25. *See also* DoDI 6400.06, *supra* note 2, para. 6.1.1.12. Again, recommend this be incorporated into a command policy letter, with the previously listed caveats.

6. AR 608-18, *supra* note 2, paras. 1-8b(4), 3-3 (the Garrison staff designates the report point of contact (RPOC)). *See id.* para. 1-8a(5) (unit/company commanders must report suspected spouse or child abuse to the RPOC). *See also* DoDI 6400.06, *supra* note 2, paras. 6.1.1.2., 6.1.1.5.

7. Fort Bragg, Joint Base Lewis-McChord (JBLM), Fort Campbell, and Fort Riley use the Military Police desk at the PMO as their RPOC. Memorandum from Commander, U.S. Army Garrison Fort Bragg, subject: Garrison Policy Letter #10—Family Advocacy Program (FAP) (14 Jan. 2020); Memorandum from Commander, I Corps and Joint Base Lewis-McChord, subject: Policy on Domestic Violence (1 Jun. 2017) [hereinafter JBLM DV Policy]; Memorandum from Commander, 101st Airborne Division (Air Assault) and Fort Campbell, subject: Policy Letter 7—Command Response to Incidents of Domestic Violence (1 Apr. 2019) [hereinafter Fort Campbell DV Policy]; Memorandum from Commander, 1st Infantry Division and Fort Riley, subject: Family Advocacy Program (FAP) Policy (31 Aug. 2020) [hereinafter Fort Riley FAP Policy]. As of the publication of this article, Fort Hood's RPOC is (254) 287-CARE, and the hotline is available 24 hours a day, seven days a week. Memorandum from Commander, III Corps and Fort Hood, subject: Army Family Advocacy Program (AFAP) (23 Aug. 2017) https://home.army.mil/hood/application/files/9015/5309/5495/AFAP.pdf [hereinafter Fort Hood FAP Policy].

8. AR 608-18, *supra* note 2, para. 3-12.

9. U.S. Dep't of Army, Reg. 190-30, Military Police Investigations para. 4-4d (1 Nov. 2005) [hereinafter AR 190-30] (for a sample serious incident report (SIR), see figure 9-1); U.S. Dep't of Army, Reg. 190-45, Law Enforcement Reporting para. 4-16, 4-18g(5), 8-1a (27 Sept. 2016) [hereinafter AR 190-45].

10. AR 190-45, *supra* note 9, para. 8-1b; AR 190-30, *supra* note 9, para. 9-2.

11. In the event of subsequent civil litigation, a dependent spouse may use the SIR to prove what the Army knew and when. A follow-up SIR provides updated information in writing to higher commanders and documents the correction for potential future litigation, thus eliminating the potential of a finder of fact making an erroneous finding that results in liability. *See* AR 190-45, *supra* note 8, para. 9-3b.

12. U.S. Dep't of Army, Reg. 195-2, Criminal Investigation Activities app. B (21 July 2020) [hereinafter AR 195-2]; DoDI 6400.06, *supra* note 2, para. 6.1.1., 6.2.

13. *Supra* note 12.

14. *Id.*

15. AR 608-18, *supra* note 2, para. 1-8j(2).

16. *Id.* para. 1-8j(3).

17. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 4-4a (24 July 2020) [hereinafter AR 600-20]; AR 195-2, *supra* note 12, app. B.

18. AR 608-18, *supra* note 2, paras. 1-8f, 2-4, 3-8, app. C.

19. *Id.* app. C.

20. *Id.* para. 1-8b(8); AR 190-45, *supra* note 9, para. 4-17; Fort Bragg, JBLM, Fort Benning, Fort Bliss, and Fort Riley all have mandatory 72-hour cooling off periods. Memorandum from Commander, U.S. Army Garrison Fort Bragg, subject: Installation Policy Letter #40—Command Response to Incidents of Domestic Violence (15 Nov. 2019) [hereinafter Fort Bragg DV Policy]; JBLM DV Policy, *supra* note 7; Memorandum from Commander, U.S. Army Maneuver Center of Excellence, subject: Physically Separating Parties Involved in Domestic Violence (23 Sept. 2020) [hereinafter Fort Benning DV Policy]; First Armor Division and Fort Bliss, Reg. 27-10, Military Justice para. 5-1 (18 Nov. 2016) [hereinafter Fort Bliss MJ Reg.]; Fort Riley FAP Policy, *supra* note 7. Fort Campbell and Fort Stewart have no mandatory cooling-off period. Fort Campbell DV Policy, *supra* note 7; Memorandum from Commander, Third Infantry Division and Fort Stewart, subject: Family Advocacy Program (not dated). *See also* DoDI 6400.06, *supra* note 2, para. 6.1.2.

21. AR 608-18, *supra* note 2, para. 1-8b(8).

22. *Id.* para. 3-21d(3)(h).

23. *Id.* para. 3-21d(3)(a).

24. AR 190-45, *supra* note 9, para. 4-17.

25. AR 608-18, *supra* note 2, para. 1-8b(8). *See also* DoDI 6400.06, *supra* note 2, para. 6.1.3.3.

26. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. 111–383, §1062, 124 Stat. 4137, 4363 (codified as amended at National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112–239, §1057, 126 Stat. 1632, 1938); All Army Activities Message, 063/2013, 252019Z Mar. 13, U.S. Dep't of Army, subject: Control and Reporting of Privately Owned Weapons [hereinafter ALARACT 063/2013].

27. See the applicable Army regulation regarding the physical security of arms (on file with author).

28. §1057, 124 Stat. 4137, 4363; ALARACT 063/2013, *supra* note 26.

29. *Supra* note 28.

30. *Id.*

31. ALARACT 063/2013, *supra* note 26.

32. *Id.*

33. *Id.*

34. *Id.*

35. U.S. Dep't of Army, Reg. 600-8-2, Suspension of Favorable Personnel Actions (Flag) paras. 2-1e, 2-2h (5 Apr. 2021).

36. *Id.* para. 2-2h.

37. AR 608-18, *supra* note 2, para. 1-8b(5).

38. *Id.* paras. 1-8b(12), 3-28.

39. *Id.* para. 1-8j. *See also* AR 195-2, *supra* note 12, app. B.

40. AR 608-18, *supra* note 2, para. 1-8j(6), (10).

41. AR 600-20, *supra* note 17, para. 4-4a.

42. AR 608-18, *supra* note 2, para. 1-8b(7).

43. *Id.* para. 3-22d. Violation of a bar order is a federal crime. 18 U.S.C. § 1382.

44. AR 608-18, *supra* note 2, para. 1-8b(6), (9), (10).

45. AR 608-18, *supra* note 2, para. 1-8b(14); AR 600-20, *supra* note 17, para. 4-22c(1); 18 U.S.C. § 922(g)(1)–(9). Administrative action or nonjudicial punishment under Article 15, Uniform Code of Military Justice, is not considered a qualified conviction under the Lautenberg Amendment. *See* AR 600-20, *supra* note 17, para. 4-22b(2); 18 U.S.C. § 922(g)(1)–(9). *See also* DoDI 6400.06, *supra* note 2, paras.6.1.4, 6.4.

46. AR 190-45, *supra* note 9, para. 4-7b.

47. *Id.* para. 4-7c.

48. *Id.*

49. AR 608-18, *supra* note 2, para. 1-8b. *See also* Fort Bragg DV Policy, *supra* note 20; Fort Hood FAP Policy, *supra* note 7; JBLM DV Policy, *supra* note 7; Fort Bliss MJ Reg., *supra* note 20; Fort Campbell DV Policy, *supra* note 7; Fort Riley FAP Policy, *supra* note 7; Fort Benning DV Policy, *supra* note 20.

50. AR 608-18, *supra* note 2, para. 1-8j.

51. *See* Cuadrado-Concepcion v. United States, 2020 U.S. Dist. LEXIS 143040 (S.D.C. Ga. 2020).

52. *See* Wilburn v. United States, 616 F. App'x 848 (6th Cir. 2015).

53. U.S. Dep't of Army, Reg. 27-10, Military Justice para. 5-67a (20 Nov. 2020).

Appendix B

Sample DV Policy Memo

SUBJECT: Command Response to Incidents of Domestic Violence

1. References.

a. DoD Instruction (DoDI) 6400.06, Domestic Abuse Involving DoD Military and Certain Affiliated Personnel, 26 May 2017.

b. ALARACT 063/2013, Control and Reporting of Privately Owned Weapons, 25 March 2013.

c. Army Regulation (AR) 600-20, Army Command Policy, 24 July 2020.

d. AR 608-18, The Army Family Advocacy Program, 30 October 2007 (Rapid Action Revision, 13 September 2011).

2. Applicability. This policy applies to all units, commands, tenant units, and activities located on [INSTALLATION].

3. Purpose. To provide unit leaders with instructions to effectively respond to incidents of domestic violence.

4. Policy. Violence against a spouse, partner, or child is a crime and contrary to the values and standards of the Army. Domestic violence is a community issue that affects family stability, Soldier morale, and mission accomplishment. Commanders located on [INSTALLATION] will take immediate actions required of this policy and Army regulations to address domestic violence. Family Advocacy Program (FAP) providers are professionally trained to break the cycle of abuse by identifying abuse as early as possible and providing treatment for affected Family members.

5. Upon learning of a suspected case of domestic violence, commanders will immediately:

a. Report Suspected Cases. Commanders will report suspected cases of spouse, partner, or child abuse alleged to have occurred on or off post to the [INSTALLATION Provost Marshal Office (PMO) at 555-555-5555], which is the designated, 24-hour report point of contact (RPOC). The RPOC will contact FAP, local law enforcement, and Child Protective Services (CPS), as appropriate.

b. Issue a Military Protective Order (MPO). Commanders will issue a 72-hour no-contact order on a DD Form 2873 as a cooling-off period, whether the incident was on- or off-post. Commanders will immediately forward a copy of an issued no-contact order to the PMO and provide a copy to the protected individual within 24 hours. Commanders may modify the terms,

including duration, of the MPO, as appropriate for the facts and circumstances, but they must notify protected individuals of any changes or termination.

c. Ensure Civilian Protective Order (CPO) Compliance. Commanders will take actions as appropriate to ensure a subordinate Soldier's compliance with a CPO. This may include directing the Soldier to comply with the CPO, modifying the MPO to include terms of the CPO, or rescinding the Soldier's pass privileges off post or outside the unit area.

d. Control of Firearms.

(1) If a Soldier resides on post, the commander will ask about any privately-owned firearms stored on-post. Generally, commanders are prohibited from inquiring about possession of privately-owned firearms stored off-post.

(2) Regardless of where a Soldier resides or stores firearms, if a commander comes to the reasoned conclusion based on direct observation or reports from friends, family, or health care providers that a Soldier is a threat to self or others, the commander will take action to control the Soldier's access to privately-owned firearms. The commander will order any firearm stored on post to be moved to the unit's arms room and request any firearm stored off-post be stored in the unit's arms room as well. If the Soldier declines to store the firearm in the unit's arms room, the commander will consult the servicing judge advocate and consider ordering the Soldier to reside on post and possibly temporarily restricting the Soldier to post, if appropriate.

(3) If a commander concludes a Soldier is a threat to self or others, the commander will initiate a command-directed behavioral health evaluation.

6. As soon as practicable upon learning of a suspected case of domestic violence, commanders will:

a. Direct a FAP Assessment. Commanders will contact FAP at [555-555-5555], request a FAP assessment, and direct the Soldier to participate in the FAP assessment. If appropriate, the commander will direct the Soldier escorted to the FAP assessment. Further, the commander will encourage civilian Family members to participate in FAP treatment programs.

b. Law Enforcement Investigates Domestic Violence Incidents.

(1) Law enforcement officers, who have received specialized training in investigating domestic violence, investigate allegations of domestic violence; commanders do not. Commanders attempting to investigate may hinder proper law enforcement investigation.

(2) Rights Advisement. Commanders will, however, advise Soldiers of their rights under Article 31(b), Uniform Code of Military Justice, against self-incrimination using DA Form 3881 (Rights Warning Procedure/Waiver Certificate) prior to any voluntary statement or the FAP assessment.

c. Consider Requesting a Bar from Post. If the alleged abuser is a civilian and the alleged victim lives on post, consult your servicing judge advocate regarding whether to request that the garrison commander bar the alleged abuser from post.

7. Commanders will attend all case review committee (CRC) case presentations regarding their Soldiers and comply with CRC recommendations or otherwise provide written nonoccurrence through the chain of command to the medical treatment facility commander.

8. Commanders should consult with their servicing judge advocate to ensure compliance with all applicable regulations. Commanders will comply with mandatory requirements, including those stated in AR 608-18, paragraph 1-8b.

9. Proponent. The proponent for this policy is the [INSTALLATION] Office of the Staff Judge Advocate, Chief of Military Justice at [555-555-5555].

NAME
RANK, BRANCH
Commanding

The 412th Contracting Support Brigade command judge advocate discusses common legal issues in contracting during an operational contract support joint exercise. (Credit: SSgt Jonathan Snyder)

Practice Notes

Deploying as a Fiscal Law Judge Advocate

What to Expect and How to Succeed

By Major Christopher D. Elder

Just as you start to get comfortable as a newly-minted judge advocate (JA) practicing administrative law, your deputy staff judge advocate calls you into their office. They sit you down and say you are going to deploy with the division headquarters as a fiscal law attorney. As you leave their office you say, "thank you" and that you are "looking forward to such a great opportunity." You slump back down into your chair, put your forehead on your desk, audibly groan, and think, *"What the heck is fiscal law?"*

This scenario plays out frequently in many corps and division staff judge advocate (SJA) offices as they prepare to deploy. Most garrison SJA offices use non-deployable civilians for contract and fiscal law positions. This means active duty JAs are not frequently exposed to fiscal law as captains. This also means deploying SJAs will frequently task captain JAs as fiscal law attorneys, when the captains may not actually know the fundamental difference between contract law and fiscal law.[1] However, U.S. Army JAs are flexible and accustomed to learning new disciplines in short periods of time. This article discusses preparation strategies for the new Army fiscal law JA, what to expect in the job, practical considerations, and tips for a successful deployment.

Preparation for Deployment

First, start thinking about purpose, time, and amount (PTA). Once you know you will deploy as a fiscal law JA, ask your SJA to send you to the fiscal law course at The Judge Advocate General's Legal Center and School. Unless you recently graduated from the Officer Basic Course, you probably have not reviewed fiscal law in a while. This course will get you back to the fundamentals of fiscal law, refresh your understanding of the basic PTA requirements, and provide practical application of some fiscal law issues. You will also

receive the latest version of the fiscal law deskbook.[2] This course also reviews the various appropriations and authorizations available to the major theaters of operation (i.e., U.S. Central Command). As you will see, fiscal law is a team sport, and this course is a great opportunity to start building your informal network of fiscal law JAs that you can use as a sounding board. If you have the time, and your SJA agrees, you may also want to attend the contract attorney's course held every July. Your deployment may demand that you be familiar with contract structure, language, and methods. If you are unable to attend either course, fear not; you can view a pre-recorded version of many of these courses on the Judge Advocate General's University (JAGU) website.[3]

The next step is to contact the counterparts currently in the position you will take over. You will most likely deploy to an area where a JA is already there, doing your job. Try to schedule a call with your counterpart, and have a list of questions ready. This conversation should expand your understanding of the real-world requirements of your new job, the command's mission, and provide a more in-depth knowledge of the authorities available to your command. You should ask about: 1) unique issues they are encountering; 2) the appropriations and authorities they are using; 3) what the battle-rhythm is like; 4) whether you will be able to overlap and observe them for any time period; and 5) what you should bring with you. The most important question to ask might be, "What do you wish you knew prior to deploying?" Be sure to ask if they can send you an example of a legal review they recently drafted, along with the primary documents they used to write the review.[4] This will give you a more practical understanding of what the job will entail.

Next, seek out and introduce yourself to the Soldiers deploying with you from your command's G-4 (logistics), G-8 (comptroller), and engineer sections. Chances are, these are the individuals you will work with the most. They are also the people who hold the information you will need to draft your legal reviews. Building positive relationships with them early on will make your job *much* easier. Likewise, locate and contact the Regional Contracting Office (RCO)[5] and servicing Contracting Support Brigade (CSB)[6] responsible for your area of operations (AO). While CSBs are responsible for military contracting actions theater-wide, an RCO manages procurements in a particular geographic area within that theater. Many fiscal issues can blend with contract law, and building a relationship with your local RCO's commander[7] and CSB's command judge advocate (CJA) will help you advise your commanders. Once you are in the position, the CJA will likely be an experienced, trusted, and frequent sounding board for legal issues in your AO. The CJA and the RCO will also be great resources to find the answers to your command's procurement questions—for instance, "How soon can I get my stuff?"

Finally, if you are at a division-level command or higher, become familiar with your command's operational contracting support plan[8] and the personnel assigned to this function. Doctrinally, they will come from the G-4 section, but this may not always be the case. Operational contract support (OCS) is a relatively new concept and term in Joint Doctrine[9] and is intended to integrate the "entire process of planning and executing contract support in contingencies" from the requiring activity's[10] (RA's) procurement request to contract close-out.[11] While these OCS personnel are deployed, they will be part of an Operational Contracting Support Integration Cell (OCSIC).[12] The OCSIC is responsible for shepherding requirements, and they should require your legal review as part of their packet to the Requirement Review Boards.[13]

What to Expect in the Job

Normally, your responsibilities will entail drafting written fiscal legal reviews for procurement requirements in your area and advising requirement approval boards. However, in order to do your job effectively you will need to educate and gain the trust of those you work with. You will also need to learn to speak their language. For example, the contracting officer might classify a purchase of building materials as a "supply" purchase. However, in a fiscal law context, you would classify the requirement based on what the RA is actually building with those materials—i.e., "construction." Your understanding of these subtle differences in perspective will help you draft your legal reviews, educate stakeholders, and gain credibility. You will also find most requirement requests are legitimate; however, you will need to help the RA articulate the justification in plain language. Without building these relationships and gaining trust, you will not have the required information to write a competent legal review—think "protection for your command"; likewise, those with the information will not know to give it to you.

You are a teacher. Know your craft. Expect some people may have little to no prior experience in their specific roles, and they will come to the JA for many answers. Normally, a garrison command would have a full-time professional Department of Public Works office, and these professionals know the laws and regulations. However, many of the people filling the deployed roles are doing it for the first time, or they come from different positions and disciplines. Take every opportunity to teach the elements of your command about fiscal law and explain why it is important to them. Some common issues on which to educate your counterparts include: the systems analysis for investment items, the expense/investment threshold, split requirements, and funded versus unfunded costs related to construction.

In addition to the PTA limitations, you will also have multiple layers of internal withholding policies, delegations of authority, and policy memos. For example, the Combatant Commander will likely have delegated the authority to approve construction projects up to a certain cost to your commander. Each of these delegations will determine who the appropriate approval authority is based on the cost of the project. Pay special attention to the withholding policies. These will mandate the approval authority for certain sensitive procurements or extra steps required for the approval. These frequently involve re-locatable buildings, non-tactical vehicles, communications equipment and SIM cards, and overseas property disposal.

Obtain a copy of these documents early, compile them into a user-friendly chart, and update the chart frequently. This will help you organize all of the requirements and approval authorities in your AO. The chart will be a great way to demonstrate your added

value early on, and it will aid in your ability to teach. Many established AOs also have a document, or set of documents, detailing a theater's particular procurement process. Sometimes, these documents are called "Money as a Weapons System" (MAAWS).[14] Depending on the AO, this can be a comprehensive document with detailed descriptions of all the financial limitations and authorities in your area. The MAAWS should be a product of your command's resource manager (G-8) with a detailed review by the SJA office. Either way, obtaining your AO's applicable documents will help you focus on what is important in your area.

Once you get to your office, if you have not done so already, identify the working groups and approval boards dealing with procurements and construction. For example, the engineers will likely have a working group through which all real property projects requiring a plan or design will first have to pass.[15] Each of the higher level commands (division and above) will also have a Requirements Review Board that vets and approves certain requirements based on the internal delegations. If you have one at your command, you will likely sit as a non-voting member and advise the board chairperson. Gaining the trust and confidence of the chairperson will be vital to your role as legal advisor to the board. Keep in mind that it is important to understand and communicate the difference between a restriction of fiscal law and a restriction of fiscal policy. Unlike fiscal law, a restriction of fiscal policy gives commanders the option to request an exception to policy or a waiver by the appropriate approval authority. Your role will extend beyond providing legal advice, and you will frequently be asked about non-legal matters. Your training as an attorney to think critically, evaluate issues logically, and offer solutions will provide valuable insight to these boards and your command.

Practical Considerations

Funding Sources

While deployed to a Contingency Operation,[16] the primary source of money your command will use is the Overseas Contingency Operation, Operations and Maintenance (OCO O&M) fund.[17] Units may use OCO O&M funds when the mission involves combat or direct combat support operations in Afghanistan, the Persian Gulf, Gulf Nations, or in other specified areas when the expense falls within an authorized funding category, and they are costs the Army would not have incurred absent the contingency operation.[18] On the other hand, they will also have regular unit Operations and Maintenance Army (OMA) funds available for expenses consumed in the otherwise normal operating and maintaining of the unit. You will have to uncover all of the relevant facts to determine which fund is appropriate for the requirement. It will also help to remind RAs that equipment purchased using OCO must also remain in theater. Remember, the primary beneficiary for either of these funds must be the U.S. Army, unless a statutory exception authorizes a benefit to foreign forces or civilians.

If the purpose of the requirement is to benefit anyone other than the U.S. military, you will need to consider an alternate funding source. Without an exception, we cannot use OCO O&M or OMA funds to make purchases outright for foreign beneficiaries. However, there are various "Train and Equip" funds, depending on your AO.[19] Each of these will have its own approval process and approval authorities, which will require your legal review.

Many U.S. operations are combined with the militaries of partner nations. These forces will frequently request that the United States make purchases intended to benefit them. One exception to the rule against using O&M funds for foreign beneficiaries is the use of an Acquisition and Cross-Servicing Agreement (ACSA). The Department of Defense has these agreements with most partner nations. While not really a "fund," an ACSA is a bilateral agreement between the militaries of two nations and a useful tool to help our partners obtain logistical support, supplies, and services (LSSS).[20] Find the ACSA managers in your AO; they are typically located within the G-4. Similar to a Contracting Officer, only an ACSA manager is authorized to enter the U.S. military into an ACSA transaction. It is important for your commanders to know they do not have the authority to bind the Government in either a contract or an ACSA transaction. They can validate the need, but they may not actually sign a contract or make an order.

Legal Reviews

In drafting your legal reviews, include a background section detailing all known relevant facts supporting the requirement and stipulate the review is valid only for that set of facts. Facts and requirements frequently change. Including this language, and all of the relevant facts from the request in your legal review, will require the RAs to return to you if circumstances change. This is particularly important for the G-8 and RCO, who will eventually pay for and execute the procurement.

Your legal review should be complete prior to an approval authority validating the requirement. Many times, RAs view their requests as time sensitive and will want to fast-track their packet through the process. However, once a requirement is approved, it moves to the contracting entity and out of your view. Should there be some legal objection at this point in the process, the ability to correct the issue is exponentially more difficult than it was prior to the validation step. Educating the OCSIC personnel and the validation authority about the importance of a legal review prior to validation is vital to preventing problems that might endanger mission success. At the same time, understand there will be time sensitive requirements important to your command, and your ability to quickly and effectively respond is important to that success.

Reach Back

Inevitably, you will come across difficult issues. Deployed fiscal law practitioners quickly find there are relatively few reliable sounding boards with fiscal law experience. Luckily, you will have counterparts at the various levels of your command all the way up to your Combatant Command. This is your technical chain of command regarding legal issues, and these counterparts will be your primary lifeline. Identify them early and establish a relationship. Additionally, for particularly difficult issues, the Contract and Fiscal Actions Division (KFAD) at the Office of The Judge Advocate General at the Pentagon is there to support the field. After first using your technical chain of command to grapple with a significant or contentious issue, particularly one affecting your operations or units outside your formation, KFAD is a fantastic collaborative partner

with which to work. At a minimum, they can provide substantive feedback on your analysis to get you on the right track. More significantly, however, they can also provide a level of Army-wide context and support that can be a valuable backstop to your legal position or your SJA office.

Five Rules for Success

If you take nothing else from this article, adhere to the following five rules for fiscal law success. First, do not get reckless with legal interpretation. Much like ethics, fiscal law is not an area where you want to push the boundaries of an interpretation. Your commander's career ultimately depends on running the fiscal mid-field. Second, be consistent and be correct. If you do not know the answer, do not guess. This is especially true if the answer is a "no."[21] Find out, double-check your information, and then get back with them in a timely manner. There is no faster way to lose the trust of your commander than guessing and being wrong. Third, when in doubt, after doing your own research, ask and get top cover. Discuss the issue with your fiscal network, your SJA, and your fiscal counterparts at the various levels of your command. This will also ensure the different level SJAs have one voice on your issue.

Fourth, beware a "just get to yes" mentality and refer back to the first rule. Managing expectations from the start will pay dividends in the end. Become comfortable being the only voice in the room to question the validity of a requirement. Usually the other staff officers at the table just want to execute the commander's intent. They rarely have the expertise in the law and regulation to know its left and right limits. It is your job to fully and completely inform your commander of the potential risks and limiting factors of their procurement decision.

Finally, be value added. Always teach, coach, and mentor. Reach out and get into the working groups early, where they are developing ideas and working on requests from the field. Educating these people and getting in on the "ground floor" will save a lot of time and future headache for very busy staff sections. This will also make it more likely they will come to you when they spot an issue.

Conclusion

Fiscal law can be challenging. However, it is also rewarding. Proper preparation and expectation management will set the stage for a successful deployment. You will find it to be an enjoyable and meaningful experience. This is especially true when you see how your contribution has a real and direct impact on the mission. Congratulations on your new job. Your command and your SJA are depending on you. **TAL**

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Notes

1. Contract law (also known as procurement law) examines the method by which we acquire things, and encompasses the rules for the conduct of the procurement. Fiscal law (also known as appropriations law) deals with the propriety of using an appropriation for a particular expenditure.

2. The current versions of the Fiscal Law Deskbook and the Contract Attorney's Deskbook are available for download on The Judge Advocate General's Legal Center and School website. *See TJAGLCS Publications,* The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, https://tjaglcs.army.mil/tjaglcs-publications (choose "Deskbooks and Handbooks"; then chose "Contract and Fiscal Law" folder) (last visited June 29, 2021).

3. Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, *Contract & Fiscal Law Presentations*, JAGU (login to jagu.army.mil; then choose "Library"; then "Video Library"; then, "Contract & Fiscal Law Presentations" (last visited Sept. 29, 2020) (note that this source is only available to DoD employees due to the log-in requirement.).

4. They will likely have to request permission to release the documents from their SJA and their client (their command).

5. Usually located closer to your area of operations.

6. For example, the 408th Contracting Support Brigade, located at Camp Arifjan, Kuwait, is responsible for supporting contracting actions throughout most of the Middle East. The Command Judge Advocate for your supporting CSB is also a good contact and resource to know.

7. Who, interestingly, will also likely be a Contracting Officer.

8. *See* U.S. Dep't of Def., Instr. 3020.41, Operational Contract Support (OCS) (20 Dec. 2011) (C2, 31 Aug. 2018); U.S. Dep't of Army, Reg. 715-9, Operational Contract Support Planning and Management para. 2-2(a) (24 Mar. 2017) [hereinafter AR 715-9].

9. Joint Chiefs of Staff, Joint Pub. 4-10, Operational Contract Support (4 Mar. 2019) [hereinafter JP 4-10].

10. The Requiring Activity is the subordinate unit making the procurement request.

11. AR 715-9, *supra* note 8, para 1-5(a).

12. JP 4-10, *supra* note 9, at III-1(c).

13. These boards may also be called "Validation Boards," "Acquisition Review Boards," "Coalition Acquisition Review Boards," or a number of other acronyms. Functionally, they are the same in that their purpose is to validate or deny a requested expenditure.

14. *See generally* Commander Patricia Robinson, CJ8 Financial Management Guidebook for Supporting Combined Joint Task Force (CJTF)–Operation Inherent Resolve (OIR) (18 Jan. 2019) (this document is also called a "CJ8 Financial Management Guidebook" in the Combined Joint Task Force–Operation Inherent Resolve Area of Operations (Iraq and Syria)).

15. *See* U.S. Dep't of Army, Pam. 420-11, Project Definition and Work Classification para. 1-6(a) (18 Mar. 2010) [hereinafter DA Pam. 420-11]. This DA Pamphlet is a good resource to know regarding engineer-specific definitions regarding construction, repair, maintenance, and the difference between funded and unfunded costs.

16. A "contingency operation" is a military operation "designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operation, or hostilities against an enemy of the United States or against an opposing military force," or one that "results in a call or order to, or retention on, active duty of members of the uniformed services" under various provisions of law. 10 U.S.C. § 101(a)(13).

17. Consolidated Appropriations Act, 2021, 116 Pub. L. No. 260, div. C, tit. IX, div. J, tit. IV (2021).

18. *See* Off. of the Assistant Sec'y of Army (Fin. Mgmt. & Comptroller), U.S. Dep't of Army, Department of the Army Financial Management Guidance for Mobilization and Deployments (7 Oct. 2019) (helping practitioners determine what expenditures are appropriate for OCO and which are appropriate for Base Operation and Maintenance Funds). *See also* 10 U.S.C. § 101(a)(13) (2020).

19. For example, in Iraq and Syria there is the Counter-ISIS Train and Equip Fund. In Afghanistan, there is the Afghanistan Security Forces Fund. Both are found in the Consolidated Appropriations Act. *See* Consolidated Appropriations Act, 2021, 116 Pub. L. No. 260 (2021).

20. 10 U.S.C. § 2350 (the term "logistic support, supplies, and services" means food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such terms include temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act (22 U.S.C.S. § 2778(a)(1))).

21. A "no" in this context means a strong recommendation not to proceed with some course of action. This would likely occur when analyzing a restriction of fiscal law, as opposed to fiscal policy. However, it is ultimately the duty of a judge advocate to advise, while it is the command's duty to decide. Successful judge advocates will be able to help the command develop courses of action, make recommendations, and assess risks associated with each course of action.

The U.S. Army Consolidated Rehearing Center is located in the Office of the Staff Judge Advocate building at Fort Leavenworth, Kansas. (Photo courtesy of MAJ Mitchell Suliman)

Practice Notes

The U.S. Army Consolidated Rehearing Center

By Major Mitchell M. Suliman & Captain Jeremy J. Disotell

Rehearings, new trials, other trials (per Rule for Courts-Martial 810), and remands often have unique challenges that require particularized experience and expertise. Establishing a single location for the prosecution and defense of these cases enables the Army to maximize opportunities to develop and maintain this critical expertise.[1]

On 31 July 2020, The Judge Advocate General (TJAG) established the U.S. Army Consolidated Rehearing Center at Fort Leavenworth, Kansas, to process, prosecute, and defend all rehearings, new trials, other trials, and remands. The rehearing center now exists to tackle a unique and complex facet of military justice: Army rehearings. Between fiscal years 2000 and 2019,

there were between eight and twenty-nine cases per year remanded to different General Court-Martial Convening Authorities (GCMCAs) by the Army Court of Criminal Appeals (ACCA).[2] Historically, surges of remands follow significant ACCA opinions, such as *United States v. Fosler*[3] and *United States v. Hills*.[4] For example, since the *Hills* opinion was published in June 2016, appellate courts have overturned convictions in at least fifty-one cases and authorized a rehearing in forty-five of those cases.[5] The Rehearing Center is the JAG Corps's newest creation to further its statutory mandate of administering military justice.[6] Located on the Missouri River, right down the road from the U.S. Disciplinary Barracks (USDB) and the Midwest Joint Regional Correctional Facility (JRCF), the Rehearing Center now receives all rehearings, new trials, other trials, and remands—regardless of the alleged offense(s).

The Rehearing Center serves to standardize and enhance the processing, prosecution, and defense of rehearings, new trials, and other trials and remands—all while developing subject matter experts in the complex procedures involved in the prosecution and defense of these types of cases.

TJAG Policy Memorandum 20-02

The Rehearing Center serves to standardize and enhance the processing, prosecution, and defense of rehearings, new trials, and other trials and remands—all while developing subject matter experts in the complex procedures involved in the prosecution and defense of these types of cases.[7] Pursuant to TJAG's policy, the Clerk of Court for ACCA, acting on an order of remand from the appellate court, will refer records of trial to the Commanding General, Combined Arms Center, Fort Leavenworth, Kansas, subject to some exceptions discussed below.[8] The Rehearing Center will receive all rehearings, new trials, other trials, and remands, regardless of the alleged offense(s), including both special victims and general crimes cases.[9] In addition to rehearings in full and rehearings on sentence, the Rehearing Center may also receive limited proceedings remanded under Article 66(f)(3), Uniform Code of Military Justice.[10] These are fact-finding hearings, also known as *DuBay* hearings, to address a substantial issue determined by ACCA.[11]

While the policy directs that all remanded records be referred to the Rehearing Center, there are exceptions allowing the case to be sent back to the original convening authority. First, if an appellate authority has only directed a new action by the convening authority without ordering a rehearing, the action will ordinarily go back to the original convening authority.[12] Additionally, the Staff Judge Advocate (SJA) of the original convening authority has a right of first refusal and can request that the case be returned to them. In those situations, the Clerk of Court for ACCA may send the case to the original convening authority.[13] Last, a rehearing case may be sent to a different installation if there is a compelling interest to do so. Compelling interests include, but are not limited to, the preference of the victim(s) in the case, the presence of members of the original prosecution team at the Office of the Staff Judge Advocate (OSJA) of the original convening authority, or the accused's assignment to the command or installation of the original convening authority. If there is such a compelling interest, the Clerk of Court for ACCA may refer the record to the original convening authority.[14] Barring these exceptions, the Rehearing Center will receive all rehearings, new trials, other trials, and remands.

Who We Are

All Rehearing Center personnel are assigned to the Trial Counsel Assistance Program (TCAP) at U.S. Army Legal Services Agency (USALSA) and attached to the Fort Leavenworth OSJA for the purpose of prosecuting rehearings, new trials, or other trials and representing the government in remanded limited hearings.[15] The Rehearing Center is composed of four government positions: Rehearing Center Officer-in-Charge (OIC), Rehearing Center Prosecutor, Rehearing Center Special Victim Noncommissioned Officer (SVNCO), and Special Victim Witness Liaison (SVWL).[16] The Rehearing Center OIC, an O-4, is responsible for the supervision of all personnel assigned to the Rehearing Center and serves as the chief litigator of all U.S. Army rehearings, new trials, other trials, and remands.[17] The Rehearing Center prosecutor, an O-3, litigates all rehearings and provides sound advice to commanders and the SJA on all rehearing prosecutions. Akin to the traditional Special Victim team structure, the SVNCO provides support and oversight over rehearing logistics and pre-trial coordination, and the SVWL serves as the primary coordinator for victim and witness services.

The consolidation of all rehearings at Fort Leavenworth requires additional support from Special Victims' Counsel (SVC) and Trial Defense Service (TDS). Presently, SVC support is provided by the Fort Riley, Kansas, OSJA until an SVC authorization is allocated to the Fort Leavenworth OSJA. Although a part of Fort Riley's OSJA, this SVC conducts duty at Fort Leavenworth and supports rehearings and limited hearings.[18] With the consolidation of rehearings at Fort Leavenworth, trial defense counsel are currently detailed from the Fort Leavenworth field office to support rehearing clients. In accordance with the U.S. Army TDS standard operating procedures, this representation is prescribed by the Senior Defense Counsel and Regional Defense Counsel. It is imperative that TDS continues to be appropriately resourced with experienced defense counsel to fully support accused Soldiers of all remanded cases. The centralization of rehearings may require additional resources to ensure accused Soldiers are best represented throughout the rehearing process.

Rehearings represent a complex facet of the military justice system. While many of the procedures are the same as in an

original trial, rehearing proceedings require certain modifications to the traditional court-martial procedure.[19] Accordingly, the Army's Chief Trial Judge is the detailing authority for cases remanded to the Consolidated Rehearing Center. Due to the complexity of the proceedings, the detailed judge will normally have significant prior experience.[20] While complex in nature, the consolidation of all rehearings provides several benefits for military justice.

The Benefits Outweigh the Challenges

While rehearings may be challenging, there are several benefits to the consolidation of rehearings. The main benefit is that military justice shops will no longer receive remanded cases to try. Ordinarily, by the time a case returns on remand, the original counsel on the case—both government and defense—have completed a permanent change of station. This means new counsel have to get caught up on the case, locate and re-interview the witnesses, review all the evidence, and make a new trial plan. To compound the task, some witnesses may be missing or hard to find. If found, the witnesses' memories may have significantly deteriorated.[21] Traditionally, this was a significant competing interest from the justice shop's ongoing caseload at particular jurisdictions. Oftentimes, rehearings and remands come with little to no advanced warning. Moreover, the 120-day speedy trial clock is triggered when the Government receives the record of trial and the opinion authorizing or directing the rehearing.[22] With a speedy trial clock already ticking away after receipt, the government must review a lengthy record of the previous trial and prepare the case for disposition, prosecution, or otherwise.[23] With these cases now being consolidated and sent to the Rehearing Center at Fort Leavenworth, military justice shops and litigators no longer have to handle the significant workload that rehearings bring. The Rehearing Center does its best to track cases and issues that are under appellate review and forecast when cases will be received on remand. Once a case is projected to be remanded or once a rehearing is ordered, the Rehearing Center will reach out to the original justice shop to get the case file and speak to the original litigators. Generally, this will be the only requirement of the justice shop—significantly reducing the burden of handling remanded cases.

In addition to reducing the load on justice shops in the field, centralizing remanded cases provides several other benefits. With all remanded cases consolidated at Fort Leavenworth, there is consistency and standardization in the processing of the cases. There are several tasks associated with remand cases that are not normally part of a traditional court-martial. Oftentimes, the accused is serving confinement; this means that an order to release the accused may be needed. In some cases, the accused is on involuntary excess leave and not located at an Army installation as they await appellate review. Bringing the accused Soldier back on orders, reassigning them to a unit, obtaining housing, and resuming pay and allowances are a few of the potential tasks to accomplish in a rehearing. The general crimes litigator may not be experienced with these tasks and procedures. However, over time, the Rehearing Center will have battle drills, procedures, and systems in place to streamline these necessary functions, allowing for more efficient processing of cases.

The intent behind consolidation is to develop subject matter experts in the complex procedures involved in the prosecution and defense of remanded cases. The appellate courts will remand a case if there is an error in the original trial which prejudices the accused. The Rehearing Center is designed to provide experienced litigators with knowledge and practice in the intricacies of rehearings. This improves the integrity of cases being processed and potentially re-tried.

In theory, the expertise gained over time lowers the risk of cases being returned a second time due to an error on the part of the litigators. Further, it preserves the rights of accused Soldiers under the law. A rehearing results after the appellate court provides relief to the accused by overturning one or more of the original convictions. Thus, accused Soldiers now have an additional chance to be acquitted or not even prosecuted.[24] Defense counsel must decide how to best represent a client who may have lost faith in the military justice system after being convicted the first time.[25] Consolidation enables defense counsel to be better prepared to handle retrials. In many cases, the accused is in confinement at the USDB or the JRCF still serving their original sentence.

Their client may remain or be placed into pre-trial confinement during the rehearing process. If not placed into pre-trial confinement, the Soldier is re-assigned to the command at Fort Leavenworth. Physical proximity to their client allows defense counsel easier access and availability to meet and prepare for their case. With training and experience, defense counsel can provide better representation at their client's subsequent action or trial.

In theory, the expertise gained over time lowers the risk of cases being returned a second time due to an error on the part of the litigators. Further, it preserves the rights of accused Soldiers under the law.

In addition to having more experience and knowledge in front of the bar, cases will now likely be tried before more practiced military judges. Prior to the formation of the Rehearing Center, cases were simply sent to the original jurisdiction for retrials. The judge in that jurisdiction would normally be tasked with hearing or deciding the case—regardless of whether the military judge was new to the bench or had any prior experience in rehearings. Under the new system, the Chief Trial Judge receives all cases that are remanded to the Consolidated Rehearing Center and, whenever practica-

ble, details a military judge with considerable judicial experience. This ensures that the accused Soldiers' rights are best protected, while still receiving the fairest retrial.

Conclusion

For those who want additional courtroom time beyond their general crimes prosecution or trial defense work, an assignment at the Rehearing Center provides another opportunity to try cases and gain experience in complex litigation. As discussed in this article, the Rehearing Center handles all types of cases; this means that litigators who may have handled only general crimes or only special victims cases in their government litigation time would now have the opportunity to try different cases as well. Due to the complexity of the cases, TCAP provides technical oversight, subject matter expertise, and assistance to the Rehearing Center. This is a great opportunity to work closely with and learn from complex litigators and justice leaders at TCAP. Additionally, rehearings provide complex litigation experience for defense counsel. Rehearings are known for their different procedures and complex legal issues. Defense counsel will gain valuable experience dealing with these issues while advocating in the best interest of their clients. Future litigators of the U.S. Army Consolidated Rehearing Center, on both sides of the aisle, will undoubtedly walk away more experienced and refined justice practitioners. **TAL**

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CPT Disotell is the rehearing trial counsel at Fort Leavenworth, Kansas.

Notes

1. Policy Memorandum 20-02, The Judge Advoc. Gen., U.S. Army, subject: Consolidation of Rehearings, New Trials, Other Trials, and Remands (31 July 2020) [hereinafter Policy Memo 20-02].

2. TJAG Decision Brief PPTO, Plans, Rehearing Cell (RHC) (Dec. 11, 2019) (unpublished PowerPoint) (on file with author). U.S. Army Ct. Crim. Appeals, Cases Remanded by ACCA & CAAF (Apr. 22, 2015) (unpublished Excel spreadsheet) (on file with author).

3. United States v. Fosler, 70 M.J. 225 (C.A.A.F. 2011) (marking a dramatic shift in pleading the terminal elements of Article 134 offenses. Specifically, the Court of Appeals for the Armed Forces (CAAF) held that Article 134 offenses should explicitly allege the terminal element under Clause 1 or 2, notwithstanding prior case law holding otherwise.).

4. United States v. Hills, 75 M.J. 350 (C.A.A.F. 2016) (holding that the longstanding practice of using charged sexual offenses for propensity purposes to prove other charged sexual offenses was unconstitutional because it ran contrary to the presumption of innocence and the government's burden of proving each charged offense beyond a reasonable doubt).

5. *See* Major Colby P. Horowitz, *Confessions of a Convicted Sex Offender in Treatment: Should They be Admissible at a Rehearing?*, 228 Mil. L. Rev. 44, 44–45 (2020).

6. The Army's military justice mission is congressionally mandated pursuant to Uniform Code of Military Justice, 10 U.S.C. Chapter 47.

7. *See* Policy Memo 20-02, *supra* note 1.

8. *Id.*

9. *See* Manual for Courts-Martial, United States, R.C.M. 810(a)(2)(A) discussion (2019) [hereinafter MCM] ("The terms 'rehearings,' 'new trials,' 'other trials,' and 'remands' generally have the following meanings: 'rehearings' refers to a proceeding ordered by an appellate or reviewing authority on the findings and the sentence or on the sentence only; 'new trials' refers to proceedings under Article 73 because of newly discovered evidence or fraud committed on the court; 'other trials' refers to a proceeding ordered to consider new charges and specifications when the original proceedings are declared invalid because of a lack of jurisdiction or failure of a charge to state an offense; and 'remands' connotes proceedings for determining issues raised on appeal with require additional inquiry.").

10. UCMJ art. 66(f)(3) (2017).

11. *Id. See also* Off. of The Judge Advoc. Gen., Rehearing Consolidation Business Rules 4 (31 July 2020) [hereinafter Rehearing Consolidation Business Rules] ("In such cases, the Chiefs of GAD and DAD may desire to have appellate counsel litigate the issues before the hearing court to ensure the hearing fully addresses matters necessary to resolve appellate issues and for the efficient administration of justice. These cases should be coordinated amongst the FLKS SJA, Chief of GAD, FLKS Senior/Regional Defense Counsel, and Chief of DAD to facilitate the appointment of counsel.").

12. Rehearing Consolidation Business Rules, *supra* note 11, at 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. Two of the four positions are presently staffed; however, the center should be fully staffed by the end of fiscal year 2022.

17. While the Rehearing Center Officer-in-Charge (OIC) serves as the chief litigator of all rehearings, regardless of the alleged offense or offenses, the OIC also serves as the Special Victim Prosecutor (SVP) for Fort Leavenworth and—per TJAG Policy Memorandum 17-05—performs SVP duties. *See* Policy Memorandum 17-05, The Judge Advoc. Gen., U.S. Army, subject: Special Victim Prosecution Program (1 Dec. 2017).

18. Rehearing Consolidation Business Rules, *supra* note 11, at 4.

19. U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook app. G (29 Feb. 2020) (unofficial update 22 Mar. 21).

20. Colonel Timothy Hayes, Chief Trial Judge, U.S. Army, Gateway Discussion with the Fort Leavenworth, Kansas, Office of the Staff Judge Advocate (Dec. 9, 2020) (notes on file with author).

21. *See generally* Major Timothy Thomas, *Sometimes, They Come Back! How to Navigate the World of Court-Martial Rehearings,* Army Law., July 2015, at 34.

22. MCM, *supra* note 9, R.C.M. 707(b)(3)(D). *See also* Major Grace M.W. Gallagher, *Don't Panic! Rehearings and* Dubays *Are Not the End of the World*, Army Law., June 2009, at 1.

23. *See* Horowitz, *supra* note 5, at 46.

24. *Id.* at 46 n.16.

25. *See* Thomas, *supra* note 21, at 34.

Containerized Housing Units at a deployed location. (Credit: Petty Officer 1st Class Eric Dietrich)

Practice Notes

Give It Away

A Field Guide for JAs and FEPP

By Captain Phillip Blevins

You have less than forty-eight hours in theater when you receive your first request for a Foreign Excess Personal Property (FEPP) legal opine. Barely knowing how to spell FEPP, you crack open the excel spreadsheet and see dollar signs with lots of commas. Where do you start? Hopefully, you will begin with this field guide. Alternatively, you should start by reviewing the authoritative guidance and reconciling the property list. With respect to FEPP, one of a judge advocate's (JA) most important duties is ensuring positive authority exists to actually donate property.[1] A pre-approved list of property exists as an attachment to the 2012 Assistant Secretary of Defense for Logistics and Materiel Readiness Delegation of Authority Memorandum.[2] After identifying that positive authority to donate the property exists, the next step is to ensure the donation memorandum specifies the property is "as is, where is." Last, JAs must ensure that the U.S. Government receives a tangible benefit from donating the property.

As FEPP deals with property donation and disposal, George Strait's 2006 country music hit "Give It Away"[3] has never rung more true as the Total Force has rapidly reduced its footprint in the Combined Joint Operations Area–Afghanistan (CJOA–A). Albeit, George Strait probably wasn't thinking about FEPP when he recorded the billboard-dominating song. At first blush, JAs may be wondering, "Why give away perfectly fine property instead of shipping it back stateside?" To put it simply, the juice isn't worth the squeeze. The cost to ship personal property in overseas contingency locations back stateside is astronomical, oftentimes far exceeding the actual value of the property itself. Not to mention, donating excess personal property to our partners both equips them to further the fight and generates goodwill. This article serves as a resource for JAs charged with providing a legal opine on the disposal of FEPP. It is not intended to replace scholarly articles, such as *Herding Cats I*[4] and *Herding Cats II*.[5] Rather, this article should be consulted as a field guide on current issues as we continue to dispose of FEPP. The following sections of this article will concentrate on defining excess personal property, methods of disposal, and the approval authority.

Excess Personal Property

The first step to any legal opine is nailing down what is meant by "excess property." Federal law defines excess property as "property under the control of a Federal agency that the head of the agency determines is *not required to meet the agency's needs* or *responsibilities*."[6] Foreign excess property is any excess property that is not located in the United States, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands.[7] Foreign excess property can either be real (improvements affixed to real property) or personal (anything not affixed to the land itself). Similar to FEPP, Foreign Excess Real Property, commonly known as FERP, is a disposal process in which the United States transfers real property, such as land or any permanent improvements made on that land, to foreign allies. To properly distinguish between FEPP and FERP, JAs must take a trip down memory lane to property law 101: What is a fixture? Army Regulation 420-1 provides that "installed building equipment . . . includes items of real property affixed to or built into a facility that are an integral part of the facility."[8] At risk of beating a proverbial dead horse, this distinction is a critical step to discern whether JAs are disposing of personal or real property.

Despite common belief, re-locatable buildings (such as containerized housing units (CHUs)) are treated as foreign excess personal property. However, the concrete poured underneath the CHU is foreign excess real property. At risk of compounding the confusion, seasoned JAs may note that re-locatable buildings are procured as real property but disposed of as personal property—so long as the sum of building disassembly, repackaging, and non-recoverable building costs (such as foundation costs) do not exceed 20 percent of the acquisition cost of the re-locatable building.[9]

Another reoccurring conundrum that JAs will almost assuredly face is how we, the United States, can reclaim "donated" property if a future need is realized. Legally, it may be permissible to insert such a condition in the donation agreement; this practice is lawful but awful. This type of "just in case" clause could have the unintended consequence of insulting our allied forces and cuts against the definition of what is truly "excess." When looking to determine what is "excess," look no further than the unit commander. Unit commanders, arguably, should be in complete control of their property—making them best-situated to determine when that property is excess. Examples of excess personal property include living quarters and kitchen equipment, non-tactical vehicles, and relocatable buildings. Examples of property that are typically not considered excess include equipment capable of receiving and transmitting signals, military uniforms, and weapons. Even though the U.S. Government has supplied our allies with communications equipment, uniforms, and weapons, FEPP is not the disposition vehicle that allows us to make such transfers.

As the head of the Department of Defense, the Secretary of Defense oversees the disposal of all personal and real property. The Secretary of Defense delegated this authority to the Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD L&MR). In an effort to reduce red tape and expedite the FEPP process, ASD L&MR and the U.S. Embassy in Kabul, Afghanistan, have developed a list of common items in the CJOA–A that require no additional coordination.[10] Items on this "pre-approved" list are determined to have no economical retrograde back to the United States.[11] Among the seventeen categories of property on the preapproved list are re-locatable buildings; force protection equipment; office, dining facility (DFAC), and laundry equipment; as well as air conditioners and generators (30Kw or smaller).[12] Judge advocates may infrequently encounter FEPP requests that contemplate items not on the "preapproved" list, such as gym equipment or non-tactical vehicles. These requests are like snowflakes—no two are identical. Therefore, when tackling these issues, JAs should confirm that their J4 logistics counterparts are ensuring that no other unit in the Area of Operations has a need for this property. Once that determination has been made, J4 is responsible for coordinating the proposed transfer with the Department of State (DoS) and, in the event of transferring controlled items such as non-tactical vehicles, with the Bureau of Industry and Security. At first, this task seems monumental. However, the DoS's Property Management Division Excess and Special Projects Task Force[13] is responsive and eager to weigh in on FEPP requests.

Methods of Disposal

After determining the property at issue is truly "excess," the next step is to follow George Strait's suggestion and "give it away." Of course, it isn't quite that simple. Underpinning the analysis is the fact that retrograde of theater property is either cost-prohibitive or infeasible given current in-country security and transportation problems.[14] Likewise, JAs must pay homage to the resulting benefit the United States will receive from the donation. In almost every FEPP review, it will be evident that the United States expects to receive a tangible and appreciable benefit commensurate with the cost of shipping the depreciated property back stateside. For example, the proposed donation of property with a depreciated value of $500,000 may have

an associated shipping cost of $1.5 million. In this example, if the United States were to donate the property to allied forces vice shipping it back stateside, it will come at a projected $1 million in savings. Additionally, the United States will enjoy an immeasurable benefit by equipping allies with the tools necessary to strengthen their capabilities, as well as by having the opportunity to improve and foster relations with allied forces—ultimately leading to a more secure future for the world.

Judge advocates do not weigh in on the depreciation schedule of excess property and, traditionally, they do not perform fair market value assessments. Rather, this analysis is a product of the proponent and J4.[15] Despite a good-faith basis, it should come as no surprise that allied partners may have no use for our hand-me-downs. Judge advocates encountering such a scenario must not worry as donating excess property is not the only way to absolve the United States from having to transport such property back stateside. Other disposition alternatives include advertising the property for sale on Foreign Military Sales, transferring the property for partner forces through Excess Defense Articles, destroying the excess property, or sending it to the Defense Logistics Agency Disposition Service. It is worthwhile to note that, while legally-viable options, the latter two methods of property disposal are less preferable because they consume significant government time and resources. For example, a myriad of standards and technical procedures must be adhered to when destroying certain militarized items of property.

Approving the Donation

Like most things in life, dollar signs matter. When evaluating FEPP requests, the dollar amount of the property being donated dictates who the approval authority for the transaction is. Judge advocates will likely face the age-old question of evaluating the transfer based off "acquisition cost" or "fair-market value." This is a fair question, and it can be confusing. Foreign Excess Personal Property has one set of rules. Foreign Excess Real Property has a substantially different set of rules; however, FEPPs and FERPs will likely be routed contemporaneously. Historically, both FEPPs and FERPs were evaluated using acquisition cost. However, in 2009, the Under Secretary of Defense changed the rules for FEPP. Now, excess personal property reviews are based off their current day fair market value.[16]

The donation of all property in the CJOA–A must be memorialized in writing and signed by both the donor and the donee. Of particular importance is that the United States does not make any express or implied warranties with respect to the donated property. All agreements must state that the property is donated on an "as-is, where-is" basis. As discussed above, the unit commander is likely the best person to know what property is truly excess. After the property has been earmarked as "excess," the next steps include identifying an appropriate disposition method, conducting a review for legal sufficiency, and then routing the request to the appropriate approval authority. The ASD L&MR has delegated approval authority in tiers.[17]

Pursuant to the delegated authority, a commander in the grade of O-5 can approve the transfer of excess personal property up to $75,000, while a commander in the grade of O-6 can approve donations up to $500,000. Either the USFOR–A Commander, or Deputy Commander for Support, can approve the donation of excess property valued at $500,000 to $30 million.[18] It is worthwhile to note that the Deputy Commander for Support position no longer exists. Instead, the USFOR–A Deputy Commander for Operations assumed all of the Deputy Commander for Support authorities.[19] The approval authority for donations of personal property in excess of $30 million is the ASD L&MR.[20] Once the request has made its way through these channels, the requesting unit is authorized to conduct a joint inventory with Government of the Islamic Republic of Afghanistan (GIRoA) representatives. Afterwards, GIRoA officially accepts possession of the property by signing a memorandum with the unit's disposition representative.

Conclusion

Don't confuse FEPP with FERP next time you're driving down Disney Drive in your TATA, as you slurp an ice cold near-beer, and "Give it Away" comes on the radio. Just remember to FEPP the TATA and FERP the DFAC that you got the near-beer from. Unless of course, the DFAC is a re-locatable building, and then FEPP that too. **TAL**

Capt. Blevins currently serves as an Air Force Defense Counsel for the Keesler Region. In 2020, Capt. Blevins deployed with the 10th Mountain Division in support of Operation Freedom's Sentinel and Resolute Support.

Notes

1. Federal Property and Administrative Services, 40 U.S.C. §§ 101–1315.

2. Memorandum from Assistant Sec'y of Def. to Commanding Gen. of the U.S. Forces–Afghanistan, subject: Request for Pre-Approval of Excess Declaration of Non-Standard Equipment (31 July 2012) [hereinafter Request for Pre-Approval Memo].

3. George Strait, Give It Away (MCA Nashville 2006).

4. Captain Lyndsey MD Olson, *Herding Cats I: Disposal of DoD Real Property and Contractor Inventory in Contingency Operations*, Army Law., Apr. 2010, at 5.

5. Major Kathryn M. Navin, *Herding Cats II: Disposal of DoD Personal Property*, Army Law., Apr. 2010, at 25.

6. 40 U.S.C. § 102(3) (emphasis added) (defining excess property).

7. 40 U.S.C. § 102(6) (defining foreign excess property).

8. U.S. Dep't of Army, Reg. 420-1, Army Facilities Management para. 4-58 (12 Feb. 2008) (RAR 24 Aug. 2012).

9. Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Ctr. & Sch., U.S. Army, 2020 Fiscal Law Deskbook 8-15 para. VI.B.2.b.(8)(b) (2021).

10. Request for Pre-Approval Memo, *supra* note 2.

11. *Id.*

12. *Id.*

13. *About Us: Office of Logistics Management*, U.S. Dep't of State, https://www.state.gov/about-us-office-of-logistics-management/ (last visited July 2, 2021).

14. Memorandum from Assistant Sec'y of Def. to Commanding Gen. USFOR–A, subject: Authority to Transfer U.S. Foreign Excess Personal Property (FEPP) in Afghanistan (May 11, 2011).

15. 2 U.S. Dep't of Def., Manual 4160.21, Defense Materiel Disposition: Property Disposal and Reclamation encl. 4., para. 2 a(3)(b), (22 Oct. 2015) (C3, 30 Sept. 2019).

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17. Memorandum from Commanding Gen. USFOR-A, subject: Request to Adjust Tiered Delegation of Authority for Foreign Excess Personal Property in Afghanistan (July 16, 2013).

18. *Id.*

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No. 1

The Revenge of Preemption

How to Correct Unintended Consequences of the Military's "Revenge Porn" Statute

By Major Joshua B. Fix

The military's new statute criminalizing "revenge porn" is a well-intended law that suffers from serious flaws and requires careful revision. Congress intended the statute, Article 117a, Uniform Code of Military Justice (UCMJ), to prohibit and punish the unauthorized distribution of sexual images without the consent of the individuals depicted in the images. As drafted, however, Article 117a may actually inhibit—rather than enable—the prosecution of "revenge porn." Congress should revise Article 117a to remedy the problems that inhibit prosecution, and match the function of the law to its purpose.

First, this article discusses the phenomenon frequently called "revenge porn"—but more properly known as the wrongful distribution of intimate images (WDII). The phenomenon of WDII was central to the "Marines United" scandal, which led to the enactment of Article 117a.

Second, this article addresses several problems with Article 117a that work against the purpose of the statute. These problems include the fact that Article 117a does not prohibit WDII involving minors; it does not prohibit WDII that lacks a "direct and palpable" connection to the military; it lacks clarity in key language; and, due to the doctrine known as "preemption," Article 117a likely prevents the military from prosecuting WDII that is not prohibited by Article 117a.[1]

Third, this article reviews guidance on how to address the problems in Article 117a drawn from military, federal, and state jurisprudence. These guideposts include how to ensure any revision of Article 117a does not handicap military prosecution of child pornography and how to revise Article 117a while respecting the First Amendment. The First Amendment limits the government's ability to prohibit speech. To the extent WDII is a form of speech, the First Amendment is a challenge to prosecuting WDII. Nevertheless, states have successfully navigated this challenge, and state experiences are instructive for how to better prosecute WDII.

Finally, this article proposes specific changes to Article 117a. These proposed changes should empower the prosecution of WDII, while both preserving the ability to prosecute child pornography and respecting the First Amendment.

The Heavily Abridged History of "Revenge Porn" and Article 117a

The practice of using compromising information to gain advantage over another individual or to hurt an ex-lover is not new. Modern technology, however, enables wrongdoers to harm others on a scale that was once unthinkable. Smartphones allow individuals to easily record and share intimate events in ways inconceivable

before 2007. When wrongdoers broadcast intimate images on the internet without the consent of those the images depict, the results can be catastrophic.[2]

"Revenge Porn" or the Wrongful Distribution of Intimate Images

The origin of the term "revenge porn" is an enigma shrouded in the dark reaches of the internet. By 2007, someone posted the term to Urbandictionary.com, accompanied by a definition consistent with the phrase's popular use today.[3] Whatever the origin of the term, by 2012, "revenge porn" was so common that some websites used it as a business model.[4]

For the purposes of this article, the term "revenge porn" refers to the practice of broadcasting or distributing—usually online—intimate images without the consent of the individuals depicted therein. The term "revenge porn," however, is potentially misleading. First, wrongdoers might broadcast or distribute intimate images for motives other than revenge. Second, intimate images may not be—strictly speaking—pornographic.[5] The term "revenge porn" lacks the precision necessary to properly describe the conduct at issue; this article uses a different term: the wrongful distribution of intimate images (WDII). The term WDII is consistent with the language of Article 117a, and is consistent with experiences of victims, who report that the term "revenge porn" is misleading.[6] A prime example of how the term "revenge porn" can be misleading is the 2017 "Marines United" scandal, which included both pornographic and non-pornographic images that were harmful regardless of the motive for their publication.[7]

The "Marines United" Scandal

In early 2017, a Marine Corps veteran reported that the 30,000-member Facebook group, "Marines United," facilitated collection and distribution of a vast hoard of intimate photographs without the consent of the individuals appearing in those photographs.[8] The images primarily depicted women associated with the Marine Corps—because the women were themselves Marines, Marine Corps veterans, current or former family members of Marines, or current or former intimate partners of Marines.[9] The images were intimate in nature, including nude photographs.[10] The "Marines United" Facebook group also generally disparaged women.[11]

While widespread misconduct is always harmful to the armed forces, the "Marines United" scandal was particularly ill-timed. The scandal broke shortly after the Marine Corps first incorporated women in Marine infantry units.[12] Further, the scandal that began with "Marines United" soon spread to other branches of the armed forces.[13] News reports about the military and the integration of women into combat arms units were replete with references to the "Marines United" scandal.[14] While the "Marines United" Facebook group was reputed to have over 30,000 members, the Marine Corps only court-martialed eleven Marines for misconduct related to the scandal.[15]

Congress Responds by Creating Article 117a

Congress almost immediately expressed strong concern about the "Marines United" scandal and the practice of WDII in the military.[16] Later that year, Representative Martha McSally introduced the PRIVATE Act, a bill to prohibit WDII under a new article of the UCMJ—Article 117a.[17] Contemporaneous statements from the House floor explicitly referenced the "Marines United" scandal as a reason for the PRIVATE Act.[18] Eventually, the National Defense Authorization Act for 2018 incorporated the PRIVATE Act, and the President signed it into law on 12 December 2017.[19] Thus, Article 117a came into being.

Article 117a is a lengthy statute, running more than 540 words. In relevant part, Article 117a prohibits the broadcast or distribution of an "intimate visual image" or a "visual image of sexually explicit conduct" without the consent of the individuals depicted in such an image.[20] In other words, Article 117a prohibits WDII. Unfortunately, other provisions of Article 117a introduce problems that likely render the new statute more hindrance than help in the prosecution of WDII.

The Problems with Article 117a

Across the armed forces, it appears there have only been twenty-three successful prosecutions of Article 117a offenses between the statute's enactment and the final edits to this article—over three and a half years later.[21] This number seems remarkably low considering the urgency with which Congress enacted Article 117a after the "Marines United" scandal. The comparatively low number of prosecutions is probably a result of problems in the article itself. Article 117a includes several clauses that raise potential problems for prosecuting WDII. First, it does not prohibit the broadcast or distribution of WDII involving minors.[22] Second, Article 117a is limited to prohibiting WDII that has a "reasonably direct and palpable connection to a military mission or the military environment."[23] Third, Article 117a uses convoluted language and definitions that may impede prosecution. Finally, the doctrine of preemption aggravates the foregoing issues and may prevent the military prosecution of WDII that otherwise could have been prosecuted before Article 117a came into effect. This article addresses each of these problems in turn.

Article 117a Does Not Apply to WDII Involving Minors

Article 117a only prohibits WDII if the person depicted "is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created."[24] Congress likely included the eighteen-years-of-age element because it did not want military prosecutors bringing charges under Article 117a that are more properly alleged as child pornography under Article 134. Floor comments of the PRIVATE Act repeatedly referred to the nonconsensual distribution of "pornography."[25] This underscores one of the reasons for abandoning the term "revenge porn" and adopting the language of "WDII": under Article 117a, images need not be pornographic to fall within the scope of Article 117a. "Intimate visual images" under Article 117a include even underwear-clad genitals and female breasts. By contrast, "pornography"—at least under the definition of child pornography found in the *Manual for Courts-Martial* (*MCM*)—requires unclothed genitals and either sexual conduct or a focus on the genitals.[26]

In short, while a topless photograph of a seventeen-year-old girl usually does

not constitute child pornography under Article 134, it usually does constitute an "intimate visual image" under Article 117a. Unauthorized distribution of such an image would not be illegal under Article 117a, so long as the victim was under eighteen years of age at the time the image was recorded. Absurdly, it is a defense to a charge under Article 117a that the victim was a child.

As might be expected, sending risqué photographs by cellular phone is distressingly common among teenagers.[27] If anything, teenagers are at a higher risk of being the victim of WDII.[28] Unfortunately, Article 117a does not prohibit Service members from broadcasting or distributing intimate images of minors. Congress should remedy this gap in the law.

Article 117a Only Applies to WDII with a Direct and Palpable Military Connection

The requirement that an accused's conduct have "a reasonably direct and palpable connection to a military mission or military environment" attempts to insulate Article 117a from First Amendment challenges. Congress adopted this unusual phrasing from case law on the balancing test for speech-related offenses charged under Article 134 as either prejudicial to good order and discipline or service discrediting.[29]

Because of the direct-and-palpable element, it is unlikely the military would be able to prosecute a Service member who sent intimate images of a civilian to the civilian's friends or family.[30] Similarly, Article 117a probably does not apply to intimate images of a civilian posted on a website unrelated to the military.

The prevalence of state laws against WDII strongly suggests that it is not a military-specific problem.[31] The link between the "Marines United" Facebook group and the military was probably more of an exception than a rule in cases of WDII. Thus, there is little reason to believe WDII committed by Service members will typically have a sufficient nexus with the military to meet the direct-and-palpable element of Article 117a. Congress should not limit prosecution of WDII to unusual cases.

Convoluted Language in Article 117a May Endanger Prosecutions

A third issue arising from Article 117a is the convoluted nature of the statutory language itself. The statute repeatedly refers to two defined terms: "intimate visual image" and "visual image of sexually explicit conduct." Those terms are repetitive and cumbersome. More importantly, those terms mask deeper inconsistencies in the language of the statute.

When the word "image" is used in place of "intimate visual image or visual image of sexually explicit conduct," Article 117a only prohibits the broadcast or distribution of an image when the "[image] was made under circumstances in which the person depicted in the [image] retained a reasonable expectation of privacy regarding any broadcast or distribution of the [image]."[32] This clause seems reasonable until one reads the definition of "reasonable expectation of privacy."

Article 117a defines a "reasonable expectation of privacy" as "circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public."[33] In a vacuum, this definition also seems reasonable; but, when that definition is inserted into the relevant portion of Article 117a(a)(2), the result reads as follows:

> [T]he [image] was made under circumstances in which the person depicted in the [image] retained [circumstances in which a reasonable person would believe that a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public] regarding any broadcast or distribution of the [image].[34]

This is nonsensical. While congressional intent is probably discernable from the surrounding context, the grammatical failure of the statute's construction might leave it open to a challenge for vagueness.[35]

Article 117a May Preempt Charging WDII Under Article 134

"The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132."[36] The Court of Military Appeals defined preemption as, "the legal concept that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element."[37] The preemption doctrine, however, does not automatically apply just because a charged Article 134 offense lacks an element in an enumerated article.[38] To preempt a charge under Article 134, "it must be shown that Congress intended the other punitive article to cover a class of offenses in a complete way."[39]

The test for preemption necessarily depends on the enumerated article at issue.[40] In the case of Article 117a, the statute appears to represent Congress's comprehensive action against WDII in the military. Therefore, courts will likely conclude that Article 117a preempts charging WDII offenses under Article 134—especially if the reason for bringing charges under Article 134 is that the offense had a child victim or lacked a direct and palpable military connection. While the military could have prosecuted such misconduct under Article 134 prior to the enactment of Article 117a, due to Article 117a and the doctrine of preemption, WDII involving minors and WDII without a direct and palpable military connection are now likely beyond the reach of courts-martial. Congress should find this outcome unacceptable.

Guideposts for Revising Article 117a

The main problems with Article 117a originate from well-intended efforts to address legitimate concerns. Congress probably intended the eighteen-years-of-age element to prevent Article 117a from undermining the prosecution of child pornography. Similarly, Congress probably intended the direct-and-palpable element to respect the protections of the First Amendment. Both concerns are valid, but Congress can better address them without inhibiting prosecutions.

Prohibiting WDII Without Undermining the Prosecution of Child Pornography

Congress likely included the eighteen-years-of-age element in Article 117a for two reasons. First, Congress may have been concerned that military prosecutors would

elect to charge Article 117a rather than possession or distribution of child pornography in cases involving WDII that also constitutes child pornography. Second, Congress may have been concerned that Article 117a would preempt[41] charging possession or distribution of child pornography—offenses that are still presidentially established under Article 134 rather than congressionally established under a separately enumerated article.

The first concern—that military prosecutors might elect to charge Article 117a instead of charging possessing or distributing child pornography—is likely misplaced. Military prosecutors are not likely to take it easy on Service members who possess or distribute images of child pornography.[42] Further, child pornography is not a lesser included offense of Article 117a, or vice versa. For this reason, the two statutes are not mutually exclusive; it is possible to charge them simultaneously without offending the Double Jeopardy Clause of the Fifth Amendment.[43] The second concern—that Article 117a might be interpreted to preempt child pornography charges under Article 134—can be addressed in one of two ways: either by explicitly disclaiming preemption or by codifying child pornography in the enumerated articles.

Congress may explicitly disclaim preemption in the text of Article 117a.[44] For example, Congress could add a subsection (c) to Article 117a that states: "Nothing in this article may be interpreted to preempt the prosecution of child pornography under Article 134, Uniform Code of Military Justice, or under 18 U.S.C. § 13." Remember, the doctrine of preemption focuses on whether Congress intended to occupy the field with a certain piece of legislation.[45] There can be no clearer sign that Congress did not intend to occupy the field than Congress's explicit statement to that effect in the text of the statute at issue.[46]

Congress may also eliminate the preemption issue by codifying the offense of child pornography. It may come as a surprise to some that Congress has never prohibited child pornography under the UCMJ. Instead, military prosecutors historically charged civilian federal child pornography laws through Article 134.[47] Later, the President established parallel child pornography offenses in the *MCM* section elaborating on Article 134.[48] To this day, Congress has never passed legislation prohibiting child pornography under the UCMJ. Correcting this bizarre omission would have the collateral effect of eliminating any question as to whether Article 117a preempts the prosecution of child pornography. Preemption simply does not apply to UCMJ articles other than 134.

Prohibiting WDII While Respecting the First Amendment

Congress took the term "direct and palpable" from a line of cases addressing when the military may punish conduct ordinarily protected by the First Amendment.[49] A direct and palpable connection to a military mission or the military environment is part of the balancing test for whether speech-related misconduct may be punished under clause one or clause two of Article 134.[50] Speech-related misconduct charged under Article 134 enjoys less First Amendment protection than similar civilian speech because of the strong government interest in maintaining good order and discipline in the armed forces.[51] Thus, the direct-and-palpable element appears to represent congressional concern that Article 117a would not otherwise withstand a First Amendment challenge.

Congressional concern about First Amendment protections of speech is reasonable. Commentators have suggested the First Amendment makes it difficult, if not impossible to prohibit WDII.[52] The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."[53] Thus, courts may strike down some laws that prohibit speech as unconstitutional.[54] For the purposes of the First Amendment, courts construe the term "speech" broadly, to include photography and other forms of expression.[55]

The right to free speech, however, is not absolute. There are categorical exceptions for types of speech that the First Amendment does not protect. As Chief Justice Holmes famously wrote, there is no protection for "falsely shouting fire in a theatre."[56] Commonly-recognized exclusions from First Amendment protection include incitement,[57] threats,[58] obscenity,[59] and child pornography.[60] The First Amendment does not protect speech subject to an exclusion. The Supreme Court has suggested that there may be "some [other] categories of speech that have been historically unprotected but have not yet been specifically identified or discussed as such."[61] The Court, however, has cautioned that the judiciary enjoys no "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."[62] Therefore, courts—at all levels—will probably not hold that WDII is subject to a previously unrecognized categorical exception to First Amendment protections.

Absent a categorical exception, restrictions on speech fall into two general categories relevant to Article 117a. First, content-neutral restrictions on speech are subject to a moderate level of protection under the standard known as "intermediate scrutiny."[63] Second, content-based restrictions on speech are subject to "strict scrutiny," which is the most exacting standard of constitutional review.[64]

Unfortunately, "[d]eciding whether a particular regulation is content based or content neutral is not always a simple task."[65] Therefore, it can be difficult to predict which standard of review courts will apply to some statutes.[66] Because it can be difficult to predict which standard of review courts will apply, any revision to Article 117a should use a belt-and-suspenders approach—designing Article 117a to trigger only intermediate scrutiny while also designing it to withstand strict scrutiny in case courts determine the higher standard of review should apply. The next two subsections address intermediate scrutiny and strict scrutiny and draw lessons from recent state cases that apply each standard, respectively.

A Revised Article 117a Should Trigger Intermediate Scrutiny

Under intermediate scrutiny, a law will withstand constitutional challenge if: "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[67] The requirement that incidental restrictions on speech be "no greater than essential" does

not mean the regulation must use the least restrictive means available. Under intermediate scrutiny, "a regulation need not be the least speech-restrictive means of advancing the Government's interests."[68] Courts will uphold a content-neutral regulation despite incidental restrictions on speech so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation."[69]

Intermediate scrutiny applies to content-neutral restrictions on speech. A law is content neutral if it prohibits speech based on criteria other than the conceptual subject of the speech—such as a law prohibiting lawn signs greater than four square feet in size.[70] By contrast, a law is content based if it prohibits speech based on the content thereof—such as a law prohibiting lawn signs publicizing religious events as opposed to secular events.[71]

Some commentators presume that laws criminalizing WDII are necessarily content-based restrictions on speech.[72] Such a presumption is likely wrong. Not all laws related to the content of speech are content-based restrictions. The Supreme Court has explained: "'content-neutral' speech regulations [are] those that 'are *justified* without reference to the content of the regulated speech.'"[73] For example, in *City of Renton v. Playtime Theaters*, a law restricting the placement of businesses specializing in pornographic entertainment was held to be content-neutral because its predominant concern was to prevent negative secondary effects of such businesses, not to prevent speech in the abstract.[74]

Speech involving purely private matters also enjoys lesser First Amendment protections than speech involving matters of public interest.[75] In *Snyder v. Phelps*, the Supreme Court synthesized earlier cases to explain, "where matters of purely private significance are at issue, First Amendment protections are often less rigorous [than when dealing with public issues]."[76] While *Snyder* did not address the standard of review explicitly, other courts have relied on the reasoning of *Snyder* to apply intermediate scrutiny to statutes that otherwise pose close questions.[77]

In *People v. Austin*, the Illinois Supreme Court recently followed the reasoning of *Playtime Theaters*, *Snyder*, and similar cases to hold Illinois's WDII statute was content-neutral, and thus subject to only intermediate scrutiny.[78] The Illinois court further concluded that Illinois's WDII law—that is, in relevant part, similar to Article 117a—withstood intermediate scrutiny and was not facially unconstitutional.[79]

Under the reasoning of *Playtime Theaters*, *Snyder*, and *Austin*, properly drafted WDII statutes are more akin to laws that prohibit nonconsensual recording than laws directed at curtailing speech based on content. Courts have generally upheld statutes that prohibit the nonconsensual recording of matters in which an individual has a reasonable expectation of privacy.[80] This is true even when such laws only prohibit the nonconsensual recording of intimate images.[81] In such cases, it is the expectation of privacy—not the content of the recording—that separates lawful from unlawful conduct. Thus, such laws are content neutral and subject to intermediate scrutiny.[82] By contrast, courts have overturned laws that prohibit the nonconsensual recording of matters with no reasonable expectation of privacy.[83]

Under the reasoning of *Playtime Theaters*, *Snyder*, *Austin*, and cases addressing nonconsensual recording offenses, Article 117a should be subject to intermediate scrutiny—not strict scrutiny. This is especially true if Congress revises Article 117a to focus explicitly on private matters of no legitimate public interest. Even without the direct-and-palpable element, courts should find Article 117a constitutional under intermediate scrutiny because it furthers a substantial government interest other than the suppression of speech,[84] and the interests that Article 117a promotes would be achieved less effectively without the law.

A Revised Article 117a Should Survive Strict Scrutiny

Content-based regulation of speech is subject to constitutional challenge under the standard known as "strict scrutiny"—one of the most demanding standards of judicial review. Under strict scrutiny, courts will only uphold a law if it addresses a compelling state interest and is narrowly tailored to that interest.[85] A statute impinging on free speech and subject to strict scrutiny may also be struck down as overbroad if "a 'substantial number' of its applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'"[86] This means that even if some applications of the law would not violate the First Amendment, a court may still strike the law down if a "substantial number"[87] of applications would violate the First Amendment. Nevertheless, while it is a harsher standard of review than intermediate scrutiny, strict scrutiny is not an insurmountable hurdle.[88]

Contrary to the popular anecdote that strict scrutiny is "strict in theory, [but] fatal in fact,"[89] courts ultimately find about 30 percent of statutes they test under strict scrutiny are constitutional.[90] While strict scrutiny is a high standard, well-drafted statutes regularly survive such review.

In *State v. VanBuren*, the Supreme Court of Vermont recently held that the state's WDII law survived strict scrutiny.[91] The court's analysis in *VanBuren* is instructive of how to draft a law that will survive the most stringent form of review without unduly hobbling prosecution. In *VanBuren*, the court conducted a two-part analysis: first, it found the state had a compelling interest in protecting individuals' privacy with respect to intimate images;[92] second, it concluded that Vermont's WDII law was narrowly tailored to advance that interest.[93]

In both parts of its analysis, the Vermont court relied on, among other things, several carve-outs the law made for conduct that was not subject to criminal prosecution. Such carve-outs included the disclosure of images depicting individuals without a reasonable expectation of privacy.[94] Other carve-outs included disclosures made in the "public interest" and disclosure of matters of "public concern."[95]

Vermont's law defines disclosures made in the "public interest" to include disclosures made to report crimes, conduct legal proceedings, and engage in medical treatment.[96] The carve-out for matters of "public concern" was important to the Vermont statute surviving strict scrutiny because speech on matters of public concern enjoys heightened First Amendment protection.[97] Congress should use similar carve-outs to insulate Article 117a from potential First Amendment attack while allowing military prosecutors greater latitude to act against WDII.

Specific Recommendations for a Revised Article 117a

Congress should revise Article 117a to make it a more effective tool for combatting WDII. The inability to prosecute offenses against minors or offenses without a direct and palpable military connection is a needless restriction on the prosecution of a common, non-military offense. Synthesizing the lessons of *Austin*, *VanBuren*, and the Supreme Court cases on which they rely provides insight on how Congress can revise Article 117a to allow necessary prosecutions and withstand First Amendment challenges. This article identifies five main categories for revision.

Allow the Prosecution of WDII Involving Minors

Article 117a should not be limited to images depicting adults. Congress should therefore eliminate subsection (a)(1)(A), which currently exempts images of minors from the statute. Further, Congress should eliminate any chance of curtailing the prosecution of child pornography by taking one of two steps: either add an additional subsection "(c)" to Article 117a, explicitly stating the statute does not preempt the prosecution of child pornography under Article 134; or make child pornography a statutory offense under a new Article 117b.

Strengthen the Definitions Related to a Reasonable Expectation of Privacy

Congress should ensure the law clearly articulates the meaning of a reasonable expectation of privacy, because that expectation is crucial to separating lawful from unlawful acts. Congress should reorganize the definition of "reasonable expectation of privacy" in subsection (b)(5) to read coherently when substituted for the words "reasonable expectation of privacy" found in subsection (a)(2). To ensure reasonable expectations of privacy are predictable, Congress should revise the definition of "private area" in subsection (b)(4)—due to the breadth of the terms "underwear clad" and "buttocks." Breadth and ambiguity are weaknesses for any statute that courts might construe as regulating speech. The broad and ambiguous term "underwear clad" is therefore a point of vulnerability, which Congress should revise. Similarly, the term "buttocks" may be read to include both the lower gluteal region, which is commonly visible in swimwear, and the upper gluteal region, sometimes visible due to loose clothing and movement patterns.[98] Further, the word "buttocks" is not included in the definitions of "intimate parts" or "nude" used in the statutes that passed constitutional muster in *Austin* and *VanBuren*, respectively.[99] For these reasons, Congress should change the term "underwear clad" to reflect the ability to directly view the relevant area, and they should remove the term "buttocks."

Eliminate the Direct-and-Palpable Element and Add a Public Interest Exception

Rather than limiting the statute to conduct with a direct and palpable military connection, Congress should limit the statute to conduct not in the public interest and not addressing matters of public concern. Therefore, the element currently found in subsection (a)(4)—"had a reasonably direct and palpable connection to a military mission or military environment"—should be replaced with a requirement that the conduct "was not in the public interest." Congress should then define the term "public interest" in a new subsection—(b)(8). The definition of "public interest" should include exceptions for criminal reporting, law enforcement and judicial functions, medical diagnosis and treatment, and the exercise of parental supervision.[100] Finally, the definition of "public interest" should include the report or discussion of matters of "public concern." Such a carve-out was important to the survival of the statute at issue in *VanBuren*.

Use a Mens Rea of Recklessness, Not Negligence

Congress should use the mens rea of recklessness rather than negligence in those places where Article 117a currently invokes a negligence standard. Although the Supreme Court's jurisprudence on this point is not crystal clear, historical limitations on punitive damages for speech-based torts suggest the Court may disfavor punitive—including criminal—sanctions for negligent speech.[101] Therefore, Congress should change the mens rea in both subsections (a)(2) and (a)(3) from "knows or reasonably should have known" to "recklessly disregards."

Eliminate Redundancy in Core Terms

Congress should streamline Article 117a and amend the definitions section to untangle convoluted language. Subsection (a)(1) should be simplified by leveraging the definitions in subsection (b) to reduce redundant terms. Specifically, subsection (b)(3)—defining "intimate visual image"—should be changed to define "intimate image" because the word "visual" is redundant with the word "image." The definition of "intimate image" should then be expanded to include images of sexually explicit conduct so that the term "intimate image" can be used elsewhere in the statute, rather than the more cumbersome set-phrase "an intimate visual image of another person or a visual image of sexually explicit conduct involving a person." This alone will substantially streamline the statute. Likewise, subsections (a)(2) and (a)(3) should both be streamlined by using the term "intimate image" throughout, as discussed above for subsection (a)(1).

Congress should change the name of the offense, found in subsection (a)(5), to be consistent with the streamlined language about "intimate images." Subsection (a)(5) should state that in individual who commits the offense is "guilty of wrongful distribution of intimate images." As previously discussed, this change would also help define the offense in terms consistent with the experience of victims.[102]

Conclusion

Congress created Article 117a to enable prosecution of WDII in the military. Ironically, it may limit such prosecution instead. Due to the doctrine of preemption, Article 117a probably prevents the military prosecution of any WDII involving minors, as well as any WDII without a direct and palpable military connection. Congress should revise Article 117a to enable the military to prosecute Service members who commit WDII regardless of the age of the victim or the connection to the military. While the First Amendment protects the freedom of speech, Congress can revise Article 117a without infringing on the First Amendment. State laws that criminalize WDII and state courts' reviews of those laws can help chart a path forward to better realize the purpose of Article 117a. This article has advocated for several specific

changes to Article 117a based on state and federal precedent as applied to the military. Congress should strongly consider implementing changes like those proposed in this article, and revise Article 117a to match the function of the law to its purpose. **TAL**

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Notes

1. Preemption is the legal doctrine under which Article 134, Uniform Code of Military Justice (UCMJ), may not be used to prosecute offenses that are highly similar to offenses Congress has prohibited under other articles of the UCMJ. Prior to the enactment of Article 117a, the military could have used Article 134 to prosecute wrongful distribution of intimate images (WDII), either as service-discrediting behavior or as a violation of state law. Because Article 117a addresses a comparatively narrow range of WDII offenses, the enactment of Article 117a, combined with the preemption doctrine, has likely reduced the military's overall ability to charge WDII offenses, as compared with the prosecutorial options under Article 134.

2. *See, e.g.*, Niraj Chokshi, *How to Fight Back Against Revenge Porn*, N.Y. Times (May 18, 2017), https://www.nytimes.com/2017/05/18/us/fighting-revenge-porn.html.

3. JonasOooohyeah, *Revenge Porn*, urbandictionary.com (Sept. 25, 2007), https://www.urbandictionary.com/define.php?term=revenge+porn (last visited June 29, 2021). Urban Dictionary is not a scholarly source of information; but, due to its system of date-stamping user-submitted definitions, it is useful for finding when certain terms gained some form of popular recognition. Coincidentally, 2007 is also the year Apple released the iPhone. *This Day in History, January 9, 2007: Steve Jobs Debuts the iPhone*, History (Aug. 29, 2012), https://www.history.com/this-day-in-history/steve-jobs-debuts-the-iphone.

4. *See* Alex Morris, *Hunter Moore: The Most Hated Man on the Internet*, Rolling Stone (Nov. 13, 2012, 9:10 PM), https://www.rollingstone.com/culture/culture-news/hunter-moore-the-most-hated-man-on-the-internet-184668.

5. For example, topless images of a female under the age of eighteen years—without more—do not qualify as "child pornography" under Article 134. *See* Manual for Courts-Martial, United States pt. IV, ¶ 95c(4) (2019) [hereinafter MCM].

6. *See* Sophie Gallagher, *"Revenge Porn" Is Not the Right Term to Describe Our Experiences, Say Victims*, HuffPost, https://www.huffingtonpost.co.uk/entry/why-are-we-still-calling-it-revenge-porn-victims-explain-change-in-the-laws-needed_uk_5d3594c2e4b020cd99465a99 (Aug. 3, 2019) (describing the experience of one particular victim who discovered topless photos of herself as a fourteen-year-old on the internet).

7. *See* Lolita C. Baldor, *Scouring for Nude Images in Photo Scandal at Marine Base*, Associated Press (May 5, 2017), https://apnews.com/4e725b203f624788966ccd8717eef1db/Scouring-for-nude-images-in-photo-scandal-at-Marine-base (describing 150,000 nude or "semi-nude" images, of which approximately 20,000 had "a possible military connection").

8. *See* Anne Claire Stapleton et al., *Lewd Photos of Female Marines Spark Probes, Consternation*, CNN, https://www.cnn.com/2017/03/06/politics/marines-united-photos-investigation/index.html (Mar. 6, 2017, 5:07 PM).

9. *See* Dave Philipps, *Inquiry Opens into How a Network of Marines Shared Illicit Images of Female Peers*, N.Y. Times (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/inquiry-opens-into-how-30000-marines-shared-illicit-images-of-female-peers.html.

10. *See, e.g., id.*

11. *See, e.g., id.*

12. *See* Jeff Schogol, *First Female Infantry Marines Joining Battalion on Thursday*, Marine Corps Times (Jan. 3, 2017), https://www.marinecorpstimes.com/news/your-marine-corps/2017/01/03/first-female-infantry-marines-joining-battalion-on-thursday.

13. *See* Corey Dickstein, *FBI Joins Army, Air Force and Coast Guard in Investigation into Nude-Photo Scandal*, Stars & Stripes (Mar. 17, 2017), https://www.stripes.com/news/fbi-joins-army-air-force-and-coast-guard-in-investigation-into-nude-photo-scandal-1.459244.

14. *See, e.g.*, Gayle Tzemach Lemmon, *The Marines Finally Have a Female Infantry Officer, but Now Comes the Hard Part*, CNN, https://www.cnn.com/2017/10/01/opinions/first-female-marine-infantry-officer-lemmon-opinion/index.html (Oct. 1, 2017, 10:18 AM).

15. *See* Hope Hodge Seck, *11 Troops Kicked Out After Court-Martial in Wake of Marines United Scandal*, Military (Sept. 13, 2018), https://www.military.com/daily-news/2018/09/13/11-troops-kicked-out-after-court-martial-wake-marines-united-scandal.html. The title of the article appears to be inaccurate. The article states that eleven Marines were convicted at courts-martial and all received a bad-conduct discharge. The article also states that two of those Marines were convicted at summary courts-martial. A summary court-martial may not adjudge a punitive discharge. Therefore, it appears the reference to bad-conduct discharges only refers to the nine Marines convicted at general and special courts-martial. Eight other marines were administratively separated for conduct related to the scandal and forty-five more received non-judicial punishment or adverse administrative action. *See id.* Notably, the Marine Corps successfully prosecuted the Marines in question before the passage of Article 117a.

16. Tara Copp, *In Wake of Marines United Nude-Photo Scandal, Lawmakers Question DOD Social Media Policies*, Stars & Stripes (Mar. 21, 2017), https://www.stripes.com/news/us/in-wake-of-marines-united-nude-photo-scandal-lawmakers-question-dod-social-media-policies-1.459829.

17. Protecting the Rights of Individuals Against Technological Exploitation Act, H.R. 2052, 115th Cong. (2017) (also known as the PRIVATE Act).

18. *See* 163 Cong. Rec. H3052–58 (daily ed. May 2, 2017) (statements of Reps. Barbara Lee, Ann Kuster, Don Bacon, Lois Frankel, and Martha McSally); 163 Cong. Rec. H4477–80 (daily ed. May 23, 2017) (statement of Rep. Martha McSally).

19. *See* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 533, 131 Stat. 1283, 1389–90 (2017).

20. *See* UCMJ art. 117a (2017).

21. Thirteen Army courts-martial have convicted a Soldier for violating Article 117a. E-mail from the Office of the Clerk of Court, Army Ct. of Crim. Appeals, to author (June 29, 2021) (on file with author). The Navy has reported four convictions under Article 117a. *See Navy Results of Trial*, U.S. Navy JAG Corps, https://jag.navylive.dodlive.mil/Military-Justice/ (a month-by-month search of the Navy's court-martial results, found four convictions for broadcasting or distributing "intimate images" as of 28 June 2021). The Air Force has reported three convictions. *See The Judge Advocate General's Corps Air Force Docket*, A.F. Judge Advoc. Gen.'s Corps, https://legalassistance.law.af.mil/AMJAMS/PublicDocket/docket.html (a line-by-line review of the Air Force's court-martial results found three convictions for Article 117a as of Jun. 28, 2021). The Marine Corps has reported three convictions. *See Monthly Court Martial Reports*- U.S. Marines, https://www.hqmc.marines.mil/sja/Court-Martial-Reports/ (a month-by-month search of the Marine Corps's court-martial results found three convictions for broadcasting or distributing "intimate images" or "intimate visual images" as of 28 June 2021). By contrast, the Marine Corps alone reported fifty-six separate courts-martial resulting in a conviction for child pornography in the same timeframe. *See id.*

22. *See* UCMJ art. 117a(a)(1)(A) (2017).

23. *Id.* art. 117a(a)(4).

24. *Id.* art. 117a(a)(1)(A).

25. *See* 163 Cong. Rec. H4477–80 (daily ed. May 23, 2017) (statements of Reps. Jackie Speier and Susan Davis).

26. *See* MCM, *supra* note 5, pt. IV, ¶ 95.c.(4) (defining "child pornography" to require either "an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct"). *See also* United States v. Blouin, 74 M.J. 247, 250 (C.A.A.F. 2015) (discussing the relatively stringent standards of child pornography definitions in a slightly different context).

27. According to one study conducted in 2012, nearly one-in-five high school students reported having sent a nude or semi-nude image of themselves to another individual. *See* Donald S. Strassberg et al., *Sexting by High School Students: An Exploratory and Descriptive Study*, 42 Archives Sexual Behav. 15, 17–22 (2013). In another study, nearly two-in-five teenagers reported being sent a nude or semi-nude photograph originally meant for someone else. *See* Melissa R. Lorang et al., *Minors and Sexting: Legal Implications*, 44 J. Am. Acad. Psychiatry & L. 73, 73–80 (2016).

28. *See* Lorang et al., *supra* note 27.

29. *See* United States v. Wilcox, 66 M.J. 442, 448–49 (C.A.A.F. 2008) (citing United States v. Priest, 45 C.M.R. 338, 343 (C.M.A. 1972).

30. This hypothetical largely mirrors the facts reported about Second Lieutenant (2ndLt) Vincent Provines and his wife, Cesaria Marquez, who sent intimate images of 2ndLt Provines's former girlfriend to her parents. Provines and Marquez were convicted of cyberstalking in state court. *See* James Laporta, *Exclusive: U.S. Marine Couple Found Guilty of Sending Revenge Porn of Young Woman to Her Parents*, Newsweek (July 14, 2018, 6:10 AM), https://www.newsweek.com/marine-corps-marines-united-revenge-porn-military-1021152.

31. *See 48 States + DC + One Territory Now Have Revenge Porn Laws*, Cyber C.R. Initiative, https://www.cybercivilrights.org/revenge-porn-laws/ (last visited May 4, 2021).

32. UCMJ art. 117a(a)(2) (2017).

33. *Id.* art. 117a(b)(5).

34. *Id.* 117a(a)(2) (substituting the definition of "reasonable expectation of privacy" found in Article 117a(b)(5) for the words "a reasonable expectation of privacy").

35. *See generally* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 Elon L. Rev. 291, 393–95 (2016).

36. MCM, *supra* note 5, pt. IV, ¶ 91.c.(5)(a).

37. United States v. Kick, 7 M.J. 82, 85 (1979).

38. *See id.*

39. *Id.*

40. For example, the Army Court of Criminal Appeals (ACCA) recently found Article 120b preempted court-martial charges that a Solider violated all three clauses of Article 134 by "wrongfully annoying and molesting a minor." *See* United States v. Rodriguez, No. 20130577, 2015 CCA LEXIS 551, at *10 (A. Ct. Crim. App. Dec. 1, 2015), *aff'd on reconsideration*, 2016 CCA LEXIS 145 (Army Ct. Crim. App. Mar. 7, 2016). Affirming its prior decision on reconsideration, the ACCA explained that, because the government charged the accused Soldier under all three clauses of Article 134, including assimilation of state law through the Assimilative Crimes Act, 18 U.S.C. § 13 (ACA), two distinct forms of preemption were at issue: the form generally applicable to Article 134, and the form of preemption inherent to the ACA. *See* United States v. Rodriguez, 2016 CCA LEXIS 145, at *10 (A. Ct. Crim. App. Mar. 7, 2016). For the purposes of this article—and as the ACCA concluded in *Rodriguez*—the distinction between the two forms of preemption makes little, if any, difference. It is sufficient to note that the ACA is the mechanism through which military prosecutors may charge state-law offenses committed in areas of federal jurisdiction.

41. *See Kick*, 7 M.J. at 85; *supra* text accompanying note 37.

42. *Cf., e.g.*, United States v. Forrester, 76 M.J. 389, 391–92 (C.A.A.F. 2017) (a Marine was convicted of four specifications of possessing child pornography involving the same images on four different devices); United States v. Mobley, 77 M.J. 749, 750 (A. Ct. Crim. App. 2018) (a Soldier was initially convicted of two specifications of possessing child pornography for different images all contained on a single device).

43. *See generally* Blockburger v. United States, 284 U.S. 299 (1932).

44. Wrongful distribution of intimate images is sufficiently distinct from child pornography. Laws against the former probably do not preempt charging the latter under Article 134 at all, but further measures to distinguish between the two may be adopted in an abundance of caution.

45. *See Kick*, 7 M.J. at 85.

46. While the UCMJ does not have such a savings clause elsewhere in the enumerated articles, the presidentially-established offenses under Article 134 found in the MCM include exactly such a clause with respect to child pornography. *See* MCM, *supra* note 5, pt. IV, ¶ 95.c.(1). Similarly, other parts of the U.S. Code include such "savings clauses" expressly disclaiming federal preemption of relevant state law. *See* Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer 13–14 (2019).

47. *Cf.* United States v. Blouin, 74 M.J. 247, 248 (C.A.A.F. 2016) (discussing a charge under Article 134 incorporating the federal civilian child pornography statute).

48. *See generally* MCM, *supra* note 5, pt. IV, ¶ 95.

49. *See* United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008).

50. *See id.* (citing United States v. Priest, 45 C.M.R. 338, 343 (C.M.A. 1972)).

51. *See id. See also* Parker v. Levy 417 U.S. 733, 759 (1974) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to [military] command. If it does, it is constitutionally unprotected."). In *Levy*, the Supreme Court's recognition of the unique military interest in prohibiting certain kinds of otherwise protected speech echoed earlier decisions of military courts that allowed prosecution of otherwise protected speech based on a "direct and palpable" prejudice to good order and discipline. *See generally Priest*, 45 C.M.R. at 343 (citing United States v. Gray, 42 C.M.R. 255, 260 (C.M.A. 1970)). The "direct and palpable" standard later evolved to embrace both speech prejudicial to good order and discipline and speech of a nature to bring discredit on the armed forces. Punishment of speech under Article 134 therefore requires, "a direct and palpable connection between [the] speech and the military mission or military environment." *Wilcox*, 66 M.J. at 448.

52. *See* John A. Humbach, *The Constitution and Revenge Porn*, 35 Pace L. Rev. 215, 216–18 (2014).

53. U.S. Const. amend. I.

54. *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002).

55. *See id.* at 241–42, 258 (holding the First Amendment protects some sexually explicit images as speech).

56. *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

57. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

58. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

59. *See* Roth v. United States, 354 U.S. 476, 483 (1957).

60. *See* New York v. Ferber, 458 U.S. 747, 763–64 (1982).

61. United States v. Stevens, 559 U.S. 460, 472 (2010).

62. *Id.*

63. *See* Kelso, *supra* note 35, at 293–96 (using both the terms "intermediate review" and "intermediate scrutiny").

64. *See id.*

65. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994).

66. *Cf.* People v. Austin, 155 N.E. 3d 439, 456 (Ill. 2019) (rejecting a government concession that strict scrutiny should apply to a statute under review).

67. United States v. O'Brien, 391 U.S. 367, 377 (1968).

68. *Turner*, 512 U.S. at 662.

69. United States v. Albertini, 472 U.S. 675, 689 (1985).

70. *See* Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015).

71. *See id.* at 164.

72. *See, e.g.*, Ashton Cooke, *The Right to Post: How North Carolina's Revenge Porn Statute Can Escape Running Afoul of the First Amendment Post-*Bishop, 15 First Amend. L. Rev. 472, 482 (2017).

73. City of Renton v. Playtime Theatres, 475 U.S. 41, 47 (1986) (quoting Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)).

74. *Id.*

75. Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (plurality opinion)).

76. *Id.* at 352 (citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (quoting Dun & Bradstret, 472 U.S. at 758; Connick v. Myers, 461 U.S. 138, 145–47 (1983)).

77. *See* People v. Austin, 155 N.E. 3d 439, 458–59 (Ill. 2019).

78. *Id.* at 456.

79. *Id.* at 474. *See also* 720 Ill. Comp. Stat. Ann. 5/11–23.5 (2019).

80. *See, e.g.*, United States v. Bessmertnyy, 2019 CCA LEXIS 255, at *64–65 (A.F. Ct. Crim. App. June 14, 2019).

81. *See, e.g., id.*

82. *See* People v. Clark, 6 N.E.3d 154, 160–61 (Ill. 2014).

83. *See id.* (overturning an eavesdropping law when it was revised to apply regardless of privacy expectations).

84. The substantial government interests that Article 117a furthers include the protection of individual privacy interests and prevention of the individual and societal harms that result from WDII.

85. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991).

86. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6, (2008) (quoting New York v. Ferber, 458 U.S. 747, 769–71 (1982)). *See also* United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting *Washington State Grange*, 552 U.S. 442).

87. The criteria of a "substantial number" is vague.

88. *See, e.g.*, State v. VanBuren, 2018 VT 95, 210 Vt. 293, 214 A.3d 791. *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 814–15 (2006).

89. *See* Winkler, *supra* note 88, at 794–95 (surveying similar statements from various sources).

90. *Id.* at 815 (The "survival rate" for freedom of speech cases drops to about 22 percent.).

91. *See VanBuren*, 214 A.3d at 813–14 (the statute is still subject to an as-applied challenge).

92. *See id.* at 811.

93. *Id.* at 812–13.

94. *See id.* at 813.

95. *See id.* at 812–13.

96. *See id.* at 796, 812. *See also* Vt. Stat. Ann. tit. 13, § 2606 (2015).

97. *See VanBuren*, 214 A.3d at 812–13. *Cf.* Bartnicki v. Vopper, 532 U.S. 514, 533–34 (2001) (speech on matters of public concern is a "core purpose" of the First Amendment).

98. A phenomenon sometimes colloquially referred to as "plumbers' crack."

99. *See* 720 Ill. Comp. Stat. Ann. 5/11–23.5 (2019); Vt. Stat. Ann. tit. 13, § 2606 (2015).

100. Such as taking baby pictures, or one parent notifying the other of the content of their child's text messages.

101. In civil cases, punitive damages are only allowed upon a showing of at least recklessness. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974). This issue is different from the issue in *Elonis v. United States*, 135 S. Ct. 2001 (2015), and similar cases about the minimum mens rea applicable to laws that do not explicitly specify a mens rea. The issue in *Gertz* relates to whether merely negligent speech—that is not subject to a categorical exception to First Amendment protections—can trigger punitive sanction. At least in civil cases, it cannot. The same logic would disallow punitive sanctions for negligent speech in criminal cases.

102. *See* Gallagher, *supra* note 6 and accompanying text. A copy of Article 117a with the proposed changes using underlined text for additions and strikethrough text for deletions is available in the appendix.

Appendix

Proposed Revisions to Article 117a

(a) Prohibition.—Any person subject to this chapter—

(1) who knowingly and wrongfully broadcasts or distributes an intimate ~~visual~~ image of another person ~~or a visual image of sexually explicit conduct involving a person~~ who—

~~(A)~~ ~~(A) is at least 18 years of age at the time the intimate visual image or visual image of sexually explicit conduct was created;~~

~~(B)~~ (A) is identifiable from the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~ itself, or from information displayed in connection with the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~; and

~~(C)~~ (B) does not explicitly consent to the broadcast or distribution of the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~;

(2) who recklessly disregards ~~knows or reasonably should have known~~ that the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~ was made under circumstances in which the person depicted in the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~ retained a reasonable expectation of privacy regarding any broadcast or distribution of the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~;

(3) who recklessly disregards ~~knows or reasonably should have known~~ that the broadcast or distribution of the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~ is likely—

(A) to cause harm, harassment, intimidation, emotional distress, or financial loss for the person depicted in the intimate ~~visual~~ image ~~or visual image of sexually explicit conduct~~; or

(B) to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; and

(4) whose conduct, under the circumstances, was not in the public interest ~~had a reasonably direct and palpable connection to a military mission or military environment~~,

(5) is guilty of wrongful distribution of intimate ~~visual~~ images ~~or visual images of sexually explicit conduct~~ and shall be punished as a court-martial may direct.

(b) Definitions.—In this section:

(1) Broadcast.—The term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons.

(2) Distribute.—The term "distribute" means to deliver to the actual or constructive possession of another person, including transmission by mail or electronic means.

(3) Intimate visual image.—The term "intimate visual image" means a visual image that depicts a private area of a person, or sexually explicit conduct involving a person.

(4) Private area.—The term "private area" means any of the following areas when either naked or insufficiently covered to prevent direct viewing: the ~~naked or underwear-clad genitalia~~ genitals, pubic area, anus, buttocks, or female areola or nipple.

(5) Reasonable expectation of privacy.—The term "reasonable expectation of privacy" means a reasonable belief that, under the circumstances, ~~circumstances in which a reasonable person would believe that~~ a private area of the person, or sexually explicit conduct involving the person, would not be visible to the public.

(6) Sexually explicit conduct.—The term "sexually explicit conduct" means actual or simulated genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, bestiality, masturbation, or sadistic or masochistic abuse.

(7) Visual image.—The term "visual image" means the following:

(A) Any developed or undeveloped photograph, picture, film, or video.

(B) Any digital or computer image, picture, film, or video made by any means, including those transmitted by any means, including streaming media, even if not stored in a permanent format.

(C) Any digital or electronic data capable of conversion into a visual image.

(8) Public Interest—The term "the public interest" means:

(A) reporting a crime to a law enforcement agency;

(B) the conduct of law enforcement operations;

(C) the conduct of medical diagnosis and treatment;

(D) the exercise of parental supervision of minor children; or

(E) reasonably related to reporting or discussing matters of public concern.

(c) Nothing in this Article shall be construed to preempt the prosecution of child pornography under Article 134, Uniform Code of Military Justice or 18 U.S.C. § 13.

(Credit: Alexandr Bakanov – stock.adobe.com)

No. 2

Choose Your Own (Mis)Adventure

Navigating The VA's Disability System Under the Veterans Appeals Improvement and Modernization Act of 2017

By Major Amber L. Turner

You and YOU ALONE are in charge of what happens in this story. There are dangers, choices, adventures, and consequences. YOU must use all of your numerous talents and much of your enormous intelligence. The wrong decision could end in disaster—even death. But don't despair. At any time, YOU can go back and make another choice, alter the path of your story, and change its result.[1]

If you grew up in the 1980s or 1990s, you probably remember the *Choose Your Own Adventure* books.[2] As the reader, you took on the role of the protagonist, propelling yourself through the plot, the decision-making in your hands. There was a sense of power in the ability to choose your own path, a feeling of trepidation as you turned to the page you selected, and the joy of a successful choice. On the other hand, you may have experienced the sinking feeling upon seeing "The End" after suffering some miserable fate. The feeling likely did not last long—you probably had a thumb marking your last decision-point so you could quickly make another selection and continue through the story, the power back in your hands.

The Appeals Improvement and Modernization Act of 2017[3] (AMA) puts veterans on a similar adventure by significantly modifying the review and appeals process for disability claims in the Department of Veterans Affairs (VA).[4] After an initial decision on a claim for disability benefits,[5] the VA gives veterans three options to appeal the decision—to include options within those options and the ability to move between options. Additionally, veterans may seek the representation of an agent or attorney earlier in the process, allowing for additional assistance in choosing the correct path through their adventure. A wrong turn of the page could mean the difference between a successfully disputed claim and a veteran faced with "The End" of their claim. Given these legislative changes and the far-reaching consequences on a veteran's claim, it is imperative that practitioners (both attorneys and representatives within Veterans Service Organizations) understand the process and the effects these changes will have on veterans, and can properly advise them while they navigate the numerous options available to them.

After briefly discussing the path a disability claim takes in the "legacy system," "Legislative History of the AMA" summarizes the legislative history leading to the enactment of the AMA. "The AMA Framework" focuses on a detailed overview of the new review and appeals process, to include every option available to veterans and the effect of those options on claim effective dates. Last, "Tips for Practitioners" lays out useful practice points for assisting veterans navigating the new system.[6]

The "Legacy System"

Prior to the enactment of the AMA, the VA appeals system was "an accumulation of processes and procedures that have built up in stages since [World War I]."[7] In 2016, the Secretary of Veterans Affairs described the legacy system as:

> complex, ineffective, confusing, and understandably frustrating for Veterans who wait much too long for final resolution of their appeal. The current appeals process has no defined endpoint, and multiple steps are set in statute. The system requires continuous evidence gathering and multiple re-adjudications of the very same or similar matter. A Veteran, survivor, or other appellant can submit new evidence or make new arguments at any time, while the VA's duty to assist requires continuous development and re-adjudication. Simply put, the VA appeals process is unlike other standard appeals processes across Federal and judicial systems.[8]

A brief overview of the legacy system will assist practitioners in understanding the substantial changes the AMA brings to the appeals process. A visual chart is included in Appendix A[9] to aid in the explanation of the legacy system.

Notice of Disagreement

Under the legacy system, a veteran who received an unfavorable rating from the VA Regional Office (RO) initiated the appeal process by filing a Notice of Disagreement (NOD) within one year of the initial decision.[10] A veteran then had the ability to choose between traditional review or review by a Decision Review Officer (DRO). In the traditional review process, a reviewer at the RO reviewed the file, examined any new evidence submitted by the veteran, and had the authority to change the original decision based on the new evidence or based on a clear and unmistakable error in the initial decision.[11] Alternatively, a veteran could have elected for review by a DRO. Assessment by a DRO included review by an "individual who did not participate in the decision being reviewed" and who gave "no deference to the decision being reviewed."[12] The DRO had the ability to revise a decision based on a difference of opinion.[13]

Statement of the Case and Appeal to the Board of Veterans' Appeals

Following review (through either lane), the RO sent the veteran a Statement of the Case (SOC). The SOC detailed the evidence reviewed, applicable laws and regulations, and the VA's reasons for any decisions made.[14] After receipt of the SOC, a veteran could file a substantive appeal to the Board of Veterans' Appeals (BVA) for a one-time review.[15] Following a hearing (if requested), the BVA reviewed the entire record de novo and either granted the appeal, denied the appeal, or remanded the claim back to the RO for additional development.[16] Following a decision by the VA, a veteran could appeal to the Court of Appeals for Veterans Claims (CAVC), with follow-on review available in limited circumstances at the U.S. Court of Appeals for the Federal Circuit and the U.S. Supreme Court.[17]

Evidence Submission

Under the legacy system, veterans had the ability to submit additional evidence to support their claim at any time during the appeals process.[18] If a veteran submitted evidence after filing an NOD, but before the VA issued an SOC, the VA would review the evidence and incorporate it into the SOC. If the VA received the evidence after issuing the SOC, the VA reviewed the evidence and issued a Supplemental Statement of the Case (SSOC).[19] This occurred every time a veteran submitted additional evidence.[20] If the veteran submitted evidence after filing a substantive appeal to the BVA, the BVA could remand the claim back to the RO for re-adjudication and issuance of another SSOC.[21]

Duty to Assist

Under the legacy system, the VA was required by law to assist veterans in obtaining and developing evidence throughout the entire appeals process, from the filing of an initial claim through final adjudication.[22] As one can imagine, an appeal could sit in the legacy system for years, a process that essentially re-started every time a veteran submitted additional evidence. With over 417,000 appeals pending in October 2017, veterans could expect to wait up to seven years for resolution of their appeal.[23] The continuous re-adjudication and years of waiting for a decision highlighted the ineffectiveness, confusion, and frustration of the system as it stood, leading to a push by legislators, veterans' advocates, and veterans themselves for change.[24]

Legislative History of the AMA

The AMA was a deeply collaborative effort between Congress and multiple organizations that represent veterans in the claims process. In February 2016, President Barack Obama submitted his Fiscal Year (FY) 2017 budget to Congress. The President's budget specifically addressed and prioritized a proposal to reform the VA appeals process.[25] The President's message echoed the VA's budget request, which requested additional funds to support, and asked Congress to enact a "Simplified Appeals Process."[26]

Following submission of the FY 2017 budget, in March 2016, the VA convened an "Appeals Summit."[27] Prior to this summit, both the Senate and House of Representatives introduced legislation proposing a "fully developed appeals" process; however, no legislation made it to enactment.[28] The 2016 summit involved four months of collaboration with congressional staff, the BVA, and stakeholders in the appeals process.[29] Seeking to balance the VA's desire to expedite and streamline the appeals process with stakeholders' intimate knowledge of the problems facing veterans in the appeals process, eleven stakeholder organizations participated in the development of a proposal.[30] Concerns raised by veterans' advocates included the desire for more detailed decision letters, preservation of effective

dates, and an easy-to-understand process that gave veterans more options.[31] The proposals developed during this summit would eventually become the foundation for the AMA.

Following the 2016 summit, both the House and Senate introduced several bills in an attempt to overhaul the appeals system using the knowledge gained from the 2016 summit,[32] but the 114th congressional term ended with no enacted legislation significantly altering the appeals process. On 2 May 2017, Representative Mike Bost introduced House of Representatives Bill (H.R.) 2288—also known as the Veterans Appeals Improvement and Modernization Act of 2017.[33] The next day, Senator Johnny Isakson introduced similar legislation.[34] The House and Senate eventually passed H.R. 2288, and President Donald Trump signed the AMA into law on 23 August 2017.[35]

In November 2017, the VA again met with stakeholders to highlight the changes made by the AMA and address specific concerns raised by stakeholders.[36] Using this meeting as a foundation, the VA published its proposed rule to implement the AMA in August 2018, accepting comments for roughly two months.[37] After reviewing and addressing submitted comments, the VA published the final rule on 18 January 2019, which ultimately took effect on 19 February 2019.[38]

The AMA Framework

Under the AMA framework, veterans have three options to contest a decision on a claim. They may 1) seek higher-level review from the agency of original jurisdiction;[39] 2) file a supplemental claim; or 3) file an NOD with the BVA.[40] See Appendix B[41] for a visual representation of this framework. For three reasons, this decision point is where the adventure truly begins and is explored below.

> The first is the ability of veterans to bifurcate claims among different review options:
>
> With respect to service-connected disability compensation, an issue . . . is defined as entitlement to compensation for a particular disability. For example, if a decision adjudicates service-connected disability compensation for both a knee condition and an ankle condition, compensation for each condition is a separate entitlement or issue for which a different review option may be elected.[42]

Essentially, using the example described above, a veteran could have multiple *Choose Your Own Adventure* books open at a time, appealing a decision regarding the knee condition in a separate venue from an appeal regarding the ankle condition.

Second, if a veteran timely and properly files under the requirements for each option, a claim could sit in the review and appeals system, bouncing from option to option, with no clear finality. The AMA actually contemplates and allows for "continuously pursued claims," whereby a veteran can, in succession, dispute a decision from one lane in another.[43] A detailed explanation of each review option below will highlight some limitations to this rule. Last, while a claim is pending adjudication in one review lane, a veteran may withdraw the review request and file it in a different lane, which is discussed in detail in "Court of Appeals for Veterans Claims."

Review Options

Higher-Level Review

Higher-level review is a "new look" at a claim decided by the RO and purports to be the fastest review option of the three.[44] Veterans must submit their request for higher-level review within one year of the RO's issuance of a decision. Generally, an "experienced" adjudicator who did not participate in the original decision—and who is from an office that did not render that decision—will conduct the higher-level review (unless the veteran requests an exception or the claim requires specialized processing).[45] Review is de novo and limited to the evidence in the record as of the date of the original decision.[46]

When requesting higher-level review, a veteran may request an informal conference with the higher-level adjudicator for the sole purpose of allowing the veteran to identify any errors.[47] Following this conference (if requested), the adjudicator will review the evidence available at the time of the initial decision and issue a detailed decision that includes all the elements required for written notifications of decisions, along with a description of any evidence not considered and a list of options available to the veteran.[48] Following a decision on higher-level review, a veteran may either file a supplemental claim or appeal to the BVA.[49]

Supplemental Claim

A supplemental claim is a request for re-adjudication of a claim by the RO based on "new and relevant" evidence.[50] "New" evidence is defined as "evidence not previously part of the actual record before agency adjudicators."[51] "Relevant" evidence is defined as "information that tends to prove or disprove a matter at issue in a claim."[52] Review is limited to the record as of the date of the original decision and any new and relevant evidence submitted prior to the VA issuing a decision on the supplemental claim.[53] Although significantly curtailed by the AMA, the filing of a supplemental claim is one way to trigger the VA's duty to assist.

Remember that, under the legacy system, the VA's duty to assist a veteran existed at all stages in the adjudication process.[54] Under the AMA, the VA's duty to assist prior to issuance of an initial decision remains the same, as it existed under the legacy system.[55] However, the AMA has significantly limited the VA's duty to assist after the initial decision, applying the duty only to a supplemental claim.[56]

A veteran may file a supplemental claim any time after the issuance of a decision from the RO; however, as discussed below, the timing can change the effective date for benefits.[57] Following a decision on a supplemental claim, a veteran may file another supplemental claim, request a higher-level review, or appeal to the BVA.[58]

Board of Veterans Appeals

Selecting this option takes a claim out of the agency of original jurisdiction (RO) and moves it (not permanently) to the BVA. To effectuate an appeal to the BVA, a veteran must file an NOD.[59] When filing an NOD, veterans can select from three dockets for the processing of their appeal by the board: 1) the hearing docket, 2) the evidence docket, or 3) the direct docket.

Veterans can opt for the "hearing" docket, whereby the VA affords them both the opportunity to submit additional evidence and to have a hearing in front of the board. The board will consider evidence in the record at the time of the original decision, evidence submitted by the veteran during the hearing, and evidence submitted to the board within ninety days following the hearing.[60] The BVA conducts hearings at the VA in Washington, D.C., or through videoconference at a VA facility.[61] The hearing consists of testimony by the veteran and any witnesses, introduction of evidence, and argument by the veteran or veteran's representative.

If a veteran does not want to have a board hearing, but wishes to submit additional evidence, the "evidence" docket is the most appropriate. Veterans may submit additional evidence with the NOD, or up to ninety days following the board's receipt of the NOD.[62]

Last, a veteran may select the "direct" docket, in which they do not request a hearing or to submit additional evidence. Think of this as a higher-level review conducted by the BVA, as opposed to an adjudicator from the RO. The board reviews only the evidence in the record at the time of the decision by the RO.[63] The VA projects this docket will have the fastest processing time of the three (365 days), but also expects the process to take much longer than higher-level review or a supplemental claim (125 days).[64]

Once a veteran files an NOD and makes a docket selection, they maintain a limited ability to switch dockets. For example, if a veteran originally selected the "direct" docket, but subsequently decides to submit evidence and/or have a hearing ("evidence" or "hearing" docket), the regulations provide for this with certain limitations. The switch in dockets must occur within one year of the date the RO issued a decision on the claim, or within sixty days of receipt of the NOD by the BVA (whichever is later).[65] The BVA will not grant a request to change dockets if the veteran has already submitted evidence in the "hearing" docket or "evidence" docket lanes.[66] Practically speaking, a change in dockets will only be advantageous when a veteran is seeking to move from the "direct" docket to the "evidence" or "hearing" docket.

The board will render a decision following a de novo review of the evidence and testimony, if any.[67] The restrictions on the type of evidence the board will consider are not clear. While the VA requires "new and relevant" evidence for a supplemental claim,[68] this standard does not appear to apply to review by the BVA. The evidentiary limitations require the board to maintain "reasonable bounds of relevancy and materiality" and allows for the exclusion of "documentary evidence, testimony, and/or argument which is not relevant or material to the issue, or issues, being considered or which is unduly repetitious."[69] Following a decision by the BVA, a veteran may file a supplemental claim or appeal to CAVC, but may not submit a request for higher-level review.[70]

Court of Appeals for Veterans Claims

Appeal to CAVC operates in much the same way as it did under the legacy system, with the exception of an additional option for further review following a CAVC judgment. Following a decision by the BVA, a veteran has 120 days to submit an appeal to CAVC.[71] The scope of review by CAVC is limited, but CAVC has exclusive jurisdiction over decisions by the BVA and the authority to affirm, modify, reverse, or remand those decisions.[72] Veterans may spend a significant amount of time waiting for a CAVC decision. In its annual report for FY 2018 (prior to the AMA taking effect), CAVC reported receiving 6,802 appeals.[73] The court took an average of 233 days to process an appeal from the time of filing to disposition.[74] In its FY 2020 report, CAVC reported receiving 8,954 appeals, with an average processing time of 265 days.[75] As the AMA took effect in February 2019, the FY 2020 report is the first to cover an entire year operating under the AMA. However, the COVID-19 pandemic may have influenced the statistics in the FY 2020 report to a degree. As a result, the FY 2021 or FY 2022 reports may be the best assessment of processing times at CAVC under the AMA.[76] In any event, it appears that the CAVC expects its caseload to continue to grow, reporting that the court saw an average of 748 appeals filed per month during FY 2020, the highest in CAVC's 30-year history.[77] Veterans going down this road should plan for a longer rather than shorter adjudication time.

Following a CAVC judgment, a veteran may appeal to the Court of Appeals for the Federal Circuit, but should expect to wait six to fourteen months for a decision on their appeal.[78] Alternatively, if new and relevant evidence becomes available, a veteran may file a supplemental claim and thrust the appeal back to the RO.[79] As detailed above in discussing supplemental claims, as a veteran now has the ability to take a decision on that supplement claim and submit another supplemental claim, request higher-level review, or appeal to the BVA, this has the potential to add a significant amount of time to the processing of an appeal. This situation especially highlights the many avenues present in the page-turning adventure of the AMA.

Effective Dates

Choosing an appeal option is only half the battle. With all the options available, it is important for practitioners to be able to competently explain how the different options affect the effective date for a claim, with the goal of ensuring the preservation of the earliest possible effective date. This will require careful attention to the date the RO issues a decision and the date a veteran submits a request for higher-level review, a supplemental claim, or appeals to the BVA. The effective date is critical, as it is the date that a veteran becomes eligible for benefits on an approved claim.

The earliest possible effective date for entitlement to benefits is the day following separation from service.[80] The AMA provides that, as long as a veteran continues to pursue a claim in the applicable timeframes, the effective date will remain the date of that initial application.[81] For example, if a veteran files an application (more than a year after separation) for compensation on 1 March 2019, and receives notice of a decision from the RO on 1 August 2019, the claim effective date is 1 March 2019. They must file for review (in any lane) before 1 August 2020, to preserve that effective date. If, instead, that same veteran allows the one-year timeline to lapse (after the initial decision, higher-level review

decision, supplemental claim decision, or decision by the BVA), they are limited to filing a supplemental claim, and the earliest possible effective date is the date of receipt of the supplemental claim.[82] After filing the supplemental claim, if the veteran continues to pursue the claim within the timeframes discussed above for higher-level review and appeal to the BVA, they will continue to preserve the effective date as the date of the supplemental claim. This effective date nuance is further complicated by the ability to change review lanes during the appeals process.

Preserving the Effective Date When Changing Review Lanes

While pending a decision in one review lane, a veteran can withdraw their request and switch review lanes while still preserving the initial effective date, as long as the veteran completes the switch during the one-year period.[83] That is, a veteran can essentially place a thumb on the last page in their adventure, but go back and change their mind without losing the initial effective date. In the previous example, if the veteran filed a request for higher-level review before 1 August 2020, but then decided to withdraw the request and instead submit a supplemental claim, the effective date of 1 March 2019 would stand—as long as the veteran withdrew the request for higher-level review and filed the supplemental claim prior to 1 August 2020.

Preserving the Effective Date After the One-Year Time Limit Has Expired

All is not lost, however, if the one-year period does elapse. In this situation, a veteran can still preserve the initial effective date in limited circumstances with two caveats. The first is that a veteran is limited to filing a supplemental claim after the one-year time limit expires.[84] Second, and more important, to preserve the initial effective date, the veteran must request an extension from the VA of the one-year time limit and show "good cause."[85]

To show good cause, a veteran must articulate to the VA in a request for an extension "why the required action could not have been taken during the original time period and could not have been taken sooner than it was."[86] No clear requirements exist on what constitutes good cause, but case law states that the determination is a "decision committed to sole discretion of the Secretary,"[87] and the standard of review is "highly deferential and . . . equated to the abuse-of-direction standard."[88] Even if the Secretary determines no good cause exists for an extension to the filing timeframe, the VA will still adjudicate the supplemental claim. The effective date, instead of being the date of the initial claim, will be the date of the supplemental claim.

Finality

With a "continuously contested appeals" process, one might wonder when a decision is final, if ever. The VA considers a claim "finally adjudicated" upon the expiration of the timeframe to file for higher-level review, a supplemental claim, or an appeal to the BVA, or at disposition on judicial review when no review option is available.[89]

In the simplest scenario, the VA considers a fully granted claim finally adjudicated after the one-year time limit to file for review has lapsed. One can imagine, however, a scenario where a claim could sit in the review process, evading final adjudication for years. For example, a veteran could—after an initial decision from the RO—file in succession a request for higher-level review, a supplemental claim, an appeal to the BVA, and an appeal to CAVC. Supposing that the veteran meets all applicable timelines to keep the claim "continuously pursued," even after a final judgment from CAVC, the claim is not finally adjudicated if the veteran files a supplemental claim within one year of the CAVC judgment. This scenario obviously works against the AMA's goal of expediting the appeal process. Practitioners can do much to ensure this does not happen.

Tips for Practitioners

One of the most pressing reasons veterans and their advocates pushed for a change to the appeals process is that veterans did not understand the legacy system.[90] The system was confusing, and, at times, veterans did not even know where they were in the process.[91] Given this, it is a fair assumption that most veterans do not know the appeals process has changed; and, if they do, they are unlikely to understand the new process. Under the AMA, practitioners can insert themselves into the process earlier than under the legacy system. In the legacy system, veterans could not utilize paid representation until they filed an NOD to the BVA.[92] The AMA allows for paid representation at the point a veteran receives notice of the RO's initial decision.[93] It is this author's hope, in an effort to choose the correct appeal path from the start, veterans will reach out to practitioners after receiving this initial decision.

Directing veterans to the most appropriate lane based on their particular circumstances can help contribute to a quicker decision and keep them from becoming the subject of their own *Choose Your Own Adventure* novel. Upon receiving an initial decision from the RO, there are a few key tasks will help practitioners guide veterans to the proper review lane.

Understanding the Notification Letter

The first step in determining which lane in the appeals process to pursue is a thorough reading of the RO's decision letter. The AMA provides far more detailed notification letters earlier in the process than the legacy system.[94] Part of this detailed notification includes "identification of elements not satisfied leading to denial" and "identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation."[95]

Assuming the notification letter adequately identifies information a veteran can submit to substantiate their claim, practitioners should categorize the missing information or evidence. Missing information can be separated into three categories: 1) information the VA should have acquired under their duty to assist; 2) information the VA can acquire if a veteran provides enough information to the VA sufficient to locate the records; and 3) information the veteran has to provide on their own.[96] The practitioner should also consider whether the evidence is "new and relevant" or simply additional evidence.

After this review and categorization, a practitioner has essentially come to the *Choose Your Own Adventure* part of the story. From here, practitioners will need to ensure the veteran chooses the next step that is best for the veteran and their claim.

Choosing an Appeal Lane

Higher-Level Review

Remember that during higher-level review, the adjudicator will not consider any additional evidence. Given this, is it ever beneficial to recommend a veteran file for higher-level review? There are three situations where it can be.

First, if the VA failed in their duty to assist during adjudication of the original claim, the higher-level reviewer must return the claim for correction and re-adjudication.[97] Remember that the VA has three main areas where it must assist during adjudication of an initial claim.[98] If a veteran believes the VA failed in its duty to assist in any of these three ways, higher-level review provides the mechanism to have the claim re-adjudicated without submitting new evidence or appealing to the BVA. This is where the categorization of missing information becomes important. If it is clear that the VA failed to acquire the veteran's service medical records, or had sufficient information and authorization to obtain a veteran's private medical records and failed to acquire and consider these records, a higher-level reviewer should return the claim for re-adjudication.

Second, higher-level review is appropriate if a veteran believes that the adjudicator made an error of law or fact in making the original decision. If the VA failed to apply the correct rating schedule, failed to review all the evidence in the file, or failed to presume service connection when required to by law, a higher-level reviewer can order the claim be re-adjudicated, without the submission of new evidence or the longer decision time at the BVA.

Last, higher-level review is appropriate if a mere difference of opinion on the part of the experienced adjudicator may result in a revised decision. Higher-level adjudicators are "senior technical expert[s] in adjudication matters"[99] and have the authority to change a decision based on a difference of opinion.[100] The VA expects these individuals to have three years of adjudication experience and a mandated fifty-seven hours of training.[101] If a veteran has no new evidence, but wants the benefit of review by an experienced adjudicator who may change a decision based on a difference of opinion, higher-level review may be the right way to go. The veteran will still receive a detailed notification decision letter, allowing for a more informed second step, if necessary.

Supplemental Claim

A supplemental claim is most appropriate when a veteran has new and relevant evidence to support a claim, wishes to trigger the duty of the VA to assist in obtaining some or all of that evidence, and is looking for a quicker decision than appealing to the BVA.[102]

While a veteran can submit additional evidence through either a supplemental claim or appeal to the BVA, the VA projects review of a supplemental claim to take much less time than review at the BVA.[103] Most importantly, the filing of a supplemental claim triggers the VA's duty to assist, whereas appeals to the BVA do not.[104] If there is "new and relevant" evidence that the veteran needs assistance in acquiring, this is the way to get it.[105] Remember that to trigger the duty to assist, the veteran must provide sufficient information to locate the records.[106]

BVA

Given the shorter processing times for higher-level review and supplemental claims, practitioners may be dissuaded from recommending that a veteran go straight to the BVA.[107] However, there are some reasons a veteran might want to go down this route.

The decision-maker at the BVA is a Veterans Law Judge (VLJ). A VLJ is an administrative judge employed by the BVA. A VLJ is required to hold a juris doctor degree and be licensed to practice law.[108] Additionally, a VLJ must have seven years of experience in veterans law.[109] While this does not guarantee a favorable result, veterans may want to take advantage of the experience a VLJ brings to the table in the review of their claim.

Another reason a veteran may wish to proceed directly to the BVA is to open the possibility of appealing to CAVC right away. Practically speaking, there is little adjudicative difference between a request for higher-level review and an appeal to the BVA in the "direct" docket. No additional evidence is considered, and the record is limited to the evidence in the record at the time of the RO's decision.[110] Appeal to the BVA will result in a longer adjudicative time,[111] but a decision from the BVA is directly appealable to CAVC, whereas a decision from higher-level review is not.[112] If a veteran has no additional evidence to submit, and does not mind the processing time at the BVA, appeal to the BVA may be the best course of action. The veteran is able to automatically appeal to CAVC and still has the ability to file a supplemental claim after the BVA decision (or after the CAVC judgment if the veteran decides to appeal to CAVC).

If a veteran does have additional evidence to submit, the "hearing" or "evidence" docket is appropriate and may be preferential to filing a supplemental claim. The law is unclear regarding whether the BVA requires evidence to be "new and relevant." The BVA's decision is "based on a de novo review of the evidence of record at the time of the agency of original jurisdiction decision on the issue or issues on appeal, and any *additional* evidence or testimony submitted."[113] This is not the same standard required for the filing of a supplemental claim ("new and relevant").[114] There is an argument that "additional evidence" is broader than "new and relevant." One can assume this is an intentional drafting difference by Congress and the VA. Therefore, veterans who have evidence that may not be "new and relevant", but that does help support their claim, may want to try to take advantage of this difference in terms outlined in the law.

Conclusion

While making significant changes to the appeals process, at the request and guidance of multiple stakeholders, the AMA can still be a confusing process to veterans attempting to navigate it. The options appear endless, and one choice can make the difference between a successful claim and "The End." Practitioners can do much to inform veterans of the process and guide them through the twists and turns. A thorough understanding of the options, along with the key tips discussed in this article, can help veterans hold the power in the *Choose Your Own Adventure* (or "Misadventure") novel that is the AMA. **TAL**

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Notes

1. R.A. Montgomery, Choose Your Own Adventure: House of Danger, at i (Chooseco 2006) (1982).

2. The *Choose Your Own Adventure* gamebooks were a series of books published by Bantam Books from the 1970s through the 1990s and are now published by Chooseco LLC. *History of CYOA*, Choose Your Own Adventure, https://www.cyoa.com/pages/history-of-cyoa (last visited June 1, 2021).

3. Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified as amended in scattered sections of 38 U.S.C.).

4. Stacey-Rae Simcox, Professor of Law and Director of Stetson University College of Law's Veterans Law Institute and Veterans Advocacy Clinic, first alluded to this idea in 2019. *See* Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. Kan. L. Rev. 513, 549 (2019).

5. The Appeals and Modernization Act of 2017 (AMA) and corresponding Department of Veterans Affairs (VA) regulations apply to all claims for monetary benefits from the VA, to include compensation (disability), pension/survivor benefits, fiduciary benefits, and burial benefits. VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (codified as amended in scattered sections of 38 C.F.R.). This article solely focuses on claims for disability benefits.

6. This article does not address the process of filing for an initial decision on a disability claim, nor does it seek to critique the legacy system of appeals. As a guide for practitioners, this article also does not critique the AMA, except by way of explaining, in detail, how to navigate the new review and appeals process under the AMA.

7. *The Fiscal Year 2017 Budget for Veterans' Programs: Hearing Before the S. Comm. on Veterans' Affs.*, 114th Cong. 165 (2016) (response to post-hearing questions submitted by Sen. Johnny Isakson, Chairman, S. Comm. on Veterans Affs., to the U.S. Dep't of Veterans Affs.).

8. *Id.* at 21 (prepared statement of Robert A. McDonald, Sec'y, U.S. Dep't of Veterans Affs.).

9. U.S. Gov't Accountability Off., GAO-17-234, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions fig.1 (2017).

10. 38 U.S.C. § 7105(b)(1) (2018).

11. U.S. Gov't Accountability Off., *supra* note 9, fig.1.

12. 38 C.F.R § 3.2600(a) (2018).

13. U.S. Gov't Accountability Off., *supra* note 9, fig.1.

14. 38 U.S.C. § 7105(d)(1) (2018).

15. 38 U.S.C. § 7104(a) (2018). A veteran had to file an appeal within sixty days from the time the VA mailed the Statement of the Case (SOC). *Id.* § 7105(d)(3).

16. *The Fiscal Year 2017 Budget for Veterans' Programs: Hearing Before the S. Comm. on Veterans' Affs.*, 114th Cong. 178 (2016) (response to post-hearing questions submitted by Sen. Richard Blumenthal to U.S. Dep't of Veterans Affs.).

17. 38 U.S.C. § 7266(a) (2018); 38 U.S.C. § 7292(a), (c) (2018). Judicial review did not become available to veterans until 1988. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

18. *The Fiscal Year 2017 Budget for Veterans' Programs: Hearing Before the S. Comm. on Veterans' Affs.*, 114th Cong. 178 (2016) (response to post hearing questions submitted by Sen. Richard Blumenthal to U.S. Dep't of Veterans Affs.).

19. *Id.* The VA could also change its initial decision based on the additional evidence provided, but they would have to issue a Statement of the Case (SOC)/ Supplemental Statement of the Case (SSOC) when unable to grant benefits. *Id.*

20. *Id.* This meant that the VA issued a new SSOC each time a veteran submitted additional evidence, adding an average of 360 days per SSOC to the appeal processing timeline in Fiscal Year (FY) 2015. *Id.*

21. *Id.* Sixty percent of decisions remanded back to the VA were a result of veterans submitting additional evidence after the appeal reached the Board of Veterans' Appeals (BVA). *Id.*

22. The VA's duties included: 1) notifying veterans of information required of them to substantiate their claim; 2) assisting veterans in obtaining evidence to substantiate their claim; and 3) providing medical examinations or obtaining medical opinions when necessary to decide a claim. 38 U.S.C. § 5103A (2018).

23. U.S. Dep't of Veterans Affs., Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeals System 6 (2017), https://benefits.va.gov/benefits/docs/appeals-report-201711.pdf (noting that seven years elapsed from the time a veteran initiated an appeal to final resolution by the BVA).

24. H.R. Rep. No. 115-126, at 30 (2017).

25. Off. of Mgmt. & Budget, Exec. Off. of the President, Budget of the United States Government, Fiscal Year 2017, at 85 (2016).

26. U.S. Dep't of Veterans Affs., Budget in Brief 35 (2016); *The Fiscal Year 2017 Budget for Veterans' Programs: Hearing Before the S. Comm. on Veterans' Affs.*, 114th Cong. 21–24 (2016) (prepared statement of Robert A. McDonald, Sec'y, U.S. Dep't of Veterans Affs.).

27. VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818–19 (Aug. 10, 2018). This summit served as an extension of similar, but smaller, meetings that began in 2014. Simcox, *supra* note 4, at 548 (citing *Legislative Hearing on: H.R. 3216, H.R. 4150, H.R. 4764, H.R. 5047, H.R. 5083, H.R. 5162, H.R. 5392, H.R. 5407, H.R. 5416, H.R. 5420, H.R. 4528: Hearing Before the H. Comm. on Veterans' Affs.*, 114th Cong. 55 (2016) (statement of Paul Varela, Assistant Nat'l Legis. Dir., Disabled Am. Veterans)).

28. Express Appeals Act, H.R. 800, 114th Cong. (2015); American Heroes COLA Act of 2015, H.R. 677, 114th Cong. (2016); Express Appeals Act of 2016, S. 2473, 114th Cong. (2016).

29. Simcox, *supra* note 4, at 548 (citing *Legislative Hearing on: H.R. 3216, H.R. 4150, H.R. 4764, H.R. 5047, H.R. 5083, H.R. 5162, H.R. 5392, H.R. 5407, H.R. 5416, H.R. 5420, H.R. 4528: Hearing Before the H. Comm. on Veterans' Affs.*, 114th Cong. 21 (2016) (statement of Paul Varela, Assistant Nat'l Legis. Dir., Disabled Am. Veterans).

30. U.S. Gov't Accountability Off., *supra* note 9, at 24. The organizations included in discussions with the VA were the American Legion, American Veterans, Disabled American Veterans, Military Officers Association of America, National Association of County Veteran Service Officers, National Association of State Directors of Veterans Affairs, National Organization of Veteran Advocates, National Veterans Legal Services Program, Paralyzed Veterans of America, Veterans of Foreign Wars, and Vietnam Veterans of America. *Id.* n.43.

31. *Legislative Hearing on the Veterans Appeals and Modernization Act of 2017: Hearing on H.R. 2288 Before the H. Comm. on Veterans' Affs.*, 115th Cong. 35 (2017) (prepared statement of Louis J. Celli Jr., Director of Nat'l Veterans Affs. & Rehab. Div., The Am. Legion).

32. VA Appeals Modernization Act of 2016, H.R. 5083, 114th Cong. (2016); VA Accountability First and Modernization Act of 2016, H.R. 5620, 114th Cong. (2016); VA Accountability First and Modernization Act of 2016, S. 3170, 114th Cong. (2016); VA Accountability First and Modernization Act of 2016, S. 3328, 114th Cong. (2016).

33. *Legislative Hearing on the Veterans Appeals and Modernization Act of 2017: Hearing on H.R. 2288 Before the H. Comm. on Veterans' Affs.*, 115th Cong. (2017).

34. *Hearing on Pending Legislation: Hearing on S. 23, S. 112, S. 324, S. 543, S. 591, S. 609, S. 681, S. 764, S. 784, S. 804, S. 899, S. 1024, S. 1094 Before the S. Comm. on Veterans' Affs*, 115th Cong. (2017).

35. Veterans Appeals and Improvement Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified as amended in scattered section of 38 U.S.C.).

36. VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818–19 (Aug. 10, 2018) (codified as amended in scattered sections of 38 C.F.R).

37. *Id.* at 39,818.

38. VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019).

39. The agency of original jurisdiction is the "activity which entered the original determination with regard to a claim for benefits under laws administered by the Secretary." 38 U.S.C. § 101(34) (2019). The agency of original jurisdiction with regards to a claim for disability compensation is the Veterans Benefits Administration (VBA) Regional Office (RO) where the initial adjudication of a veteran's claim is made.

40. 38 U.S.C. § 5104C(a)(1) (2021); 38 C.F.R. § 3.2500(a) (2021).

41. U.S. Dep't of Veterans Affs., Board of Veterans' Appeals, Appeals Modernization, at slide 6 (2019), https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf.

42. 38 C.F.R. § 3.151(c)(2) (2021).

43. 38 U.S.C. § 5104C(a)(2)(B) (2021); 38 C.F.R. § 3.2500(c) (2021).

44. The VA projects higher-level review will take an average of 125 days to complete. U.S. Dep't of Veterans Affs., *supra* note 23, at 7. In September 2020, the VA processed and decided 7,885 requests for higher-level review, with an average processing time of 49 days. U.S. Dep't of Veterans Affs., Veterans Benefits Admin. Repts., Appeals Modernization Act Reporting, September 2020, https://www.benefits.va.gov/REPORTS/ama/ (last visited Apr. 16, 2021) [hereinafter Appeals Modernization Act Reporting].

45. 38 C.F.R. § 3.2601(e) (2021).

46. 38 U.S.C. § 5104B(1)(d)–(e) (2021); 38 C.F.R. § 3.2601(f), (i) (2021).

47. 38 C.F.R. § 3.2601(h) (2021).

48. 38 C.F.R. §§ 3.103(f), 3.2601(k) (2021).

49. 38 C.F.R. § 3.2500(c)(2) (2021).

50. 38 C.F.R. § 3.2501 (2021).

51. 38 C.F.R. § 3.2501(a)(1) (2021).

52. *Id.*

53. *Id.* § 3.2501(b).

54. *See supra* "Legacy System—Duty to Assist."

55. *Cf.* 38 U.S.C. § 5103A (2018) (discussing the VA's duty to assist under the legacy system), *with* 38 U.S.C. § 5103A (2021) (discussing the VA's duty to assist under the AMA).

56. *Id.* § 5103A(e).

57. *See infra* "Effective Dates."

58. 38 C.F.R. § 3.2500(c)(1) (2021).

59. 38 U.S.C. § 7105(a) (2021); 38 C.F.R. § 20.201 (2021).

60. 38 U.S.C. § 7113(b) (2021); 38 C.F.R. § 20.302(a) (2021).

61. 38 C.F.R. § 20.702 (2021).

62. 38 U.S.C. § 7113(c) (2021); 38 C.F.R. § 20.303 (2021).

63. 38 U.S.C. § 7113(a) (2021); 38 C.F.R. § 20.301 (2021).

64. U.S. Dep't. of Veterans Affs., *supra* note 23, at 7.

65. 38 C.F.R. § 20.202(c)(2) (2021).

66. *Id.*

67. *Id.* § 20.300(a).

68. *Id.* § 3.2501.

69. *Id.* § 20.700(c).

70. *Id.* § 3.2500(c)(3).

71. 38 U.S.C. § 7266(a) (2021).

72. Simcox, *supra* note 4, at 522–23; 38 U.S.C. §§ 7252(a), 7261(a) (2021).

73. U.S. Ct. of Appeals for Veterans Claims, Fiscal Year 2018 Annual Report 1 (2018), http://www.uscourts.cavc.gov/documents/FY2018AnnualReport.pdf.

74. *Id.* at 4.

75. U.S. Ct. of Appeals for Veterans Claims, Fiscal Year 2020 Annual Report 1, 4 (2020), https://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf.

76. While the FY21 report will be helpful to the assessment, it is likely that the FY22 report will be the first report covering an entire FY post-pandemic.

77. U.S. Ct. of Appeals for Veterans Claims, Fiscal Year 2020 Annual Report 7 (2020), https://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf.

78. 38 U.S.C. § 7292(c) (2019). After docketing, appeals to the U.S. Court of Appeals for the Federal Circuit from the CAVC took anywhere between six and four months to reach disposition. U.S. Ct. of Appeals for the Fed. Cir., Median Time to Disposition in Cases Terminated After Hearing or Submission 1 (2020), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/06_Med_Disp_Time_MERITS_table.pdf. Further review is available at the U.S. Supreme Court. 38 U.S.C. § 7292(c) (2019).

79. 38 C.F.R. § 3.2500(c)(4) (2021).

80. 38 C.F.R. § 3.400(b)(2)(i) (2021). This only applies to those veterans who had a condition in service and file for compensation within one year from their separation date. *Id.* For all other veterans filing for disability, the effective date will be the date a veteran files an initial application for compensation. 38 U.S.C. § 5110(a)(1) (2019).

81. 38 U.S.C. § 5110(a)(2) (2021).

82. 38 C.F.R. § 3.2500(h)(2) (2021).

83. *Id.* § 3.2500(e)(1). Withdrawal must be in accordance with 38 C.F.R. § 3.2500(d) (2021) (explaining the withdrawal process for higher-level review requests and supplemental claims) and 38 C.F.R. § 3.205(b) (2021) (outlining the withdrawal process for appeals to the BVA).

84. 38 U.S.C. § 5104C(b) (2021).

85. 38 C.F.R. § 3.2500(e)(2) (2021).

86. *Id.* § 3.109(b).

87. Morgan v. Principi, 16 Vet. App. 20, 27 (2002) (quoting Corry v. Derwinski, 3 Vet. App. 231, 235 (1992)).

88. *Id.* (quoting Tulingan v. Brown, 9 Vet. App. 484, 489 (1996) (Farley, J., concurring)).

89. 38 C.F.R. § 3.160(d)(2) (2021).

90. U.S. Dep't of Veterans Affs., Ctr. for Innovation, Veteran Appeals Experience: Listening to the Voices of Veterans and their Journey in the Appeals System 24 (2016) ("No matter how much they want or how hard they try, Veterans can't understand the current process beyond the most basic elements.")

91. *Id.* at 8 ("Veterans and their families struggle to understand the process or their place in it. They have little understanding of the relationship between steps in the process and sometimes don't even realize when they're making a decision—even if it might delay their appeal for years.").

92. 38 U.S.C. § 5904(c)(1) (2018); 38 C.F.R. § 14.636(c)(1) (2018).

93. 38 U.S.C. § 5904(c)(1) (2021); 38 C.F.R. § 14.636(c)(1)(i) (2021).

94. 38 U.S.C. § 5104 (2021). In the legacy system, a SOC required much of the same information, but the VA did not issue a SOC until after a veteran filed a Notice of Disagreement (NOD). 38 U.S.C. § 7105(d)(1) (2018); 38 C.F.R. § 19.29 (2021).

95. 38 U.S.C. § 5104(b) (2021). Elements necessary to grant service-connected disability compensation include 1) a current diagnosis, 2) an in-service event, injury, or illness, and 3) a nexus between the diagnosis and the in-service event, injury, or diagnosis. Caluza v. Brown, 7 Vet. App. 498, 506 (1995), *aff'd*, 78 F.3d 604 (1996).

96. The VA has a duty to obtain a veteran's service medical records. 38 U.S.C. § 5103A(c)(1)(A) (2021). The VA will also obtain records held by VA healthcare facilities, as well as records held by a federal department or agency and any private medical records, provided the veteran identifies the records and authorizes the VA to obtain them. *Id.* § 5103(c)(1)(B)–(C).

97. 38 U.S.C. § 5103A(f)(1) (2021).

98. These areas include: 1) notifying veterans of information required of them (to include medical and lay evidence) to substantiate their claim; 2) assisting veterans in obtaining evidence to substantiate their claim (with some limitations); and 3) providing medical examinations or obtaining medical opinions when necessary to decide a claim. 38 U.S.C. § 5103A (2021).

99. U.S. Dep't of Veterans Affs., *supra* note 23, at 12.

100. 38 C.F.R. § 3.2601(j) (2021).

101. U.S. Dep't of Veterans Affs., *supra* note 23, at 7.

102. The VA projects a supplemental claim will take an average of 125 days to complete. *Id.* In September 2020, the VA processed and decided 20,719 supplemental claims, with an average processing time of 91.3 days. Appeals Modernization Act Reporting, *supra* note 44.

103. The BVA's published goal for processing an appeal is 365 days, for the direct docket (no hearing or evidence). U.S. Dep't of Veterans Affs., *supra* note 23.

104. 38 C.F.R. § 3.2501(c) (2021).

105. There are numerous records that the VA will assist in retrieving under its duty to assist, if a veteran provides enough information in order for the VA to identify and locate the records. 38 U.S.C. § 5103A (2021); 38 C.F.R. § 3.159(c) (2021).

106. 38 U.S.C. § 5103A(c) (2021).

107. In September 2020, the average processing time at the BVA ranged from 224.8 days (direct docket) to 325.9 (hearing docket). Appeals Modernization Act Reporting, *supra* note 44.

108. *Veterans Law Judge Job Announcement*, USAJobs, https://www.usajobs.gov/GetJob/PrintPreview/538652200 (last visited June 21, 2021).

109. *Id.*

110. 38 C.F.R. § 20.301 (2021).

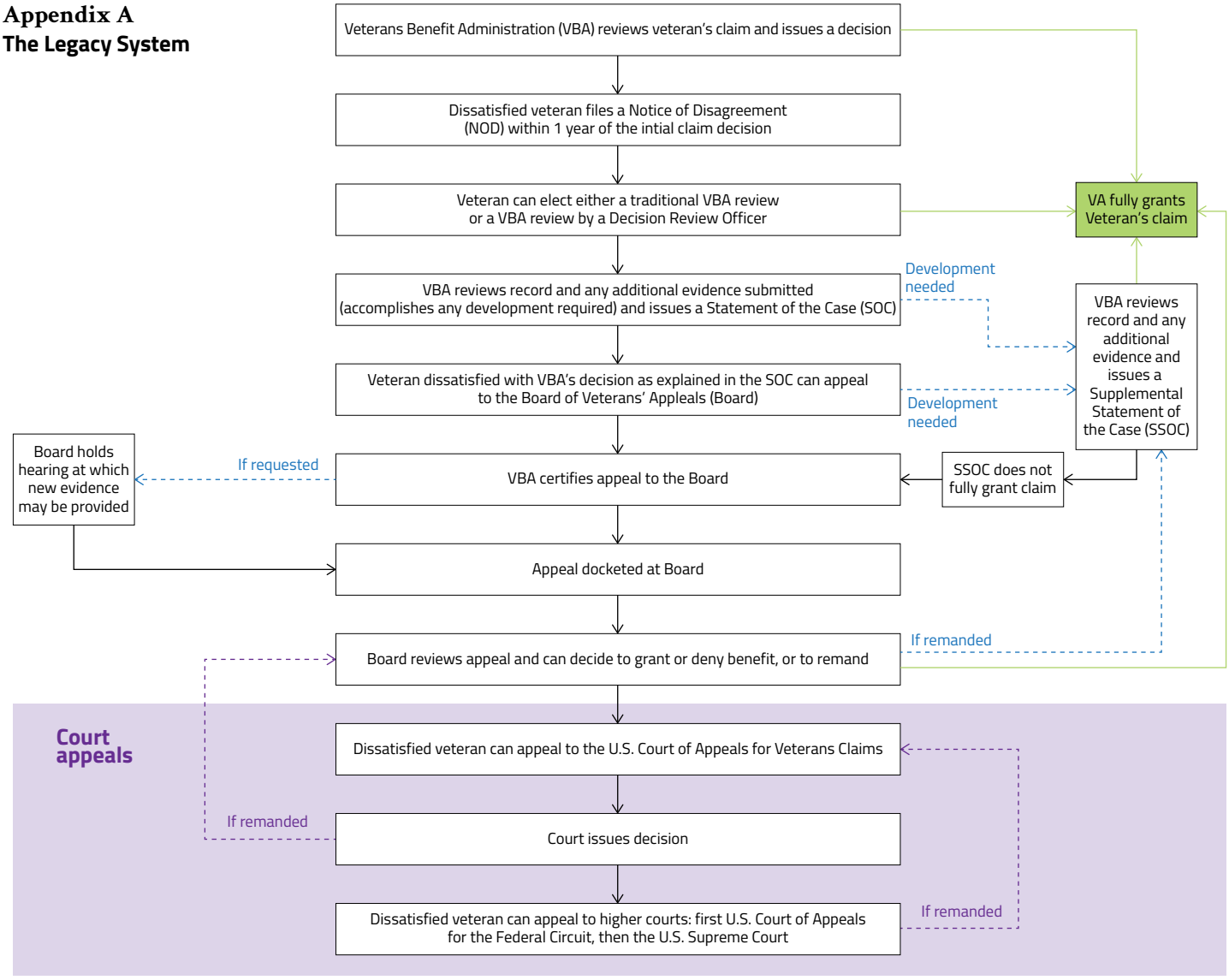
111. See *supra* note 107 and accompanying text.

112. 38 C.F.R. § 3.2500(c)(2)–(3) (2021). *See* "Court of Appeals for Veterans Claims" for details on appealing to CAVC following a BVA decision.

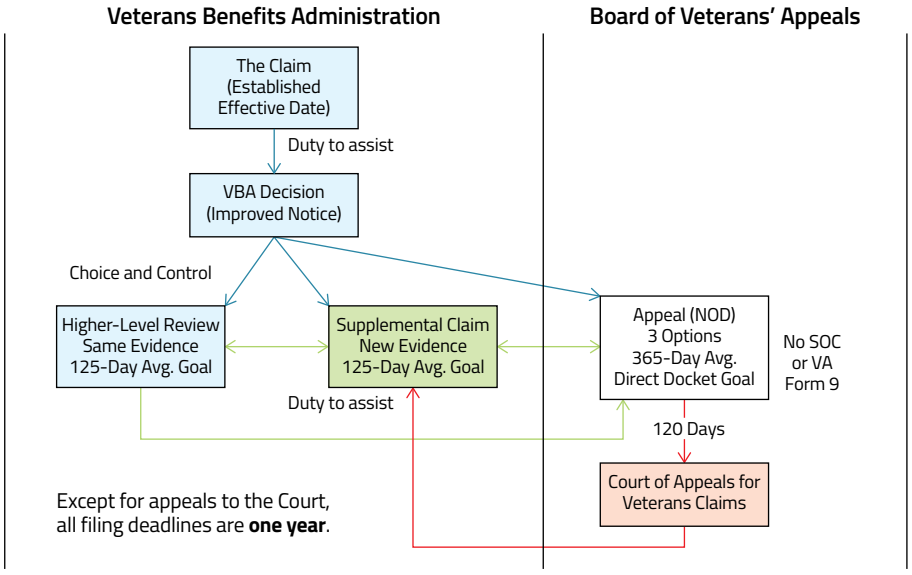
113. 38 C.F.R. § 20.300(a) (2021) (emphasis added).

114. *Id.* § 3.2501.

Appendix A
The Legacy System



Appendix B
The Appeals Improvement and Modernization Act of 2017 Process



The 167th Theater Sustainment Command Judge Advocate General section and the Alabama National Guard Trial Defense Service carried out a mock trial. (Credit: SSG Katherine Dowd)

No. 3

Making the UCMJ More Uniform

By Colonel Douglas Simon

[I]t will be sufficient that perfect Uniformity should be established throughout the Continent, and pervade, as far as possible, every Corps, whether of standing Troops or Militia . . . [and] that Congress should employ some able hand, to digest a Code of Military Rules and regulations, calculated immediately for the Militia and other Troops of the United States.[1]

George Washington's *Sentiments on a Peace Establishment* marked his early influence in suggesting a uniform military policy for the United States that contemplated a military organization which would include a well-disciplined militia.[2] Much can be drawn from George Washington's writings, but one transcendent theme is the emphasis toward a disciplined and uniform military force. It is the nature of discipline and uniformity that resurfaced in 1950 when the 81st Congress considered a basic question: How uniform is "uniform"?[3] In that year, Congress deliberated the unification of the Armed Forces' military justice systems. In broad terms, this question became a central and guiding principle spurred by the events of the time. In particular, injustices and inconsistencies with the administration of military justice compelled Congress to embark on an effort to "consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard."[4] History has borne the efficacy of congressional efforts to reform military justice, not only in terms of efficiency, but as a system of justice that provided the accused with statutory protections that exceeded those protections found in state and federal jurisdictions.[5] Indeed, the establishment of the Uniform Code of Military Justice (UCMJ) in 1950 marked a historical watershed for the Armed Forces that endures.[6]

Notwithstanding this military justice milestone, a glaring and intentional omission exists, and that is the jurisdictional separation of the National Guard not in federal service (National Guard) from the UCMJ and, more broadly, the federal military justice system.[7] This article examines this decision by exploring the early militia in terms of the U.S. Constitution, the militia's historical context, the UCMJ's legislative history, developments toward fostering uniform military justice systems among the states, and the elusive nature of uniformity. This article concludes with a conceptual proposal, referred to as "cooperative military justice," that draws inspiration from over two centuries of military cooperation between the federal and state governments to train, equip, and modernize the state militias. The conceptual proposal's primary claim is that, with the administration of military justice, true uniformity requires a National Guard path to the federal military justice system. While the concept's locus is grounded in military justice, its broad strategic implications draws upon efforts to further integrate elements of the National Guard and Armed Forces into a cohesive Total Force.[8]

The Militia and the Constitution

The historical development of the National Guard in relation to the Constitution is a necessary foundation to understanding the

relative autonomy that states and territories have enjoyed in crafting their own unique military justice systems. This uniqueness is a derivative of federal–state relations and the tensions that surround the role of the militia in contributing to the national defense. This tension was palpable early on during the Constitutional Convention and the ensuing ratification struggle. The debate centered on the intolerable nature of maintaining a standing army that could threaten individual liberty[9] with the danger of relying on poorly-trained militia Soldiers who would serve as the primary means for the national defense.[10] The ensuing debate led to a compromise that struck the balance between the Federal Government's need to raise and support armies and the states' interest in preserving the vestiges of the colonial militia.[11] This is apparent with the constitutional power over the national defense. Textually, this information is found within Congress and the Army Clause, where Congress is authorized "[t]o raise and support Armies."[12] Further constitutional power rests with the Militia Clause, which authorizes Congress to organize, arm, and discipline the militia; but, when the militia was not in federal service, control was left to the states. The Militia Clause provides:

> The Congress shall have the power . . .
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions;
>
> To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .[13]

The Militia and Army Clauses serve as the underlying law that has contributed to the inherent tension that exists between federal and state control over the militia system,[14] a tension that had led Congress early on to intervene and begin the slow process of federalizing state militias.

The first attempt to impose federal standards on state militias occurred with the passage of the Militia Act of 1792.[15] Significant headwinds from Congress diluted the Act to a set of aspirations left to the control of the states rather than a nationally-focused and funded policy directed at standardization and readiness of the militia.[16] Not until passage of the Militia Act of 1903 (commonly referred to as the Dick Act) did Congress redress the shortcomings of the Militia Act of 1792 and interpose its dormant power to organize, direct, and fund the militia.[17] The Dick Act provided the much needed overhaul of the militia system and, equally significant, created the first statutory usage of the term "National Guards."[18] The meaningful usage of the term came to bear legal distinction with the passage of the Act of June 15, 1933, where Congress created the National Guard of the United States pursuant to the Army Clause of the Constitution rather than the Militia Clause.[19] The selection of Congress's plenary power[20] to raise an army provided the needed authority to confer a new status to the National Guard as a reserve component of the Army, and therein circumvented the constraints the Militia Clause historically imposed on federal power to muster National Guard units for federal service.[21] Further, it provided dual status for every guardsman who took an oath to both the federal and relevant state government.[22] With the passage of the Armed Forces Reserve Act of 1952, Congress consolidated additional federal power over the National Guard authorizing the President to call guardsman for fifteen days of federal service for any reason—unless the Governor did not consent.[23] Finally, dramatic reductions in the standing Army at the end of the Vietnam War, smaller defense budgets, and enduring global commitments forced Congress to assert a major change in U.S. defense policy. That change led to shifting more of the direct burden of national defense to the reserve components to shore up the void of a reduced standing Army.[24] The change of defense policy is known as the Total Force concept. It is best captured by then-Secretary of Defense James Schlesinger and his forward-looking memorandum where he stated, the "Total Force is no longer a concept. It is now the Total Force Policy which integrates the Active, Guard, and Reserve forces into a homogenous whole."[25] The Total Force Policy remains one of the most important organizing principles for the national defense and, with the National Guard, has led to its modern significance within the national defense strategy. While forward-looking with integrating the Active, Guard, and Reserve forces, the uniform administration of military justice has not occurred; as an element of the "homogenous whole," it has remained elusive.

In sum, federal control over state militias has increased dramatically since the founding of the Constitution, with the modern-day establishment fixed as a reserve component of the Armed Forces prepared to defend national interests. A characteristic of federal control is the imposition of standardized and uniform rules for the National Guard to ensure its readiness posture for wartime contingencies.[26] It is this trend toward federal control and uniform rules that serves as a platform to reexamine the nature of state military justice systems in the context of the UCMJ and its relationship with the National Guard.

Legislative History of the UCMJ

In testimony before the subcommittee of the Committee on Armed Services in 1949, Major General Kenneth Cramer, who represented the National Guard Bureau and the National Guard Association, pointedly expressed his view that the UCMJ "would not apply to the National Guard [except] in [the] event where the guard were mobilized and inducted, or ordered into Federal service."[27] In later testimony, Major General Cramer objected to language found in the proposed Article 2 that would assert court-martial jurisdiction over Reserve personnel when engaged in inactive duty training.[28] He claimed that this article "should not apply to the National Guard except when in Federal Service."[29] His particular objection rested with his claim that the proposed Article 2 would violate the U.S. Constitution's Militia Clause.[30]

The non-inclusion of the National Guard within the jurisdiction of the UCMJ resurfaced in the congressional floor

debates that same year. In those debates, Senator Spessard Holland posed a question to Senator Estes Kefauver asking whether the bill (the proposed UCMJ) would apply to the National Guard of the several states. Kefauver responded that it would not "unless members of the National Guard are on Federal service."[31] This brief exchange became the beginning and the end as to whether the UCMJ applied to the National Guard. That is, no further discussion occurred in the congressional debates considering the applicability of the UCMJ to National Guard personnel in a non-federal status. Congress recognized National Guard autonomy as it related to the UCMJ in 1956 by codifying military justice provisions where the states and territories held the authority to exercise court-martial jurisdiction over National Guard personnel while in a Title 32 status.[32] The consequence and deference of these legislative decisions, and the historical independence that state militias maintained before and after the inception of nationhood, has permitted a high degree of autonomy and authority to the states and territories that make up the National Guard to craft their own military justice systems in a way that has produced variability in their structure, form, and process.[33]

Efforts Toward Structure and Uniformity

Congress sought to address the lack of structure and uniformity with state military justice systems in 2003 when it required the Secretary of Defense to prepare a Model State Code of Military Justice (Model State Code) and a Model State Manual for Courts-Martial (state MCM) for the National Guard not in federal service.[34] The desired outcome for drafting a Model State Code and the state MCM was to propose to the states a common structure and language for military justice within the states and territories.[35] The impetus for Congressional action stemmed from a report issued by the Department of Defense (DoD) in 1998 examining military justice in the National Guard.[36] The combination of the report and Congressional edict led to efforts in creating a Model State Code and state MCM. The principal agency that led this endeavor was the National Guard Bureau. In 2003, the National Guard Bureau produced a first draft of the Model State Code and a draft model for a state MCM.[37] From 2003 to 2005, the draft Model State Code and state MCM received comments from the DoD, Army, and Air Force, with final approval by the DoD in 2005.[38] Since that time, states have slowly begun to adopt the Model State Code to replace their respective and dated state military justice systems.[39]

In addition to the creation and state-by-state adoption of the Model State Code and state MCM, the National Guard Bureau has established a fully functional Trial Defense Service (TDS) for the states, territories, and the District of Columbia for members performing duty under Title 32.[40] The importance of establishing this organization is apparent: 1) it provides necessary legal defense services for members of the National Guard; 2) it ensures the professionalism and supervision of defense counsel; and 3) it eliminates perceptions of conflicts of interest. Eliminating conflicts of interest bolsters the integrity of defense services, which is critical for the operations of any fair justice system. Holistically, it also shows efforts the National Guard Bureau has committed to achieve some degree of parallel uniformity with defense services that formally began in 1980 with the Army's establishment of the U.S. Army Trial Defense Service (USATDS).[41]

In continuing the National Guard's structural transformation in relation to military justice, the National Guard Bureau is moving forward to establish, with voluntary participation from the states and territories, a Joint National Guard Trial Judiciary with eight regional circuits.[42] The purpose of this state opt-in judicial enterprise is to provide and support military justice services in the supported state or territory as well as to have interstate judicial services that facilitate military justice in the states.[43] This effort is significant in scope and coordination. While still in its creation, the establishment of a Joint National Guard Trial Judiciary continues the positive trend toward increasing the capability and professionalization of military justice in the states. While recent efforts to structurally transform and unify the National Guard's fifty-four military justice systems into a loose, yet coordinated system is ongoing, deficiencies exist that cannot be corrected because of the aforementioned constitutional, statutory, and organizational constraints. The next section highlights prominent areas of non-uniformity and results from a Military Justice Survey administered by the author. The section concludes with a Wisconsin appellate case that showcases the inevitable structural non-uniformity that exists within the present system.

The Elusive Nature of Uniformity

One goal of reforming state military justice systems is to establish consistency, uniformity, and some degree of alignment with the UCMJ. However, a primary barrier to fully achieving this goal is the current effort to modernize state military justice systems on a state-by-state basis. This is problematic because the fifty-four state and territorial jurisdictions that make up the National Guard have different levels of expertise, motives, and resources to support or adopt a uniform system, either in whole or in part. The divergence of state interests leads to non-uniformity that exposes important questions for states to consider. For instance, and to highlight a few notable and known areas: 1) what is the scope of jurisdiction over National Guard Service members;[44] 2) what is the applicability of the Military Rules of Evidence (MRE); 3) what is the applicability of the Rules for Courts-Martial (RCM); and 4) what appellate courts and procedures (military or civilian) will apply?[45] With state appellate courts, will they defer to military precedent when it may conflict with the respective state law or constitution? These important questions fueled the creation of a Military Justice Survey[46] to assess the variability with the states' military justice systems and, equally important, to understand the pace of progress with the adoption of the Model State Code that became available in 2005.[47]

The Military Justice Survey

The fifty-four states and territories that encompass the National Guard were the subjects of a Military Justice Survey. Eighty-seven percent of states responded to the questionnaire. With the addition of data gathered by the Maryland National Guard, the survey findings revealed substantial variability with the states' military justice systems.[48] For instance, the data revealed

that 28 percent of states surveyed (*n*=54) either adopted the Model State Code or adopted it with changes, while 61 percent of states maintained a system substantively similar to the UCMJ. Seven percent of the states surveyed used a unique military justice code that is substantively dissimilar from the Model State Code and the UCMJ, while two states had no code at all.[49] The court-martial appellate process held greater variety with 28 percent employing some form of military appellate court, 9 percent using the respective state supreme court, 29 percent using the respective intermediate appellate court, 28 percent having no codified process, and 3 percent using alternative review methods, to include appealing to the governor or to the state district court.[50]

The Military RCM were used in 55 percent of the states surveyed (*n*=47), and in regards to the MRE, 53 percent of states surveyed (*n*=47) responded in the affirmative that such evidentiary rules were in place in court-martial proceedings. In relation to jurisdiction, 38 percent responded that jurisdiction is determined by duty status, 7 percent require a nexus with one's military duties, 40 percent require both duty status and a nexus to military duties, and 13 percent asserted that jurisdiction exists regardless of a nexus requirement or one's duty status.[51]

Ninety-three percent of the states surveyed (*n*=47) provided for incarceration upon conviction by court-martial, yet the place where incarceration occurred varied from county jail, city jail, regional jail, state penitentiary, or, in some cases, the respective state statute was silent or the issue had not been resolved.[52] Seventy-five percent of the states surveyed (*n*=43) responded that a court-martial conviction is a criminal conviction under the respective state law, and 57 percent of the states surveyed (*n*=44) responded that some offenses in the state military code are considered felonies.[53] Finally, 94 percent of states surveyed (*n*=47) maintained non-judicial punishment, with 56 percent (*n*=44) providing the accused the ability to turn down the forum and request a court-martial.[54] In broad terms, the findings from the Military Justice Survey reflect a trend toward some degree of uniformity and consistency, but the data clearly suggests that substantial differences continue to pervade. It is these structural and substantive differences that lend themselves to uncertainty in the law as it relates to military justice in the states.

A Case Study of Uncertainty

An exemplar of military law's uncertainty in the states and territories is found in *Wisconsin v. Riemer*.[55] In that case, Sergeant First Class (SFC) Riemer was charged with thirteen offenses stemming from his misconduct as a military recruiter while serving in a Title 32 status. In a negotiated plea deal, SFC Riemer was convicted and sentenced to thirty days' confinement and a bad conduct discharge.[56] Sergeant First Class Riemer appealed his sentence, alleging that the military judge misused his discretion during sentencing; and, on due process grounds, the military judge exhibited bias, failed to consider all of the evidence, and assumed facts not in the record.[57]

The appellate court affirmed the conviction and sentence, but not after closely examining the Wisconsin Code of Military Justice and the role it served to inform the court's dueling standards of review.[58] The court looked closely at language found in Wisconsin Statute section 322.143 where it provided that the "[Wisconsin Code of Military Justice] shall be so construed as to effectuate its general purpose to make it uniform, *so far as practical*, [with the UCMJ]."[59] In determining whether to conduct appellate review in accord with the UCMJ and federal military law, the court reasoned that it is not *practical* to do so. As a result, the court applied Wisconsin state law rather than federal military law in reviewing sentencing determinations.[60] The court's reasoning in selecting Wisconsin's standard of review in sentencing rested with the observation that "Wisconsin's appellate judges lack the military judges' experience and 'accumulated knowledge' necessary to inform such an independent review of sentencing decisions."[61] The court further opined that it is "not practical for Wisconsin appellate judges to attempt to apply federal military law to the review of sentencing discretion."[62] With SFC Riemer's due process claims, the court reasoned that "[i]f there is an argument that our review of any of these three issues should be based on federal law, we leave that question for another day."[63]

The implications of *Riemer* and the results of the Military Justice Survey illustrate uncertainty in the law and procedure as it relates to military justice in the states. While momentum to modernize military justice is ongoing, the inescapable conclusion is that uniformity will remain elusive because of the nature of state control and autonomy that has historically existed with the National Guard. The broad strategic implications for this non-uniformity run counter to building a cohesive Total Force as envisioned by Secretary of Defense James Schlesinger. That is, maintaining fifty-four different military justice systems that are different from the federal military justice system does not further a homogeneous whole. Indeed, the goal of a cohesive Total Force is frustrated to some degree because the administration of good order and discipline is disparate in that it does not produce efficient and consistent employment of judicial maintenance and operations, which runs counter to uniformity and the Total Force concept. This is the stark challenge that has an answer.

Cooperative Military Justice

Efforts to modernize the National Guard's military justice systems reflect a broader tension between federal and state relations and the proper scope of Congress's plenary power to raise an Army juxtaposed with the state's interest in maintaining a high degree of autonomy with its National Guard. This tension is illustrated in the codification of military justice in Title 10 for the Armed Forces and Title 32 for the National Guard of the United States.[64] What has emerged are two statutory layers of military justice. One layer is a robust federal military justice system, and the other, less than robust military justice authorities for the states' National Guards.[65] Merging these layers into a framework that is cooperative, efficient, and seamless in relation to the administration of military justice is timely and needed. This framework is a construct and contemplates a different paradigm that advances "cooperative"[66] military justice. To advance this construct to policy, a new legal architecture is needed that ties Title 10 and Title 32 authorities in a way that integrates

elements of state military justice into the federal system. There are ten components that highlight the essential features of this construct, and they are identified in turn.

Congress's Plenary Authority to Raise an Army

The first component rests with Congress's plenary authority to raise an army coupled with its power to provide for "organizing, arming, and *disciplining*, the Militia."[67] These constitutional authorities support a policy change that permits the blending of state military justice systems with the UCMJ.[68] First, the Army Clause is significant in relation to federal power. In *Perpich v. Department of Defense*, the Court noted that "[Congress's] . . . control over [raising and supporting armies and regulating land and naval forces] is plenary and exclusive."[69] Second, the historical context of the Militia Clause is illuminating. The word "discipline" is a focal point, and arguments provided during the Constitutional Convention and the Virginia Ratifying Convention provide persuasive evidence that "Congress maintains the power to regulate courts-martial in the state militia when not in federal service . . . ."[70] For instance, during the Constitutional Convention, James Madison remarked that "disciplining" did not include "penalties and courts-martial for enforcing them."[71] Rufus King responded, stating that "[disciplining] must involve penalties and everything necessary for enforcing penalties."[72] In addition, the North Carolina, Virginia, Pennsylvania, and New York ratifying conventions attempted to limit or amend the word "discipline" to a narrow construction confined to a "system of drills" or to fines and punishments directed by state law.[73] These and similar amendments failed.[74] Consequently, the historical record suggests that Congress held the power to prescribe punishments for the militia not in federal service.[75]

The Make Rules Clause and the Jurisdictional Implications

The second component rests with Congress's authority to "make Rules for the Government and Regulation of the land and Naval Forces . . . ."[76] The Make Rules Clause is persuasive as to Congress's plenary authority to shape and expand the scope of the military justice system. *Solorio v. United States* is instructive.[77] There, the Court held that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the Armed Forces at the time of the offense charged."[78] The importance of *Solorio* is the Court's expansive reading of the Make Rules Clause that pivots court-martial jurisdiction from service connection to the Service member's status.[79] Service connection required a nexus between a Service member's military duties and the alleged crimes in order for court-martial jurisdiction to attach. For example, a Service member who committed non-military crimes off the installation against a person who is not affiliated with the military would lack a service-connection for purposes of court-martial jurisdiction.[80] In contrast, *Solorio* turned to the Service member's status at the time of the offense charged to determine court-martial jurisdiction; this change limited those who are subject to court-martial jurisdiction (civilians and dependents)[81] and expanded it. With expanding jurisdiction, the Make Rules Clause and case precedent appear to provide a basis to assert jurisdiction over Service members in a Title 32 *status.*[82] With jurisdiction hinged on Service member status, and the constitutional authorities tipped toward federal supremacy in regulating military affairs, this article does not suggest a mandated military justice system for the states and territories. Rather, cooperation implies some degree of non-encroachment and voluntariness between the federal and state governments, where state control over the essential features of military justice would remain. Stated another way, voluntariness and cooperation are central to a federal pathway.

The Voluntary Pathway to the Federal Military Justice System

The third component is state control of its military justice system and the state's willingness to structurally align itself into the federal military justice system. The implications of a state's election of a federal pathway would require state National Guards to employ the substantive and procedural law of the federal military justice system. To achieve that policy end, amending 32 U.S.C. §§ 326 and 327 is necessary. These sections provide for the courts-martial of National Guard not in federal service in terms of composition, jurisdiction, procedures, and convening authorities.[83] In relation to the National Guard, the inclusion of federal pathway language for opt-in states would define the jurisdiction of the federal military appellate courts and the federal courts. And, with sources of law, the UCMJ, the *Manual for Courts-Martial*, and all associated regulations would require employment. The states' acquiescence to a federally-coordinated and funded path to military justice provides the foundation needed to achieve uniformity between the federal and state military justice systems.

Referral to the Federal Military Justice System

The fourth component with a federal pathway is the convening authority and the court-martial itself. In accordance with 32 U.S.C. § 327 governors, adjutants general, or designees identified in federal and state statute, would continue under this construct to serve as the convening authority and refer charges to one of the three types of federal courts-martial: summary, special, or general.[84] State military judges would conform to the competency and certification requirements outlined in Article 26.[85] Both the convening authority and military judge would remain dual-hatted; when on State Active Duty (SAD)[86] or in the federal system, they would be capable of directing and hearing cases on matters involving misconduct under the state military justice code—including when the misconduct occurred in a Title 32 status. Stated another way, when Soldiers and Airmen are in SAD status, nothing prevents the state National Guard from utilizing its state military code and military justice system. Indeed, the nature of SAD status is non-federal, and—consequently—a nexus to Title 32 jurisdiction as envisioned with this construct is absent. The novelty of this approach is its flexibility. As defined by 32 U.S.C. § 327, when Soldiers and Airmen are in a Title 32 status, a convening authority may refer cases to the federal system; but, it also allows cases that are uniquely non-federal to be disposed of in accordance with state law.

The National Guard Trial Judiciary

The fifth component incorporates efforts to establish the proposed National Guard Trial Judiciary.[87] The structural elements to forming a loosely-coupled specialized national court system are numerous; but, as of this writing, and to highlight a few features, it would include eight regional circuits with a regional chief judge, links to the U.S. Army Trial Judiciary,[88] training and certification for military judges, and some degree of synchronization with the respective state's appellate court system.[89] The establishment of military trial courts that harmonize military justice across the states is needed. It is at this juncture where a deviation from current state practice is necessary. That is, review by the respective state appellate courts is problematic. As identified in the Military Justice Survey, the type and form of appeal from state to state is eclectic.[90] In addition, the substantive and procedural law that the National Guard Trial Judiciary will draw from is as varied as the law that is applied in the respective state.[91] Consequently, a different path is needed to achieve uniform application of military law, which is addressed by the sixth component.

The Court of Criminal Appeals

The sixth component envisions appellate review by a Court of Criminal Appeals (CCA), which is the first appellate tier that makes up the military appellate courts.[92] Article 66 requires that each Judge Advocate General establish a CCA, which in turn has led to the creation of the Army, Air Force, Navy-Marine Corps, and Coast Guard Courts of Appeal.[93] In addition, Article 66 governs the composition, procedures, and jurisdiction of the CCA.[94] Jurisdiction is central to putting into force a federal pathway, a trajectory that lands a state court-martial conviction under the auspices of Title 32 and, by extension, within the Army or Air Force CCA. The novelty of state court-martial convictions coming before a CCA is markedly different, but the potential harmony it brings to the predictive nature of military law is profound. This claim is exemplified by *Riemer,* where the Wisconsin appellate court maneuvered away from applying military law by employing a statutory escape route, and defaulted to the comfortable terrain of state law.[95] While the decision is not fatal as to outcome, it reflects the broader challenges of unifying military law around common substantive and procedural language that advances a law-based, predictive jurisprudence. Article 66 provides for appellate review from state court-martial convictions when in a Title 32 non-federal status.[96] Amending Article 66 would capture the relative incoherence that presently exists when applying military law in state courts, and free it to navigate in a legal environment that maintains federal uniform rules and procedures that have largely stood the test of time.

The Court of Appeals for the Armed Forces

The seventh component conforms to current statutory appellate review found in Article 67,[97] which provides when the Court of Appeals for the Armed Forces (CAAF) shall review the record in cases originating from the CCA.[98] As an Article I "court of record," the CAAF is the second tier within the military appellate structure, and it maintains both mandatory and discretionary appellate review.[99] The CAAF's appellate authority as envisioned with this construct is broadly framed to encapsulate a Title 32 court-martial conviction that has properly been reviewed by the CCA. This is because the CAAF's appellate review presumes that court-martial convictions reviewed by the CCA are, within the limits found in Article 67, fit for appellate review. Notwithstanding the plain text of Article 67 and for purposes of clarity, clear authorizing language is needed to ensure Title 32 court-martial convictions are within the subject-matter jurisdiction of the CAAF.

The U.S. Supreme Court

The eighth component is the U.S. Supreme Court. It is an Article III court of last resort authorized to exercise subject matter jurisdiction over the CAAF pursuant to statutory authority found under Article 67a and 28 U.S.C. § 1259.[100] An exemplar of the Court exercising such jurisdiction is found in *Ortiz v. United States.*[101] In *Ortiz*, the Court insisted that the "judicial character and constitutional pedigree of the court-martial system enable [the Court to review CAAF decisions]."[102] The significance of *Ortiz* is not so much its holding that the Supreme Court can exercise Article III appellate jurisdiction over the CAAF; but, for purposes of this framework, it highlights the overall structural and procedural flow of how a Title 32 court-martial conviction with tied Title 10 and Title 32 military justice authorities can find itself before the U.S. Supreme Court.

Clemency in the Proposed Construct

The ninth component involves clemency, which is generally understood to mean the power of the executive branch (state or federal) to reduce a criminal sentence. In terms of a court-martial, clemency is defined as "[a]n action to remit or suspend the unexecuted part of an approved court-martial sentence, to include upgrading a discharge and the restoration or reenlistment of an individual convicted by a court-martial."[103] Article 60a establishes the parameters by which the general court-martial convening authority may exercise clemency.[104] In addition, Article 74(a) authorizes the Secretary of the Army to "remit or suspend any part or amount of the unexecuted part of any sentence."[105] With the Department of the Army, cases concerning confinement or parole are left to the Army Clemency and Parole Board, which is charged with making determinations on clemency and parole actions. In special cases or denial of parole, the Deputy Assistant to the Secretary of the Army of the Army Review Boards Agency may take final action.[106] The significance of this brief review on clemency is to articulate how the envisioned Title 32 court-martial conviction blends with clemency actions administered at the federal level. Logically, any Title 32 court-martial conviction would be a federal conviction and subject to federal law and military regulations.

Amending Article 74

Consequently, and in the interest of ensuring a sense of comity between the states and the federal government, the ninth component suggests amending Article 74. The objective is to authorize the governor of the respective state or territory to submit a non-binding yet persuasive recommendation to the Secretary of the Army on matters concerning clemency or parole in cases of a Title 32 Service member convicted by a court-martial. Such a mechanism is neces-

sary because the governor's power to exercise clemency and reduce sentences would realize some erosion within the understanding of this framework. Consequently, a non-binding yet persuasive recommendation to the Secretary of the Army is a viable technique to partially restore the governor's role in clemency actions when it involves a Title 32 court-martial conviction.

A Recognition of Trade-Offs

The tenth component is a recognition of trade-offs. On one hand, governors and adjutants general would lose some control over military justice. On the other hand, states electing a federal pathway would address problems that have plagued the competing federal and state military justice systems. For instance, with this framework, National Guard Service members who engage in misconduct while on active duty—but later returned to state status—could still face federal court-martial proceedings that originated while in a federal active status without being ordered into federal service.[107] The jurisdictional nuance that separated federal and state status for purposes of court-martial would be obviated.

Second, the nature of a state court-martial conviction does not bear the same meaning in relation to a federal retirement. For instance, federal retirement hinges on eligibility, and a disqualifying feature of a court-martial conviction for purposes of a federal retirement is a dishonorable discharge, bad conduct discharge, and, in the case of an officer, dismissal.[108] State court-martial convictions are not contemplated as a disqualifying conviction because they are not conducted pursuant to the UCMJ.[109] While administrative procedures exist to effect an outcome denying military retirement benefits for a state court-martial conviction, the additional burden to do so would become a nullity when incorporating the federal UCMJ into Title 32. Third, American Bar Association Rule 5.5 provides for the multijurisdictional practice and the unauthorized practice of law.[110] This rule prohibits "a lawyer from practic[ing] law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . . ."[111] States have adopted this rule to varying degrees.[112] Since state military justice codes are, by definition, creatures of state law, judge advocates not admitted to practice in a respective state would be prohibited, absent an exception, from prosecuting or representing clients subject to any action related to the state military justice code. A Title 32 federal pathway addresses this limitation because the practice of law would become exclusively federal. Consequently, the ability to provide interstate judge advocate services on matters related to military justice would spark a higher degree of comity and utility. Finally, the examples provided are not exhaustive, and a learned practitioner of military justice may quickly identify additional virtues of transitioning to a legal regime that is more seamless and uniform, and at the same time, produces tangible benefits.

Conclusion

George Washington's normative statement emphasizing uniform rules for the standing army and militia have largely come to pass, yet organizational and statutory non-uniformity continues to pervade. The untethering of Title 10 and Title 32 military justice authorities from their statutory moors is the first step in projecting a new architecture that fosters cooperative military justice. Such a transformation would align with Schlesinger's prophetic statement that the Armed Forces should work toward a homogenous whole. While substantial gains have been made to modernize state military justice systems, the fact remains that the only true pathway to uniformity that leverages efficiencies and the proper administration of military justice is a federal pathway. Absent a federal pathway, uniformity will remain elusive. **TAL**

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Notes

1. George Washington, *Sentiments on a Peace Establishment* (May 2, 1783), *in* 26 The Writings of George Washington from the Original Manuscript Sources, 1745–1799, at 374, 391 (John C. Fitzpatrick ed., 1938).

2. Colonel William L. Shaw, *The Interrelationship of the United States Army and the National Guard*, 31 Mil. L. Rev. 39, 42–43 (1966).

3. This innocuous question actually held a high degree of importance, with such a question posed in the *Cornell Law Quarterly* in 1949. The article explored perceived flaws with the proposed uniform code of military justice. Later introduced into the Congressional Record, the authors identified, among other perceived flaws, the inclusion of three Judge Advocate Generals (rather than one) as contrary to the goal of uniformity. 95 Cong. Rec. 269–71 (1950) (letter from Arthur John Keefe and Morton Moskin submitted into the congressional record by Sen. Wayne Morse).

4. *Id.* at 2.

5. Lieutenant Colonel Theodore Essex & Major Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission,"* 52 A.F. L. Rev. 233, 234 (2002).

6. *See* 10 U.S.C. §§ 801–946a.

7. The National Guard not in Federal Service is defined as the fifty states and the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands. *See* 32 U.S.C. §§ 326–327.

8. The Total Force concept became policy in 1973 when Secretary of Defense James Schlesinger wrote a memo articulating the long-term strategy of integrating Active, National Guard, and Reserve forces. *See* Memorandum from Sec'y of Def. to Chairman of the Joint Chiefs of Staff et al., subject: Readiness of the Selected Reserves (Aug. 23, 1973) [hereinafter Schlesinger Memo].

9. Frederick Bernays Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 184 (1940).

10. Alexander Hamilton reminded those who opposed a standing army of the limitations of fighting a war with untrained men. He classically expressed his view, stating:

> Here I expect we shall be told that the militia of the country is its natural bulwark and would be at all times equal to the national defence. This doctrine, in substance, had like to have lost us our independence. It cost millions to the United States that might have been saved. The facts which, from our own experience forbid a reliance of this kind, are too recent to permit us to be the dupes of such a suggestion. The steady operations of war against a regular and disciplined army can only be successfully conducted by a force of the same kind. Considerations of economy, not less than of stability and vigor, confirm this position. The American militia, in the course of the late war, have, by their valor on numerous occasions, erected eternal monuments to their fame; but the bravest of them fell and know that the liberty of their country could not have been established by their efforts alone, however great and valuable they were. War, like most other things, is a science to be acquired and perfected by diligence, by perseverance by time, and by practice.

The Federalist No. 25, at 125 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

11. Jeffrey A. Jacobs, *Reform of the National Guard: A Proposal to Strengthen the National Defense*, 78 Geo. L.J. 625, 627 (1990).

12. U.S. Const. art. I, § 8, cl. 12.

13. U.S. Const. art. I, § 8, cls. 15, 16. Clauses 15 and 16 are read together as the Militia Clause.

14. *See, e.g.*, Perpich v. Dep't of Def., 496 U.S. 334 (1990).

15. Samuel J. Newland, *The National Guard: Whose Guard Anyway?*, 28 Parameters 40, 42 (1988).

16. Michael D. Doubler, I Am The Guard: A History of the Army National Guard, 1636–2000, at 68 (2001) (commenting on the near complete control that states held over their militias with no sanction regime by the federal government to ensure compliance). *See also* Newland, *supra* note 15, at 42.

17. Patrick Todd Mullins, *Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War*, 57 Geo Wash. L. Rev. 328, 333 (1988).

18. *Id.* at 333–34. While the Dick Act was transformative, exigencies of the time compelled Congress in 1916 to expand federal control over the National Guard with the passage of the National Defense Act of 1916. Sweeping changes resulted, but of significance, the increase in federal funding, compliance mechanisms, and Presidential authority to draft members of the Guard into federal service furthered its transformation. Jacobs, *supra* note 11, at 630.

19. Mullins, *supra* note 17, at 337.

20. *See* Perpich v. Dep't of Def. 496 U.S. 334, 344 (1990) (quoting Cox v. Wood, 247 U.S. 3, 6 (1918) that "the plenary power to raise armies was 'not qualified or restricted by the provision of the militia clause'").

21. *See* Wiener, *supra* note 9, at 208. The Act also restructured the War Department by changing the supervisory agency responsible for the National Guard from the Militia Bureau to the National Guard Bureau. *Id.* at 209.

22. *See* Mullins, *supra* note 17, at 337.

23. *Id.*

24. *Id.* at 338.

25. *See* Schlesinger Memo, *supra* note 8.

26. *See* Doubler, *supra* note 16, at 241.

27. *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the Comm. on Armed Servs. H.R.,* 81st Cong. 565, 771 (1949) (statement of Major General Kenneth Cramer).

28. The proposed Article 2, UCMJ, Persons subject to the code, read "(3) Reserve personnel who are voluntarily on inactive duty training authorized by written orders." *Id.* at 567. The language did not clearly specify Article 2's jurisdictional scope with the National Guard.

29. *Id.* at 771–73.

30. *Id.*

31. 95 Cong. Rec. 226 (1950)

32. Title 32 provides for court-martial jurisdiction over National Guard personnel in a non-federal status. *See* 32 U.S.C. §§ 326–327.

33. See Colonel Douglas L. Simon, Results of Military Justice Survey (1 Feb. 2020) (on file with author) (unpublished summary of data collected from National Guard Military Justice Survey conducted from 1 December 2019 to 1 February 2020) [hereinafter Military Justice Survey]. *See also* Major Robert L. Martin, *Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia,* Army Law., Dec. 2007, at 30, 36.

34. *See* Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 512, 116 Stat. 2458, 2537–38 [hereinafter NDAA 2003].

35. Bridget J. Wilson & John A. Carr, Nat'l Inst. of Mil. Just., Analysis of the Model State Code of Military Justice and Model State Manual for Courts-Martial for National Guard Units (2010).

36. *See* 116 Stat. 2458.

37. *See* Martin, *supra* note 33, at 51.

38. *Id.*

39. The state of Oklahoma became the latest state to adopt the Model State Code of Military Justice on 16 May 2019. *See, e.g.,* Okla. Stat. tit. 44, §§ 800–946 (2019).

40. The Chief, Army National Guard Trial Defense Service, is a National Guard Bureau officer and provides technical supervision, management, and direction for the Regional Trial Defense Teams. *See* Nat'l Guard Bureau, Reg. 27-12, Judge Advocate Cross Jurisdictional Practice of Law for Legal Defense Services para. 1-1 (15 Sept. 2014) [hereinafter NGR 27-12].

41. *Fact Sheet: US Army Trial Defense Service*, Army Law., Jan. 1981, at 27.

42. Brigadier General Daniel J. Hill, Assistant to the Chief Couns., National Guard Bureau, NG Trial Judiciary, at slides 5–7 (unpublished PowerPoint presentation) (on file with the author) [hereinafter BG Hill Presentation].

43. *Id.* slide 13.

44. Military Justice Survey, *supra* note 33.

45. *See* Wilson & Carr, *supra* note 35.

46. Military Justice Survey, *supra* note 33.

47. *Compare* Martin, *supra* note 33, *with* Military Justice Survey, *supra* note 33.

48. Lieutenant Colonel Rose M. Forrest, Deputy Staff Judge Advocate, Maryland National Guard State Comparison Chart (July 22, 2019) (unpublished Excel spreadsheet) (on file with author) [hereinafter Maryland Chart].

49. Military Justice Survey, *supra* note 33, tbl.1.1.

50. *Id.* tbl.1.2.

51. *Id.* tbl.1.3.

52. *Id.*

53. *Id.*

54. *Id.*

55. State v. Riemer, 2017 WI App 48, 377 Wis. 2d 189, 900 N.W.2d 326.

56. *Id.* ¶ 1.

57. *Id.* ¶ 2.

58. *Id.* ¶¶ 10–19. Wisconsin adopted and amended the Model State Code of Military Justice. *See* Wis. Stat. §§ 322.0001–322.144.

59. *Riemer*, 2017 WI App at ¶ 14 (emphasis added).

60. *Id.* at ¶ 14.

61. *Id.* at ¶ 19.

62. *Id.*

63. *Id.* at ¶ 3.

64. The Army National Guard of the United States is defined as the "reserve component of Army all of whose members are members of the Army National Guard." 32 U.S.C. § 101(5). The Air National Guard of the United States is defined as the "reserve component of the Air Force all of whose members are members of the Air National Guard." 32 U.S.C. § 101(7).

65. *Compare* 32 U.S.C. §§ 326–327, *with* 10 U.S.C. §§ 801–946a (illustrating textually the significant difference between the federal military justice system and the military justice system for the states and territories).

66. The term "cooperative" is used to fix the form of federal–state relationship to a paradigm of federalism recognized broadly from 1930–1960. A central premise to this period is that the functions and powers of government is impossible without it functioning as a whole, and secondly, from a functional perspective, the funding and administration of government encompasses a sharing of responsibilities that is cooperative rather than adversarial. *See* David B. Walker, The Rebirth of Federalism: Slouching Toward Washington 92–95 (1995).

67. U.S. Const. art. I, § 8, cl. 16 (emphasis added).

68. *See* Perpich v. Dep't of Def., 496 U.S. 334, 340–346 (discussing the interpretation of the Militia Clause and Congress's supremacy over military affairs in relation to calling National Guard units into federal service).

69. *Id.* at 353 n.27 (quoting Tarbel's Case, 80 U.S. 397, 408 (1871)).

70. *See* Wiener, *supra* note 9, at 214.

71. *Id.* at 214 n.189 (citing 2 Max Farrand, The Records of the Federal Convention 385 (Max Farrand ed., 1911).

72. *Id.*

73. *Id.* at 214–15.

74. *Id.* at 215 (citing Blair M'Clenahan, *Proceedings of the Meeting at Harrisburg, in Pennsylvania, reprinted in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 546 (Jonathan Elliot ed., 2d ed. 1836); *see also* Robert R. Livingston, *The Debates on the Convention of New York, reprinted in* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 406 (referring to The Debates in the Convention of The State of New York)).

75. *See* Wiener, *supra* note 9, at 215 n.191 (discussing the failure of Pennsylvania and New York to recommend an amendment that would limit the word discipline to not include fines, penalties and punishments).

76. U.S. Const. art. I, § 8, cl. 14.

77. 483 U.S. 435 (1987).

78. *Id.* at 450–51.

79. *See* O'Callahan v. Parker, 395 U.S. 258, 273–74 (1969) (holding that a service connection to a crime is required for court-martial jurisdiction to exist, *overruled by* Solorio v. United States, 483 U.S. 435, 450–51 (1987)).

80. *Id.* at 273.

81. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding that Congress cannot subject a civilian who was honorably discharged to trial by court-martial for offenses committed while a member of the Armed Forces); Reid v. Covert, 354 U.S. 1, 40–41 (1957) (invalidating a court-martial conviction

for civilian dependents for committing capital offenses during peacetime); Kinsella v. United States, 361 U.S. 234, 249 (1960) (invalidating court-martial convictions for civilian dependents for committing non-capital offenses during peacetime). *See, e.g.*, Stephen I. Vladeck, *Military Courts and Article III*, 103 Geo. L.J. 933, 951–56 (2015) (summarizing Congress's authority under the Make Rules Clause to subject civilians, dependents, and former Service members to court-martial jurisdiction).

82. Solorio v. United States, 483 U.S. 435, 441–442 (1987) (discussing Congress's plenary authority to regulate Service member conduct through the Make Rules Clause).

83. *See* 32 U.S.C. §§ 326–327.

84. *See* 32 U.S.C. § 327.

85. UCMJ art. 26 (2016).

86. *See, e.g.*, Minn. Stat. § 190.05(5a) (1997). The statute defines state active service as service that "excludes federal active service and federally funded state active service." The statute defines service under the authority of Title 32 as "'Federally funded state active service' [that] means service or duty under United States Code, title 32." *Id.* § 190.05(5b).

87. *See* BG Hill Presentation, *supra* note 42.

88. *See* JAGCnet, https://www.jagcnet.army.mil/USATJ (last visited August 10, 2021). The U.S. Army Trial Judiciary had its origins with the implementation of the Military Justice Act of 1968 which established the modern-day military judge. *Id.*

89. *See* BG Hill Presentation, *supra* note 42.

90. *See* Military Justice Survey, *supra* note 33, app. 2, tbl.1.2.

91. *See generally id.* app. 2, tbls.1.1–1.3.

92. UCMJ art. 66 (2017). The CCA is made up of three-judge panels of either officers or civilians. *See* Ortiz v. United States, 138 S. Ct. 2165, 2171 (2018) (holding that an Air Force military judge who held simultaneous appointments on the Air Force Criminal Court of Appeals (AFCCA) and the Court of Military Commission Review (CMCR) did not violate a federal office holding ban or the Constitution's Appointments Clause). *Id.* at 2184.

93. The National Guard of the United States is composed of the Army National Guard and the Air Force National Guard. As a result, the CCAs relevant to this study are the ACCA and AFCCA.

94. UCMJ art. 66 (2017).

95. *See* State v. Riemer, 2017 WI App 48, 377 Wis. 2d 189, 900 N.W.2d 326.

96. UCMJ art. 66 (2017).

97. The CAAF is made up of five civilian judges appointed by the President to serve 15-year terms. *See Ortiz*, 138 S. Ct. at 2171.

98. *See* UCMJ art. 67 (2016). The CAAF's appellate review is exercised in cases in which the sentence is death, when the service Judge Advocate General orders it sent for review, and by petition from the accused who can demonstrate good cause. UCMJ art. 67(a)(1)–(3) (2016).

99. *See* Ortiz v. United States, 138 S. Ct. 2165, 2172 (2018).

100. *See* UCMJ art. 67(a) (2016). *See also* 28 U.S.C. § 1259.

101. *Ortiz*, 138 S. Ct. 2165.

102. *Id.* at 2173.

103. U.S. Dep't of Army, Reg. 15-130, Army Clemency and Parole Board 33 (19 Nov. 2018) [hereinafter AR 15-130].

104. UCMJ art. 60a (2019); *See also* Manual for Courts-Martial, United States, R.C.M.1107 (2019) [hereinafter MCM].

105.UCMJ art. 74(a) (2001).

106. *See generally* AR 15-130, *supra* note 103, paras. 4-2–4-3.

107. *See* U.S. v. Wilson, 53 M.J. 327 (2000) (citing MCM, *supra* note 104, R.C.M. 201(b)(4)–(5) for the proposition that court-martial jurisdiction exists when members of the Guard are in federal service at the time of the offense and the time of trial).

108. 10 U.S.C. § 12740. The statute reads: "a person who (1) is convicted of an offense under the [UCMJ] and who sentence includes death; or (2) is separated pursuant to sentence of a court-martial with a dishonorable discharge, a bad conduct discharge or (in the case of an officer) a dismissal, is not eligible for retired pay." *Id.*

109. *Id.*

110. Model Rules of Pro. Conduct r. 5.5 (Am. Bar Ass'n 2020).

111. *Id.*

112. *See generally* CPR Pol'y Implementation Comm., Am. Bar Ass'n, Variations of the ABA Model of Rules of Professional Conduct: Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law (Feb. 20, 2020).

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Closing Argument

Mentorship Grows Ambassadors for Life

By Lieutenant Colonel Tanasha N. Stinson, Major Jason C. Coffey, Major Courtney M. Cohen, Major M. Keoni Medici, Major Patrick R. Sandys, & Major Annemarie P.E. Vazquez

On 1 July 2020, The Judge Advocate General (TJAG) directed the Leadership Center, housed within the Legal Center at The Judge Advocate General's Legal Center and School (TJAGLCS), to organize an operational planning team (OPT) to assess institutional mentorship across the Judge Advocate General's (JAG) Corps. The authors formed the OPT. As mid-career judge advocates, we easily remember the junior captain days—the questions we sought answers to but did not know who to ask, and then the relief we experienced upon receiving good advice from trusted leaders. Now, we have begun to gain experience as mentors—which comes with its own host of questions, stumbles, and successes. These facts, along with our diverse backgrounds and experiences, informed our participation in the OPT.

First, the OPT observed the current state of mentorship and mentorship training by conducting institutional research and gleaning lessons from anecdotal feedback from members' experiences around the Corps. Then, the OPT proposed a desired end state to capture the connections many visualized. Finally, the OPT developed a path to reach the end state by seeking to obviate the identified barriers to those connections. The OPT used deliberate analysis, thoughtful listening, and outside-the-box thinking to develop options for JAG Corps senior leaders to consider. While the manifestation of any institutionally-resourced mentorship program may ultimately take many forms, the OPT's most meaningful discovery was the value of mentorship generally and the importance of prioritizing it as an organization. Mentorship is a key component of elevating JAG Corps members' professional experiences and deepening their commitment to the dual profession of arms and law.

The Current State of Mentorship in the JAG Corps

Like many organizations, mentorship in the JAG Corps has been historically ad hoc and organic, without formalized structure facilitating connection of mentors and mentees. This informal approach certainly works for some. Those who are naturally prone to proactively initiate a mentoring relationship with a senior or junior person may be unimpeded by a lack of structure. Those who are surrounded by colleagues who look and act like them and share similar backgrounds, interests, or experiences may find it easy to connect without much additional effort. Some, however, may not be comfortable initiating a conversation with someone senior to them, asking more of that person's time and energy to develop the junior member. Others may rarely see people like them in the office or on the physical training field. This may be because the junior member is the only female or racial minority member of the office, or it may be because the junior member is interested in a niche legal specialty not practiced by anyone in that immediate office or on the installation. Without equal access to good-match mentors, these JAG Corps members—compared to their easier-to-match colleagues—may experience greater isolation, less integration into the JAG Corps family, a less developed institutional and professional knowledge of the JAG Corps, and a lower degree of commitment to continuing their JAG Corps career. If ad hoc and informal mentorship still leaves some valued members with limited

or no access to the meaningful connections and guidance they deserve, then more structured options may be worth exploring.

The Future of JAG Corps Mentorship

When all members have access to good-match mentors, their overall experience and impression of the JAG Corps and the Army will prosper. Later, when members choose to leave the force—after four or twenty years—they will be ambassadors for life, in part due to the mentoring relationships the JAG Corps prioritized and facilitated. A more formal mentorship program with supportive infrastructure, resourcing, and training could better facilitate creating and fostering mentoring relationships for *all* JAG Corps members.

While institutionally-resourced mentorship in the JAG Corps remains nascent, TJAGLCS has implemented initial steps. The Leadership Center re-designed the Officer Basic Course's (OBC) Professional Development Program (PDP) to focus on counseling, coaching, and mentorship, and increased the number of touchpoints students have with their PDP seminar leaders, typically majors from school faculty. In addition, the Leadership Center expanded the Graduate Course's (GC) Leadership Development Program (LDP) to include instruction on mentorship and its importance to the Corps. The Leadership Center also included discussions about counseling, coaching, and mentorship during short courses.

The Leadership Center's most visible initiative is the "crossover" between the OBC and the GC. Officer Basic Course PDP seminar groups are matched with GC LDP seminar groups for meet-ups and exercises among the seminar members. Officer Basic Course students benefit from greater access to members of the Corps who are senior to them with whom they may "click" and form an ongoing mentoring relationship. For many GC students, the crossover may be the first opportunity to connect with and mentor junior judge advocates. Graduate Course students discuss their crossover experiences in their LDP seminar group discussions, which are typically led by lieutenant colonels from TJAGLCS staff and faulty. These open discussions about the ups and downs of mentoring help to shape and refine GC students' leadership skills before they venture back out into the field. Conducting this program in TJAGLCS and as part of the assigned curriculum provides the Leadership Center and JAG Corps leaders with ready insight into how receptive JAG Corps members are to the concept, how the execution unfolds, and whether the program may require tweaking in the future.

Further into the future, institutional development of formal mentorship programming could include a digital platform to flatten communications across the Corps, a greater number of affinity groups for like-minded JAG Corps members, or events and activities to make introductions and deepen existing professional relationships. If and until any additional formal programs stand up, it is essential for JAG Corps leaders to emphasize mentorship as an important engagement tool. If only the senior-most JAG Corps leaders believe in, participate in, and enforce the value of mentorship, while leaders in the field focus on the urgent at the expense of the important, then lasting, meaningful mentoring relationships will not only fail—they will never begin. Success depends on each leader in the field appreciating the necessity and importance of mentoring to the Corps and devoting the time and attention to facilitate connections.

Conclusion

The JAG Corps is a small world. By emphasizing mentorship on a persistent basis, and acting with intention to seek and find good-match mentors for all members of our Corps, leaders can make the JAG Corps even smaller, bringing members ever closer into the fold. Leaders must become conscious of the disparate availability of good-match mentors. Through grassroots and more intentional mentorship at Offices of the Staff Judge Advocate, programs like the crossover at TJAGLCS, and even platforms like digital media and formal events, the JAG Corps can link like-minded people who otherwise may never have met. Equal access to potential mentors and mentees who share interests and experiences will contribute to JAG Corps members enjoying a positive, informed, and connected professional experience. When members do eventually leave the force, the positive mentoring experiences they appreciated throughout their military service will influence these ambassadors for life to serve as mentors to the next generation of JAG Corps leaders and those considering joining this fulfilling career. **TAL**

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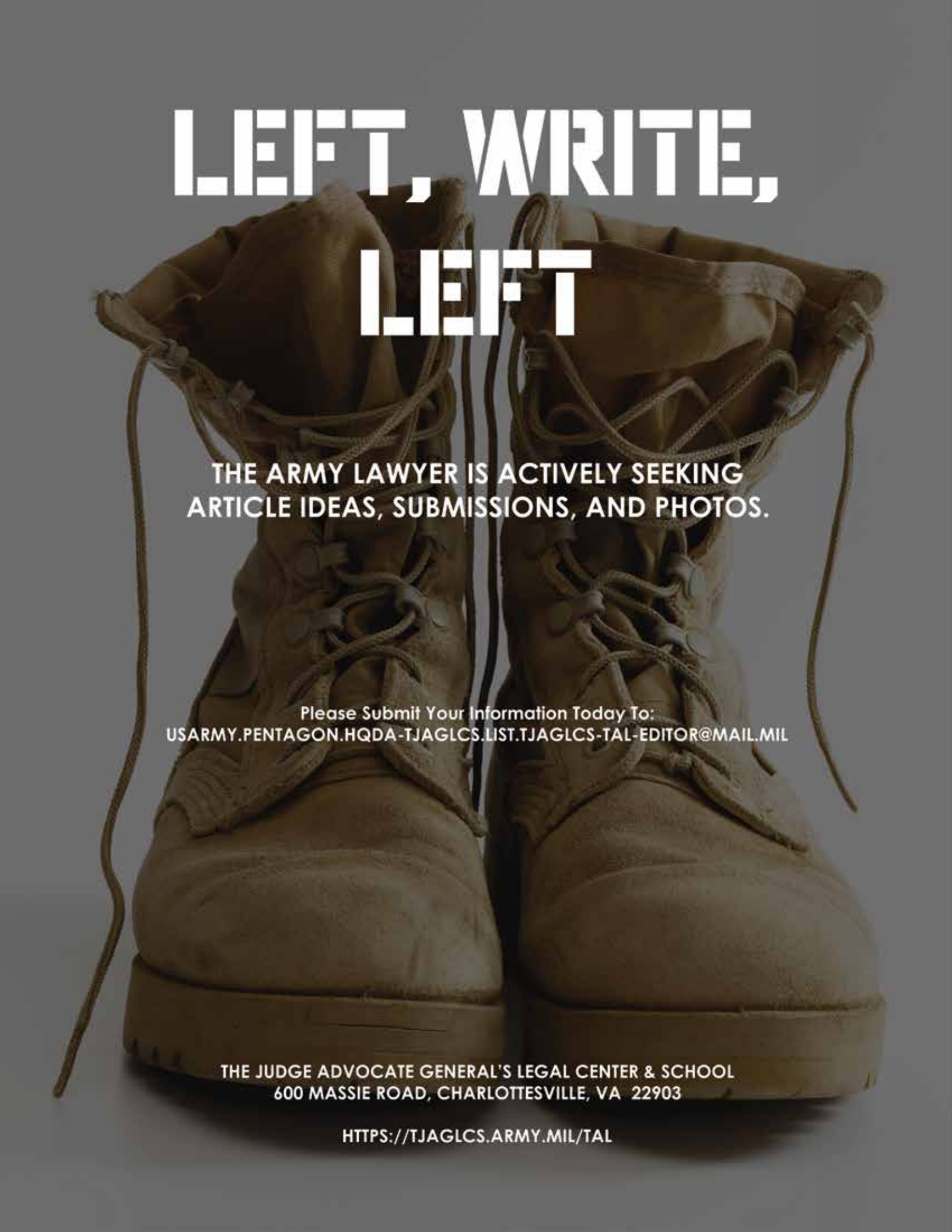
AROUND THE CORPS

MAJ Justin Moore, Joint Task Force-Haiti (Special Operations Command - South) Staff Judge Advocate, palletizes boxes of rice on a CH-47 Chinook Helicopter supporting USAID in response to the 14 August earthquake that killed more than 2,200 Haitians and damaged more than 100,000 structures. Special Operations Command South was selected to deploy as JTF-Haiti and was on the ground within 24 hours to coordinate DoD support to disaster relief.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