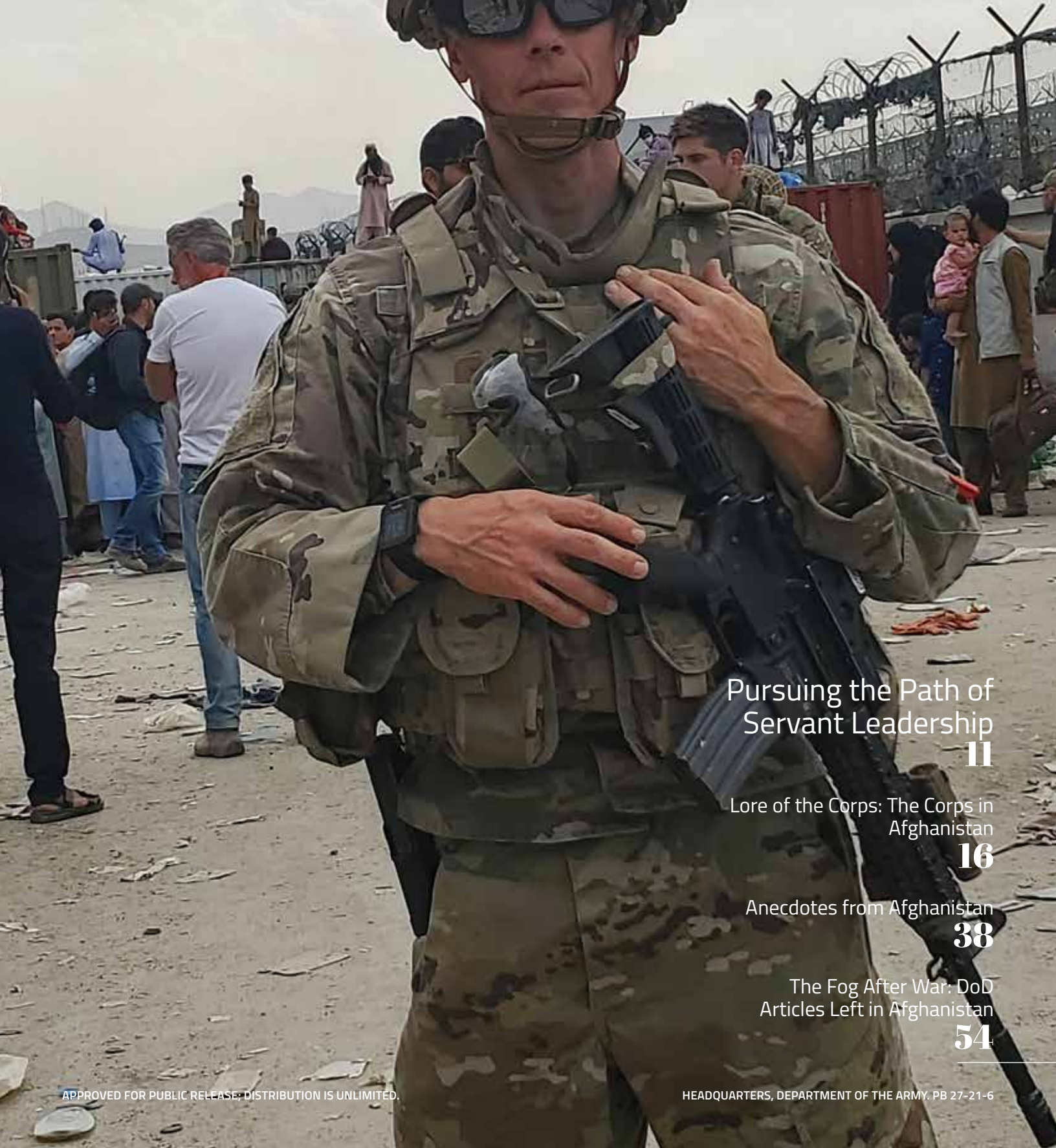


Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 6 • 2021



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CSM Joshua Quinton, Command Sergeant Major, TJAGLCS, addresses members of the JAG Corps about the contributions that SGM Cornell Gilmore made to the Corps. Sergeant Major Gilmore was serving as the Regimental Sergeant Major of the JAG Corps when he was killed in action in Iraq on 7 November 2003. (Credit: Jason Wilkerson, TJAGLCS)





SWARTWORTH HALL

*"The vocation of every man and woman is to serve other people."
Tolstoy*



AROUND THE CORPS

CW5 Tammy Richmond, Command Chief Warrant Officer, TJAGLCS, addresses members of the JAG Corps about the contributions that CW5 Sharon Swartworth made to the Corps. CW5 Swartworth was serving as the Regimental/Chief Warrant Officer of the JAG Corps when she was killed in action in Iraq on 7 November 2003. (Credit: Jason Wilkerson, TJAGLCS)

Army Lawyer

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Issue 6 • 2021

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On the cover: Lieutenant Colonel Dustin Murphy, shown here at Abbey Gate at the Hamid Karzai International Airport, was the staff judge advocate, U.S. Forces-Afghanistan Forward from mid-June to late-August 2021. (Photo courtesy of Lieutenant Colonel Dustin Murphy)

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Leaders from across 3d Brigade Combat Team, 10th Mountain Division, served Thanksgiving lunch to the Soldiers and Army families of their formation. (Credit: Staff Sergeant Kelsey Miller)

Court is Assembled

Servant Leadership

Critical Self-Reflection on Our Individual Leadership Journeys

By Major General Joseph B. Berger III

It inevitably strikes many as contradictory when I say I struggle with the term “servant leadership.” It is, after all, one of our Corps’s four constants. But bear

with me a moment. For starters, the term is not doctrinal. Perhaps it’s also the fact that the framework is credited to an academic in the early ’70s. That’s 1970s. Or maybe it

is my discomfort that this is a label placed on something that current and past Soldiers have been doing since the 1770s!

For those of us who serve as leaders in an organization with a purpose larger than ourselves, servant leadership is simply an innate part of who we are. But it is helpful to pause and think about the “label” of servant leadership as a tool for assessing (or reassessing—growth is a constant process) where we are in our individual servant-leader journeys. So, why does the Army Judge Advocate General’s (JAG) Corps emphasize “servant” leadership as one of our four constants? I believe Cheryl Bachelder’s transformation of the Popeyes food chain is informative as to why servant leadership is so important.

In 2007, Popeyes, known for its savory fried chicken and homestyle mashed potatoes was struggling and bankruptcy was looming. Founded in Louisiana in 1972, Popeyes grew steadily by building a competitive advantage around its food.¹ The company went public in 2001, but by 2007, shares were trading at only \$14,² and the future of the restaurant chain seemed bleak. The company had no long-term strategy and too much short-term thinking.³ Customer satisfaction was low, and there was little optimism about the future of the company. Too little attention had been given to developing new products and establishing a definitive brand.⁴ Events finally came to a head at a contentious board meeting in Orlando, Florida, where a number of angry and frustrated franchisees showed up uninvited to demand change.⁵ After the chief executive officer (CEO) resigned and two other candidates turned down offers to take the helm, the board of directors eventually turned to Cheryl Bachelder to lead the struggling franchise.⁶

Having held management and executive management roles in RJR Nabisco, The Gillette Company, Proctor & Gamble, Domino's, and Kentucky Fried Chicken (KFC),⁷ Ms. Bachelder was no stranger to leading large organizations. She was also no stranger to failure. In fact, hired as the president of KFC in 2001, she was let go after only two years for her "mediocre" performance.⁸ Between 2003 and 2007, Ms. Bachelder had embarked on a personal and professional journey to fully realize her potential and understand what makes good organizations transform into great organizations. After consciously seeking to answer these questions, she found that the answer was relatively simple: serving people and the enterprise is the best path to creating an environment to achieve personal and organizational excellence.⁹

As the new Popeyes CEO, Ms. Bachelder put this strategy into practice by identifying *who* she would be serving. After embarking on a "listening tour" where she engaged with all of Popeyes stakeholders, she realized that the franchisees were one population that "had the most skin in the game."¹⁰ These were people that had mortgaged their houses, taken out loans, dipped into savings, and were truly invested in the

success of the company.¹¹ Ms. Bachelder decided the entire Popeyes organization was going to make these people the number one priority and ensure they felt supported. She opened lines of communication and began investing time and energy in the franchisees as individuals, each with a "unique design."¹² "I must know you to grow you"¹³ became Ms. Bachelder's famous catchphrase. Mentorship and leadership coaching became a primary focus of her energies as she sought to serve her team as its leader.

Ms. Bachelder's strategy proved successful and the results spoke for themselves. By investing in the restaurant owners as people and seeking to serve their needs, company quality improved, and innovative ideas were realized with reinvestment driving further gains. Seven years after she took the helm, "Popeyes sales were up 25 percent, profits up 40 percent, market share had grown from 14 to 21 percent, and the stock was trading at over \$40."¹⁴ Three years later, Restaurant Brands acquired Popeyes for \$1.8 billion at \$79 per share.¹⁵ Cheryl Bachelder rescued a failing organization through servant leadership.

As Ms. Bachelder demonstrated as the CEO of Popeyes, in organizations where people are the most critical asset, effective leadership necessitates a servant component to that leadership. The terms "servant leadership" and "leadership" are, in successful practice, synonymous. Civilians and Soldiers alike in our Corps took an oath to support and defend the Constitution of the United States. To accomplish the countless missions we are given every day around the globe, the nearly 10,000 teammates in our Corps must lead by providing purpose, direction, and motivation to our subordinates, our teammates, and our clients.¹⁶ To do so, we must focus on the people who must do the work so we can accomplish the mission. As has been noted by countless leaders, "if you take care of them, they'll take care of everything else."¹⁷ That, in a nutshell, is servant leadership.

Theodore Roosevelt once observed that "[n]obody cares how much you know, until they know how much you care."¹⁸ As we reflect on our efficacy as servant leaders, the best place to start is with a gut check of whether your team knows you care about them. Time is the one commodity we

cannot get more of in this lifetime. Thus, as a leader, the most valuable commodity you can give is your time.

How can you measure your efficacy? Think about the answers to the following questions: Do you invest your time in your people and the team? When you do give your time to others, are you actively listening to them and giving them your full attention? Do you make a point every day to walk around and meet your people where they are? Or call—not just text!—your teammates who are teleworking? Do you make a sincere and genuine effort to know who they are and what makes them whole? What are their passions and what is important to them?

The American poet Robert Frost once wrote, "[n]ow when I am old my teachers are the young."¹⁹ Learning from others, especially those you may outrank, is critical. It requires humility. But servant leaders must keep an open mind and do so. Simply because you did it one way previously doesn't mean that's the only (or even the best) way. We have tremendous talent throughout the Judge Advocate Legal Service. Get to know your people—you will realize you have a lot to learn from them.

Servant leadership is also marked by a devotion to our people. This is not to say that we position ourselves, allocate our resources, and make decisions solely to make them happy. Rather, we must first and foremost be concerned about the individual well-being and professional growth of those we lead. Did those you lead grow as individuals? Did they become healthier, wiser, more independent, and more likely to become servant leaders?²⁰

You may never have thought about a great leader in terms of servant leadership. Close your eyes and think about the best (not necessarily your favorite!) leader you have known. Now, apply the attributes of servant leadership to their actions. Did they listen actively, show empathy, provide emotional healing, persuade others, steward our professions, build a sense of community, and commit to your growth?²¹

The commitment to the growth of our people is stressed in our leadership doctrine.²² It makes clear that good leaders must counsel, coach, and mentor.²³ These development processes take time (your

most valuable resource) and a deliberate effort. But servant leaders must be committed to the development and growth of others—from making sure they understand what their subordinates need, to providing subordinates with the skills and resources they need to do their jobs effectively.

Whether you are a junior paralegal responsible for sponsoring a new Soldier, or a senior staff judge advocate, we must remain committed to those in our charge. Create the conditions and provide the resources for our teams to be their very best. Be intrusive in a positive way and know what is going on in your teammates' lives. Serve and guide your teams as we get back to the basics. Be purposeful with counseling, coaching, and mentoring. Be decisive so your teammates can move out and continue to provide premier legal services.

Leaders, remember: our JALS teammates don't work for you, you work for them. It is a privilege to lead. Take care of our greatest assets. Serve your people. Validate their worth. And again, "if you take care of the people, they will take care of the mission." **TAL**

MG Berger is the Deputy Judge Advocate General of the U.S. Army Judge Advocate General's Corps at the Pentagon in Washington, D.C.

Notes

1. *Our Story*, POPEYES, <https://www.popeyes.com/our-story> (last visited Nov. 29, 2021).
2. Cheryl A. Bachelder, *The CEO of Popeyes on Treating Franchisees as the Most Important Customers*, HARV. BUS. REV. (Oct. 2016), <https://hbr.org/2016/10/the-ceo-of-popeyes-on-treating-franchisees-as-the-most-important-customers>.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Meet Cheryl*, SERVING PERFORMS WITH CHERYL BACHELDER, <https://www.cherylbachelder.com/about/> (last visited Nov. 29, 2021).
8. Hannah L. Miller, *Cheryl Bachelder Saved Popeyes with Servant Leadership*, LEADERS (Nov. 18, 2021), <https://leaders.com/articles/leaders-stories/cheryl-bachelder/>.
9. *Id.*
10. Bachelder, *supra* note 2.
11. *Id.*
12. *Meet Cheryl*, *supra* note 7.

13. *Servant Leadership: Success Through Selflessness*, BLACKSAIL CAPITAL PARTNERS, <https://blacksailcapital-partners.com/servant-leadership-success-through-selflessness-2/> (last visited Nov. 29, 2021).

14. *Id.*

15. *Burger King's Owner Buys Popeyes for \$1.8B*, NATION'S RESTAURANT NEWS (Feb. 21, 2017), <https://www.nrn.com/quick-service/burger-king-s-owner-buys-popeyes-18b>.

16. We often provide these components of leadership to superiors as well. And last, but not least, sometimes we have to provide them to ourselves! The Army defines leadership as "the activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization." U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-74 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

17. See generally Joseph Lacdan, *Army Leaders: Taking Care of People Will Help Take Care of the Force*, U.S. ARMY (Oct. 15, 2020), https://www.army.mil/article/239969/army_leaders_taking_care_of_people_will_help_take_care_of_the_force.

18. This saying is often attributed to Theodore Roosevelt. See *Theodore Roosevelt Quotes*, THEODORE ROOSEVELT CTR., <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Quotes?page=112> (last visited Nov. 29, 2021).

19. ROBERT FROST, *WHAT FIFTY SAID* (1928).

When I was young my teachers were the old.
I gave up fire for form till I was cold.
I suffered like a metal being cast.
I went to school to age to learn the past.

Now when I am old my teachers are the young.
What can't be molded must be cracked and sprung.
I strain at lessons fit to start a suture.
I got to school to youth to learn the future.

Id.

20. See ROBERT GREENLEAF, *SERVANT LEADERSHIP: A JOURNEY INTO THE NATURE OF LEGITIMATE POWER AND GREATNESS* (1977).

21. See Larry C. Spears, *Character and Servant Leadership: 10 Characteristics of Effective, Caring Leaders*, 1 J. VIRTUES & LEADERSHIP 25 (2010).

22. ADP 6-22, *supra* note 16.

23. *Id. passim.*



News & Notes

Photo 1

Fort Sill's own Mrs. Merri Rouleau, legal assistant from the 434th Field Artillery Brigade "Destroyers" is presented a coin of excellence on behalf of the commanding general, U.S. Army Fires Center of Excellence. Her drive and work ethic were recognized at the battalion and brigade level, and she received numerous accolades from other supporting agencies as well.

Photo 2

In November 2021, command judge advocate CPT Charley Eiser (second from the left) conducted a snowshoe hike with the Fort Greely, Alaska Garrison Command

Team. The conditions on Fort Greely's Bison Trail that morning included temperatures dropping down to -32 degrees!

Photo 3

On 13 November 2021, members of the Camp Arifjan JAG office completed the Norwegian Foot March, an 18-mile foot march with 25-pound ruck. Pictured L to R: SSG Zane Schmeackle, SGT Michael O'Neil, and MAJ John Parson. Not pictured: CPT Thomas Wisniewski.



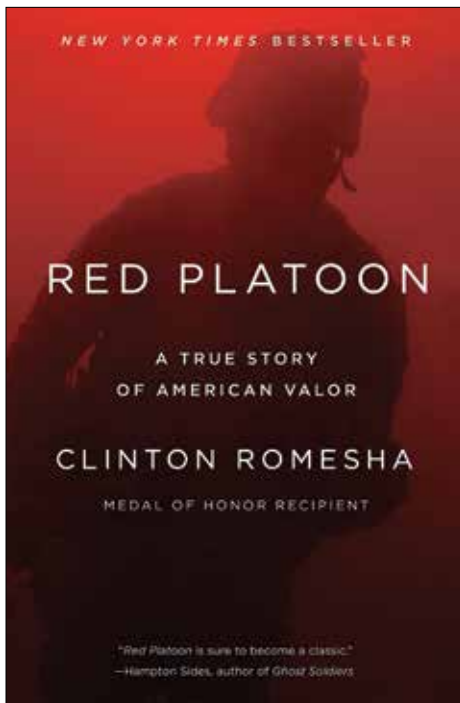
Photo 4

The 3d Battalion, 75th Ranger Regiment, legal office conducted an Airborne Operation with Spanish Jump Masters and earned their Spanish Jump Wings.

Photo 5

MAJ Joseph Levin (Trial Attorney, Trial Team III, KLIP) was recognized during a ceremony at the Pentagon for authoring the winning entry in the Future Operations category of the Eighth Annual Major General Harold J. "Harry" Greene Awards for Acquisition Writing. MAJ Levin's article will be published in the Spring 2022 edition of Army AL&T professional bulletin.





Book Review

Red Platoon A True Story of American Valor

Reviewed by Major Josiah T. Griffin

*There's so much human energy involved—so much courage, so much honor, so much blood—you could easily go a year here without questioning whether any of this needs to be happening in the first place. Nothing could convince this many people to work this hard at something that wasn't necessary—right?*¹

Red Platoon² is a firsthand narrative of the 2009 battle for Combat Outpost (COP) Keating³ in Nuristan, Afghanistan. Medal of Honor recipient Clinton Romesha (pronounced Ro-ME-Shay) authored *Red Platoon* less as a personal memoir and more as a minute-by-minute chronology of the combat action in his unit's struggle for survival against a numerically superior Taliban force on 3 October 2009.

In light of events in Afghanistan in late 2021, *Red Platoon* is just as relevant now as it ever has been. In addition to being a story of gritty combat action, *Red Platoon* is a story of "ordinary men put to an extraordinary test."⁴ Through this work, Romesha attempts to shift attention and focus from his own actions on 3 October to the collective efforts of the entire team; in this endeavor he is largely successful, and he presents a gripping narrative in the process.

From beginning to end, *Red Platoon* is a book about teamwork—the kind of literary work that one might expect from a Medal of Honor recipient.⁵ But Romesha very publicly stated his views on having been singled out and labeled a hero when he received the Medal of Honor in 2013.⁶ During the ceremony, President Obama stated, "when I called Clint to tell him he would receive this medal, he said he was honored but he also said 'it wasn't just me out there, it was a team effort.' So today, we also honor this American team, including those who made the ultimate sacrifice."⁷ With that context, it is unsurprising that Romesha, far from casting himself as a main character, goes to great lengths not to paint himself as the central hero and not to bias the narrative.⁸ He makes frequent use of words like *we*, *us*, and *ours*, and only rarely uses the vertical pronoun *I*.⁹ He also gives great deference and credit to his leaders, going so far as to state that if not for First Lieutenant Kyle Bundermann's leadership, the COP would have certainly been overrun.¹⁰ He pays homage to his comrades by telling their individual stories from ground level, based on his first-person eyewitness perspective and supported by his interviews with other primary sources after the action.¹¹

Nonetheless, the editorial comments and personal stories that *are* in the text seem completely forgivable, because there is

no hint of any self-aggrandizement in them. For example, in what might be considered heroic fashion, Romesha announced during the battle that he was going to take the COP back, prior to launching the counterassault that repelled the Taliban.¹² The way he recounts this event leaves the impression that this is exactly what happened at the time, rather than a narrative created after the action to bolster his combat bona fides.¹³

While *Red Platoon* leaves a reader believing that Romesha might not have written any books, much *this* book, if it weren't for the horrific events at COP Keating, the book is well-crafted and far from amateur. Though Romesha is an unlikely author, he builds the cast of characters like it's a fiction novel, briefly describing upfront each of the several key players that he later references as the battle unfolds. Even so, a careful reader will appreciate the convenience of prominent individual pictures spread throughout the text, particularly in the first two chapters, which facilitates easy reference. Readers of the print edition will also be pleased to have a well-drafted map of the COP located in both the front and back inside covers. These resources help the reader build a mental picture of the action, and a close reading of the narrative almost demands frequent reference to the map.

Lessons for Army Leaders

Most military readers will have at least an idea of the outcome, even if not all of the details of this story, because of the reporting that accompanied Romesha's receipt of the Medal of Honor, along with the high level Army Regulation (AR) 15-6 investigation¹⁴ that followed the battle. Yet, the story is still captivating, if not downright heartbreaking. *Red Platoon* should leave a military leader with timeless questions about tactics and leadership. Is it ever acceptable to sacrifice security for mission accomplishment? If so, under what circumstances? To what extent are tactical failures caused by strategic ones? What is the proper balance between specified and implied tasks at lower organizational levels? What exactly does a leader owe their subordinates?

Above all else, the book highlights the effects of decisions made at the highest echelons on ground forces, though it

makes no attempt to answer any weighty strategic questions. Romesha discusses the unit's mission only in passing and admits that they "didn't spend a lot of time and

Comparison to *The Outpost*

Red Platoon has a raw, readable quality to it. The book is accessible, even for non-military readers, because Romesha refrains

***Red Platoon* has a raw, readable quality to it. The book is accessible, even for non-military readers, because Romesha refrains from jargon and explains acronyms when using them is unavoidable. To the book's credit, *Red Platoon* does not stray into political commentary, nor does Romesha overly opine on actions above the tactical level.**

energy thinking about the bigger picture,¹⁵ presumably including the strategic value of the COP itself.¹⁶ That is not to say that he didn't realize COP Keating's shortcomings, only that he was focused on immediate tasks as an enlisted leader in "a poorly placed outpost surrounded by an enemy bent on killing us."¹⁷ In fact, the AR 15-6 investigation essentially found that "by mid-2009 there was no tactical or strategic value to holding the ground occupied by COP Keating."¹⁸ *Red Platoon* makes clear that only with hindsight was Romesha to realize that his commander was "balancing directives from his superiors that we didn't even know about—directives that included orders to avoid devoting too many resources to an outpost that was slated to be dismantled."¹⁹ This elicits a few difficult leadership questions: To what extent does a leader inform subordinates of higher constraints, outside of their control? How does a leader determine acceptable levels of risk for eager subordinates, when the subordinates lack the information held by the leader? Again, the book doesn't attempt to answer these questions, but they're both essentially rhetorical anyway, and dependent on the unique facts of a given situation.

By touching obliquely on these challenges, the book leaves space for the reader to ponder these issues and think through best practices; *Red Platoon* is not a leadership how-to manual.

from jargon and explains acronyms when using them is unavoidable.²⁰ To the book's credit, *Red Platoon* does not stray into political commentary, nor does Romesha overly opine on actions above the tactical level. This was a wise decision. By sticking primarily to his first-person observations and those of his platoon mates,²¹ Romesha fills a void in the extensive reporting and volumes of literature that have emerged about U.S. involvement in Afghanistan post-9/11. There is also an honest, unvarnished quality to *Red Platoon* that is sometimes lacking in non-fiction works from career journalists.²² Romesha writes like an infantryman—direct and to the point.

For a description of the events at COP Keating on 3 October 2009, the primary alternative to *Red Platoon* is *The Outpost* by Jake Tapper.²³ Tapper's work presents a comprehensive overview of U.S. military involvement in Nuristan, including the establishment of COP Keating in 2006 and the efforts of units that manned the outpost until it was abandoned in 2009.²⁴ As such, a key difference between the works is their depth and breadth of coverage. Though *Red Platoon* provides some background on the COP and the region, eighteen of twenty-four chapters are devoted to the action on 3 October 2009.

Unlike *The Outpost*, which somewhat jarringly jumps from the candid personal emails of specific Soldiers at COP Keating, to the strategic concerns of the Pentagon and the White House, to the operation-

al issues tackled at the squadron level,²⁵ Romesha generally keeps his narrative at ground level. In fact, *Red Platoon* remains almost totally silent about the political class and the international circumstances that lead to Black Knight Troop's placement at Keating and their involvement in the larger conflict.²⁶ This is a great credit to the author. While the inclusion of this information serves to build a more complete overall picture in a book with the scope of *The Outpost*, such matters would have crowded out the selected themes of selfless-service and commitment to duty that *Red Platoon* illuminates so well. *The Outpost* spends just 88 of over 600 pages describing the actions of 3 October 2009,²⁷ while nearly all of *Red Platoon* (minus a few introductory chapters) is focused on that 24 hour period. If *The Outpost* is the forest, *Red Platoon* is a single tree.

This narrow focus makes for a tidier narrative of the events of 3 October, but may leave some readers with questions that the book makes no attempt to answer. For example, if COP Keating is as indefensible as *Red Platoon* describes, a reader may be left wondering about the circumstances and decisions that led to its creation: Who put it there? Why did they put it there? What objectives did the placement serve? *The Outpost* thoroughly covers possible answers to these questions, and *Red Platoon* makes no effort to corroborate or contradict them. This narrower focus is a strength of the book rather than a weakness; *Red Platoon* does not bite off more than it can chew. Romesha describes his own position as that of "a tiny cog nestled deep inside the American war machine," and his book is a Soldier's narrative, as witnessed from the literal trenches.²⁸

A final comparative difference is that Tapper devotes a chapter to the aftermath of the battle, subsequent investigation, and how this precipitated a change in U.S. strategy, while Romesha reserves only a few paragraphs for the investigation and aftermath of the battle. That is probably for the best. The first page of *Red Platoon* is dedicated to Romesha's fallen comrades, their families, and his fellow Soldiers; he's explicitly not writing for military leadership or the literary elite,²⁹ while the objectives of *The Outpost* are noticeably more extensive.³⁰ Acknowledging these key differences,

ranking the two books against each other is a fruitless endeavor. They serve different purposes, and each does so objectively well.

The Outpost received high praise from all quarters, including from the Congressional Medal of Honor Society, who presented Tapper with an award for Excellence in Journalism in 2014.³¹ In 2013, Tapper's colleague David Westin wrote that "the time and effort—the reporting—Tapper invested made it possible for him to take . . . Staff Sergeant [Romesha] through the events of that day in a way no one else could have done."³² That was probably true in 2013, but does it remain true in 2016? Why, after the dust is finally beginning to settle, did Romesha decide now to speak with his own voice? After all, in addition to featuring prominently in Tapper's book, Romesha was the subject of a feature-length CNN documentary also reported by Tapper titled *An American Hero: The Uncommon Valor of Clint Romesha*.³³ Both books and the documentary piece all have similar subtitles, which begs the question of whether Romesha was attempting to make a statement in naming his work. And if so, what is he trying to say? Rather than fixating on his own *Uncommon Valor* or describing an *Untold Story of American Valor*, Romesha chooses to narrate a "True" *Story of American Valor*. One could argue that this subtitle implies disagreement with Tapper's characterization of the battle in *The Outpost*, if not some degree of open hostility to the narrative itself. Between disagreement and hostility, it is much more likely to be the former than the later. Romesha offers this satisfying response near the end of *Red Platoon*:

Tapper's research was conducted with painstaking care. But the one thing that he could not do was to produce a chronicle of what unfolded during the final battle—an hour-by-hour account of the actions of the living, as well as roll call of the dead—in the words of someone who was there at the time and who participated directly in the fight. That is a thing that could come only from one of our own. And although I'm often described as a man of few words, this description is a thing whose importance and urgency has

only seemed to grow with the passage of time.³⁴

It is almost as if Romesha is again saying "we're taking COP Keating back" or, to put it more directly: "now that others have put the story out there, please allow me to correct the record." If so, what corrections to the record are necessary? After all, the narrative descriptions of the battle in each book are substantially similar, and Tapper interviewed Romesha extensively for his book and CNN documentary.³⁵ But, *The Outpost* makes at least one thing absolutely clear: Romesha, and the other Soldiers who manned COP Keating over the years, are heroes.³⁶ In opposition, *Red Platoon* makes one thing equally clear: Romesha is not comfortable with the title of hero being applied to anyone, perhaps especially himself, who made it out of battle alive. To him, true heroes are the ones who didn't come home. On this note, Romesha offers a further hint at his motivations for writing this story near the end of *Red Platoon*, and he makes clear that doing so was a conscious decision and not mere coincidence:

Although I entered this project with some reluctance and hesitation, my sense of conviction burgeoned with each passing month. Eventually I came to believe that telling this story—our story—was the only way to properly honor what we had done. Odd as it may sound, I also came to believe that this might enable me to fulfill the final part of my duty to those of my comrades from Keating who did not survive. It was the only way for me to bring them home.³⁷

Romesha chose to honor his comrades, both living and gone, by telling their story from the inside. In that respect, he did what no one else had yet done, or maybe even could do.

Conclusion

It is ironic that the same humility which prompted Romesha to push the credit off of himself and onto others is what propelled him back into the spotlight by compelling the creation of this book in their honor. Although a reluctant spokesman for his fallen

comrades, he is an indispensable one. *Red Platoon* fills unoccupied space in writings about the War on Terror and is primed to become a standard work on military service reading lists for the foreseeable future. The sudden conclusion of the U.S. military presence in Afghanistan in 2021 also elevates *Red Platoon* to the level of mandatory reading for anyone seeking to understand and process these current events in context. **TAL**

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Notes

1. SEBASTIAN JUNGER, WAR 146 (2010).
2. CLINTON ROMESHA, RED PLATOON: A TRUE STORY OF AMERICAN VALOR (2016).
3. Also known as the Battle of Kamdesh. Carole Glines, MOH Recipient Recalls Unit Taking Back Outpost in Afghanistan, MILITARY.COM (Jun. 25, 2016), <http://www.military.com/daily-news/2016/06/25/moh-recipient-recalls-unit-taking-back-embattled-outpost.html>.
4. ROMESHA, *supra* note 2, at 13.
5. *Id.* ("What follows is not the story of one man, but an entire platoon."). Romesha also describes his high regard for the majority of his platoon mates, and characterizes the platoon as "cohesive and capable enough to qualify as stacked." *Id.* at 49–50.
6. TPC News, Romesha: MOH for Eight Soldiers "Who Didn't Make It," DEF. VIDEO IMAGERY DISTRIB. SYSTEM (Feb. 12, 2013), <https://www.dvidshub.net/vid-eo/281569/romesha-moh-eight-soldiers-who-didnt-make> ("This award is for the eight that didn't make it, and for the rest of the team that fought valiantly and magnificently that day.").
7. Medal of Honor Ceremony, DEF. VIDEO IMAGERY DISTRIB. SYSTEM (Feb. 12, 2013), <https://www.dvidshub.net/video/281576/medal-honor-ceremony>.
8. ROMESHA, *supra* note 2, at 13 ("What follows is not the story of one man, but of an entire platoon.") See also *id.* at 369 ("True heroes, the men whose spirit the medal [of honor] embodies—don't ever come home. By that definition, I'm not a true hero. Instead, I'm a custodian and a caretaker."). As further evidence for this level of selflessness, Romesha and fellow Medal of Honor recipient Florent Groberg donated their original medals to the 4th Infantry Division in 2017. Master Sergeant Casey Nelsen, Heroes' Medals Return Home, FORT CARSON MOUNTAINEER (Dec. 14, 2017), <http://www.fortcarsonmountaineer.com/2017/12/heroes-medals-return-home/>.
9. For example, in writing about the counterattack that he led himself, Romesha states, "we [emphasis on the team] were launching a counterattack." ROMESHA, *supra* note 2, at 225. See also Nathan S. Webster, Clinton Romesha Chronicles the Battle that Earned Him the Medal of Honor, DAILY BEAST, <http://www.thedailybeast.com/articles/2016/06/11/clinton-romesha-chronicles-the>

battle-that-won-him-the-medal-of-honor.html (July 12, 2017, 7:41 PM) (“He was worried that his ‘I’ would overwhelm the story of the other men—in fact, the word ‘I’ does not appear until page 12.”).

10. ROMESHA, *supra* note 2, at 349.

11. *Id.* at 375–76.

12. *Id.* at 223.

13. *Id.* at 223–25.

14. *Executive Summary—AR 15-6 Investigation re: Complex Attack on COP Keating—3 Oct 09*, at 1 (2009), <http://graphics8.nytimes.com/packages/pdf/world/AR15-6Sum.pdf> [hereinafter *Executive Summary*].

15. ROMESHA, *supra* note 2, at 70.

16. Even so, the reader is left with the impression that Romesha was acutely aware of the military challenges faced by the United States in Afghanistan, and was the same type of Soldier as the one described by Sebastian Junger in *War* this way:

once in awhile you’d meet a soldier who didn’t fit into any clear category, though. These were men who believed in the war but also recognized the American military’s capacity for self-delusion. ‘We’re not going to win the war until we admit we’re losing it,’ one of these guys told me in the spring of 2008.

JUNGER, *supra* note 1, at 133–34.

17. ROMESHA, *supra* note 2, at 73.

18. *Executive Summary*, *supra* note 14, at 1.

19. ROMESHA, *supra* note 2, at 73.

20. For one example, Romesha devotes a short paragraph to explaining the meaning of Quick Reaction Force (QRF). *Id.* at 303.

21. In an interview, Romesha stated his belief that interviewing the guys he served with “would paint a more clear, concise, and full view of the battle in its entirety.” Adam Linehan, *Medal of Honor Recipient Clint Romesha on Why Soldiers Go to War*, TASK & PURPOSE, <http://taskandpurpose.com/medal-honor-recipient-clinton-romesha-soldiers-go-war/> (Dec. 12, 2020, 9:24 AM).

22. This remark is intended as somewhat of a credit to Romesha rather than a slight to journalists. Also, author Kevin Fedarko is reported to have assisted Romesha on *Red Platoon*, though he is not listed as a co-author. Webster, *supra* note 9. See also ROMESHA, *supra* note 2, at 378.

23. JAKE TAPPER, *THE OUTPOST: AN UNTOLD STORY OF AMERICAN VALOR* (2012).

24. *Id.*

25. *Id.* at 467–84.

26. Obviously this did not keep Romesha or his fellow Soldiers from commenting on the tactical failings of the COP itself, and of the relative importance for them to hold this piece of ground. See ROMESHA, *supra* note 2, at 73.

27. TAPPER, *supra* note 23, at 505–92.

28. *Medal of Honor Recipient, and the Battle That Stays Forever* (CBS Sunday Morning May 1, 2016), <https://www.cbsnews.com/video/medal-of-honor-recipient-and-the-battle-that-stays-forever/>.

29. Even so, General (Retired, U.S. Army) Stanley McChrystal provides a very favorable review of his book. *Praise*, PENGUIN RANDOM HOUSE, <http://www.penguinrandomhouse.com/books/317810/red-platoon-by-clinton-romesha/9780525955054/> (last visited Sept. 22, 2016) (scroll down in the “Praise” section and General McChrystal’s view can be read).

30. In the epilogue alone, Tapper writes about the realities of combat, the Army Regulation 15-6 investigation, fallen Soldiers from the Battle of Kamdesh, resourcing post-traumatic stress disorder, the need for Afghan Forces to take the lead, Soldier memorials, as well as Romesha’s and Staff Sergeant Ty Carter’s Medals. TAPPER, *supra* note 23, at 602–22.

31. *The Medal of Honor Knoxville Convention Committee Announces Distinguished Group of 2014 Awardees*, MEDAL OF HONOR CONVENTION (June 9, 2014), <http://www.mohconvention.com/the-moh-blog/145/the-medal-of-honor-knoxville-convention-committee-announces-distinguished-group-of-2014-awardees/>.

32. David Westin, *Uncommon Reporting: The Story of Clint Romesha*, HUFFPOST, http://www.huffingtonpost.com/david-westin/the-story-of-clint-romesha_b_2665366.html (Apr. 13, 2013).

33. Jake Tapper & Chelsea J. Carter, *An American Hero: The Uncommon Valor of Clint Romesha*, CNN (Feb. 8, 2013), <http://www.cnn.com/2013/02/08/us/uncommon-valor/>

34. ROMESHA, *supra* note 2, at 376.

35. Westin, *supra* note 32.

36. In fact, *The Outpost* concludes with a bold statement: “[T]he men and women of 3-71 CAV, the 1-91 Cav, 6-4 Cav, and especially 3-61 Cav deserved better. They are heroes, and they have my appreciation and eternal gratitude. I wish they had a command structure and a civilian leadership that were always worthy of their efforts.” TAPPER, *supra* note 23, at 622.

37. ROMESHA, *supra* note 2, at 376.



(Photo courtesy of authors)

Azimuth Check

Pursuing the Path of Servant Leadership

By Colonel Joseph B. Mackey & Lieutenant Colonel Aaron L. Lykling

Life's most persistent and urgent question is, "What are you doing for others?"¹

Organizational leaders routinely and rightfully proclaim that “people are our greatest strength.” Yet these words ring hollow when leaders’ actions suggest otherwise. Trust is the foundation of effective teams, but many leaders across domains are experiencing a trust deficit.² How can we, as Judge Advocate General’s (JAG) Corps leaders, truly put people first, inspire trust, and bring out the best in our teams? It starts with servant leadership—the basic notion that “if you take care of people, they will take care of everything else.”³ This *Azimuth Check* explores the origins and intent of servant leadership, examines its key elements, and offers ways to maximize your impact as a servant leader—regardless of rank or duty position.

Servant leadership is one of our Corps’s Constants,⁴ and is the way we advance The Judge Advocate General’s priority to “lead, mentor, and care for our people—always.”⁵ It is also the key to building an organizational culture of teamwork and a legacy of future selfless leaders. As the late-poet Maya Angelou reminds us: “People will forget what you said, people will forget what you did, but people will never forget how you made them feel.”⁶ This article builds on the core principles of servant leadership that then-Major General Stuart Risch introduced in an instructive video on the topic.⁷ The insights we offer are by no means novel or exhaustive.⁸ Rather, our aim is to reinforce the servant-leader mindset and to prompt reflection, dialogue, and perhaps some positive change. As flawed human beings, none of us⁹ will ever be a perfect leader. We can, however, strive for continuous improvement, show genuine care for our teammates, and inspire others to do the same.

Defining Servant Leadership

Leaders demonstrate servant leadership when they put those they lead before themselves. A leader does this by providing purpose, direction, and motivation; they devote and commit themselves to the well-being and growth of those they serve.¹⁰

Servant leadership is not a new philosophy. History is replete with examples

While servant leadership applies in every organizational setting, it has special relevance in the military. Despite its traditional hierarchical structure, leadership experts often point to the military as a model of servant leadership. Our experience validates the centrality of servant leadership to our dual professions. We are committed to each other in collectively providing legal support to our clients in service to our Nation. People are the Army’s “center of gravity” and enduring advantage.

of servant leaders, including Abraham Lincoln, Clara Barton, Mahatma Gandhi, Martin Luther King, Jr., and Mother Theresa. While the basic idea of servant leadership is timeless, Robert K. Greenleaf launched the modern movement with his 1970 essay, *The Servant as Leader*.¹¹ Greenleaf introduced his theory through the character Leo from Hermann Hesse’s novel, *Journey to the East*.¹² Leo was the humble servant for a band of travelers on a pilgrimage, performing menial tasks and lifting morale. When Leo suddenly disappears, the group falls apart and abandons their quest. It later becomes apparent that Leo was the true leader. Greenleaf describes Leo and the concept of servant leadership as “portray[ing] at once two roles that are often seen as antithetical in our culture: the servant who, by acting with integrity and spirit, builds trust and lifts people and helps them grow, and the leader who is trusted and who shapes others’ destinies by going out ahead to show the way.”¹³ He ultimately concludes it is possible for a leader to simultaneously fulfill both roles to great effect.

The concept of servant leadership quickly took hold among business and leadership audiences. Scholars and leadership experts expanded on Greenleaf’s work and distilled the core traits of servant leaders.¹⁴ While there is no universal definition of servant leadership, the Robert K. Greenleaf Center for Servant Leadership now defines it as “a philosophy and set of practices that enriches the lives of individuals, builds better organizations and ultimately creates a more just and caring world.”¹⁵ Put simply,

servant leaders place the needs of others first, helping people and the organization flourish.

Many successful companies such as Southwest Airlines, Starbucks, Whole Foods, and Zappos espouse servant leadership and have instilled it into their corporate cultures.¹⁶ According to *Forbes* magazine, “Servant-led companies are more likely to outperform competitors, retain employees, and develop future leaders than companies that operate out of more traditional ‘command-and-control’ leadership styles.”¹⁷ The upheaval caused by the global pandemic has accentuated the importance of servant leadership to individual and organizational well-being. Servant leaders are as necessary as ever.

While servant leadership applies in every organizational setting, it has special relevance in the military. Despite its traditional hierarchical structure, leadership experts often point to the military as a model of servant leadership.¹⁸ Our experience validates the centrality of servant leadership to our dual professions. We are committed to each other in collectively providing legal support to our clients in service to our Nation. People are the Army’s “center of gravity” and enduring advantage.¹⁹ Our awesome mandate to be trained and organized to accomplish the impossible demands the type of servant leader that Greenleaf saw in Leo, which requires deliberate personal and organizational effort.

Servant leadership is not expressly defined in Army doctrine, but the theme suffuses the Oath of Office, the Army Val-

ues, regulations, initiatives like the *Army People Strategy*, and our leadership doctrine. Starting with the fundamentals of the Army Ethic and profession, Army Doctrine Publication (ADP) 6-22, *Army Leadership and the Profession*, highlights our roles as “honorable servants in defense of the Nation.”²⁰ Beyond this key theme of service to country, our Army Values emphasize broader expectations for character of service and treatment of our teammates. While each of the seven values touches on treatment of others, selfless service is the closest related to servant leadership—putting the welfare not only of the Nation, but also of others before your own.²¹ Elements of servant leadership are also woven into many Army regulations like Army Regulation (AR) 623-3, *Evaluation Reporting System*, which explicitly outlines the supervisory duties to develop and fairly rate subordinates.²² Finally, the *Army People Strategy* promotes servant leadership principles with its prevailing focus on “fostering an inclusive environment—one which facilitates collaboration, equitable treatment, and creativity.”²³

Parenting is perhaps the most familiar example of servant leadership. Colonel (Retired) Kevan Jacobson powerfully described this analogy in his leadership address to the JAG Corps’s 2014 Worldwide Continuing Legal Education (WWCLE) conference.²⁴ Colonel Jacobson highlighted the leader’s role as a parent, not in a pejorative or condescending manner, but rather a healthy one driven by an unbreakable bond of deep care and love found among family. Similar to that of an experienced parent, the role of the servant leader goes well beyond the basics of care and sustenance to that of a development facilitator. The primary developmental goal is to help those in their care become stronger and more successful than them.²⁵ Also like a parent, the servant leader’s role persists well beyond the temporal initial supervisory association to a broader enduring relationship. In less familial terms, the servant leader looks beyond the short-sighted transactional outputs and aims for the transformational growth.

In seeking to understand servant leadership, it is also helpful to consider what servant leadership is not. Being a servant leader is not an abdication of one’s leadership role or positional power. The

servant leader is still the leader, not only setting the example for standards and character but also being responsible for the entire organization. An absence of this intentional leadership leaves a team adrift, resulting in atrophy, disorder, and frustration. The senior person assigned is still in charge, demands excellence, and holds people accountable for their performance and actions.²⁶ A key difference is humility and the subordination of ego.²⁷ The servant leader is a member of the team committed to the organization and mission, rather than the team committed to serving the leader. As organizational psychologist Adam Grant puts it, “Selfish leaders divide people for personal profit. Servant leaders unite people for collective purpose.”²⁸

While a doctrinal definition of the servant leader may be elusive, ADP 6-22 succinctly describes the opposite—the selfish leader. The discussion of counterproductive leadership is valuable for all leaders to read and heed,²⁹ but the aspect of self-serving behaviors bears directly on the concept of servant leadership. It describes the anti-servant leader as one who seeks primarily to accomplish their own goals and needs before others.

Distilling Servant Leadership

Think for a moment about the best leader you have encountered, whether a boss, a coach, a parent, or a peer. Now consider the best team on which you have served. What qualities or behaviors stood out? Chances are the leader and members of the organization displayed a combination of the servant leader characteristics described below. While the profusion of books, essays, videos, podcasts, and courses on servant leadership can be overwhelming,³⁰ the basic principles overlap and common patterns emerge.³¹ When viewed deliberately through the lens of servant leadership, it becomes clear that all desirable doctrinal leader attributes³² benefit the collective team. However, a few less examined servant leader traits are especially relevant to the military and legal professions.

Compassion

*Compassion and tolerance are not a sign of weakness, but a sign of strength.*³³

While not an enumerated doctrinal leader attribute, compassion is a necessary companion to the often-discussed and critical trait of empathy. The Army’s heightened focus on eliminating counterproductive leadership has underscored the importance of empathy, defined as the ability to “genuinely relate to another person’s situation, motives, or feelings.”³⁴ However, empathy is only effective if it manifests as compassion. Compassion is essential when someone is experiencing personal or professional hardship. A reflexive mistake that leaders often make in these situations is to grant excessive time off as the solution. Although well-intentioned, disengagement delays addressing the problem and separates the person from supporting teammates and assistance when it is needed most. It is during these most difficult times when leaders can be most influential in peoples’ lives, for the better or worse. Compassion doesn’t mean overlooking mistakes or poor performance, but it does guide the manner in how we address shortcomings. Compassion is most effective if it comes from a relatable leader. It is one thing to be shown patience and understanding in times of need, but a far different one to share the experience with a leader who has navigated the same or similar problems. We wouldn’t think twice about giving food and water to a teammate in need, so why would we withhold vital personal information that could help others progress? This is another time when egos are set aside and the leader can more effectively serve by sharing our own vulnerabilities and how we overcame similar problems.

Steadiness

*You must be a steady constant amid the chaos and change.*³⁵

Soldiers and their families face formidable stressors and uncertainty given the nature of the Army’s mission, and the legal profession brings its own unique demands. We also live and operate in especially turbulent times. As the JAG Corps leadership described in their welcome message to the Regiment in July 2021: “The last eighteen months have presented challenges individually, across our Nation, and on a global scale

not seen in generations. Yet in response to the immense challenges, each of you has proven to be the trusted professionals our Army and Nation needed.”³⁶ Steady leadership was the linchpin of this effort and will remain critical as we navigate an uncertain future. Steadiness starts with consistently being present. People look to leaders to help them gain clarity, confidence, and resolve in the face of adversity. Leaders who consistently radiate calm put others at ease and create a sense of psychological safety.³⁷ They constructively channel stress, reframe challenges as opportunities, and use setbacks as a springboard for learning. Steady leaders create a climate where people feel comfortable delivering bad news, offering opinions, sharing emotions, and seeking or offering help.³⁸ The best leaders “regulate their reactions” and think deliberately before responding,³⁹ whether in a crisis or everyday situation. Human beings take our cues from each other, and the servant leader must be mindful of setting a steady tone for the team. Don’t underestimate the power of your example.

Authenticity

*If you don’t believe in the messenger, you won’t believe the message.*⁴⁰

Authenticity is a key driver of credibility and trust. As authors James Kouzes and Barry Posner explain: “Above all else, people must be able to believe in their leaders. They must believe that your word can be trusted, that you are personally passionate and enthusiastic about the work that you’re doing, and that you have the necessary knowledge and skill to lead.”⁴¹ People must also believe you genuinely have their best interests at heart. And most of us can quickly spot a phony when leaders don’t walk their talk and fulfill their commitments. As one observer wryly observed, “every leader has the informal equivalent of a ‘Yelp’ score that will eventually come to light.”⁴² An obvious aspect of being authentic is simply being yourself. Charisma, in particular, is overrated and falls flat if not backed by action.⁴³

Authenticity can amplify servant leadership in two areas especially: showing vulnerability and gratitude. First, leaders

who display appropriate vulnerability about their own mistakes, concerns, and challenges are perceived as more transparent and trustworthy. Sharing your own vulnerabilities also opens lines of communication and helps others feel safe. As an excellent book by the same title aptly describes, “leadership is a relationship.”⁴⁴ People crave genuine personal connections with relatable leaders, and demonstrating your own vulnerability—and humanity—can make a big difference.

Another basic human need is to feel relevant and valued. Awards and positive evaluations are appropriate ways to recognize great work, but a timely and sincere “thank you” is the simplest and often most effective way to show gratitude. People care deeply about their work and any form of gratitude will make them feel valued, so long as it is genuine. Similarly, look for opportunities to showcase the compassionate and generous acts of your teammates. Publicly recognizing these behaviors creates a positive cycle and helps embed the right norms in the organization.

Self-Care and Resiliency

*You cannot serve from an empty vessel.*⁴⁵

Any discussion about leadership is incomplete without addressing self-care and resiliency. No matter how experienced the leader, the simple truth is that you must take care of yourself if you want to take care of others. A leader must first be present and functioning, which is impossible with prolonged self-neglect. There is great merit to the long-standing maxim “leaders eat last” as both a symbolic and tangible sign of servant leadership, but leaders still have to eat—and rest, exercise, and otherwise care for themselves. Much like airplane safety instructions tell people to put on their own mask first, leaders are unable to care for others if they don’t take care of themselves. The principle of self-care is far from selfish; it is a prerequisite to care for the organization’s people and mission. Many a well-meaning commander and sergeant major have succumbed to burnout and fallen out of the mission, leaving a vacuum at the very moment their leadership was needed most. Selfless service is not synonymous

with self-sacrifice of basic needs, which is done only when necessary. The imperative of self-care extends to our families, who serve and sacrifice right alongside our Service members. They too deserve great care, not only for who they are but also for their shared service to our country and our teammates.

Starting and Staying on the Path

As goes the noble endeavor to lead well, the discussion inevitably concludes with questions from those seeking improvement and lessons learned from the experienced. This question also reminds us that regardless of our formal position in an organization, we are all leaders who can influence our organizational climate and culture. While ADP 6-22 provides a useful roadmap for the fundamentals of leadership, one can get lost in the doctrinal approach and miss the forest for the trees. Similarly, the list of available books, essays, videos, and tutorials on leadership can overwhelm even the most intellectually curious and committed leader. One way to start is to answer Colonel Jacobson’s question—“Do you really care?” Given that you are reading this article, the answer is most likely a resounding “yes.” The challenge is how to effectively show it. Like most things good in life, there is no easy path to great leadership but it is easy to see the results. Perhaps this is why Greenleaf articulated an end-state condition from which to evaluate a servant leader. He writes that “the best test, and difficult to administer, is: do those being served grow as persons; do they become healthier, wiser, freer, more autonomous while being served.”⁴⁶ Another way to put this is whether the followers themselves become servant leaders. But rather than provide a results-based test from which to look back on, a more forward-looking approach is to ask yourself if you have done enough for your people. While there is never enough time to do everything you want for both team and mission, the real question is whether you’ve given as much as you can while still preserving your ability to endure for yourself, your family, and your organization. Because this varies depending on individual circumstances regarding team, mission, and personal ability, it is a question only you alone can answer. **TAL**

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Notes

1. Dr. Martin Luther King, Jr., Address in Montgomery, Alabama (1957).
2. Tomas Chamorro-Premuzic, *3 Leadership Traits We Desperately Need in 2021*, FAST Co. (Mar. 6, 2021), <https://www.fastcompany.com/90610607/3-leadership-traits-we-desperately-need-in-2021> (citing a survey showing “[r]oughly one in two people distrust their leaders”).
3. #41: Brigadier General Joe Berger—On Empathy, *People First Leadership, and Being a Beginner*, INTENTIONAL LEADER (June 17, 2020), <https://calwalters.me/podcast-1/tag/army+jag+corps> [hereinafter Brigadier General Berger Podcast].
4. Our Constants—Principled Counsel, Mastery of the Law, Servant Leadership, and Stewardship—are guideposts that shape our practice and properly position the Regiment for the future. See The Judge Advoc. Gen. & Deputy Judge Advoc. Gen., U.S. Army, TJAG & DJAG Sends, Vol. 41-01, Message to the Regiment (13 July 2021) [hereinafter TJAG & DJAG Sends Vol. 41-01].
5. The Judge Advocate General Lieutenant General Stuart Risch outlined his priorities during his 2021 Worldwide Continuing Legal Education presentation, “Trusted Professionals Since 1775: Transforming for the Future while Getting Back to Basics.” Lieutenant General Stuart Risch, The Judge Advoc. Gen., U.S. Army, Address at the Worldwide Continuing Legal Education Training: Trusted Professionals Since 1775: Transforming for the Future While Getting Back to Basics (Sept. 13, 2021).
6. Abby Borovitz, *Maya Angelou’s Words to Live by*, MSNBC, <https://www.msnbc.com/the-cycle/maya-angelou-quotes-msna605571> (May 28, 2015, 1:22 PM).
7. Major General Stuart Risch, The Deputy Judge Advoc. Gen., U.S. Army, *Servant Leadership*, JAGCNET (Nov. 13, 2020), <https://www.jagcnet2.army.mil/Sites/jagc.nsf/homeContent.xsp?documentId=BC-B07A931B24FB538525861F006608D9>.
8. Countless books, articles, podcasts, and religious materials are devoted to the concept of servant leadership. The self-help literature available on Amazon.com alone contains a dizzying array of servant leadership “principles,” “pillars,” “frameworks,” “roadmaps,” and even a “manifesto.” A good starting point on servant leadership is the four-part series available on Cal Walters’s *Intentional Leader* podcast, which are all available at INTENTIONAL LEADER, <https://calwalters.me/podcast-1/category/Servant+Leadership> (last visited Jan. 7, 2022). The eponymous hero in the heartwarming

and hilarious Apple TV+ series, *Ted Lasso*, also doles out powerful servant leadership lessons. *Ted Lasso* (Ruby's Tuna et al. 2020). The show tells the story of a folksy American football coach brought in to rescue a struggling British soccer team.

9. The authors emphatically stress that we recognize our own imperfection, flaws, and mistakes as we all travel down the same road in pursuit of improving as servant leaders.

10. The Judge Advoc. Gen.'s Corps, U.S. Army, Four Constants (2021), [https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE-75266852586C5004A681F/\\$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46DCA0CA1EE-75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf).

11. ROBERT K. GREENLEAF, *THE SERVANT AS LEADER* (1970).

12. HERMANN HESSE, *THE JOURNEY TO THE EAST* (1932).

13. ROBERT K. GREENLEAF, *THE SERVANT-LEADER WITHIN: A TRANSFORMATIVE PATH* 32 (2003).

14. Larry Spears was Greenleaf's main ideological successor. Spears identified ten non-exhaustive characteristics of critical importance to servant leaders: listening, empathy, healing, awareness, persuasion, conceptualization, foresight, stewardship, commitment to the growth of people, and building community. Larry C. Spears, *Character and Servant Leadership: Ten Characteristics of Effective, Caring Leaders*, 1 J. VIRTUES & LEADERSHIP 25 (2010).

15. *Start Here: What Is Servant Leadership?*, ROBERT K. GREENLEAF CTR. FOR SERVANT LEADERSHIP, <https://www.greenleaf.org/what-is-servant-leadership/> (last visited Dec. 16, 2021).

16. Edward D. Hess, *Servant Leadership: A Path to High Performance*, WASH. POST (Apr. 28, 2013), https://www.washingtonpost.com/business/capitalbusiness/servant-leadership-a-path-to-high-performance/2013/04/26/435e58b2-a7b8-11e2-8302-3c7e0ea97057_story.html. See also LARRY W. BOONE, *SERVANT LEADERSHIP: ATTITUDES, SKILLS AND BEHAVIOURS* 4 (2019) ("[S]ervant leadership is emerging as a preferred practice as demonstrated by its adoption at numerous successful and admired business enterprises across all industries and cultures as well as at many government agencies and multitudes of not-for-profit organizations and religious institutions.").

17. Kevin Kruse, *Three Things You Probably Didn't Know About Servant Leadership*, FORBES (Nov. 8, 2021, 7:00 AM), <https://www.forbes.com/sites/kevinkruse/2021/11/08/three-things-you-probably-didnt-know-about-servant-leadership/?sh=2dc674c53292>. See also Tera Allas & Bill Schaninger, *The Boss Factor: Making the World a Better Place Through Workplace Relationships*, MCKINSEY Q. (Sept. 22, 2020), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/the-boss-factor-making-the-world-a-better-place-through-workplace-relationships> ("Research shows that this 'servant leader' mentality and disposition enhances both team performance and satisfaction.").

18. See SIMON SINEK, *LEADERS EAT LAST: WHY SOME TEAMS PULL TOGETHER AND OTHERS DON'T* 8 (2017).

19. U.S. DEP'T OF ARMY, *THE ARMY PEOPLE STRATEGY* (2019).

20. U.S. DEP'T OF ARMY, *DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION* para. 1-9 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

21. *Id.* para. 2-9.

22. U.S. DEP'T OF ARMY, REG. 623-3, *EVALUATION REPORTING SYSTEM* para. 1-8 (14 June 2019) [hereinafter AR 623-3].

23. U.S. DEP'T OF ARMY, *ARMY PEOPLE STRATEGY: DIVERSITY, EQUITY, AND INCLUSION ANNEX 4* (2020).

24. Colonel Kevan Jacobson, Address at the Worldwide Continuing Legal Education Training: Principles of Leadership (2014), <https://tjaglcpublic.army.mil/principles-of-leadership>.

25. Leadership expert Simon Sinek neatly captured the connection between parenting and leadership in his famous TED Talk, "How Great Leaders Inspire Action," which has been viewed over 57 million times. Simon Sinek, *How Great Leaders Inspire Action*, TED (Sept. 2009), https://www.ted.com/talks/simon_sinek_how_great_leaders_inspire_action?language=en Leadership ("Great leaders want exactly the same thing [as great parents] . . . They want to build self-confidence, to give opportunities to try and fail, all so that they can achieve more than we could imagine for ourselves.").

26. See BOONE, *supra* note 16, at 10.

27. Dan Cable, *How Humble Leadership Really Works*, HARV. BUS. REV. (Apr. 23, 2018) (adding that "[h]umility and servant leadership do not imply that leaders have low self-esteem, or take on an attitude of servility. Instead, servant leadership emphasizes that the responsibility of a leader is to increase the ownership, autonomy, and responsibility of followers. . . ."). For a superb example of humble leadership, consider Ulysses S. Grant's actions during the Civil War as described in Ron Chernow's sweeping biography. RON CHERNOW, GRANT (2017). Whether shouldering the blame for subordinates' mistakes, welcoming disagreement, or wearing a tattered private's jacket, Grant's humility conveyed strength and decency. *Id.*

28. Adam Grant, LINKEDIN, https://www.linkedin.com/posts/adammgrant_the-point-of-leadership-is-not-to-accumulate-activity-6573937737836085248-JaYg/ (last visited Jan. 7, 2022).

29. See ADP 6-22, *supra* note 20, paras. 8-45 to -50.

30. See Jeffrey Pfeffer, *Getting Beyond the BS of Leadership Literature*, MCKINSEY Q. (Jan. 1, 2016), <https://www.mckinsey.com/featured-insights/leadership/getting-beyond-the-bs-of-leadership-literature>.

31. As the current Deputy Judge Advocate General, Major General Joe Berger has observed that while the term "servant leadership" is redundant, it serves as a "powerful reminder of the role we have to play, and that we should play, and that we should want to play." Brigadier General Berger Podcast, *supra* note 3. See also Patrick Lencioni, *What's Your Motive?*, GLOB. LEADERSHIP NETWORK (Aug. 13, 2019), <https://globalleadership.org/articles/leading-yourself/patrick-lencioni-whats-your-motive/> ("Servant leadership is the only kind of leadership there is.").

32. AR 623-3, *supra* note 22, para. 1-86.

33. Dalai Lama XIV [n.d.], GOODREADS, <https://www.goodreads.com/quotes/9170389-compassion-and-tolerance-are-not-a-sign-of-weakness-but> (last visited Jan. 7, 2022).

34. Army Doctrine Publication 6-22 lists the three general attribute categories and specified attributes therein as "character" (Army values, empathy, warrior ethos and service ethos, discipline, and humility); "presence" (military and professional bearing, fitness, confidence, and resilience); and "intellect" (mental agility,

sound judgement, innovation, interpersonal tact, and expertise). ADP 6-22, *supra* note 20, para. 2-23, tbl.3-1, para. 4-3.

35. Jacobson, *supra* note 24.

36. See TJAG & DJAG Sends Vol. 41-01, *supra* note 4.

37. Jacqueline Brassey & Michiel Kruyt, *How to Demonstrate Calm and Optimism in a Crisis*, MCKINSEY & CO. (Apr. 30, 2020), <https://www.mckinsey.com/business-functions/people-and-organizational-performance/our-insights/how-to-demonstrate-calm-and-optimism-in-a-crisis> ("Leaders' emotions have a big impact on an organization: when a leader is impatient, fearful, or frustrated, people begin to feel the same way, and their feelings of safety diminish. On the other hand, when a leader is hopeful and calm, the group can face challenges more creatively.").

38. As the late General Colin Powell cautioned, "The day the soldiers stop bringing you their problems is the day you stopped leading them. They have either lost confidence that you can help them or concluded that you do not care. Either case is a failure of leadership." COLIN L. POWELL & JOSEPH E. PERSICO, *MY AMERICAN JOURNEY* 52 (2010).

39. See Brassey & Kruyt, *supra* note 37.

40. JAMES M. KOUZES & BARRY Z. POSNER, *THE TRUTH ABOUT LEADERSHIP: THE NO-FADS, HEART-OF-THE-MATTER FACTS YOU NEED TO KNOW* 24 (2010).

41. *Id.* at 23.

42. Bill George, *Authentic Leadership Rediscovered*, HARV. BUS. SCH. (Nov. 10, 2015), <https://hbswk.hbs.edu/item/authentic-leadership-rediscovered>.

43. See SUSAN CAIN, *QUIET: THE POWER OF INTROVERTS IN A WORLD THAT CAN'T STOP TALKING* (2013).

44. MICHAEL S. ERWIN & WILLYS DEVOLL, *LEADERSHIP IS A RELATIONSHIP: HOW TO PUT PEOPLE FIRST IN THE DIGITAL WORLD* (2021).

45. *Most Popular Quotes by Eleanor Brown*, ELEANOR BROWNN, <http://www.eleanorbrownn.com/> (last visited Nov. 28, 2021).

46. ROBERT K. GREENLEAF, *SERVANT LEADERSHIP: A JOURNEY INTO THE NATURE OF LEGITIMATE POWER & GREATNESS* 27 (1977)



Lieutenant Colonel C. John Taylor (right) was the first member of the Corps to set foot on Afghan soil. In this photograph, taken in Afghanistan on 7 January 2002, Taylor is joined by Brigadier General Gary Harrell (left) and Senator John McCain (middle). (Photo courtesy of author)

Lore of the Corps

The Corps in Afghanistan

The Alpha (2001) and Omega (2021) of Legal Operations

By Fred L. Borch III

Editor's note: This issue of The Army Lawyer contains first-hand accounts of members of the Judge Advocate General's (JAG) Corps who served in Afghanistan over the last twenty years; this Lore of the Corps complements those accounts by providing the "bookends" of the Corps's time in Afghanistan, i.e., who was the first in country and who was last out.

With the final withdrawal of U.S. forces from Kabul in August 2021, now is the time to examine the role played by judge advocates, legal administrators, and paralegals in the war in Afghanistan that began twenty years ago. Between 24 November 2001, when the first Army lawyer arrived in Bagram, to 30 August 2021, when the last judge advocate and paralegal specialist left Kabul, more than 500 members of the Corps served in Operations ENDURING FREEDOM and FREEDOM'S SENTINEL.

Members of the Corps also participated in the North Atlantic Treaty Organization (NATO)-led International Security Assistance Force (ISAF) and its successor, Operation RESOLUTE SUPPORT. While it will take a monograph to adequately discuss the contribution made by the Corps to the conflict in Afghanistan, this article focuses on who was the first to deploy in late 2001 and early 2002, and who were the last members of the Corps to serve in Afghanistan in August 2021.

Background

After the al-Qaeda-sponsored suicide terrorist attacks on the World Trade Center and the Pentagon on 11 September 2001, President George W. Bush decided that U.S. military forces would be sent to Afghanistan, since al-Qaeda was based primarily in that country. Afghanistan, however, is "an immense, land-locked country approximately the size of Texas,"¹ and the rough terrain and minimal road and rail facilities meant that the first U.S. troops to deploy as part of Operation ENDURING FREEDOM set up operations in Uzbekistan, a country situated about 200 miles northwest of Kabul. The Americans were physically located at an old Soviet airbase near Karshi Kandabad in south-central Uzbekistan.²

One of the first units deployed to Uzbekistan was the 5th Special Forces Group (Airborne) from Fort Campbell, Kentucky. Ultimately, these Army Special Forces personnel formed the nucleus of Joint Special Operations Task Force NORTH, called Task Force DAGGER, along with the headquarters element of the U.S. Air Force's 16th Special Operations Wing. Aviators from the 160th Special Operations Aviation Regiment (SOAR) from Fort Campbell and Air Force special operations personnel (combat tactical air controllers) and AC-130s from Hurlburt Field, Florida, were also part of Task Force DAGGER.³

To support these special operations forces and provide a quick reaction force of heavily armed infantrymen, the 1st Battalion, 87th Infantry Regiment, 10th Mountain Division (Light), also deployed to Karshi Kandabad—in October 2001.⁴

The first "conventional" troops did not enter Afghanistan until late November 2001, when a company-sized quick reaction force from the 87th Infantry was sent to provide security at Quala-i-Jangi fortress in Mazar-e Sharif.⁵ Eventually, elements of the 87th would be stationed at Bagram Air Base, where they provided base security and were a quick reaction force.

The Alpha: First In

So what about judge advocates in the early days of ENDURING FREEDOM? The first Army judge advocate in Afghanistan was Lieutenant Colonel (LTC) G. John Taylor, who arrived at Bagram Air Base just before midnight on Saturday, 24 November 2001.⁶ Taylor, who previously had served with the 82d Airborne Division and in various special forces units, including Delta Force from 1998 to 2001, was well-suited to be the first Army lawyer in Afghanistan. Taylor provided legal advice to Brigadier General Gary Harrell, who served as the commander of Task Force BOWIE and the Director, U.S. Central Command Joint Interagency Task Force.⁷

As LTC Taylor remembers, he arrived at Bagram on an Air Force Special Operations Command MC-130 aircraft “doing a typical combat corkscrew descent from high altitude”—the corkscrew being required because the pilots were worried about the potential anti-aircraft missile threat.⁸ “We landed with a thump, screeched to a stop, they [the Air Force crew] literally shoved our pallet off the back of the aircraft and pushed us all out into the darkness.”⁹ The MC-130 immediately taxied away and took off. “We all looked at each other. It was cold, pitch black dark, and we were alone.”¹⁰

Over the next few months, Taylor provided counsel on a variety of intelligence law, Rules of Engagement, administrative and criminal law, and fiscal law issues. Much of his advice, however, related to the legal status of detainees in the custody of Task Force BOWIE, particularly after Brigadier General Harrell put Taylor in charge of establishing and running the High Value Detention Center at Bagram. Harrell wanted to be absolutely sure that the requirements of U.S. and international law were scrupulously observed at the detention center, and believed that the best way to ensure that this occurred was to put a judge advocate in charge. Lieutenant Colonel Taylor personally took charge of the first two detainees, one of whom was Salim Hamdan. Hamdan, who had been Osama bin Laden’s driver and bodyguard, ultimately was transferred to Guantanamo Bay, Cuba, where he faced trial by a military commission.¹¹

In addition to providing legal advice and running the Task Force BOWIE detention center, LTC Taylor supported the mission in other ways. He took part in various operational security missions as well as classified covert intelligence operations, served as a Class A ordering officer, Headquarters Commandant, and worked as a public affairs officer on occasion. He also served as U.S. Central Command’s liaison to the International Committee of the Red Cross delegation in Kabul.¹² Lieutenant Colonel Taylor left Afghanistan in May 2002.

The second Army JA to set foot in Afghanistan was Captain (CPT) Chris Soucie, a 10th Mountain Division asset. He deployed to Sheberghan for the first time on Christmas night for a three-week mission. After returning to Karshi Khanabad, Soucie remained in Uzbekistan until relocating to Bagram on 17 February 2002.¹³

The third Army JA in Afghanistan appears to have been LTC Kathryn Stone, staff judge advocate (SJA), 10th Mountain Division. She deployed to Uzbekistan on 1 or 2 December 2001. While LTC Stone spent most of her time at Karshi Kandabad, she did fly to Bagram on a mission on 31 December for two days. After returning to Uzbekistan, Stone flew again to Bagram on 2 January 2002 for two days, before returning to Karshi Kandabad. Her final trip to Bagram was on 18 February 2002; she remained there until re-deploying to Fort Drum.¹⁴

Other early JA arrivals in Afghanistan include then-CPT Harper Cook, who arrived in Kandahar on 4 January 2002,¹⁵ and then-CPT Nicholas “Nick” Lancaster joined Cook in Kandahar about 23 or 24 January.¹⁶ Then-CPT Dean Whitford—who had arrived in Uzbekistan on 9 October 2001 as the SJA for Task Force DAGGER—went to Mazar-e Sharif and Quala-i-Jangi fortress from 11 through 18 January 2002 for a short mission; Whitford later returned to Afghanistan on 26 February to provide legal advice as part of Operation ANACONDA (2 to 19 March 2002).¹⁷

Over the next two decades, hundreds of judge advocates, legal administrators, and paralegal specialists—Active component, Reserve, and Army National Guard—provided legal services to commanders and their staffs. While an examination of who

did what, where they did it, and how they did it, requires book-length treatment, it is fair to say that after the fighting capabilities of al-Qaeda and the Taliban were significantly degraded, the United States and its allies transitioned to a new mission: building a free, independent, and democratic Afghanistan.

In November 2005, the Deputy Secretary of Defense directed that “stability operations” were a “core U.S. military mission” that should “be given priority comparable to combat operations.”¹⁸ Consequently, while members of the Corps continued to provide traditional legal advice and counsel to commanders and their staffs, they also began using their legal skills and talents to help strengthen Afghan state institutions. Central to these post-conflict legal efforts was the implementation of a “Rule of Law” program that sought to counter widespread corruption, fight the opium trade, and reduce the pernicious influence of warlords. Ultimately, the goal was to create an independent court system where ethical prosecutors, defense counsel, and judges followed the law and strengthened the ties between Afghan citizens and the Afghan government.¹⁹

The Omega: Last Out

On 29 February 2020, then-President Donald Trump’s representatives signed an agreement with the Taliban that required the departure of all U.S. and allied troops from Afghanistan. In this *Agreement for Bringing Peace to Afghanistan* (also known as the *Doha Agreement*), the United States pledged to withdraw all military forces by 1 May 2021.²⁰

After being elected in 2020, President Joseph Biden inherited the agreement, which he agreed to honor. In April 2021, Biden announced the withdrawal of the roughly 2,500 U.S. troops remaining in Afghanistan, but stipulated that all troops would depart by 11 September 2021—twenty years to the day that al-Qaeda had attacked the World Trade Center and Pentagon. President Biden subsequently moved the date for all troops to leave Afghanistan to the end of August 2021. In remarks made at the White House in July 2021, the President emphasized that the United States needed to move swiftly to conduct the main elements of the drawdown.²¹



Colonel Jeffrey Thurnher (left), Major Rachel Walkup (center), and Captain Hayley Boyd (right) were all part of the 82d Airborne Division's mid-August 2021 rapid deployment to Afghanistan. (Photo courtesy of author)

The President almost certainly reasoned that if he did not withdraw military personnel as promised by President Trump, the United States would need to escalate combat operations against the Taliban—which President Biden did not want to do. But, in ordering the withdrawal, President Biden insisted that the United States would “continue to provide civilian and humanitarian assistance” to the Afghan government headed by President Ashraf Ghani.²²

At the time of President Biden’s July announcement, U.S. military personnel on the ground were in the newly-formed U.S. Forces Afghanistan-Forward (USFOR-A FWD). This was a new organization; it was not a successor to USFOR-A/RESOLUTE SUPPORT. Rather, USFOR-A FWD was directly under the operational control of U.S. Central Command. The new unit was, however, using the old USFOR-A/RESOLUTE SUPPORT compound, which was under the control of the U.S. Embassy in Kabul.²³

As the withdrawal got underway in mid-2021, Taliban victories accelerated rapidly. Lieutenant Colonel Dustin P. Murphy, who had arrived in Kabul in mid-June to serve as the SJA, USFOR-A FWD, realized that that the Taliban’s rapid progress on the

battlefield would soon threaten Kabul. The U.S. Embassy in Kabul, however, did not fully share this perspective. The embassy did not believe that a Taliban victory was imminent, or that it would be wise to accelerate the evacuation of embassy personnel and other U.S. citizens in country.²⁴

On 15 August 2021, the Taliban entered Kabul. Afghan Security Forces either fled or surrendered. President Ghani fled the country and the Afghan government collapsed. It seemed likely that the Taliban would storm the U.S. embassy grounds—where LTC Murphy and other U.S. personnel were living and working as part of USFOR-A FWD. Concerned that any attack would result in U.S. military and civilian personnel being killed and wounded, Murphy requested that Vice Admiral Peter Vasely, the senior U.S. commander on the ground in Afghanistan, request modifications to the existing Rules of Engagement to allow U.S. forces to assume a better defensive posture at the embassy compound in Kabul. Although U.S. Central Command granted Admiral Vasely’s request, the Taliban did not attack. This meant that a Non-Combatant Evacuation Operation (NEO) began without incident on 16 August 2021.²⁵

In the airlift that followed from Hamid Karzai International Airport in Kabul, C-17 jets began ferrying both U.S. citizens and Afghan nationals with special visas to safety out of the country. Many of the latter were journalists, activists, judges, translators, and others who had worked for or with the Americans, and consequently were vulnerable to reprisals from the Taliban. More than 100,000 men, women, and children ultimately would leave the chaos of Kabul.²⁶

At the Hamid Karzi International Airport, LTC Murphy provided national security legal advice, including counsel on issues involving the NEO and escalation of force. He also provided advice on issues including intelligence matters, State Department coordination, and on-going talks with the Taliban.²⁷

On 16 and 17 August, Afghanistan civilians broke through gates and fences surrounding the airport. They flooded into the area and blocked the ingress and egress of C-17s evacuating personnel. Lieutenant Colonel Murphy advised on the degree of force necessary to move civilians off the airfield and back behind the gates. He also personally went to several airport gates to gain a clearer picture of the situation so as to better advise his commander on crowd control. Murphy was at Abbey Gate just days before the suicide attack at that location.²⁸

Meanwhile, elements from the 82d Airborne Division arrived in Kabul to provide additional support and security. Paratroopers from the 1st Brigade deployed from Fort Bragg, North Carolina, as part of the no-notice immediate response force (IRF) less than eighteen hours after being notified that they were going to Afghanistan.²⁹

Major Rachel L. Walkup, brigade judge advocate, 1st Brigade, arrived on 15 August, along with Sergeant (SGT) Sawyer Roberts, a paralegal specialist from 1st Brigade. Colonel Jeffrey S. Thurnher, SJA, 82d Airborne Division, arrived on 19 August, along with other 1st Brigade personnel, including CPT Hayley J. Boyd and SGT Johnny Luna. Colonel Thurnher deployed to support Major General Christopher T. Donahue, the division commander, who had deployed to Kabul as the commander of Joint Task Force (JTF)-82.³⁰

Colonel Thurnher and MAJ Walkup provided uniform legal advice to commanders and staff at JTF-82 and the 1st Brigade, respectively. They provided advice on ROE and escalation of force measures implemented in the chaotic and rapidly-changing security situation. Central to their efforts were numerous use-of-force briefings that COL Thurnher and MAJ Walkup personally delivered to units arriving at the airport in Kabul. They also coordinated on security and legal issues with U.S. State Department personnel at the embassy and with the U.S. Marine Corps legal teams vetting Afghan evacuees.³¹

But these last members of the Corps in theater did more than legal work. Major Walkup and CPT Boyd also performed security functions on many occasions, thereby ensuring that the airport remained open to air traffic and that those being evacuated could move safely through Hamid Karzai International Airport. They also took part in the physical search of U.S. citizens and Afghans being evacuated (for unauthorized weapons and contraband). Sergeant Johnny Luna also supported the airfield operations team by preparing and manifesting re-deploying Soldiers on flights leaving Afghanistan.³²

Colonel Thurnher was the last judge advocate to leave Afghanistan when he departed by air from Hamid Karzai International Airport at 1400 on 30 August. Major Walkup had already re-deployed—about 1100 on 30 August—a few hours before COL Thurnher. Sergeant Luna, the last paralegal specialist in country, had departed the day before; CPT Boyd had re-deployed on 28 August.³³

A final note: COL Joseph Mackey, SJA, XVIII Airborne Corps, Fort Bragg, who was the last Army lawyer to serve as the Senior Legal Advisor, RESOLUTE SUPPORT, and SJA, U.S. Forces-Afghanistan, had left Afghanistan in mid-June. The last legal administrator in Afghanistan was Chief Warrant Officer Two Misty D. Lakota, who had arrived in country in May 2020 and retrograded in January 2021.³⁴ And LTC Dustin P. J. Murphy? Who had arrived in June and witnessed both the start and the finish of the chaos in Kabul? Murphy flew out on a C-17 on 29 August. As Murphy remembers: “Those three months

in Afghanistan felt like a year. Day-to-day it was something new, something complex, and something chaotic.”³⁵ **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. RICHARD W. STEWART, *THE U.S. ARMY IN AFGHANISTAN: OPERATION ENDURING FREEDOM 7* (2004).

2. *Id.* at 8.

3. *Id.* at 10.

4. *Id.* The 10th Mountain Division headquarters—and additional division personnel along with Major General Franklin L. “Buster” Hagenbeck—did not arrive in Karshi Kandabad until 12 December 2001). *Id.* at 20.

5. *Id.* at 18.

6. A February 2018 article in *The Army Lawyer* by the author erroneously identified another judge advocate as the first Army lawyer in Afghanistan. This is incorrect; LTC Taylor was in Bagram more than a month before a second judge advocate set foot in Afghanistan. The author regrets this misstatement of fact.

7. Letter from G. John Taylor to Brigadier General Robert P. Huston (Nov. 20, 2018) (on file with author).

8. Email from G. John Taylor to author, subject: Your arrival in Afghanistan on 24 November 2001 (Oct. 26, 2021, 3:16 PM) (on file with author). A corkscrew landing occurs when the pilot “banks sharply and descends toward the runway in a slow, tight circle, like someone walking down a spiral staircase. During the spiral the crew keeps an eye out for other air traffic, and for anything coming at them from the ground. After several turns, the pilot pulls out of the rotation with careful timing, straightens out, and lands.” Allan T. Duffin, *Landing in Baghdad*, *AIR & SPACE MAG*, Nov. 2006.

9. *Id.*

10. *Id.*

11. *Id.* See also *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

12. Email from G. John Taylor to author, subject: Read this for Accuracy and Completeness (Nov. 18, 2021, 2:34 PM) (on file with author).

13. Email from Kathryn Stone to author, subject: JAGC History (Aug. 13, 2014, 12:17 PM) (on file with author).

14. Email from Kathryn Stone to author, subject: When did you get to Afghanistan (Feb. 16, 2018, 10:29 AM) (on file with author).

15. Source cited *supra* note 13.

16. *Id.*

17. For more on ANACONDA, see STEWART, *supra* note 1, at 30–45.

18. U.S. DEP'T OF DEFENSE, DIR. 3000.05, *MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION OPERATIONS* (28 Nov. 2005).

19. Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, *ARMY LAW.*, July 2007, at 45.

20. Steve Coll, *Defeat*, *NEW YORKER*, Sept. 13, 2021, at 13.

21. Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan (July 8, 2021), www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/08/remarks-by-president-biden-on-the-drawdown-of-u-s-forces-in-afghanistan/.

22. *Id.*

23. Email from Lieutenant Colonel Dustin P. Murphy to author, subject: Please read this for accuracy and any additions (Nov. 5, 2021, 7:46 AM) (on file with author) [hereinafter Murphy E-mail].

24. *Id.*

25. Email from Lieutenant Colonel Dustin P. Murphy to author, subject: Let's try one more time (Nov. 6, 2021, 7:12 AM) (on file with author).

26. Coll, *supra* note 20.

27. Murphy E-mail, *supra* note 23.

28. *Id.*

29. Email from Colonel Jeffrey S. Thurnher to author, subject: Please read for accuracy (Nov. 4, 2021, 4:40 PM) (on file with author).

30. *Id.*

31. *Id.*

32. *Id.* Email from Major Rachel L. Walkup to author, subject: Afghan (Sept. 7, 2021, 9:45 AM) (on file with author).

33. *Id.*

34. Email from Colonel Joseph B. Mackey to author, subject: Afghan (Sept. 7, 2021, 9:30 AM) (on file with author).

35. Email from Lieutenant Colonel Dustin P. Murphy to author, subject: Can you help me with some details here? (Nov. 4, 2021, 8:40 AM) (on file with author).



President Joseph R. Biden Jr. and Vice President Kamala D. Harris stand with U.S. Army Major General Omar J. Jones IV, commanding general, Joint Task Force–National Capital Region, at the U.S. Capitol during the passing of the Army Band, “Pershing’s Own,” in Washington, D.C., on 20 January 2021. (Credit: SPC Josue Patricio)

Practice Notes

Noon on the 20th Day of January

A Legal Advisor’s Perspective on the 59th Presidential Inauguration

By Lieutenant Colonel Micah W. Elggren, Major Brian M. Shust, & Captain Ravi R. Doshi

This is America’s day. This is democracy’s day. A day of history and hope. Of renewal and resolve.¹

Every four years, at noon on the 20th day of January, the eyes of the world turn to the west front of the U.S. Capitol to witness the swearing-in ceremony for the President of the United States.² The ceremony on 20 January 2021, however, looked different from years past: a limited audience of dignitaries sat physically distanced while wearing masks. The National Mall, empty of its usual crowds, was stained by nearly 200,000 flags representing lives lost because of the

coronavirus pandemic. Over 20,000 National Guard troops kept watch over the Capitol Building still under repair from a deadly assault. And, most notably, the President’s oath was preceded by the swearing-in of Vice President Kamala Harris, who was the first woman, first Black American, and first South Asian American to be elected to the office.

For viewers at home on 20 January 2021, the presence and prominence of Department of Defense (DoD) personnel at the in-

auguration was undeniable—from escorting luminaries to marching a pass and review, from orchestra performances to consequence management—over 2,000 military and DoD civilian personnel participated in this momentous event.³ As judge advocates, we had a front row seat to this historic moment (not to mention the countless months of planning leading up to Inauguration Day), while providing the legal support that accompanies and enables such a massive effort.⁴ The following article is a reflection on our time as legal advisors for the 59th Presidential Inauguration.

Legal Foundations: DoD Support to the Presidential Inauguration

To allow their new system of government to endure, the Framers of our Constitution understood that innovative ideas and personalities must regularly be introduced into government; they also understood the need for the peaceful transfer of power.⁵ To facilitate the timely transition between presidential administrations, the Twentieth Amendment provides that each presidential term will end at noon on 20 January, and the term of the successor administration will begin upon the president's swearing of the oath found in Article II, Section 1 of the Constitution.⁶

Since 1789, when the military escorted President-elect George Washington to Federal Hall in New York City to be sworn in as the first president of the United States, DoD personnel have played an integral role in supporting presidential inaugurations.⁷ Over time, the traditional DoD role has been codified into federal law at 10 U.S.C. § 2553, which authorizes the Secretary of Defense to support presidential inaugurations, including through 1) engaging in activities related to security and safety; 2) executing ceremonial events; 3) loaning property; and 4) providing any other assistance the Secretary considers appropriate.⁸ Many DoD components help execute inauguration support and are led at the tactical and operational level by the commanding general of Joint Task Force–National Capital Region (JTF–NCR)⁹ from Fort Lesley J. McNair in Washington, D.C.

For the 2021 inauguration, the commander of U.S. Northern Command (USNORTHCOM) stood up¹⁰ JTF–NCR to plan, coordinate, and execute all DoD

ceremonial support to the inauguration in a manner consistent with Ceremonial Support Guidelines (Ceremonial Guidelines) issued by the Secretary of Defense.¹¹ Moreover, JTF–NCR served as the official liaison to the Presidential Inaugural Committee (PIC) (a committee appointed by the President-Elect to organize ceremonial events, performances, and receptions on and around Inauguration Day)¹² and the Joint Congressional Committee on Inaugural Ceremonies (JCCIC) (the group of key leaders from the U.S. Senate and U.S. House of Representatives who provide support for the swearing-in ceremony and other events at the Capitol on Inauguration Day).¹³ Joint Task Force–National Capital Region was, therefore, primarily responsible for ensuring the *ceremonial* excellence of DoD participation in the inauguration.¹⁴ Although USNORTHCOM authorized JTF–NCR to support the Secret Service for consequence management¹⁵ if necessary,¹⁶ inauguration security support remained a civilian law enforcement function under the framework of a national special security event.¹⁷ Also, at the direction of the USNORTHCOM commander, JTF–NCR assisted the National Archives and Records Administration (NARA) with transporting the former administration's presidential records from the White House complex to NARA facilities.¹⁸

Against this backdrop, JTF–NCR's inauguration legal team ensured that any DoD support to the inauguration occurred in accordance with the law and DoD policies and regulations.¹⁹ Beginning eight months before Inauguration Day, our legal team engaged with hundreds of stakeholders within JTF–NCR, across DoD, and from state, district, and federal agencies—often relying on virtual meetings in light of the ongoing coronavirus disease 2019 (COVID-19) pandemic. Ultimately, our legal team provided a full range of legal support—across all functional areas—to help ensure DoD's safe, successful, and *legal* execution of the 59th Presidential Inauguration.

Our Inauguration Legal Team: Unity of Effort Across Legal Objectives

For those of us assigned to the JTF–NCR inauguration legal team—which included

two active duty Air Force majors and a reservist Army captain and sergeant—the role of legal advisor provided us with unique opportunities to learn, and challenges to overcome, as we helped execute DoD's highly visible participation in the inauguration. Thankfully, because we conducted our work for JTF–NCR under the existing office of the staff judge advocate at Joint Force Headquarters–National Capital Region/U.S. Army Military District of Washington, we had access to the expert support and resources of a high-functioning legal team, which we relied upon on regularly. Indeed, weekly touchpoints with Colonel Thomas E. Schiffer, staff judge advocate, and confabs with the legal office's division chiefs on emerging legal issues were critical to our success. In addition, our legal team relied heavily on the expertise and support of assigned reservists and reservists from the 151st Legal Operations Detachment for both planning and execution of the inauguration.

A Worldwide Pandemic: Reimagining an Inauguration

Although it informed every decision made to support the inauguration, COVID-19 did not impact the success of Inauguration Day due to careful planning and clear understanding of risks. For our legal team, COVID-19 posed the same challenges to communication, collaboration, and cooperation that others in DoD and broader workforces have experienced in the remote-work environment. The pandemic also heightened the challenge of executing DoD's participation in the inauguration: early in the planning process, we knew that we needed to be ready to execute an inauguration of uniquely historical significance.

Due to the delayed start of the formal presidential transition,²⁰ JTF–NCR did not know the scope of PIC and JCCIC requests for DoD inauguration support until early January 2021. Therefore, JTF–NCR planned for a full-scale inauguration—consistent with historical precedent—while at the same time recognizing that at least some scaling down might ultimately be required. When plans were finalized, the differences between 2017's inauguration and 2021's were profound due to COVID-19. The number of DoD personnel was reduced by

thousands.²¹ The 2,200 military personnel that traditionally support a parade and street cordon on Pennsylvania Avenue were scaled back to just over 200 personnel in a street cordon only. The customary eight to twelve inaugural balls—which normally include support from fifty military members each—were reduced to a single virtual event with participation from approximately 100 military personnel. No opening ceremony occurred, which typically requires 100 to 400 military personnel, and the number of military personnel needed for all other events (e.g., events at the Capitol, presidential escort, departure ceremony) was significantly reduced. These dramatic changes to the inauguration plan required the JTF–NCR team, including those of us providing legal advice, to work quickly to meet the reimagined intent, sometimes processing support requests in a number of hours that, in previous years, would have been reviewed over the course of days or weeks.

The pandemic also prompted us to consider how to keep DoD inauguration personnel safe while not unnecessarily restricting personal freedoms. Our legal team worked in conjunction with a COVID-19 mitigation operational planning team that met almost daily for several weeks to help advise on COVID-19 related legal issues, including leave and travel policies, command authority to protect the force, and contingency plans for operational authority in the event COVID-19 impacted key JTF–NCR leaders in advance of Inauguration Day. The legal team also adapted our trainings for a remotely operating force, balancing the need to keep personnel safe while ensuring their understanding of mission-specific duties. And, when a suspected COVID-19 case was discovered in the Joint Operations Center just before Inauguration Day, our legal team had to quickly revise our staffing plan—a good reminder to plan for the contingencies of a staffing shortfall.

Legal Support: Integration from Planning Through Execution

Beyond COVID-19-related issues, our legal team faced uncommon questions in operational law, fiscal law, ethics, administrative law, and even military justice during our support to the inauguration. We also

worked with JTF–NCR leaders and action officers on matters that were not necessarily legal issues but required practical advice on the way ahead—matters at the intersection of law, policy, and best practice. For instance, our legal team worked with the JTF–NCR Communications Directorate to develop a media strategy for DoD content and scripts for military participants supporting the virtual events on the night of Inauguration Day.²² These non-traditional legal experiences helped us integrate as members of a joint team and challenged us to think beyond our functional areas of practice.²³

Our legal team regularly attended JTF–NCR meetings to engage in discussions as issues emerged, and we actively participated in the joint planning process, especially mission analysis and course of action development.²⁴ In addition, we provided a unique perspective as DoD representatives to meetings held by an interagency legal subcommittee for the inauguration, which allowed us to collaborate with attorneys experienced in national special security events at federal agencies (including the Secret Service, Federal Bureau of Investigation, Department of Justice, Department of the Interior, and Department of Homeland Security) and district government offices (including the D.C. Metropolitan Police and D.C. Attorney General’s Office). Participating virtually in almost all meetings allowed our legal team to conduct research in real time and provide proactive legal advice as issues emerged, but also challenged us to sift through the fog of faceless screens and voices.

Operational Law Advice: The Tooth not the Tail²⁵

Operational matters made up the preponderance of legal issues our team encountered. This included support requests from the PIC and JCCIC, training on the standing rules for the use of force (SRUF), and planning for potential consequence management. An important aspect of our legal support involved ensuring all operations—whether ceremonial or otherwise—were consistent with Title 10 authorities, DoD regulations, and the Ceremonial Guidelines.

Support requests from the PIC and JCCIC—which covered everything from the U.S. Army Band Herald Trumpets musicians playing fanfare at the swearing-in ceremony, to the joint team providing presidential escort to the White House, to members of The Old Guard facilitating the wreath laying ceremony at Arlington National Cemetery—required legal review. Our legal team shaped the process by which review of support requests occurred, ensuring legal review happened after all other stakeholders to the request had provided input. This allowed our legal team to provide JTF–NCR leadership with the most comprehensive legal advice. We closely checked to make sure each of the approximately thirty support requests would not result in violations of law or DoD regulation, and ensured the requested support fell within the Ceremonial Guidelines.²⁶

Our legal team also coordinated and provided tailored training on SRUF to Title 10 forces (e.g., medics, cordon personnel, and escorts) participating in the inauguration.²⁷ While these rules—at least at a high level—were likely familiar to some, our legal team remained mindful that, for the past two decades, our military personnel have been primarily engaged in overseas operational environments where different rules apply. For many, the SRUF were likely new, and thus we needed to ensure that each inauguration participant received clear training on the SRUF that taught them not only the SRUF itself,²⁸ but also helped them understand how the SRUF might apply in real-world situations specific to the inauguration. Creating hypothetical SRUF scenarios tailored to each of the various inauguration missions helped our legal team convey the nuances of the SRUF and, importantly, break through the virtual wall inherent to training that cannot be conducted in-person. This point is key for legal practitioners providing SRUF training in any context.

We also worked to ensure that our JTF–NCR command team had a clear understanding of their non-ceremonial authorities. Joint Task Force–National Capital Region provided an important role in support of the Secret Service for potential consequence management.²⁹ This effort positioned specialized military capabilities

and an array of response forces at the ready in the event of an emergency.³⁰ Some of these capabilities and forces were prepositioned at the request of the Secret Service. Any additional requests for emerging needs would have required approval by proper authority—likely the Secretary of Defense.³¹ Given the importance of authorities in this context, the transfer of responsibility between administrations (to include DoD personnel) became relevant to our planning process.

The day prior to Inauguration Day, then-Deputy Secretary of Defense David L. Norquist produced a plan detailing the named successors for key DoD positions upon departure by senior non-career officials from the outgoing administration at 1201 on 20 January 2021.³² In the event an additional request for forces became necessary after President Joseph Biden took office, the succession memorandum would have directed us to the proper approval authority.

Our legal team also regularly advised on the scope of Title 10 authorities—an issue which increased in prominence after the deployment of over 25,000 National Guard members from all fifty states to the National Capital Region in response to the 6 January 2021 attack on the Capitol.³³ Because the Posse Comitatus Act and DoD regulation limit the types of direct support active duty (i.e., Title 10) forces can provide to law enforcement,³⁴ the Secret Service relied on the National Guard (under the authority of Title 32) to provide various types of security support.³⁵ In fact, members of the National Guard were sworn in and deputized as special police for the U.S. Capitol Police, U.S. Park Police, and D.C. Metropolitan Police Department.³⁶ Our legal team worked to educate Title 10 personnel on the limitations of their authority in support of law enforcement, and we participated in daily National Guard Bureau legal coordination meetings with our Title 32 counterparts to ensure situational awareness between our forces.

Fiscal and Administrative Law Advice: Authorizations, Exceptions, and Waivers³⁷

As in any operational assignment, our legal team also conducted fiscal reviews and

provided administrative law and ethics advice to JTF–NCR leadership. While many of these issues were not unlike those that judge advocates regularly encounter, the context of the inauguration (overlaid with the ongoing pandemic) created a new flavor to these seemingly pedestrian questions.³⁸ We advised on a broad range of matters—from whether congressionally-appropriated funds could be used to purchase inauguration coins or unit patches, to whether DoD personnel could use non-federal property (e.g., Smithsonian buildings) for inauguration purposes. Below are a few key issues that involved inauguration-specific analysis.

Department of Defense personnel needed water to keep hydrated during Inauguration Day. As a general rule, bottled water cannot be purchased using appropriated funds absent a specific exception.³⁹ To purchase bottled water with appropriated funds, an agency must show that either an agency's work site has no available potable drinking water or that the available drinking water poses health risks if consumed.⁴⁰ Thus, our legal team analyzed the availability of potable, safe water at locations where certain ceremonial forces performed their missions on Inauguration Day. This involved understanding whether bottles of water and/or backpacks could be taken through Secret Service and U.S. Capitol Police security checkpoints, whether water fountains were available and safe due to COVID-19, and whether carrying water sources would allow personnel in their service dress to project the professional image required by the ceremonial mission.

Gifts received by DoD inauguration participants also required a unique analysis in the context of the inauguration. For instance, our legal team analyzed whether military assistants could accept N95 masks as a gift from the PIC.⁴¹ We closely scrutinized the PIC's status (prohibited or permissible source), the intent in providing the gift, and the value of the gift, to assess the hopefully once-in-a-lifetime question: whether face masks could legally be provided as a gift to individual military members. Our legal team also considered approval authorities for accepting the gifts, including whether the gifts should be accepted at the individual level, the JTF–NCR command level, or by a higher authority.

The use of military assistants during the inauguration events posed unique ethics questions. Military assistants were in the grade of O-4 and had been hand-selected and tasked with coordinating and facilitating the participation of significant inaugural participants (SIPs) (i.e., presidential cabinet members and personnel with cabinet-level rank) and designated inaugural participants (DIPs) (i.e., immediate family members of the President/Vice President and President-Elect/Vice President-Elect) at official inauguration events. Military assistants and drivers⁴² (noncommissioned officers selected to facilitate SIP and DIP transportation) interacted constantly with the DIPs and SIPs during inauguration events,⁴³ which gave them a unique and intimate opportunity to speak with highly visible people—some of whom have a professional interest in government and politics. To ensure military assistants and drivers did not stray into questionable situations (e.g., contemptuous speech, political activities, and gifts), our legal team provided comprehensive training with scenarios based on the duties of military assistants and drivers. As with the SRUF training, the targeted scenarios in the ethics context also helped our legal team ensure that the military assistants and drivers could concretely envision how they might encounter (and avoid violating) ethics and other rules.

Conclusion

Mr. President, I'm pulling for your success. Your success is our country's success.⁴⁴

As with any military operation, an unexpected amount of legal support occurred behind the scenes of the 59th Presidential Inauguration—a historic and unprecedented event. This afforded an opportunity for our legal team to rethink the way we have seen legal issues in the past and grow as leaders among a joint team. Judge advocates integrate among the joint staff to provide a unique capability to military operations.⁴⁵ During the 59th Presidential Inauguration, our legal team drew from all functional areas of practice⁴⁶ to enable our part in a safe and successful event honoring our new Commander in Chief. It was our privilege to serve among a well-integrated JTF–NCR

team. Planning is already underway for the 60th Presidential Inauguration, which will—without a doubt—provide the next team of legal advisors with a once-in-a-lifetime experience. **TAL**

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Notes

1. Joseph R. Biden, Jr., U.S. President, Inaugural Address at the United States Capitol (Jan. 20, 2021).
2. The first inauguration held on the west front of the Capitol occurred on 20 January 1981 for former President Ronald W. Reagan. *Inauguration at the U.S. Capitol*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/what-we-do/programs-ceremonies/inauguration> (last visited Jan. 11, 2021).
3. C. Todd Lopez, *Despite COVID-19 Restrictions, Service Members Play Important Role in Inauguration*, U.S. DEP'T OF DEF. (Jan. 19, 2021), <https://www.defense.gov/Explore/News/Article/Article/2476394/despite-covid-19-restrictions-service-members-play-important-role-in-inauguration/>. This number does not include the over 20,000 National Guard personnel who provided security support during the inauguration.
4. JOINT CHIEFS OF STAFF, JOINT PUB. 3-84, LEGAL SUPPORT, at II-6 to II-16 (2 Aug. 2016) [hereinafter JOINT PUB. 3-84]. As the operational law team for Joint Task Force–National Capital Region, we actively participated in the joint operation planning process—from mission analysis to execution—to ensure all aspects of the Department of Defense's (DoD) participation in inauguration events complied with federal law, DoD regulations, and the standards of conduct for DoD employees.
5. *Uniquely American*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <https://www.inaugural.senate.gov/uniquely-american/> (last visited Jan. 11, 2021).
6. U.S. CONST. amend. XX, § 1; U.S. CONST. art. II, § 1, cl. 8.
7. *President Washington's Inauguration*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/george-washington/the-first-president/inauguration/timeline> (last visited Jan. 11, 2021).
8. 10 U.S.C. § 2553(b) (1980).
9. Joint Force Headquarters–National Capital Region (JFHQ–NCR) transitions to Joint Task Force–National Capital Region (JTF–NCR) at the direction of U.S. Northern Command. The Secretary of Defense

approved the establishment of JFHQ–NCR in 2003 to conduct planning and coordination for homeland defense and civil support missions. *Who We Are: About, JOINT TASK FORCE–NAT'L CAP. REGION & U.S. ARMY MIL. DIST. OF WASH.*, <https://mdwhome.mdw.army.mil/about> (last visited Jan. 17, 2022).

10. See U.S. DEP'T OF DEF., JOINT CHIEFS OF STAFF, JOINT PUB. 3-33, JOINT TASK FORCE HEADQUARTERS, at I-8 to I-9 (31 Jan. 2018).
11. Memorandum from Deputy Sec'y of Def. to Chief Mgmt. Officer of the Dep't of Def. et al., subject: Ceremonial Support to the 2021 Presidential Inauguration (8 Sept. 2020) [hereinafter Ceremonial Guidelines].
12. *Records of Presidential Inaugural Committees*, NAT'L ARCHIVES, <https://www.archives.gov/research/guided-records/groups/274.html> (last visited Jan. 18, 2022).
13. *About the Committee*, JOINT CONG. COMM. ON INAUGURAL CEREMONIES, <https://www.inaugural.senate.gov/about-the-committee/> (last visited Jan. 11, 2021).
14. Major General Omar J. Jones, IV, Commanding General, JTF–NCR, organized inauguration support personnel into four task forces, which were then sub-organized into specific joint teams. With the exception of one task force designated for potential consequence management operations, the preponderance of personnel assigned or attached to JTF–NCR provided ceremonial support.
15. The Federal Emergency Management Agency defines consequence management as “measures to protect public health and safety, restore essential government services, and provide emergency relief to governments, businesses, and individuals affected by the consequences of terrorism.” FED. EMERGENCY MGMT. AGENCY, *MANAGING THE EMERGENCY CONSEQUENCES OF TERRORIST INCIDENTS: INTERIM PLANNING GUIDE FOR STATE AND LOCAL GOVERNMENTS*, at J-1 (2002).
16. Lopez, *supra* note 3.
17. U.S. DEP'T OF DEF., INSTR. 3025.20, DEFENSE SUPPORT OF SPECIAL EVENTS 12 (6 Apr. 2012) (C1, 24 May 2017); SHAWN REESE, CONG. RSCH. SERV., R43522, NATIONAL SPECIAL SECURITY EVENTS: FACT SHEET 2 (Jan. 11, 2021). Occasions of national significance, such as a presidential inauguration or major sporting event, may be designated as a national special security event by the president or the president's representative. This designation allows the Secret Service to serve as the lead federal agency for planning and coordinating security operations. As the lead federal agency, the Secret Service coordinates with federal, state, and local agencies that provide support to the event—including DoD. Under a 2018 memorandum from then-Secretary of the Department of Homeland Security Kirstjen M. Nielsen, certain recurring events, including presidential inaugurations, are designated as national special security events on an ongoing basis. See Memorandum from Sec'y, U.S. Dep't of Homeland Sec. to All Fed. Dep'ts & Agencies, subject: Designation of Recurring Significant Events as National Special Security Events (24 Sept. 2018).
18. Our legal team negotiated a memorandum of agreement with the National Archives and Records Administration general counsel and coordinated on reimbursement issues under the Economy Act. 31 U.S.C. § 1535 (1984). We ensured that the agreement protected DoD personnel; clearly defined the parameters of DoD responsibilities and support; and restricted support that might be against the law or DoD regulation.
19. Our legal team drafted the memorandum of agreement between DoD and the Presidential Inaugural Committee (PIC), which detailed the conditions under which JTF–NCR could provide support, the procedures to request support, and the types of support requiring reimbursement.
20. Matt Viser, *After Long, Bitter Delay, Biden Transition Kicks into Gear*, WASH. POST (Nov. 24, 2020), https://www.washingtonpost.com/politics/biden-transition-trump/2020/11/24/26b8e4ba-2e7a-11eb-bae0-50bb17126614_story.html.
21. Lopez, *supra* note 3.
22. See Biden Inaugural Committee, *Celebrating America Hosted by Tom Hanks–Biden-Harris Inauguration 2021*, YOUTUBE (Jan. 20, 2021), <https://www.youtube.com/watch?v=RkRLaS9P8r8> [hereinafter *Celebrating America*].
23. See JOINT PUB. 3-84, *supra* note 4, at III-2 to III-4.
24. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING, at III-12 to III-44 (1 Dec. 2020); JOINT PUB. 3-84, *supra* note 4, at II-7 to II-13. Our regular meetings included the Joint Planning Group, Future Operations Steering Group, Future Operations Decision Board, Plans and Operations Steering Group, Plans and Operations Decisions Board, Inauguration Course of Action Development Operational Planning Team, and Joint Exercise Working Group.
25. JOINT PUB. 3-84, *supra* note 4, at I-1. “It is also clear from the commanders who testified that legal advice is essential to effective combat operations in the current environment—legal advice is now part of the tooth not the tail.” *Id.* (quoting Section 574, 2005 National Defense Authorization Act, Independent Review Panel to Study the Relationship between Military Department General Counsels and Judge Advocates General, 15 Sept. 2005).
26. The Ceremonial Guidelines required each support request to satisfy certain criteria. Support needed to be an official inaugural event, i.e., sponsored by the PIC or the Joint Congressional Committee on Inaugural Ceremonies, and DoD personnel could not be placed in “demeaning assignments [where] they may discredit themselves or DoD” such as “bag handlers” or “parking lot attendants.” Ceremonial Guidelines, *supra* note 11, at 4. Support had to avoid the perception of “impropriety, implied endorsement, or selective benefit” to the requestor or other entity, and DoD could not be in a position to provide support that competed with commercial enterprises or that was available from another governmental agency. Any entity requesting DoD support that was normally available via commercial means needed to justify why DoD, and not commercial vendors, should provide the capability. Certain categories of support considered to be in the best interest of DoD did not require reimbursement. Ceremonial Guidelines, *supra* note 11, at 4–6.
27. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT OF CIVIL AUTHORITIES, at C-1 (29 Oct. 2018) (discussing applicability of rule for the use of force for DoD personnel).
28. CTR. FOR L. & MIL. OPERATIONS (CLAMO), THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., DOMESTIC OPERATIONAL LAW HANDBOOK ch. 10 (2021).
29. Lopez, *supra* note 3.
30. *Id.*

31. See LAWRENCE KAPP, CONG. RSCH. SERV., IF11324, DEFENSE PRIMER: DEFENSE SUPPORT OF CIVIL AUTHORITIES 1 (2020).
32. See Memorandum from Deputy Sec'y of Def. to Senior Pentagon Leadership and Def. Agency and DoD Field Activity Directors, subject: Succession Plan for January 20, 2021 (19 Jan. 2021).
33. See Press Release, U.S. Dep't of Def., Statement by Acting Secretary of Defense Christopher Miller on National Guard Support in Washington, D.C. (Jan. 18, 2021), <https://www.defense.gov/Newsroom/Releases/Release/Article/2474963/statement-by-acting-secretary-of-defense-christopher-miller-on-national-guard-s/>; Terri Moon Cronk, 12 *Guardsmen Relieved of Duty for Inauguration, Officials Say*, U.S. DEP'T OF DEF. (Jan. 19, 2021), <https://www.defense.gov/Explore/News/Article/Article/2476044/12-guardsmen-relieved-of-duty-for-inauguration-officials-say/>.
34. 18 U.S.C. § 1385 (1878); U.S. DEP'T OF DEF., DIRECTIVE NO. 3025.21, DEF. SUPPORT OF CIV. LAW ENFORCEMENT AGENCIES (27 Feb. 2013) (C1, 8 Feb. 2019).
35. Captain Tinashe Machona, *D.C. National Guardsmen to Provide Traffic Control and Crowd Management During D.C. Demonstrations*, D.C. NAT'L GUARD (Jan. 4, 2021), <https://dc.ng.mil/Public-Affairs/News-Article-View/Article/2461793/dc-national-guardsmen-to-provide-traffic-control-and-crowd-management-during-dc/>; *Inaugural Heritage*, D.C. NAT'L GUARD, <https://dc.ng.mil/About-Us/Heritage/DC-National-Guard-Museum/Exhibits/Inaugural-Heritage/> (last visited Jan. 12, 2022).
36. Machona, *supra* note 35; Staff Sergeant Anthony Small, *Guard's Judge Advocates Brief Soldiers and Airmen in DC*, NAT'L GUARD (Jan. 17, 2021), <https://www.nationalguard.mil/News/Article/2474812/guards-judge-advocates-brief-soldiers-and-airmen-in-dc/>.
37. See JOINT PUB. 3-84, *supra* note 4, at II-9.
38. The Mission Installation Contracting Command at Fort Belvoir, Virginia, provided contracting support for JTF-NCR inauguration requirements.
39. Clarence Maddox—Relief of Liability for Improper Payments for Bottled Water, B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Comp. Gen. Mar. 21, 2006).
40. See *id.*; U.S. Agency for Int'l Dev.—Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Comp. Gen. Apr. 10, 1992); Dep't of the Army, Aberdeen Proving Ground—Use of Appropriated Funds for Bottled Water, B-324781 (Comp. Gen. Dec. 17, 2013); Dep't of the Army—Use of Appropriations for Bottled Water, B-310502, 2008 U.S. Comp. Gen. LEXIS 38 (Comp. Gen. Feb. 4, 2008).
41. 5 C.F.R. § 2635.202 (2021) (discussing general prohibition on acceptance of gifts); 5 C.F.R. § 2635.204 (2021) (discussing exception to prohibition on acceptance of unsolicited gifts).
42. Our legal team strategized with the military assistants team on use and access to PIC-procured vehicles, requiring us to consider whether the vehicles should be treated as government vehicles.
43. We also worked with public health to create procedures for transporting and interacting with significant inaugural participants and designated inaugural participants to ensure adequate physical distancing while also meeting the intent of the Ceremonial Guidelines.
44. *Celebrating America*, *supra* note 22, at 1:18:55 (former U.S. President George W. Bush speaking to President Joseph Biden in a videotaped joint message with former U.S. Presidents Bill Clinton and Barack Obama).
45. JOINT PUB. 3-84, *supra* note 4, at x.
46. *Id.* at III-3 to III-4.



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Practice Notes

Called to Order

Pursuing DEI Initiatives in Military Justice

By Members of the JAG Corps's Diversity, Equity, and Inclusion Council

When the Diversity, Equity, and Inclusion Council (DEIC) kicked off its inaugural meeting in 2020, it was clear that its mandate was meant to include every core discipline in the Judge Advocate General's (JAG) Corps. Representatives with a wealth of experience in each core discipline were in attendance—military justice was no exception. The DEIC included (and still includes) the Chief of the Trial Defense Service, the Chief Trial Judge, and the Senior Judge on the Army Court of Criminal Appeals. Intentionally or otherwise, the inclusion of these individuals on the DEIC both ensured and enabled initiatives that would positively impact the effectiveness and fairness of our military justice practice. This article seeks to highlight three examples of those initiatives.

The first significant initiative proposed by the DEIC was in response to the Breonna Taylor tragedy. Breonna Taylor was a medical worker who was shot and killed by three plain-clothed police officers who forced entry into her apartment after midnight.¹ While it remains unclear if they announced their status as police officers prior to attempting entry, the deceased's boyfriend fired at the officers as they entered the home and the three officers returned fire thirty-two times.² While none of the bullets injured her boyfriend, Breonna Taylor was killed when she was shot six times.³ Her apartment was never searched. The police were conducting a drug investigation and Ms. Taylor's boyfriend was a suspect. One of the police officers was charged with wanton endangerment for

firing into a neighboring apartment.⁴ This incident exacerbated racial tensions because Ms. Taylor was Black and the police officers were all White.

The ensuing uproar caused many jurisdictions to examine the justification for law enforcement officers to conduct a search of a home at night without announcing themselves, a so-called “no-knock” search.⁵ While exigent circumstances at the scene may require such tactics, in order to authorize their use when gaining authorization for a probable cause search, at least in the military context, specific written authorization from a military magistrate is required.⁶ Without that authorization, the law enforcement agent executing the warrant is required to announce their presence and to conduct the search in the daytime.⁷ While these procedures should reduce the risk of what happened to Breonna Taylor happening to someone associated with the Army, to decrease the risk even further, the DEIC asked the Trial Judiciary—the agency responsible for supervising military magistrates—to review these procedures. As a result, the entire Trial Judiciary considered the available options and potential ramifications, and determined the most prudent option was to require magistrate consultation with their supervising judge prior to authorizing a request for a nighttime or unannounced search of a dwelling place.⁸ Approval of these tactics is still required to be in writing.⁹ While these requests are rare, the extra scrutiny is worth the minimal time and effort to consult a judge given the magnitude of the risk.

Another initiative pursued by the DEIC in the area of military justice was determining whether practitioners received training in unconscious bias.¹⁰ The Council determined that unconscious bias training is provided to practitioners at all levels, to include the trial judiciary.¹¹ In response to presentations and discussions on the topic, trial judges have expressed increased willingness to expand the scope of voir dire while strictly adhering to its purpose, which is to gather information necessary to intelligently exercise challenges.¹² This expansion could possibly include questions regarding whether the panel or individual member has received unconscious bias training; if they recalled whether the training alerted

them to any unconscious biases they might harbor; whether or not they agreed with that assessment; and so forth. Beyond the answers themselves, the panel member’s willingness to discuss such issues may provide cause for further exploration of relevant topics to obtain information that may uncover a basis for challenge. As the *Rules of Practice Before Army Courts-Martial* require counsel to submit proposed voir dire questions in advance, an artful counsel should provide ample justification for such questions in their written request.¹³

A final example of the initiatives undertaken by the DEIC in the military justice context is in the area of retention and recruiting. As part of the JAG Corps’s efforts to build the bench and identify future leaders in the core disciplines, the current leaders in those disciplines are always on the lookout for new talent. With the support and encouragement of the DEIC, several affinity groups within the JAG Corps have blossomed, such as the Hispanic Mentor Group and the Asian-Pacific American Network, joining the long-running Buffalo JAG group. Members of the DEIC who are also leaders within the core disciplines have been able to speak to those affinity groups about the possibilities for career advancement in those core disciplines and provide advice to potential candidates that are interested in joining their ranks. These DEIC members have enthusiastically provided presentations to these groups, and in many cases joined the groups themselves. These efforts can be expected to have a tangible effect on the increased diversity within the upper echelons of those disciplines in years to come.

If you have an idea to promote DEI in military justice—or any other core discipline—contact a field board representative—or better yet, join one!¹⁴ The DEIC looks forward to working with and for the JAG Corps to promote and celebrate our diversity in the most inclusive and equitable ways we can. **TAL**

The Judge Advocate General’s Corps Diversity, Equity, and Inclusion Council is made up of Judge Advocate Legal Services leaders, to include officer, enlisted, and civilian personnel.

Notes

1. *Breonna Taylor: What Happened on the Night of Her Death?*, BBC NEWS (Oct. 8, 2020), <https://www.bbc.com/news/world-us-canada-54210448>.
2. *Id.*
3. *Id.*
4. *Breonna Taylor: Police Officer Charged but not over Death*, BBC NEWS (Sept. 23, 2020), <https://www.bbc.com/news/world-us-canada-54273317>.
5. *E.g.*, Christina Carrega & Peter Nickeas, *Justice Department Limits Use of Chokeholds and “No-Knock” Warrants*, CNN, <https://www.cnn.com/2021/09/14/politics/justice-chokeholds-no-knock-warrant/index.html> (Sept. 14, 2021, 3:27 PM).
6. U.S. ARMY TRIAL JUDICIARY, STANDARD OPERATING PROCEDURES FOR MILITARY MAGISTRATES sec. II, para. 2c (2021) [hereinafter *MAGISTRATE SOP*].
7. See U.S. Dep’t of Army, Form 3745, Search and Seizure Authorization (2002) (requiring annotation of the time of day of the execution; however, announcement of their presence is not specifically articulated on the form itself).
8. *MAGISTRATE SOP*, *supra* note 6, sec. II, para. 2c.
9. *Id.*
10. See *Unconscious Bias*, U.C.S.F. OFF. OF DIVERSITY & OUTREACH, <https://diversity.ucsf.edu/resources/unconscious-bias> (last visited Jan. 18, 2022) (“Unconscious biases are social stereotypes about certain groups of people that individuals form outside their own conscious awareness. Everyone holds unconscious beliefs about various social and identity groups, and these biases stem from one’s tendency to organize social worlds by categorizing.”).
11. The aforementioned members of the Diversity, Equity, and Inclusion Council representing Trial Defense Service, the Trial Judiciary, and the prosecutorial arm all verified that their personnel had conducted such training within the past year. For example, the Trial Judiciary received the training alongside trial judges from the other services during their annual joint training in February 2022. The training was conducted by a civilian contracted provider and was 150 minutes in length.
12. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, R.C.M. 912(d) discussion (2019).
13. U.S. ARMY TRIAL JUDICIARY, *RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL* f. 15.1 (2022).
14. *JAG Corps Diversity, Equity & Inclusion Council Field Board Member Roster*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/DivInc.nsf/homeContent.xsp?open&doctype=announcement&documentId=77212AE41FC44337852587030051C159> (last visited Jan. 19, 2022) (field board member assignments are available via login to Department of Defense members).



A Soldier stationed in Hawaii fills a bulk water container at the Navy Exchange Moanalua Terrace water distribution station. The U.S. Navy is working closely with the Hawaii Department of Health, U.S. Environmental Protection Agency, and the U.S. Army to restore safe drinking water to Joint Base Pearl Harbor–Hickam housing communities through sampling and flushing, and the recovery of the Red Hill Well. (Credit: Mass Communication Specialist 2d Class Chelsea D. Meiller)

Practice Notes

Army Green

Environmental Law and Readiness

By Major Michael T. Davis

Besides being admonished by their leadership not to bother the wildlife and to ensure drip pans are correctly placed in the motor pool, most Soldiers do not concern themselves too much with the environment or the laws governing its protection. However, as the Army prepares for Multi-Domain Operations, environmental stewardship has become a matter of strategic importance.¹ Furthermore, environmental law can directly impact readiness—it can result in fines which deplete limited operations and maintenance

(O&M) budgets, loss of range access, and delays in training and plans. Judge advocates in the field can help by spotting issues before they impact readiness.

Readiness requires access to realistic training environments; non-compliance with environmental laws jeopardizes that access. To meet its enduring mission to provide “military forces needed to deter war and ensure our nation’s security,”² the Department of Defense (DoD) manages approximately 26.9 million acres of

real property worldwide; of this, the Army controls 51 percent, or 13.7 million acres.³ The Army uses these lands to conduct the training, testing, and basing needed to build and maintain operational readiness. This is especially critical to train the large-scale Multi-Domain Operations necessary to prepare for the threats posed by near-peer competitors such as China and Russia. In addition to the vital role these lands play in support of operational readiness, they also represent a significant part of our national natural heritage. These lands are home to “500 federally-listed plant and animal species, over 550 species at-risk of needing listing protections, including 60 listed species and 74 species at-risk that occur only on DoD lands.”⁴ A panoply of federal laws requires all federal agencies, including the DoD and the Army, to preserve and protect this natural heritage.

Judge advocates may be called on to advise commanders on matters involving environmental law where non-compliance can result in consequences that threaten readiness.⁵ This article draws the connection between environmental law and readiness, describes basic categories of environmental laws, provides examples of common friction points, outlines reporting requirements, and identifies resources available to assist practitioners in the field.

Basic Categories of Environmental Law and Common Friction Points

The sheer array of environmental laws applicable to the Army can be overwhelming; therefore, it is helpful to group them according to their function—planning, prospective, and retrospective:

[P]lanning statutes such as the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”) . . . require government agencies to consider the environmental consequences of their actions [P]rospective statutes such as the Clean Water Act (“CWA”), the Clean Air Act (“CAA”), the Resource Conservation and Recovery Act (“RCRA”), and the Toxic Substances Control Act (“TSCA”) . . . seek to minimize or eliminate pollution before it is created [R]etrospective statutes such as the Comprehensive En-

vironmental Response, Compensation and Liability Act (“CERCLA”) . . . seek to clean up and restore the environment after the damage has been done.⁶

These functional areas apply to the full range of Army activities and, in the case of retrospective statutes, remain a concern even after the activity ends. Regardless of function, non-compliance and the resulting enforcement can adversely affect readiness through substantial fines payable from O&M funds, criminal or civil penalties, or injunctions that result in denial or restriction of access to training areas.⁷ Legal advisors can help their command avoid these adverse outcomes through the judicious application of common sense and basic knowledge of the common friction points between Army activities and environmental law.

While installations can inadvertently violate environmental laws in many ways, most environmental law violations fall within a sufficiently narrow set of circumstances so as to be foreseeable and, therefore, avoidable. Unfortunately, many practitioners do not know what these potential violations look like. Common friction points involve construction; encroachment; hazardous wastes; site contamination and clean up; operations that “kill, threaten, harm, or harass an endangered species or destroy its habitat” or “destroy wetlands or floodplains”; and “commencing a major project without first doing a NEPA analysis.”⁸ To mitigate these friction points, practitioners should work to identify installation-specific issues before they flare up.

Installation Department of Public Works (DPW) environmental personnel can help in this process by assisting practitioners to quickly learn and remain abreast of the installation’s ever-evolving environmental features and practices. For example, does the installation have any endangered or threatened species, critical habitats, migratory birds nesting sites, or wetlands? Does it contain historical properties or cultural sites? The DPW environmental personnel likely have a list or an overlay that includes this information.

Likewise, DPW can help practitioners examine environmental practices, such as waste disposal. Are motor pool and medical facility personnel who handle, store, and

dispose of waste trained, certified, and doing so as required by law? These examples, while common, are not exhaustive. This is why it is critical to develop and maintain a good relationship with the DPW environmental personnel. Armed with the knowledge gained from this relationship, practitioners should attend planning meetings where they will be able to spot environmental law issues early in the process. Practitioners should not wait for friction to arise; rather, they should actively seek to identify and resolve environmental law issues early. To this end, from coordinating with DPW environmental personnel to attending planning meetings, practitioners must proactively engage key stakeholders so they can ask the hard questions before a good idea becomes an enforcement action.

Enforcement Mechanisms

Enforcement of environmental laws occurs through a combination of executive branch oversight, cooperative federalism, and civil enforcement. Department of Defense Instruction (DoDI) 4715.06 defines enforcement action (ENF) as “[a] formal, written notification by the EPA [Environmental Protection Agency] or other authorized federal, State, tribal, or local environmental regulatory agency of violation of any applicable statutory or regulatory requirement.”⁹ Executive branch oversight is provided by the EPA. When the EPA becomes aware of an infraction, it generally sends a “notice of violation” (NOV). An NOV addresses the facts of the alleged violation addresses the applicable requirements, and commonly requests the agency enter into negotiations to achieve full compliance.¹⁰ Other federal, state, or local environmental regulatory agencies generally provide similar notice. The result of an enforcement action can be a fine, penalty, or, in egregious circumstances, criminal prosecution. Notice of civil enforcement occurs when a party files a civil complaint. Civil enforcement can result in injunctions that disrupt operations and sizeable judgments against the government. While waiver of sovereign immunity and citizen suit notice provisions differ for each environmental law, the receipt of an ENF, NOV, or civil complaint triggers reporting requirements through both command and technical legal channels.

Reporting Requirements

Garrison commanders must report ENFs that involve “(1) [c]riminal enforcement; (2) [a] fine, penalty, fee, or tax; (3) [i]nsta-llation-wide (show stopper or major mission restriction), Army-wide, or DOD-wide im- pact, media attention, or community (on/off post) impact; or (4) third party fault . . .” in the Army Environmental Quality Reporting System within “48 hours (2 business days).”¹¹ Commanders must report all other ENFs within “seven business days.”¹² The 48 hours (2 business days) reporting requirement also includes notification to the Environ- mental Law Division (ELD).¹³ Additionally, Installation Management Command has its own separate reporting requirements for environmental incidents or actions.¹⁴ Timely reporting is vital, as “[d]elays or failure to re- spond in accordance with DoD/Army policy can increase or compound the potential for military training delays or prohibitions, fines and criminal or civil penalties.”¹⁵ Fortunate- ly, there are significant resources available to assist practitioners who encounter this sometimes byzantine area of the law.

Resources

Navigating the complex web of statutes and regulations that make up the body of environmental law can be challenging. Fortunately, the Army’s environmental law team includes a robust bench of skilled environmental law practitioners stand- ing by to help. At the installation level, environmental law specialists possess both subject matter and regional expertise. These experienced attorneys can assist practi- tioners in identifying local environmental law issues and introduce critical stakehold- ers. They are also an excellent resource for learning environmental law as it affects the installation. In addition to installation en- vironmental law attorneys, the attorneys at the ELD are another excellent resource. En- vironmental Law Division attorneys advise the Army on environmental law matters and, in conjunction with the Department of Justice, represent the United States in environmental litigation. Both installation environmental law specialists and ELD attorneys are available to assist as questions or issues arise. The contact information for these resources is in the Judge Advocate General’s Corps personnel directory.¹⁶

Conclusion

Stewardship and compliance with envi- ronmental law are matters of readiness and strategic importance.¹⁷ Non-compliance harms our national natural heritage and can result in legal actions that delay or deny access to training areas, deplete funding, and, in extreme cases, result in criminal prosecution.

Judge advocates must be ready to help commanders avoid these pitfalls. Awareness of common friction points, common sense informed by legal training, and proactive engagement with stakeholders can help avoid non-compliance. In the event of non-compliance, the timely reporting of potential enforcement actions is vital to mitigate the impact of enforcement actions on operations.

When questions and issues arise, instal- lation-level environmental law specialists and ELD attorneys are ready to assist judge advocates in the field and, if necessary, to defend Army interests. “Now [you] know. And knowing is half the battle!”¹⁸ **TAL**

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Notes

1. See U.S. DEP’T OF ARMY, ARMY INSTALLATIONS STRATE- GY (2020) [hereinafter ARMY INSTALLATIONS STRATEGY].
2. U.S. DEP’T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2018).
3. U.S. DEP’T OF DEF., BASE STRUCTURE REPORT—FISCAL YEAR 2018 BASELINE: A SUMMARY OF THE REAL PROPERTY INVENTORY DATA, at DoD-15-16 (2018).
4. U.S. DEP’T OF DEF., DoD NATURAL RESOURCES PRO- GRAM 1 (Feb. 2021).
5. See U.S. DEP’T OF ARMY, REG. 200-1, ENVIRONMENTAL PROTECTION AND ENHANCEMENT para. 2-3 (13 Dec. 2007) [hereinafter AR 200-1].
6. Bridget Dorfman, Comment, *Permission to Pollute: The United States Military, Environmental Damage, and Citizens’ Constitutional Claims*, 6 U. PA. J. CONST. L. 604, 606-07 (2004) (footnotes omitted).
7. See 40 C.F.R. § 19.4 (2021) (civil penalties admin- istered by the EPA). See also *Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) (transfor- mation of the 2d Infantry Brigade Combat Team, 25th Infantry Division, to a Stryker Brigade Combat Team (SBCT) was delayed because the Army violated National Environmental Policy Act. This delayed the

Army’s ability to deploy 2-25 SBCT in support of com- bat operations.). See also *Malama Makua v. Rumsfeld*, 163 F.Supp. 2d 1202 (D. Haw. 2001) (enjoining the Army from conducting live-fire military training at the Makua Military Reservation pending final disposition). See also *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990) (Army employees were prosecuted for violations of Resource Conservation and Recovery Act).

8. ENV’T LAW DIV., U.S. ARMY LEGAL SERVS. AGENCY, ENVIRONMENTAL CRIMINAL AND CIVIL LIABILITY HANDBOOK 4 (2015).
9. U.S. DEP’T OF DEF., INSTR. 4715.06, ENVIRONMENTAL COMPLIANCE IN THE UNITED STATES 27 (4 May 2015) (C2, 31 Aug. 2018).
10. *Overview of the Enforcement Process for Federal Facilities*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/overview-enforcement-process-federal-facilities> (last visited Apr. 3, 2021).
11. AR 200-1, *supra* note 5, para. 16-4a.
12. *Id.* para. 16-4b.
13. *Id.* para. 16-4c. See also U.S. DEP’T OF ARMY, REG. 27- 40, LITIGATION para. 3-1c(4) (19 Sept. 1994).
14. U.S. ARMY INSTALLATION MGMT. COMMAND, REG. 190-45-1, SERIOUS INCIDENT REPORTS (SIRs) AND (COM- MANDER’S CRITICAL INFORMATION REPORTS (CCIRs)) [sic] para. 8.g (2016).
15. ENV’T COMMAND, U.S. ARMY, COMMANDER’S GUIDE TO ENVIRONMENTAL REQUIREMENTS 18 (2017) (provides a reporting requirements flow chart on page 19).
16. See THE JUDGE ADVOC. GEN.’S CORPS, U.S. ARMY, JAGC PERSONNEL DIRECTORY (2021).
17. See ARMY INSTALLATIONS STRATEGY, *supra* note 1.
18. *G.I. Joe PSA: What to Do If You Catch on Fire* (Marvel/Sunbow 1986), <https://www.youtube.com/watch?v=R41W9anu4i8>.



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Practice Notes

I Do, But Only in a Jurisdiction with Legal Separation

A Proposed Remedy for the Flawed Affirmative Defense in Extramarital Sexual Conduct Cases

By Major Oluwaseye (Mary) Awoniyi

The amendments to the 2019 Uniform Code of Military Justice (UCMJ) not only broadened the crime of adultery to extramarital sexual conduct,¹ but also added a second defense to the offense.

In addition to the mistake-of-fact defense,² legal separation is now an affirmative defense to extramarital sexual conduct.³ The legal separation must be “by order of a court of competent jurisdiction.”⁴

However, because legal separation is not recognized in every jurisdiction, not every Service member getting a divorce can claim the defense.

Location is dispositive in a Service member's ability to assert legal separation as an affirmative defense because legal separation is not an option in every jurisdiction. A Service member stationed at Fort Campbell, Kentucky, can assert the defense,⁵ but a Service member stationed at Fort Bliss, Texas, cannot.⁶ Service members generally have little control over where the military sends them.⁷ Therefore, the availability of the defense is largely out of their hands if they are pursuing separation in a state that does not have legal separation proceedings. The end result is that some commanders can take administrative or UCMJ action for the same behavior that other commanders cannot. A simple remedy to this inconsistency is to permit a notarized separation agreement,⁸ in lieu of a court order, as evidence of a Service member's separation from their spouse. This amendment is necessary for an equal application of the offense and availability of defenses across formations.

Unequal Treatment Under the Law

Legal separation proceedings are not available in all states. Presently, the following ten states do not have legal separations: Florida, Georgia, Iowa, Maryland, Michigan, Mississippi, Pennsylvania, South Carolina, Texas, and Virginia.⁹ These ten states house 109 bases from all military branches.¹⁰ The list includes the third-most populated military base in the world—Fort Hood, Texas—with a population of approximately 227,000 (including 35,000 active duty Service members) and the fifth-most populated base in the world—Fort Benning, Georgia—with a population of approximately 105,887 (including 22,778 active duty Service members).¹¹ Service members can also be stationed in multiple overseas locations where legal separation proceedings are unavailable, and thus they too may be prevented from asserting the defense.

For the affirmative defense of legal separation to apply, the marital status of both parties engaging in the conduct is significant.¹² Therefore, even if a Service member is legally separated, the command may still take action against them for extra-

marital sexual conduct if the other person is married and not legally separated.¹³ The following scenario demonstrates the arbitrary consequence of requiring a court-ordered legal separation: Service members *A* and *B* are in a consensual sexual relationship. They are both married to other people, but they are estranged from their spouses. Each is pursuing a divorce in the state where the spouse resides. Service member *A*'s spouse lives in Kentucky. Service member *A* filed for, and received, a legal separation through a Kentucky court. Service member *B*'s spouse lives in Texas. Despite Service member *B*'s efforts, she cannot get a legal separation from her spouse because Texas does not have legal separation proceedings.

As a result, neither Service member *A* nor Service member *B* may claim legal separation as a defense to extramarital sexual conduct. Although Service member *A* is in-fact legally separated, as evidenced by a court order, he cannot assert the defense because he is in a relationship with a Service member whose spouse is unable to get a legal separation because of the spouse's state of residency. Service member *A* has no control over where Service member *B*'s spouse lives. Nevertheless, the command has the authority to punish Service member *A* for something that would not be a crime if Service member *B*'s spouse lived in one of the forty states that have legal separation proceedings.

A Proposed Remedy to Potentially Dire Consequences

Due to the unequal application of the defense, Congress should amend the statute to also permit a notarized separation agreement to suffice as an alternative to a legal separation in cases where a court order is not possible. A separation agreement demonstrates that the Service member and spouse have taken a substantial step past a mere intent to separate. Current regulations demonstrate that mere physical separation is sufficient to trigger a Service member's financial support obligations to their spouse.¹⁴ Notably, a separation agreement is not even a prerequisite for spousal or child support.¹⁵ However, separation agreements require the signature of both parties, usually involve attorneys, and address significant terms such as child and spousal support.

Separation agreements may be drafted and notarized at a local client legal services (CLS) office. Even if a Service member is not co-located with a CLS office, a geographically-separated attorney may still assist in advising and drafting the agreement.¹⁶ Consequently, it is reasonable that something less than a court order can sufficiently demonstrate that a Service member is separated from their spouse.

This amendment would rectify a disparity that now exists in the law. The potential ramifications of this disparity are vast. The maximum punishment for extramarital conduct is a dishonorable discharge, one-year confinement, and total forfeiture of pay.¹⁷ Generally, Service members are not prosecuted solely for extramarital sexual conduct.¹⁸ Rather, it is an offense sometimes added to the charge sheet to paint a broader picture of the accused's misconduct, specifically in sexual assault cases.¹⁹ This has proven to be detrimental to an accused in a "close-call" sexual assault case where a panel acquits the accused of the sexual assault, but finds them guilty of the more easily provable extramarital conduct instead. The result is the panel's attempt to somehow "split the baby" on these cases—cases where the members acquit the accused of the sexual offense, but impose a harsh sentence because there were enough bad facts to lead the members to believe *something* happened in that room, even if they are not sure what.²⁰

Even outside of the court-martial realm, nonjudicial and administrative punishments can still have dire consequences for a Service member. For example, punishment imposed under Article 15, UCMJ,²¹ and permanently filed memorandums of reprimand can trigger mandatory separation initiation²² for an enlisted member or a Human Resources Command-mandated separation initiation for an officer.²³ The potential consequences are far too severe for Congress to permit the preservation of an unreasonable, location-based defense. A court order should not be necessary for an affirmative defense to the crime of extramarital sexual conduct.

Conclusion

A notarized separation agreement should be sufficient to defend against the charge of extramarital sexual conduct. Congress in-

tended to provide a defense for the offense;²⁴ however, the manner in which the defense is currently drafted does not equally apply across the formation. The need to ensure uniform application of the law and equal due process outweighs the benefit of criminalizing the behavior. It is only through an amendment to this article that both the punishment of, and defense against, extramarital sexual conduct can equally affect Service members worldwide. **TAL**

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Notes

1. The elements of adultery under the 2016 Manual for Courts-Martial (MCM) were

(1) That the accused wrongfully had sexual intercourse with a certain person; (2) that, at the time, the accused or the other person was married to someone else; and (3) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 62 (2016) [hereinafter 2016 MCM]. The elements of extramarital conduct under the 2019 version of the MCM are

(1) That the accused wrongfully engaged in extramarital conduct [involving genital, oral, or anal sexual intercourse] with a certain person; 2) That, at the time, the accused knew that the accused or the other person was married to someone else; and 3) that, under the circumstances, the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 99b (2019) [hereinafter 2019 MCM].

2. According to the 2019 *Manual for Courts-Martial*,

A defense of mistake of fact exists if the accused had an honest and reasonable belief either that the accused and the co-actor were both unmarried or legally separated, or that they were lawfully married to each other. If this defense is raised by the evidence, then the burden of proof is upon the United States to establish that the accused's belief was unreasonable or not honest.

2019 MCM, *supra* note 1, pt. IV, ¶ 99c(5).

3. *Id.* pt. IV, ¶ 99c(4).

4. *Id.*

5. Pursuant to Kentucky law, a Kentucky court may enter a decree of separation. KY. REV. STAT. ANN. § 403.140(2) (LexisNexis 1972).

6. See *Texas Does Not Have Legal Separation. What Options Are There?*, TEXASLAWHELP.ORG, <http://texaslawhelp.org/article/texas-does-not-have-legal-separation-what-options-are-there> (Dec. 29, 2021).

7. While Service members have control over their state of residency and where they get married, the typical Service member does not base their decision on where to get married on whether the state has legal separation proceedings available.

8. Army Regulation 608-99 defines a support agreement as

any written document (such as a separation agreement or property settlement agreement, a letter, email, or a series of letters or emails) evidencing an intent to create a binding financial support agreement. Ordinarily, informal forms of written communication (for example, text messages and social media posts) do not demonstrate an intent to create a binding agreement.

U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PARENTAGE para. 2-3b (13 Nov. 2020) [hereinafter AR 608-99].

9. *Legal Separation: U.S. Divorce Center Law*, HG, <https://www.hg.org/divorce-legal-separation.html#1> (last visited Dec. 13, 2021).

10. MIL. BASES, <http://militarybases.com> (last visited Dec. 13, 2021).

11. *The World's Biggest Military Bases*, ARMY TECH., <https://www.army-technology.com/features/feature-largest-military-bases-world-united-states/> (Dec. 10, 2019, 4:13 PM).

12. 2019 MCM, *supra* note 1, art. 134 analysis, at A17-17.

13. *Id.* While the Service member is legally separated, he may still be punished for extramarital sexual conduct because of his co-actor's marital status.

14. *E.g.*, AR 608-99, *supra* note 8, para. 2-1; U.S. DEP'T OF AIR FORCE, INSTR. 36-2906, PERSONAL FINANCIAL RESPONSIBILITY para. 3.2.5 (13 May 2021).

15. AR 608-99, *supra* note 8, para. 2-3.

16. This assertion is based on the author's professional experiences as the command judge advocate at Camp Darby, Italy, from 16 June 2015 to 12 July 2017, where she provided legal services to Service members located in Vicenza, Italy, and referred Service members to Germany for telephonic legal services. This has proved to be even more vital in the age of COVID-19.

17. 2019 MCM, *supra* note 1, app. 12, at A12-8.

18. This assertion is based on the author's recent professional experiences, including her tour at the Defense Appellate Division from 13 July 2017 to 4 June 2019, and as the chief, military justice, for the 25th Infantry Division from 29 July 2021 to present.

19. *Id.*

20. *Id.*

21. 2019 MCM, *supra* note 1, pt. V, ¶ 5.b.

22. These actions can be based on a Soldier reaching a retention control point because of a reduction in rank or by the Qualitative Management Program being triggered by the bad paper in the Soldier's Army Military Human Resource Record. See U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. 3-15d (16 June 2021); U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 16-11 (28 June 2021).

23. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFER AND DISCHARGES para. 4-2c (8 Feb. 2020).

24. 2019 MCM, *supra* note 1, art. 134 analysis, at A17-17.



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Practice Notes

What All Judge Advocates Should Understand About the Presidential Pardon Power

By Major Allyson J. Montgomery

The presidential pardon power has recently received both praise¹ and scrutiny² in the news for its use in pardoning individuals accused and convicted of war crimes. One need only conduct a brief internet search to find dozens of articles about former Service members pardoned for their role in committing war crimes in Iraq and Afghanistan. An active duty, publicly-apolitical judge advocate (JA) may ponder the need to understand the President's pardon power or the process by which Service members may request a presidential pardon. However, in light of the recent pardons issued to Service members, all JAs should understand how a pardon

or request for pardon may impact their practice, regardless of their current duty assignment. Before discussing the need-to-know aspects of the pardon power, consider a few scenarios.

First, imagine you are a brigade judge advocate whose unit is court-martialing a Soldier accused of killing an unarmed civilian in a combat zone. At trial, the court acquits the Soldier of the war crime, but finds him guilty of a lesser offense and sentences him to a reduction in rank. After the trial concludes, you receive a call from the convicted Soldier's commander, who happens to be your boss. The commander, a senior member of the special forces

community, wants to begin administrative proceedings to remove the Soldier from the elite community, and is considering initiating administrative separation proceedings. You advise him on both processes and believe the matter to be resolved. Soon, you hear a news story about possible presidential intervention to grant the convicted Soldier a pardon. You anticipate a subsequent call from your boss with questions about what happens next. If this scenario sounds familiar, it is similar to the one JAs faced during and after the court-martial of Chief Petty Officer Edward Gallagher.³

Next, in an alternate universe, imagine you are serving as a branch chief at the Defense Appellate Division. In the process of assisting an appellate counsel on your team, you learn about their client who is working with a civilian co-counsel to request a post-conviction pardon. The client asked the military appellate counsel questions about how a pardon would affect his remaining sentence of confinement and a dishonorable discharge. Trusting your guidance, the appellate counsel has come to you with questions about how to advise their client. If this scenario sounds familiar, it could have come from either the former First Lieutenant Michael Behenna⁴ or former First Lieutenant Clint Lorange⁵ cases.

Similarly, chiefs of justice are not immune from questions related to pardons. The case of Major Matthew Golsteyn is an excellent example of how the issue of pardons may arise before trial, as Major Golsteyn was pending court-martial at the time then-President Donald Trump granted his pardon.⁶ The scenarios above show that the issue of presidential pardons could arise in myriad situations, regardless of duty position.

The Basis for the Presidential Pardon Power

Turning now to the origin of the modern pardon power, it is important to note that the pardon power found in the United States' Constitution is derived from the English Prerogative (also known as the clemency power).⁷ The English Prerogative was a tool of clemency used by the Crown to reduce adjudged punishment.⁸ Article 2, Section 2 of the Constitution vests the President with the "[p]ower to grant Reprieves

and Pardons for Offences against the United States, except in Cases of Impeachment."⁹ Because offenses against the United States include offenses under the Uniform Code of Military Justice, the President may pardon Service members for any violation of the code, including war crimes.¹⁰

The power of the President to pardon individuals of federal crimes is expansive: "The pardon power may be exercised at any time after the crime's commission, either before legal proceedings, during their pendency, or after conviction and judgment."¹¹ In using the pardon power, the President can fully and unconditionally pardon the individual, which ends punishment (such as confinement) and removes some of the negative consequences of a criminal conviction (such as the prohibition on voting).¹² The President may also exercise lesser clemency by postponing or reducing an individual's punishment.¹³ Critics of the broad grant of authority have existed since the time of the Constitutional Convention.¹⁴ More recently, critics have argued that an exception to the pardon power should be enacted to prevent the President from pardoning war criminals.¹⁵

How the Presidential Pardon Power Intersects with Military Law

Whether serving as a command legal advisor, military justice manager, or defense counsel, there are several takeaways related to pardons that every JA should keep in their toolkit. First, JAs should be aware of the process by which Service members may request a pardon or sentence commutation. Second, military attorneys must recognize the effect of an approved pardon or commutation and any collateral consequences that may impact the former Service member. Finally, practitioners must understand whether and how pardoned misconduct can be used in criminal or administrative actions.

The process for a Service member convicted at a court-martial to request a presidential pardon or commutation of sentence differs from the process for individuals convicted by a federal court.¹⁶ Instead of submitting requests to the Department of Justice, Service members submit their requests to the military department responsible for exercising court-martial jurisdic-

tion over them.¹⁷ For example, a Soldier would apply for a pardon to the Secretary of the Army through the Office of The Judge Advocate General Criminal Law Division.

Service members interested in submitting a request for pardon, or JAs advising a client on the matter, should review the Department of Justice Office of the Pardon Attorney website.¹⁸ This site contains useful information about which materials Service members should include in the application for pardon or commutation, as well as the current points of contact for each military department. Though there is a difference in the procedure for submitting a request for a pardon, all individuals seeking presidential clemency must admit they are guilty of the criminal offense.¹⁹ Additionally, Service members must follow many of the same application requirements as non-Service members, such as completing the pardon application and submitting materials relevant to the request.²⁰

If a Service member successfully receives a full pardon or a sentence commutation, the individual's discharge will not be affected.²¹ Suppose a Service member is sentenced to a bad conduct or dishonorable discharge at trial or later receives an administrative discharge after the conviction. In that case, the pardon will not reinstate the Service member to active duty service or grant the individual an honorable discharge. The discharge will remain in effect unless the Service member petitions the relevant military department's administrative review agency and the agency grants the request for discharge upgrade.²² For example, pardoned Soldiers would apply for a discharge upgrade to the Army Review Board Agency.²³ Depending on the pardon or commutation's timing, a pardoned Service member may be ineligible to seek legal help in applying for a discharge upgrade from either the Trial Defense Service or the Legal Assistance Office.

Military justice practitioners and command legal advisors should note the provisions in the Manual for Courts-Martial relevant to pardons. Rule for Courts-Martial (RCM) 907(b)(2)(D) bars the Government from prosecuting Service members for pardoned misconduct.²⁴ Additionally, RCM 1001(b)(3) prohibits the Government from offering pardoned misconduct during

the presentencing proceeding.²⁵ Military Rule of Evidence (MRE) 609(c) prohibits the Government from using a pardoned summary court-martial conviction as evidence to support a witness's character for untruthfulness.²⁶

The use of pardoned misconduct for administrative action is not as clear. Whether or not a command may take administrative action against a pardoned Service member—including initiation of separation for the pardoned misconduct—requires the legal advisor to review their service-specific regulations relevant to administrative boards and separation procedures. For Army JAs, the definition of admissible evidence found in Army Regulation 15-6 does not prohibit the use of pardoned misconduct for administrative actions.²⁷ However, many factors bear on the decision whether to recommend a commander take administrative action against a pardoned Service member, including the type of action, period of enlistment, date of misconduct, and timing of pardon. Judge advocates should consider contacting their service-specific human resources command if confronting this situation.

Conclusion

Judge advocates advising their clients about pardons will not only face questions about the power, process, and effect of such presidential action. They will also face the prospect of significant media attention, requests for information from higher echelons, and questions from the Service member's family. In high-profile cases, film producers or news outlets may even approach JAs for comment. For instance, in the lead-up to the pardon granted to former First Lieutenant Lorange, the Starz documentary, *Leavenworth*, featured his story.²⁸ Additionally, information about former First Lieutenant Behenna, Chief Petty Officer Gallagher, and Major Golsteyn appeared on Fox News broadcasts.²⁹ Media attention may not be limited to national outlets, as seen in articles by international human rights advocates about these recent pardons.³⁰

Most JAs will never encounter a presidential pardon in their careers. Still, if the issue arises, JAs should remember they are not alone when advising clients about the

pardon power. Subject matter experts exist in each of the respective military departments, and JAs should seek their counsel. Because the possibility of a pardon carries with it the potential of substantial media attention, JAs should consult their public affairs office for guidance on best practices. If any question exists about whether a client is eligible for assistance in requesting a pardon, the attorney concerned should speak with the Trial Defense Service or Legal Assistance Policy Division for guidance. **TAL**

MAJ Montgomery is the special victim prosecutor at 10th Mountain Division and Fort Drum at Fort Drum, New York.

Notes

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3. Andrew Dyer, *Navy SEAL Eddie Gallagher, Neither Pardoned Nor Cleared by Trump, Says Navy Is Retaliating Against Him,* SAN DIEGO UNION-TRIB. (Nov. 20, 2019, 7:46 PM), <https://www.sandiegouniontribune.com/news/military/story/2019-11-20/navy-seal-eddie-gallagher-neither-pardoned-nor-cleared-by-trump-says-navy-retaliating-against-him>; Keith Zubrow, *President Trump and the Case of Navy SEAL Eddie Gallagher,* CBS NEWS (Mar. 1, 2020, 7:23 PM), www.cbsnews.com/news/president-trump-navy-seal-eddie-gallagher-60-minutes-2020-03-01/.

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5. Michael A. Robinson, *Trump's Pardon of Two Former Army Officers Has Sparked New Controversy. Here's Why.,* (Nov. 17, 2019), <https://www.washingtonpost.com/politics/2019/11/17/trumps-pardon-two-former-army-officers-has-sparked-new-controversy-heres-why/>.

6. *Id.*

7. Laura Palacios, *The Presidential Pardon Power: Interpreting Its Scope and Enacting an Effective Solution to Limit Its Potential for Abuse,* 40 T. JEFFERSON L. REV. 209, 214–17 (2018).

8. *Id.* at 215.

9. U.S. CONST. art. II, § 2, cl. 1.

10. Michael Davidson, *The President's Pardon Power,* MIL. REV., May–June 2020, at 127, 129.

11. Palacios, *supra* note 7, at 217.

12. Davidson, *supra* note 10, at 129.

13. Palacios, *supra* note 7, at 217.

14. *Id.* at 218.

15. Dan Maurer, *Should There Be a War Crime Pardon Exception?* LAWFARE (Dec. 3, 2019, 9:31 AM), <https://www.lawfareblog.com/should-there-be-war-crime-pardon-exception>.

16. *Frequently Asked Questions*, U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/frequently-asked-questions> (Dec. 7, 2021) [hereinafter DoJ FAQs].

17. *Id.*

18. *Id.*

19. Palacios, *supra* note 7, at 217.

20. DoJ FAQs, *supra* note 16.

21. *Id.*

22. *Id.*

23. *Id.*

24. Davidson, *supra* note 10, at 129; MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 907(b)(2) (2019) [hereinafter MCM].

25. Davidson, *supra* note 10, at 129; MCM, *supra* note 24, R.C.M. 1001(b)(3)(A).

26. Davidson, *supra* note 10, at 129; MCM, *supra* note 24, M.R.E. 609(c).

27. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 3-7 (1 Apr. 2016).

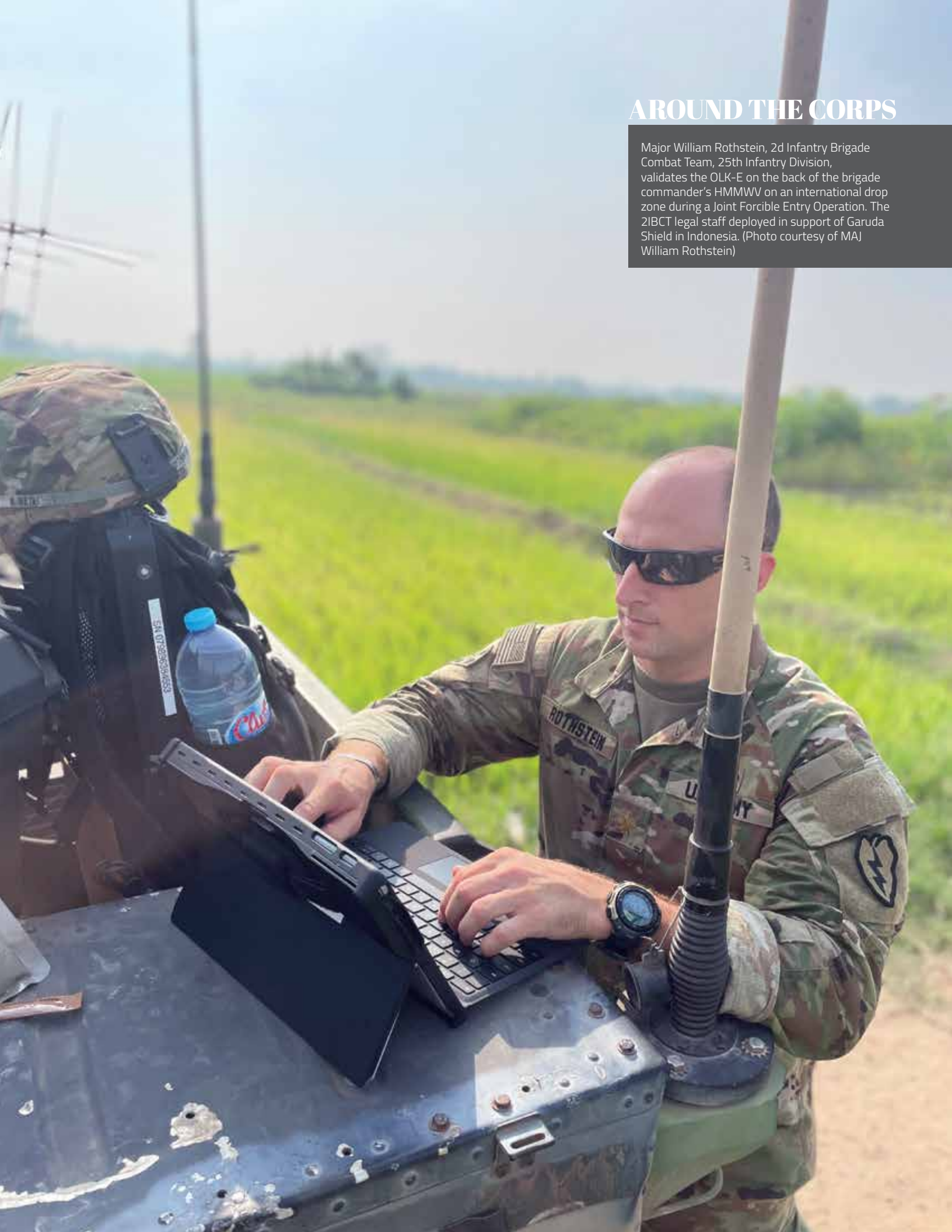
28. *Leavenworth* (Check Point Productions & Dallas Drone Pros 2019).

29. Matt Ford, *The Fox & Friends Pardon for War Crimes* (May 8, 2019), <https://newrepublic.com/article/153849/fox-and-friends-pardon-war-crimes>.

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AROUND THE CORPS

Major William Rothstein, 2d Infantry Brigade Combat Team, 25th Infantry Division, validates the OLK-E on the back of the brigade commander's HMMWV on an international drop zone during a Joint Forcible Entry Operation. The 2IBCT legal staff deployed in support of Garuda Shield in Indonesia. (Photo courtesy of MAJ William Rothstein)



Navy judge advocate Lieutenant Commander Eileen Joy takes a moment during her deployment to Camp Sabalu-Harrison, Afghanistan, in 2013 to take a photo of the flags that symbolized the United States partnership with the Government of the Islamic Republic of Afghanistan. (Photo courtesy of LCDR Eileen Joy)



No. 1

Anecdotes from Afghanistan

JALS Personnel Reflect on 20 Years in Theater

Editor's Note: The Army reached a watershed moment in withdrawing troops from Afghanistan in August 2021. This issue of *The Army Lawyer* features short anecdotes and images from Judge Advocate Legal Services personnel who deployed to Afghanistan in support of operations from 2001 to 2021. *The Army Lawyer* seeks to honor those who have served in theater and capture some of the lessons our Corps learned through their experiences. Their anecdotes appear in chronological order.

Master Sergeant (U.S. Army, Retired) Jerome Klein

Location: Karshi-Khanabad Air Base, Uzbekistan, October 2001–April 2002

Before our deployment at the start of Operation ENDURING FREEDOM, there was some discussion in 5th Special Forces Group (Airborne) about how many legal team members would be taken with the Group headquarters. At first it was only supposed to be the group judge advocate (JA). After some further discussion where it was pointed out that, at some point, the JA must sleep, it was decided it might be prudent to also deploy the group senior paralegal. We quickly provided input for augmentation of the legal team on the joint manning document (JMD), asking for an Air Force JA and paralegal to round out what we were sure would be a joint operation of special forces teams on the ground utilizing air power.

After establishing Joint Special Operations Task Force North–Task Force DAGGER, the legal team was working what amounted to 20-hour days. The noncommissioned officer slept on a tough box in the joint operations center so the JA could get some sleep away from the activity. One particular morning in late October 2001, we had just been informed by the J-1 that our requested

augmentation was cut from the JMD. We asked for it to be put back on the JMD. We knew it was vital to get more legal team members, especially in light of what happened that morning: The group judge advocate, then-Captain Dean Whitford, was emailing his wife to send items, when he asked the paralegal noncommissioned officer, then-SSG J.D. Klein, a question that demonstrated the somewhat tired nature of the legal team.

“Hey J.D., I am emailing Brenda and asking for some stuff. How do you spell cappuccino? Is it c-a-p-p-u-c-c-i-n-o, or c-a-p-u-c-c-i-n-o?”

To which the following reply showed the tired, but upbeat nature of the legal team:

“Ready, sir? C-O-F-F-E-E”

After a short pause and a look of confusion from CPT Whitford, he said,

“That’s not how you spell cappuccino.”

“Coffee, sir. It’s all coffee.” **TAL**

MSG (Retired) Klein is a supervisory paralegal for the U.S. Army Claims Service Center for Personnel Claims Support at Fort Knox Kentucky.

Colonel Marie Anderson & Colonel Kasia Stich

*Location: Bagram and Kandahar Airfields,
Afghanistan, July 2003–June 2004*

Deployed Justice Leadership Matters

In 2003, then-Lieutenant Colonel (LTC) Charles “Chuck” Pede was the staff judge advocate (SJA) for 10th Mountain Division (Light Infantry), and both he and the division were on their second deployment to Afghanistan. Two years into the war, improvements at Bagram and Kandahar Airfields gave the feeling of almost steady state operations. Deployments were extended well past six months, chow was served three times a day and the post exchanges were generally stocked with the basics. Soldiers certainly appeared more familiar with combat operations than during the initial invasion period. This feeling of settling into some sort of a routine likely contributed to Soldiers’ individual opportunities to engage in misconduct and for commanders to look to options on how to ensure good order and discipline.

Enter LTC Pede. In hindsight, perhaps it is not surprising that LTC Pede had the distinct and expressed vision to provide commanders with the full range of options available under the Uniform Code of Military Justice (UCMJ), including special and general courts-martial while down-range. He was a firm believer in executing justice forward and he found a willing ally in then-Brigadier General Lloyd Austin, Commander, Combined Joint Task Force-180. Lieutenant Colonel Pede fully articulated his intent to his legal team: we would try cases forward whenever possible. For tactical, operational, and strategic reasons, this was the right answer.

It wasn’t long before a 1st Brigade, 10th Mountain Division Soldier was accused of stealing an Afghan family’s life savings while conducting a cordon and search of their home. This crime was not only egregious, but it had a true impact on the unit’s mission. It was clear that justice would be best served in country, where the victims, witnesses, and accused all resided. This first court-martial demanded a team effort.

The SJA rearticulated the vision: use the UCMJ as intended and try crimes forward to best support commanders in the field.

We are the only legal regime that offers the degree of portability and due process for a reason, and we should exercise our mission to ensure justice. In true mission command style, he turned the execution over to the seven judge advocates, one legal administrator, and six paralegals deployed with the Division at Bagram Airfield and 1st Brigade Legal Team at Kandahar Airfield.

The trial team, most of whom were on their first deployment, had some doubts about our abilities to coordinate investigative efforts with the Criminal Investigation Division, generate necessary referral documents, build a courtroom, deploy a military judge to Kandahar, try the court-martial, and complete all post-trial matters. Lieutenant Colonel Pede never doubted us. On the contrary, as only a leader can, he encouraged us, reminded us of the “why,” and trusted our abilities. Creative paralegals found a way to build a courtroom from the abandoned Kandahar International Airport. It was complete with folding counsel tables and bench and a properly-placed American flag. The team cleaned the dusty “courtroom” until it sparkled, checked weapons at the door, and guarded the building overnight from wild dogs who had found shelter there. There was a true understanding of the tactical, operational, and strategic importance of the mission from all involved.

While a first of its kind in Afghanistan, deployed justice was a well-worn path blazed by previous judge advocates in other conflicts, and we all rose to the occasion. However, true leadership—the vision, trust in subordinates, and certainty of how our system best supports commanders in the field—ensured the reality of deployed justice.

Since the Taliban’s return to Kabul on 15 August 2021, many are reflecting on experiences from their respective service in Afghanistan. For the authors, we believe the images coming from Afghanistan as U.S. forces departed reinforces the tenets of this article. First, the UCMJ reflects deep national commitment to due process, military accountability, and the rule of law. Military justice is an invaluable tool commanders use to ensure good order and discipline as we send Soldiers all over the world to protect the lives and interests of Americans.

Second, we must be able to practice our craft in even the most austere environments.



U.S. Army Courtroom, Kandahar Airfield, Kandahar, Afghanistan, in 2003/2004. Paralegals from 1/10 MTN DIV, located, cleaned, and created the “courtroom” in the passenger terminal of the Kandahar International Airport. They defended the courtroom from feral dogs the night before trial and tried to improve acoustics by fixing blown-out windows with duct tape and clear trash bags. The trial counsel of record are thankful to the dedication. Pictured left to right: SGT Nick Taylor, paralegal NCOIC, 1/10 MTN DIV (LI); CPT Kasia (Krul) Stich, trial counsel, 1/10 MTN DIV (LI); CPT Marie Anderson, chief, operational law, 10th MTN DIV (LI); CPT Joseph Orenstein, defense counsel. Seated: LTC Stephen Henley, military judge. Not pictured: SPC Diego Echeverri, paralegal. (Photo courtesy of COL Anderson & COL Stich)

Even within a degraded war-time environment, swift justice with due process is a must to maintain good order and discipline of our force. Judge advocates must train, prepare, and deploy to austere locations to enable commanders’ use of this tool everywhere while demonstrating the United States’ commitment to the rule of law to host nation personnel, partners, and allies.

Finally, leadership matters. As the Army moves forward, now with reflections on lessons learned from those opportunities on which we capitalized and those challenges we failed to overcome in the past two decades, Soldiers will look to leaders for guidance and answers. Those leaders must lead, especially during the coming times of immense transition. Their leadership will be the force ensuring our Army continues to be a premier fighting force capable of defending the homeland. **TAL**

COL Anderson is the Legal Counsel for U.S. Africa Command at Kelley Barracks, Stuttgart, Germany.

COL Stich is the Staff Judge Advocate for U.S. Army Special Operations Command at Fort Bragg, North Carolina.

Colonel Christopher E. Martin

Location: Kabul, Afghanistan, 2004–2006

Afghan Military Justice Real Impact in Real Time

From early-2004 to late-2006, the Defense Institute of International Legal Studies (DIILS) helped lead fifteen legal training missions in Afghanistan and twice organized planning visits to the United States for senior Afghan leaders in an effort to help the Afghan National Army (ANA) rebuild its tattered Soviet-era military justice system. The Office of Military Cooperation–Afghanistan, DIILS, judge advocates from every U.S. military branch, and British and Dutch coalition partners supported ANA and Ministry of Defense leaders in an Afghan-led revision of the military justice criminal code, procedural rules, and court system. Some of these efforts are described in *Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform* by Major Sean M. Watts and Captain Christopher E. Martin, *The Army Lawyer*, May 2006, at 1. Eventually, new court facilities were established in each of the five then-existing ANA Corps. In June 2006, less than two-and-one-half years after reform efforts began, the ANA successfully and independently conducted its first court-martial in the post-Taliban era. The accused, an ANA officer, admitted to the charged offense of an eight-month absence without leave, but offered extenuation evidence that he had left to care for his sick mother, who later died. The accused was sentenced to one year of confinement, suspended for three years.

Although recent Afghan developments may be hard to accept, it is worth remem-



An officer in the Afghan National Army 201st Corps, flanked by his defense counsel, stands trial in the first post-Taliban court-martial, June 2006 (Photo courtesy of COL Martin)

bering that nothing can take away from the fact that our partnership efforts had a real impact on real people in real time. **TAL**

COL Martin is a military judge in the U.S. Army Trial Judiciary, 4th Circuit.

Sergeant First Class Timothy J. Beckwith

Location: Bagram Airfield, Tactical Base Gamberi, and Resolute Headquarters–Kabul, Afghanistan, 2005–2006 and 2015–2016

From Asadabad (ABAD) to Jalalabad (JBAD), Masir Sharif to Herat and Bagram; from “private first class-in-charge” of Trial Defense Service to noncommissioned officer-in-charge of Train, Advise, Assist, Command–East (TAAC–E); from Article 6 visits with The Judge Advocate General Major General Thomas Romig and Regimental Command Sergeant Major Michael Glaze to Major General Thomas Ayres and Regimental Command Sergeant Major Joseph “Pat” Lister; from TV-show *Friends* and *Jay-Z’s Diamonds* to *Big Bang Theory* and *Flight of the Conchords’s Business Time*. From my first tour from 2005 to 2006 to the ten-year anniversary tour in 2015 to 2016, one statement I made to Command Sergeant Major Lister sums up my whole Afghanistan experience: it is amazing to me how much has changed, and yet how little has changed.

To this day, some of my closest friends were made in Afghanistan. They shared some of my deepest losses. During my time in Afghanistan I was the most excited, overwhelmed, and challenged that I have been in my entire life. I learned my strengths and limitations and the value of honor, trust, and teamwork that those who haven’t deployed will never know. I don’t get scared, but I was “startled” quite a few times, and I am a better person for each of those experiences. **TAL**

SFC Beckwith is the senior paralegal noncommissioned officer and observer, controller/trainer for the 5th Armored Brigade at Fort Bliss, Texas.



Members of the Train Advise Assist–East legal team pose for a group photo at Tactical Base Gamberi, Afghanistan. Pictured left to right: CPT John McGuire, MAJ Sandra Brannom, then-MAJ Brian Lohnes, then-SSG Tim Beckwith. (Photo courtesy of SFC Beckwith)



Members of 44th Signal Battalion, Mannheim, Germany, escort General Limbu from Nepal who was observing the U.S. humanitarian mission activities in local villages and schools in Parwan Province. Pictured left to right: unknown, SPC Elizabeth Navarro, SPC Tim Beckwith, General Limbu from Nepal, SPC Coty McCartney, SPC Adam Richardson, CPL Sergey Batyrshin. (Photo courtesy of SFC Beckwith)

Colonel (Retired, U.S. Army) Thomas Umberg

Location: Camp Eggers, Afghanistan, August 2009–June 2010

Eleven years ago, I was the first Chief of Anti-Corruption at NATO Training Mission–Afghanistan/Combined Security Transition Command–Afghanistan with responsibility for addressing corruption in the Afghan Army and Afghan National Police. One afternoon, I met with an Afghan Army general to discuss the massive loss of coalition fuel and how we might collectively stop what appeared to be theft by our Afghan partners. This particular general fought with the Ahmad Massoud-led Northern Alliance before we arrived in

2001. As a patriarch of a large family he explained the following to me:

I am responsible for a family which includes my wife, children, parents, siblings, nieces, nephews, and others—maybe 100 in all. They are my first responsibility. We have seen other powers come and go and leave chaos. When the Americans leave, as I know they will, I will have to protect my family. We may have to flee to survive. So “some” who can—take what they can—for the day when the Americans leave. When that day happens—you will understand. **TAL**

COL (Retired) Umberg was the Chief of Anti-Corruption for NATO Training Mission–Afghanistan/Combined Security Transition Command–Afghanistan at Camp Eggers, Afghanistan. He retired after 33 years of active and reserve duty as a judge advocate.

Colonel Marie Anderson & Lieutenant Colonel Joey Comley
Location: Kandahar Airfield, Kandahar, Afghanistan, August 2010–June 2011

Losing an Argument Teaches Key Lessons in Combined Operations—Shukran

In 2010, then-Captain (CPT) Joey Comley was the chief of operational law for 10th Mountain Division (Light Infantry) and Combined Joint Task Force Regional Command South deployed to Kandahar, Afghanistan, as part of the Resolute Support (RS) mission. Under our North Atlantic Treaty Organization (NATO) mission for RS, the Division reported to the International Security Assistance Force (ISAF) Intermediate Joint Command (IJC). As such, CPT Comley and I frequently coordinated with NATO Legal Advisors (LEGADs) within the ISAF IJC office of the staff judge advocate (OSJA). The bulk of this coordination was related to target asset allocation and target validation issues. These regular exchanges amongst LEGADs, calling for international legal application and debate of Commander ISAF (COMISAF) policy parameters, were some of the

most operationally-significant and professionally-rewarding experiences of our deployment. They substantially expanded the aperture of considerations used in the application of force by even the most battle-hardened of commanders including then-Brigadier General Jeffrey L. Bannister, Deputy Commander for Operations, who often told others that, “The answer was ‘no’ because the lawyer said so, but that’s okay ‘cause he’s forcing us to separate the fly shit from the pepper.”

In advance of one particular target validation discussion, Joey came to me and asked for my assistance. The target was important to BG Bannister, and Joey’s initial discussions with ISAF IJC LEGADs suggested it would be difficult to gain their concurrence for this target. I reviewed the target packet and discussed the legal issues with Joey. Without getting into classified discussion, it is safe to say that this disagreement amongst practitioners centered largely on a weighing of two factors: 1) temporal considerations informing the “for such time as” element of direct part in hostilities from Article 51(3) of Additional Protocol 1 vice 2) the combat function and consequence of the hostile activities that the same individual was known to have directly participated in. Feeling confident, I placed a call to Joey’s counterpart who was a lawyer from the Australian Defence Forces (ADF). After a lively discussion about the finer points of what it means to take a direct part in hostilities, I confirmed that my rank was not a substitute for Joey’s knowledge of law, policy, and regulation. We had to tell BG Bannister that we either needed additional intelligence or a different target. Although I was embarrassed by my lack of effective advocacy, this engagement provided an invaluable lesson about what it means to serve in a Combined Joint Task Force.

Joey and I were trained to view the law of war through the lens of a U.S. legal education and U.S. policy interpretation of what it means to take a direct part in hostilities. Although the ISAF IJC commander wore a uniform emblazoned with a U.S. flag and a U.S. Army patch, he served in a NATO billet. He received legal advice from lawyers of various troop-contributing nations. Their legal advice was informed by their training and understanding of interna-

tional law. Interpretive differences between the United States and other nations may be slight, but in cases like this, they could result in different outcomes for target validation. To be more effective advocates for our command, Joey and I would have to study different interpretations of international law.

The United States was not alone in deploying forces to Afghanistan. For twenty years, the U.S. military was joined by service members from various troop-contributing nations, many of whom also deployed LEGADs. In some cases, these LEGADs advised their own nation’s forces. In other cases, they were part of the joint manning documents advising NATO commanders from the United States and other nations. Many of us who served in Afghanistan were fortunate to work side by side with these extremely talented foreign LEGADs. Joey and I, and the other members of the 10th Mountain Division (Light Infantry) OSJA, want to express our most-sincere and deepest gratitude to those foreign LEGADs. You made us better. With professionalism, humor, and extreme competency, you taught us lessons on law, operations, and what it means to be a command legal advisor. We are grateful in general to all those LEGADs and specifically to the Australian Defence Force attorney who schooled Joey and me on the limits of taking a direct part in hostilities.

In the words of our Afghan partners, “Shukran”—Thanks! **TAL**

Authors’ notes: Major General Jeffrey Bannister, who later went on to command the 10th Mountain Division (Light Infantry) and Fort Drum, passed away while still on active duty. As written in his obituary, he was a legendary Soldier. He also never failed to make time to listen to legal advice and mentor judge advocates to make us better command legal advisors.

For LTC Comley and the Operations Section, Major General Bannister often used a one-of-a-kind north Georgia way of telling someone to take a more detail-oriented approach. He is referenced herein with the utmost respect and remains LTC Comley’s most reliable and seasoned general when it came to appropriately accounting for risk to mission and risk to force.

COL Anderson is Legal Counsel for U.S. Africa Command at Kelley Barracks, Stuttgart, Germany.

LTC Comley is the chief of military justice for V Corps at Fort Knox, Kentucky.

Captain Noah D. Johnson
Location: Delaram, Afghanistan,
January 2011–July 2011

Hot. Sandy. Dangerous. Exhilarating. Boring. The death of my idealism. My proudest moment of service. All of these things describe my time in Afghanistan.

I spent the majority of 2011 embedded with the 2d Brigade of the 215th Corps of the Afghan National Army in Helmand Province, Afghanistan. Back then, I was a first lieutenant in the U.S. Marines, and I was laughably asked to fill a medical advisor slot on a manning document when I had neither medical experience nor advising experience. However, as Marines are known for, I was happy to adapt and overcome. My state school business degree would have to suffice.

My time in country was spent living and working with my Afghan counterparts, many of whom had been fighting a war—on-and-off-again—for the better part of twenty years: first against the Russians, occasionally against each other, and now against the Taliban. Many were good-spirited, but most were disinterested, and knew that my vigor to improve the Afghan Army, and therefore, Afghanistan, would not outlast their perpetual war.

It turns out, they were right.

When I spoke with Afghan civilians when I was on a foot patrol, they quickly ended my idealism: these particular individuals had no interest in democracy, the rule of law, or my Western values. They simply yearned for security, an end to their suffering, and, understandably, a better life for their children than they had. I fear my time in Afghanistan brought them none of these things.

My tour of duty saw improvised explosive device strikes, I was shot at, I was denied sleep for days, and I chain-smoked Marlboro cigarettes bought for \$20 a carton



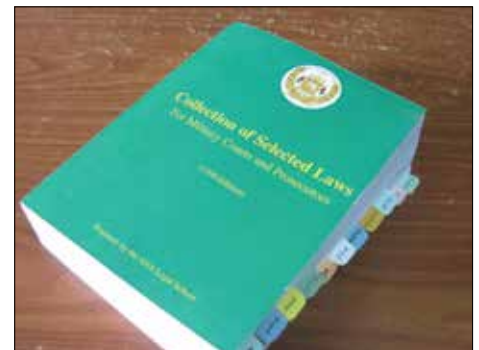
Colonel Muhibullah Zaheer, Afghan National Army (ANA) Legal School Deputy Commander for Educational Affairs, makes opening remarks to ANA legal advisors from around Afghanistan at the first Brigade Legal Advisor Course. (Photo courtesy of LTC Chelluri)

off the local economy. I had the time of my life. I was honored to have served with my fellow Marines. **TAL**

CPT Johnson is the military justice advisor for the Arctic Support Command (Provisional), United States Army Alaska, at Fort Wainwright, Alaska.

Lieutenant Colonel Nagesh Chelluri
Location: Kabul, Afghanistan,
July 2011–June 2012

I deployed to Afghanistan on the 10th anniversary of 9/11. It was my follow-on assignment from the Graduate Course at The Judge Advocate General's Legal Center and School, and I was excited to go. I spent my pre-deployment trying to learn Dari and continued to do so throughout my tour in Afghanistan. Being South Asian, I feel a certain historical kinship with the people of Afghanistan. The Indian Mauryan Empire filled the void in Afghanistan after Alexander the Great and the first Mughal emperor of India, Babur, came to India from his capital in Kabul in 1526 to begin a dynasty that



A team effort between mentors and faculty resulted in an Afghan National Army "Manual for Courts-Martial." (Photo courtesy of LTC Chelluri)

lasted until 1857. I was assigned to NATO Training Mission–Afghanistan (NTM–A) and stationed at Camp Alamo, a small post within the Kabul Military Training Center. It was a multinational post, and forming friendships with our coalition partners was a rewarding experience. My team's mission was to help stand up the Afghan National Army (ANA) Legal School. The motto of NTM–A was "Shona-ba-Shona" or "Shoulder to Shoulder" in Dari, and we trained in that spirit with our ANA counterparts.

When I arrived, the ANA instructors taught the courses; we were there to mentor

and advise. I was the advisor to Colonel Muhibullah Zaheer, the school's Deputy Commander for Educational Affairs. One of his duties was to devise the course schedule for the school commander. As the only judge advocate on the team with experience in a brigade, I worked with Colonel Zaheer to develop the first Brigade Legal Office Course, which was among my most rewarding achievements during the deployment. At the end of my deployment, our legal school advisor team disbanded, and our Canadian judge advocate remained to close out. He informed us shortly after our return that the ANA legal school was the first ANA branch school to be characterized as "independent" of NTM-A. In view of this development, we had helped all our interpreters with their Special Immigrant Visa packets before we redeployed. I'm happy to say all five interpreters were out of the country by 2015. Despite everything that happened last year, I feel we successfully did our small part to advance the rule of law. **TAL**

LTC Chelluri is the deputy staff judge advocate for U.S. Army Installation Management Command at Joint Base San Antonio-Fort Sam Houston, Texas.

Mr. Peter Merkl

Location: Bagram Airfield, Afghanistan, August 2012-February 2013

I was still half asleep when the first rocket hit just before dawn. It sounded far off, but what did I know? It was my first.

It may have been my first, but I had no doubt what it was. Things bang and boom on a military base in Afghanistan all day and night, but there was an unmistakable, percussive finality to it that shook awake some primitive, previously dormant part of my brain. As a new federal civilian employee and 53-year-old, loyal citizen of Recliner Nation USA, I simply couldn't get my mind around this disturbing fact: people were shooting powerful explosives in my direction, and they'd rejoice if they managed to kill me.

The next one, maybe twenty seconds later, hit closer. Wide-awake now, I realized that the base warning system had been

blaring out an alert to take cover and put on our bullet-proof vests and helmets. I pulled the covers over my head.

The third one was nearer still. I was surprised by how powerful the explosions were. Based on my experience with July 4th bottle rockets, I'd assumed that all rockets were mostly propellant. But these things sounded more like big bombs.

The fourth and fifth marched even closer. I remembered that at lunch the day before, a tired veteran of three deployments told me, "You're OK unless you hear one whistle. If you hear that, it's close."

And then I heard a whistling sound. "No freakin'"—I shot under my bed faster than when I was six and saw something 'move' in my closet—"way!" The huge explosion shook my quarters so violently that I thought it was going to collapse. When the all-clear finally sounded, I asked myself yet again, "What the heck am I doing here?"

I'd only been a federal employee for a few months when I got the recruitment email. I'd been planted in Corpus Christi, Texas, for twenty-five years, and out of nowhere I was being asked to volunteer for six months in Afghanistan. But then I thought, if Uncle Sam put up the "Bat Signal," and I was the best he could do, then count me in, never thinking for a second I'd actually get picked.

So, why send civilians into a warzone? Years ago, the military decided that Soldiers would do the fighting, and civilians would serve in support roles. We cook, clean, and clerk for the troops.

The hours are brutal: 12/7/365. Basically, if you're awake, you're at work; if you're asleep, you're not. The days pass in a blur of similarity. You go to the same place, do the same thing, and see the same people: like the movie *Groundhog Day*. We don't check our watches to see what time it is; we check them to see what day of the week it is.

What does Afghanistan look like? Picture the lunar surface, but all the moon dust is blowing around. The whole country makes me edgy. I don't trust the air because you can see it; I don't trust the mountains because they frequently disappear in the dusty air; I don't trust the birds because they skitter around as guiltily as informants; and,

at a time when I never needed a beer more in my life, the place is dry.

But it's all worth it to serve our troops. For an older guy to be treated with such courtesy and respect by young Americans is unusual. Their goodness breaks your heart. Make no mistake, they're lethal. They carry their loaded automatic weapons everywhere they go on base, to the point that I constantly feel underdressed without an M-16. And they're brave enough to volunteer to go outside the wire and fight a war against an army of people willing to perform suicidal acts to advance their mission.

But they're also just kids. At Thanksgiving dinner, they argued happily about the Cowboys and Redskins while eating facsimiles of turkey and all the trimmings. But you could see it in their suddenly stony expressions as each was overwhelmed by memories of home. And then to see their buddies jolly them out of their sad reveries . . . it was beautiful.

This is an impressive group of young people. They're hardened by more than a decade of war, strengthened by their discipline and sacrifice, and painfully aware of the real price of foreign policy. From what I've seen, we could be looking at a truly transformative generation. They deserve a warm welcome and our lasting gratitude and respect when they finally come marching home. **TAL**

Mr. Merkl wrote this piece in 2013 after returning from a six-month deployment to Afghanistan. It was previously published in the Caller Times on 2 March 2013. It has been revised and reprinted with the permission of the Caller Times. He retired as an attorney-advisor from the Corpus Christi Army Depot in November 2021.

Major Ravi T. Kambhampaty

Location: RC-East, North of Kabul (Laghman, Kunar, and Nangarhar Provinces), Afghanistan, July 2013-March 2014

I deployed to then-Forward Operating Base (FOB) Fenty located in Nangarhar province, Afghanistan. At the time, I was a mobilized Army Reservist (and a brand new captain), who was attached to 4th Brigade Combat

Team, 10th Mountain Division (Light Infantry). The brigade was transformed into a Security Force Assistance Brigade (SFAB) and was assigned a Train, Advise and Assist mission in support of the 201st Corps of the Afghan National Army. We were also assigned collaborative work across various lines of effort in the provinces assigned to its area of responsibility (AOR).

I was privileged to work on the rule of law mission. I coordinated with the key inter-agency and international partners who were in the AOR to ensure that rule of law missions were not conducted in a vacuum or wholly contingent on U.S. resourcing. These efforts had to be nested with the higher headquarter priorities. The accompanying photograph depicts a monthly inter-agency/international coordination meeting that I organized on the FOB to discuss and address various issues relevant to the rule of law effort and its impacts on the Governance Line of Development effort that was a priority at the operational and strategic level.

In addition to personnel from the brigade, the meeting involved Department of State, U.S. Agency for International Development (USAID), law enforcement professional contractors, Afghan non-governmental organizations that had been vetted and funded by USAID, and on occasion, the United Nations Mission for Afghanistan (UNAMA) personnel. The purposes of the meeting were to create a common sight picture amongst the various participants and to enhance cross-functional situational awareness, and to focus our collective work on projects that were rooted in the realities of Afghanistan and were believed to be sustainable without permanent U.S. support.

While the current situation in Afghanistan is tragic, and it is hard to conjure any meaningful lesson learned, I do believe that effective engagement with the inter-agency early on is critical when tasked with rule of law and similar missions. These engagements need to be appropriately vetted with the military chain of command and coordinated to ensure that there are no overreaches in authority or binding of positions of military commanders. These efforts also need to account for local realities and projects that cannot be sustained without the

globally-unique stature of the U.S. military need to be reconsidered.

Ultimately, my time in Afghanistan was of deep significance to me personally as someone who was born in South Asia (Andhra Pradesh, India). I will be forever grateful to have worked with fantastic colleagues: the active duty brigade judge advocate and team who took me (an Army Reservist less than a year out of the Basic Course on my first deployment) on, mentored me, and gave me an understanding of effective staff operations at the brigade level; the great colleagues from across the U.S. Government and, most profoundly, the Afghans themselves. **TAL**

MAJ Kambhampaty is an individual mobilization augmentee assigned to the National Security Law Section of Third Army/U.S. Army Central's Office of the Staff Judge Advocate at Shaw Air Force Base, South Carolina. In his civilian capacity, he is an attorney with the U.S. Department of Justice in the National Security Division.

Captain Aaron Pool

Location: Kandahar City, Afghanistan, 2014

In 2014, my platoon was the last infantry platoon stationed at Forward Operating Base (FOB) Walton in Kandahar City. We were partnered with eight of the ten police substations covering the city and would regularly try to help train, work with, and provide support to the commanders. I never could tell ahead of time which materials we brought to the area would be used to improve their area, or would ultimately be sold for personal profit instead.

In 2014, we were heavily focused on retrograde operations which meant closing most of the smaller FOBs and bringing supplies and material back to Kandahar Airfield. We were giving away, shipping home, or destroying a lot of extra equipment and material. Forward Operating Base Walton had a large plywood scrap pile that I made available to one of the police substation (PSS) commanders to take some for his district. I believed he was going to use it to maintain some of his guard shacks since many of them were built from plywood.

After he loaded his truck, he expressed frustration with me that it was not as much as he had hoped for, and he would not make much money when he sold it. That was the last time we gave him supplies.

Another encounter had a very different outcome. A PSS commander asked me for some hesco boxes. Hescos are large rectangular chain link fence boxes with cardboard inserts that can be filled with dirt to build walls or provide protection from enemy fire at outposts or FOBs. We had an extra CONEX full, so he brought a truck and I gave him as many as it could hold. I'll never forget the look on the truck driver's face when his entire truck sagged from the forklift dropping the hescos into the bed. The next time I conducted a key leader engagement with the PSS commander, he invited me into a new hut in the courtyard of his station. Three sides of the hut were the chain link fence portions of the hescos I had given him. They had removed the cardboard, woven grass through the links, and rigged up a water pipe to drip water down one side. With the slightest breeze, the entire hut resembled one large swamp cooler. After twenty minutes in the hut, I was shivering, and this was in the middle of the summer in Kandahar City.

Much of the support and resources we provided the Afghans during my time there seemed like it was not sustainable without our direct participation. However, that outdoor swamp cooler was something the Afghans took initiative to create themselves by repurposing materials we provided. The result was something the Afghans could take pride in and hopefully continue to use long after we left. **TAL**

CPT Pool is the brigade judge advocate for 1st Combat Aviation Brigade, 1st Infantry Division, at Fort Riley, Kansas.

Captain Nandor Kiss

Location: Headquarters, Resolute Support, Kabul, Afghanistan, May–August 2017

In May 2017, I deployed to Kabul, Afghanistan, to serve as part of the Combined Security Transition Command–Afghanistan's Essential Function 3–Rule of Law



CPT Nandor Kiss presenting CSTC-A's legislative proposal to President Ashraf Ghani and members of his cabinet, alongside GEN John Nicholson, Commander USFOR-A/NATO RS, and MG Robin Fontes, Commander CSTC-A. (Photo courtesy of CPT Kiss)

(CSTC-A EF3). While in that role, I was given the incredible opportunity to work alongside a team of North Atlantic Treaty Organization and Afghan partners to restructure the Afghan National Army's personnel laws. In order to combat corruption and inefficiency, we drafted extensive legislative changes and presented them to the Afghan government for implementation. President Ghani was so impressed with the work that he invited the team and me to the presidential palace in Kabul where we presented the plan to members of his cabinet. One of the best things about working in a deployed environment was the leadership's willingness to place relatively junior personnel into positions to effect real change. I am eternally grateful for leaders like Brigadier General Clayton Moushon (U.S. Air Force) and Colonel John Siemietkowski, Director and Deputy Director of EF-3, for trusting and empowering me and the rest of our team. **TAL**

CPT Kiss is an appellate counsel for the U.S. Army Defense Appellate Division at Fort Belvoir, Virginia.

Captain Thomas P. Edmonds
Location: Resolute Support Headquarters & Hamid Karzai International Airport, Kabul, Afghanistan, 2017-2018

Rule Makers and Law Breakers
Developing the Rule of Law in Afghanistan
 In 2017, I deployed to Kabul, Afghanistan. I had the honor of serving with Essential Function 3 (EF3) Rule of Law, Combined Security Transition Command Afghanistan, U.S. Forces-Afghanistan. Its mission was to counter corruption and strengthen the trust between the Afghan people and their officials by developing an honest judicial system and punishing violators of the law in an equitable manner. Our responsibilities included developing laws with the Afghan government, confront human rights violations, reduce incidents of torture, battle the use of child soldiers, and eliminate the acceptance of *bacha bazi*—"dancing boy."

By late 2017, with the help of the United Nations staff, the Afghan government prohibited the practice of *bacha bazi*, writing it into the Afghan criminal code. The rule of law got a win, but our mission was not over. Little did we know, the

mission just got tougher because now we had to *enforce* the law. Enforcing the new criminal code meant arresting violators, protecting witnesses, earning trust from victims to testify, and developing a transparent judicial system to give a fair verdict. I worked tirelessly with some of the best people in my career, a team comprised of Afghan lawyers, soldiers, policemen and women, North Atlantic Treaty Organization (NATO) officials, contractors, and U.S. federal civilian employees.

United States and NATO Forces have now pulled out of Afghanistan. I do not know what will happen to the rule of law in Afghanistan, or what will happen to the people who are still fighting. I worry about my friends battling the Taliban, as they struggle to preserve order. We gave our blood, sweat, and tears to accomplish the rule of law mission, becoming a family in the process. I pray they can hold their ground and maintain the laws we put in place together. I pray for those still there. I pray for rule of law in Afghanistan. **TAL**

CPT Edmonds is a military law attorney for U.S. Army Training and Doctrine Command at Fort Eustis, Virginia.

Major Mike Gilbertson
Location: Bagram Airfield, Afghanistan, May-June 2019

I was the Group Judge Advocate (GJA) for the Asymmetric Warfare Group (AWG) at Fort Meade, Maryland, from 2017 to 2019. Briefly stated, AWG's operational advisors (OAs) were military, civilian, and contractor subject matter experts (SME), typically from the special forces (SF) community, deployed in two-to-three person teams worldwide and tasked to solve the hardest problem sets that others did not have the time or resources to solve.

As I supported AWG's globally-deployed OAs and read their weekly reports, there were several ongoing concerns about the emerging threat of weaponized unmanned aircraft systems (UAS) in the Middle East and the conventional Army's lack of effective counter-UAS (c-UAS) tactics, techniques, and procedures. In addition to



Resolute Support Essential Function 3 (EF3) Rule of Law Director, U.S. Air Force Brig Gen David Dziobkowski, visits AP Lightning to meet with TF Southeast Commander, Brig Gen David Hamilton, EF3 advisors, and law enforcement professionals to discuss Train Advise and Assist efforts in Gardez, Afghanistan, in December 2017. (Credit: SGT Michael Uribe)



Members of Essential Function 3 (EF3) Rule of Law are returning home to Resolute Support Headquarters, Kabul, from AP Lightning after evaluating team members in Paktia Province with their local Afghan counterparts in December 2017. (Credit: SGT Michael Uribe)

our c-UAS technological shortfall, the OAs stated that many conventional Army commanders were confused on the appropriate rules of engagement (ROE) for the c-UAS fight. As a judge advocate (JA), I found this issue concerning, but I remembered that a previous AWG GJA deployed to Iraq around 2008 and developed a successful warrant-based targeting program for the

U.S.-Iraqi detention effort. After conducting research and coordinating virtually with U.S. Army stakeholders in Afghanistan to understand the problem, the AWG Group Commander approved my trip to see the problem for myself and to propose a possible solution.

Most of my time in Afghanistan was spent at Bagram Airfield working with JAs

and c-UAS SMEs supporting the base defense operations center, SMEs conducting c-UAS systems training, members of the Rapid Equipping Force (REF), and SF and Army Intelligence units. I also had the good fortune to spend some time in Kabul with the U.S. Forces-Afghanistan office of the staff judge advocate and work on this project with their chief of intelligence law and their Australian operational law JA. This effort, which would not have been possible without the collaboration among those deployed Army JAs, resulted in an unclassified c-UAS ROE training package requested by JAs and SMEs alike from across the joint force and U.S. Government. **TAL**

MAJ Gilbertson is the command judge advocate for the 1st Infantry Division (forward) at Poznan, Poland.

Captain Jonathan M. Harrar
Location: Bagram, Afghanistan, 2019–2020

On 12 December 2019 in Bagram Airfield, Afghanistan, I awoke from a deep sleep early in the morning to a loud thud. A few things had flown off of my containerized housing unit wall and the very first thought that came to this meathead’s brain was, “I think they blew up the gym.” As the on-call judge advocate for base defense, I started to slowly put my PTs on to meander over to the Base Defense Operations Center (BDOC) until I heard a young Soldier shout, “we are under attack, wake the [expletive] up, we are under attack!” Another Soldier yelled at him to calm down and I thought to myself, “that was a bit dramatic.” Then I heard it—for the first time in the several months that I had been at Bagram, they played the cavalry charge over the “big voice.” This was far different than the “incoming, incoming, incoming” we heard almost daily; this meant we were actually under attack. From where? How? We are behind massive T-Walls? Are they on the compound? Insider attack? There were too many questions, but I knew where I had to be. I grabbed my weapon and sprinted to the BDOC as fast as I could.

I spent the next eighteen hours (with a short relief from Major Prasad, U.S. Air

Force) giving the most influential legal opines I may ever give. Though I cannot get into specifics, on 12 December 2019, I felt like part of the team. The commanders and staff looked to me for suggestions and information in a wildly dynamic situation with numerous legal issues presenting themselves.

What I will never forget that day is watching several 82d Airborne Division Soldiers who I personally knew, worked with, and spent hours on the BDOC floor with run to the sound of gunfire in their PTs. One of them came back to the BDOC for a coffee break, and then went back out to throw grenades into the windows where the intruders were shooting from!

I don't know that I offered much to what transpired that day, but I was proud to be part of a team that made sure not a single person was seriously injured and every single intruder was neutralized. I was also very happy that the compound gym was not destroyed as I was approaching a new deadlift record. **TAL**

CPT Harrar is currently a military justice advisor for the Joint Task Force–National Capital Region and U.S. Military District of Washington at Fort Lesley J. McNair, Washington, D.C.

Colonel Perry Wadsworth & Lieutenant Colonel Howard Clayton

Location: Kabul, Afghanistan, 2019–2020 and 2020–2021 respectively

Rule of Law and the Counter-Corruption Advisory Group Serving as a Soldier First

Every judge advocate is familiar with the Corps's motto: "Soldiers first, lawyers always!" The import of being a Soldier first—particularly in being a competent Army officer—is especially seen in the handful of judge advocate authorizations in which they lead organizations conducting military operations rather than providing traditional legal advice. The Director, Rule of Law and the Counter-Corruption Advisory Group (ROL/CCAG) was one such authorization.

The ROL/CCAG directorate executed North Atlantic Treaty Organization (NATO) Essential Function 3, Civilian Governance of the Afghan Security Institutions and Adherence to Rule of Law. This legal line of effort fit within Operation RESOLUTE SUPPORT's mission to train, advise, and assist (TAA) the Afghan National Defense and Security Forces (ANDSF) in both the Ministry of Defense and Ministry of Interior, which were the military and civilian security forces, respectively. In aggressively exercising disciplined initiative within the commander's intent, ROL leaders planned a comprehensive rule of law and counter-corruption campaign, coordinated with the interagency and coalition partner leaders, and integrated initiatives with those of the other staff principals.

The TAA mission focused principally on ROL matters, which involved working with host-nation Afghan leadership and the legal and inspector general departments in the Afghan ministries of defense and interior. The 2004 Afghanistan constitution provided an Islamic legal framework, which challenged a number of initiatives, such as women's rights, because ROL teams could not impose Western legal requirements. Nevertheless, working with Afghans at all levels created positive influences and progress in many areas, such as a more transparent legal system and vastly-improved investigative abilities.

The counter-corruption effort protected billions of dollars given by donor nations annually. Consistent with the RESOLUTE SUPPORT mission, the CCAG principally focused on corruption in five broad categories: ANDSF pay, facilities, maintenance, distribution of supplies and commodities to the ANDSF, and corruption associated with the Afghan legal system. In addition to conducting counter-corruption activities, the CCAG assisted in identifying potential insider threats to protect coalition forces.

The Director, ROL/CCAG led experienced civilian and military attorneys conducting rule of law missions and a team of contractors composed of the finest law enforcement and intelligence professionals in the world conducting counter-corruption activities. The team deftly worked with a wide variety of coalition, joint, and

interagency entities to help the government of the Islamic Republic of Afghanistan govern with legitimacy and fairness in the eyes of not just the international community, but of all Afghans as well. The honor of conducting such a mission and leading such an extraordinary team is indescribable. Judge advocates must develop as Soldiers throughout their career to be prepared to serve as a special staff officer when the nation calls them to do so, even in the most challenging environments. **TAL**

The authors wish to thank two CCAG members, LTC (Retired) Tim Troutman and Dave Swingle, for their assistance with this article.

COL Wadsworth is the commander of the 153d Legal Operations Detachment at Horsham, Pennsylvania.

LTC Clayton is the staff judge advocate for the U.S. Army Support Activity at Fort Dix, New Jersey.

Major Justin MacDonald *Location: Kabul, Afghanistan, June–August 2021*

Kabul was bustling when I first arrived in June 2021 to Resolute Support Headquarters (RSHQ), a fortified compound adjacent to U.S. Embassy Kabul (USEK) serving as the primary location for the North Atlantic Treaty Organization's (NATO) military mission in Afghanistan for the past 20 years. I saw several foreign military service members on the installation and, while not as full as in years past, the circle of flagpoles in front of RSHQ's well-known "Yellow Building" still flew a not-insignificant contingent of international banners. Most notably, the atmosphere was not one of concern over the future of the mission or Afghanistan as a whole, nor of elation at the prospect of the long-standing enterprise finally ending after two decades. Instead it simply felt like business as usual, a strange proposition to encounter at the time. In my short stint at RSHQ (seven weeks, during which the location became known as the USEK South Compound), the atmosphere changed drastically and did so quickly.

Flags began to disappear, one at a time, along with more and more people. Then the Italian market, which was only open sporadically and was typically half empty, closed its doors for good. The international boulevard (my own term), a narrow, paving-stone path wandering its way through shipping containers converted into various offices or social gathering places for different nations, and decorated accordingly, evoked images of centuries-old corridors in Europe and corner cafes ideal for lounging lazily. It now sat empty, abandoned to the unknown future of Afghanistan, non-threatening in the bright sunlight of summer days in Kabul, yet still eerie to walk through at times, knowing the history seen by those paths and walls and the possible ending on the near horizon. The somber aura was magnified only by the ever-increasing and concerning reports of Taliban advances flooding every email inbox daily.

Though I left Afghanistan shortly before the Taliban entered Kabul on 15 August 2021, and the presence of people within the South Compound counterintuitively increased by the time I departed (mostly from USEK personnel making quick trips over from their side of the fence), I'm still haunted by the empty feeling of the grounds as the end drew near. In retrospect, the image feels prophetic in nature, a portent of the frightening result to come and the spectral legacy left behind. Who will occupy that space in the future and how will they look upon the previous tenants? The answers are both elusive and harrowing. **TAL**

MAJ MacDonald is an associate professor in the National Security Law Department at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Members of the Office of the Staff Judge Advocate, Defense Security Cooperation Management Office–Afghanistan

Location: Al Udeid Air Base, Qatar, June–November 2021

In the aftermath of the fall of Kabul, Afghanistan, on 15 August 2021, Al Udeid

Air Base in Qatar, became a hub for Afghan refugees desperate to escape Taliban rule. Within days, tens of thousands of former Afghan government officials, security forces, and others at risk, along with their family members, flooded into the Qatari air base, prompting a temporary, but significant, shift in mission focus across the installation. Operation Allies Refuge, as the effort came to be known, soon became top priority for many entities, including the Defense Security Cooperation Management Office–Afghanistan (DSCMO–A) and its legal office personnel, ultimately helping process around 60,000 refugees in Qatar alone.

More than half of the DSCMO–A legal office (3 attorneys, 2 paralegals, and 1 legal administrator) volunteered to work 12-hour shifts in the refugee hangars/tents, serving as a floor boss for a 6,000-person staging facility, handling movement of persons on and off aircraft, and doing more cleaning than thought possible. The staff judge advocate and three attorneys maintained daily DSCMO–A operations while also surging to assist the refugee effort for two-to-four hour stints on multiple occasions. In the midst of massive human suffering, each person had the opportunity to witness selfless service and a level of humanity rarely seen in action, and collect experiences not soon forgotten.

Of common note upon entering any of the Afghan housing areas and confronted with the chaos of thousands of refugees, was the feeling of exhaustion, frustration, and uncertainty. To see the conditions was often disheartening, and while it was difficult to stay positive, rays of light were a frequent occurrence and contributed immensely to sustaining morale throughout the force. Some moments will forever stand out—like the dozens of children running playfully through buildings, helping to pick up trash, and eagerly seeking fist bumps whenever possible; or the spontaneous soccer matches and sprinting competitions between young Afghans and Service members, which brought an air of levity; or, by no means least of all, the support from all sides when problems arose, pushing back with positivity, determination, and professionalism to meet the challenging circumstances head on. Striving day after day to

help others, no matter the difficulty, was the common theme, and reward, for all.

The call of duty was strong, and from it not one person shied away, no matter the level of discomfort with the long hours, immense heat, exposure to illness, or the amount of refuse needing removal. In an awe-inspiring way, the joint and total force Judge Advocate General's Corps stepped up without question, proving its personnel are all-in, no matter the mission. All who participated should feel immensely proud, as should colleagues back home, for the honor brought to the legal profession. **TAL**

The following members of the office of the staff judge advocate, DSCMO–A, Al Udeid Air Base, Qatar, assisted in this mission and contributed to this piece:

COL Ryan Dowdy was the staff judge advocate for DSCMO–A.

CDR Rob Alwine (U.S. Navy) was the deputy staff judge advocate for DSCMO–A.

LTC Matt Pullman was the director, Rule of Law/Counter-Corruption Advisory Group for DSCMO–A.

MAJ Todd Chard was the chief, contract and fiscal law for DSCMO–A.

MAJ Justin MacDonald was the chief, national security law for DSCMO–A.

MAJ Matt Wyatt was the chief, military justice and administrative law for DSCMO–A.

Capt Rachel Palacios (U.S. Air Force) was a contract and fiscal law attorney for DSCMO–A.

CW2 Vanessa Sachon was the legal administrator for DSCMO–A.

SGT Taylor Mercer was the paralegal noncommissioned officer-in-charge for DSCMO–A.

SPC Jacob Acosta was a paralegal specialist for DSCMO–A.



In June 2011, the Ministerial and General Staff Advisor Course took place at Camp Julien, Afghanistan (near the Tajbeg Palace, Kabul). The course provided valuable training for legal advisors and mentors to the Afghan National Army. Pictured left to right: COL Vivian Shafer, Col Eric Dillow, LTC Arthur Kaff, LTC Frank Hoare, CDR John Dezzani, LTC Thomas Bogar, CDR Nadeem Ahmad, Lt Col Daniel Bertsch. Their missions included mentoring the legal officers and other staff members of the Afghan National Army and contribute to the rule of law. They all believed in what they were doing. (Photo courtesy of Arthur Kaff)

On 4 February 2014, members of Trial Defense Service (TDS–Region IX), gathered outside of the Bagram TDS office at Bagram Airfield for a week-long regional training event. This was the last Region IX training conducted at Bagram Airfield. Shortly after the training, CPT Keith Stewart and CPT Wendy Schrank defended a Soldier at a fully-contested court-martial (panel case) at the Bagram Court, securing a full acquittal in the process. Pictured left to right: CPT Katherine Flowers (DC, Camp Phoenix Field Office), CPT Wendy Schrank (DC, Kuwait Field Office), CPT Keith Stewart (DC, Bagram Field Office), LTC Christopher Burgess (RDC, Bagram Field Office), CPT Jon Schoenwetter (SDC, Kuwait Field Office), CPT Jihan Walker (SDC, Kandahar Field Office), and MAJ Mary Meek (SDC, Bagram Field Office).



COL Jeffrey Thurnher, 82d Airborne Division SJA, stands with two of the Division's brigade commanders in Afghanistan during their final mission in Afghanistan. (Photo courtesy of COL Jeffrey Thurnher)



Bagram, Afghanistan (2014): Members of USCENTCOM TDS took part in leader professional development about emotional support animals in a deployed environment. Pictured left to right: SSG Kelli Pope (paralegal NCO), LTC Christopher Burgess (RDC), CPT Katherine ("Kat") Flowers (DC), MAJ Mary Meek (SDC), and CPT Keith Stewart (DC).



Major Kyle Burgamy and then-Sergeant First Class Blaise McPhearson were the last members of the Trial Defense Service to be stationed in Afghanistan. Major Burgamy was the senior defense counsel and then-Sergeant First Class McPhearson was the paralegal noncommissioned officer in charge at Bagram Air Field. (Photo courtesy of MAJ Kyle Burgamy)



Bagram, Afghanistan (2013): Promotion Ceremony for SGT Roberto Ramos (Bagram Field Office paralegal). Pictured left to right: MSG Aaron Perez (NCOIC), CPT Keith Stewart (DC), SGT Roberto Ramos (paralegal NCO), and MAJ Mary Meek (SDC).



CPT Sean Duffy and SSG Zamora from the 82d Airborne Division OSJA team begin movement to Afghanistan. They were ultimately diverted to Kuwait, but were prepared to deploy with the last 82d legal team in the Afghanistan theater. (Photo courtesy of COL Jeffrey Thurnher)

U.S. Soldiers, assigned to the 82d Airborne Division, arrive to provide security in support of Operation Allies Refuge at Hamid Karzai International Airport (HKIA), Afghanistan, in August 2021. (Credit: Senior Airman Taylor Crul)







Contracted Logistics Support to Mi-17 operations in support of Afghan Security Forces. (Credit: U.S. Forces–Afghanistan Public Affairs Office)

No. 2

The Fog After War

U.S. Government Security Assistance and the Dissolution of Afghanistan National Defense and Security Forces Defense Articles

By Major Todd Chard, with Introduction by Colonel Ryan B. Dowdy



Introduction

Why submit an article about the challenges of defense article property disposition post-collapse of the Government of the Islamic Republic of Afghanistan (GIROA) when one could write about more intriguing issues associated with all things Afghanistan? Fair question. Appropriations law and the National Defense Authorization Acts tend to be inflexible, black-letter law with no room for legal options. The Security Assistance Management Manual (SAMM) delineates in detail the Department of Defense's (DoD) security cooperation roles, responsibilities, and processes. The DoD even has an agency, the Defense Security Cooperation Agency (DSCA), dedicated to administering enterprise-level DoD security cooperation programs across the globe. So, in light of all that, I too would have asked "why write this article" before witnessing the legal aftermath caused by the collapse of GIROA; an aftermath that exposed the gaps and seams within law and policy with which my agency—the Defense Security Cooperation Management Office—Afghanistan (DSCMO-A)—had to contend.

Briefly, DSCMO-A served as the execution agent and fiduciary for the Afghanistan Security Forces Fund (ASFF). The ASFF, a two-year, overlapping fund, was specifically appropriated to provide financial and security assistance support to the Afghan National Defense and Security Forces (ANDSF), and therein lies the problem. After 15 August 2021, we were presented with a glaring and obvious question: did the ANDSF still exist for purposes of expending ASFF? Obviously, the decision as to whether the ANDSF legally existed after 15 August 2021 resided echelons above DSCMO-A. However, such a declaration was not forthcoming in the several months after the collapse of GIROA. Understandably, the U.S. Government faced much more pressing issues immediately following GIROA's collapse. The DSCMO-A's senior leaders pressed on in the absence of immediate guidance to responsibly mitigate the consequences of closing down ASFF-funded programs, which was something akin to turning an aircraft carrier as opposed to a small skiff.

The government's collapse left millions of dollars in ASFF-procured, Afghan-owned defense articles stranded in the Continental United States (CONUS) and outside the Continental United States (OCONUS) locations. Much of the equipment—battle damaged or in need of maintenance due to wear and tear—was in various stages of repair and receiving ASFF-funded contract maintenance at logistic support hubs outside Afghanistan. These contracts also posed a problem, in that they were all at various points within their period of performance and required individualized assessments on how best to close each. This article is an account of how we navigated the legal ambiguity in which we found ourselves pending final decision from the appropriate higher authorities.

The purpose of this article is twofold. We offer our experience to legal practitioners newly assigned to a role advising senior leaders in the arena of security cooperation. At the basic level, those practitioners may use this article as a contextual primer. However, while our legal mission was strategically specific to the laws, regulations, and policies governing security cooperation in Afghanistan, our experiences advising through the U.S. Forces–Afghanistan retrograde, stand-up of DSCMO–A, and collapse of GIRoA transcend our Corps's professional competencies.

My personal experience as the DSCMO–A staff judge advocate (SJA) reinforced—more than any prior assignment—our responsibilities as legal professionals in uniform and the value we bring to organizations in which we serve. These concepts are much aligned with The Judge Advocate General's mission,¹ vision,² and our Corps's Constants³: never stop honing your critical thinking skills, commit to a lifetime of learning, and ensure that each of you master the legal portfolio that you are assigned. Do not be afraid to lead up, especially when you are fully ensconced in a complex problem that, for all the right reasons, is not the immediate priority of the larger enterprise. However, leading up requires professional tact and the recognition of when your advocacy stops and your followership begins. As each of you gain more seniority, those you advise will expect you to have the innate ability to represent your organization

within the greater hierarchy. At times, you as a leader will be the lead voice for your client as they endeavor to build interagency consensus. The art, of course, is doing so by also recognizing the terminus of your lane, balancing respect for proper organizational hierarchy while also leaning in and flattening communications.

For me, this experience reinforced another constant that I remember a very astute professor at The Judge Advocate General's Legal Center and School espousing to my basic course: the Corps and the Army are small; relationships matter. In this short deployment, I re-kindled a friendship with our J2. As captains we served in V Corps together during the invasion of Iraq. I also communicated often with legal colleagues with whom I have served over the years, all of whom were now leaders in key positions across the Army, joint force, and DoD. Their sage advice and access immeasurably contributed to my ability to assist our team of talented JAs working through the difficult problems before us. For purposes of this article, I will respect the principles of non-attribution and protect the innocent; but each have my sincerest gratitude for their personal and professional friendship. And finally, the DSCMO–A Director and I served together when I was the deputy SJA at the 82d Airborne Division. This helped our relationship begin from a position of trust. I cannot stress how important it is that you foster your relationships over the course of your career. Even when serving in a position that requires you to be a zealous advocate, do so with professionalism and tact, and not with scorched-earth, relationship-ending behaviors.

At the time of our submission, the Office of the Secretary of Defense (OSD) was still considering what official position to take as to the legal status of the materiel left stranded by the collapse of GIRoA. The DSCMO–A remains agnostic about the final decision on property disposition and the future of ASFF. We did not see ourselves as advocating for one option over another. Our only goals were to be a good teammate, a good steward of resources, take initiative during uncertain times, and succinctly communicate up the legal ambiguities and friction identified at our level. In the end, remember it's a team sport. Avoid

becoming anchored on one course of action or position, especially where law and policy intersect. A decision from higher to go a different direction is just that—a decision; it's not personal. In the end, we provided options—all of which we felt were legally sound—for consideration by those that I commend for making very hard decisions in support of our Nation's national security interests.



The Fog After War

The ability to get things done is a measure of the ability to build a consensus of support and understanding for what you are trying to do.⁴

On 15 August 2021, as Taliban troops stormed the walls of the presidential palace, Ashraf Ghani (some would say) surreptitiously fled Kabul, Afghanistan. Ghani, the last president of GIRoA, would later say he retreated to the United Arab Emirates (UAE) by helicopter with only the clothes on his back.⁵ History will say, however, that he took with him the final gasp of hope for Afghanistan's independence from Taliban rule. One day prior, two iconic warlords, Abdul Rashid Dostum (a brutal army Marshall in the ANDSF)⁶ and Atta Mohamammed Noor (the Mujahideen commander turned Balkh province governor) fled the Afghan city of Mazar-i-Sharif as it fell to the Taliban, unopposed. Dostum and Noor both enjoyed power for decades. In his final salvo to retain that power, Dostum hurriedly commanded a fleet of nearly fifty ANDSF aircraft over the northern border to a safe haven in Uzbekistan, crashing one along the way.⁷ A testament to his celebrity, hundreds of his followers who did not make the flight trailed him on foot, rushing the Friendship Bridge at the northern pass.⁸ Noor, an ethnic Tajik, took a similar approach, escaping to neighboring Tajikistan with Afghan pilots and soldiers by use of ANDSF aircraft.⁹

From 2002 to 2021, the U.S. Congress appropriated over \$88 billion to help build and sustain the ANDSF.¹⁰ This included billions of dollars in aircraft, weapons,

communications equipment, vehicles, and other materiel.¹¹ They procured most of these defense articles and the services and supplies needed to sustain them using the ASFF, an Overseas Contingency Operations (OCO) fund.¹² The ASFF was first authorized and appropriated by Congress in fiscal year (FY) 2005, to provide the ANDSF with security assistance.¹³ The Combined Security Transition Command–Afghanistan (CSTC–A)¹⁴ served as the execution agent of ASFF from 2006 until it reconstituted “over-the-horizon” at Al Udeid Air Base, Qatar, in the late spring of 2021. Shortly thereafter, it was deactivated, and succeeded by the DSCMO–A.¹⁵ The DSCMO–A mission was largely a continuation of what CSTC–A had done: manage ASFF in support of the ANDSF and enable GIRoA authorities through stabilization operations.¹⁶ In the early summer of 2021, the bulk of coalition and U.S. forces under both Resolute Support and U.S. Forces–Afghanistan (USFOR–A) reached their military end state, and the role of DSCMO–A grew in importance.¹⁷ The DSCMO–A’s intended use of ASFF to provide materiel and contractor logistics support to sustain the ANDSF fleets of rolling and non-rolling stock, and rotary and fixed wing aircraft was projected to be instrumental to the viability of the Afghan force. After 15 August 2021, with GIRoA dissolved and the ANDSF disbanded, DSCMO–A needed to revise its approach in earnest.

This article centers on DSCMO–A’s abrupt and uncertain shift in mission: from providing the ANDSF with defense articles to returning those same defense articles to the DoD after the ANDSF disbanded. Specifically, DSCMO–A grappled with whether law and policy allowed for ASFF-procured items to be returned to DoD base budgets, and if so, how. The first part of this article, “Moving to Friction,” details the problems posed by these defense articles once GIRoA collapsed. The second, “Security Cooperation and the ANDSF,” briefly describes security cooperation programs, such as pseudo-Foreign Military Sales (FMS), used by DSCMO–A to support the ANDSF. The third part, “Building the Plane in Flight,” analyzes ASFF provisions of the governing authorization and appropriation laws. The fourth section, “Defense Trade and

Arms Transfers,” returns to a discussion of security cooperation, particularly, the Excess Defense Article program, to forecast the future use of ASFF-funded defense articles. Finally, the article closes with a brief application of lessons learned towards a scenario where an Operation INHERENT RESOLVE (OIR) retrograde involves the dissolution of a partner force.

Moving to Friction

What do you do with a fleet of helicopters? This seemingly simple question can generate myriad courses of action (COA) shaped by law, policy, command authority, and the operating environment. Unfortunately, the swift collapse of GIRoA both created this quandary and left little time for DSCMO–A to solve it. Soon after the ANDSF disbanded, General Kenneth McKenzie, U.S. Central Command (USCENTCOM) commander, directed DSCMO–A to execute the responsible closeout of activities within the organization, and specifically to account for all ASFF-procured defense articles still under control of the U.S. Government (USG).¹⁸ For DSCMO–A, this was a call to action. Major General Curtis Buzzard, an infantryman by trade, did not know it when he took command in June 2021, but this USCENTCOM order would become the center of gravity to his organization’s existence.

Transition within any major operation invites risk to the security and stability of the organization, and this was no different.¹⁹ With an uncertain legal and operating landscape, “move to friction”—to seek out and defeat the ambiguity of post-war operations—became a mantra for Major General Buzzard and his staff. Working out of USCENTCOM Forward Headquarters, the DSCMO–A staff understood winding up the ANDSF estate required development of ends, ways, and means through consensus, by authority, or some combination of each. This would invoke key stakeholder input across the USG. Success, therefore, was born from the synchronization of competing requirements across the enterprise—leveraging opportunities to consolidate consensus in order to reduce internal rivalry and maximize results. Success only existed in the narrow juncture between concurrent requirements to reintegrate or



DSCMO–A leadership and legal team, October 2021. (Photo courtesy of author)

otherwise dispose of ASFF-funded defense articles, while at the same time serving as a fiduciary of appropriated funds.²⁰

To develop the plan, the staff first defined the materiel concerned. The Afghanistan Program of Record included all types of ASFF-funded end use items. The provision of significant military equipment—specifically, fixed and rotary wing aircraft—however, was at the heart of this program.²¹ Towards the end of the war, the ANDSF maintained a fleet of approximately 292 ASFF-funded ANDSF aircraft.²² A number of aircraft were destroyed or otherwise inaccessible during the later stages of the retrograde from Afghanistan and therefore could not be recovered. The remainder were found in various legal, physical, and geographic states. The DoD transferred title to the ANDSF for most, but not all, of these aircraft. There was also a cache of frustrated stock still in DoD supply chains, procured with ASFF but never transferred to the ANDSF.²³ Regardless of title, the condition of each aircraft varied from fully mission capable to requiring significant investment for intensive repair or overhaul. While many were now consolidated in the United States, others were located at U.S.-contracted depots worldwide, deteriorating in place, not cleared by customs, and incurring storage fees.²⁴

With the conditions shifted, but still in flux, the DSCMO–A staff learned they would need to navigate the priorities and paradigms of key stakeholders to properly transition from supporting the ANDSF to dissolving its estate.²⁵ An intervening constant to best laid plans, however, is law and policy. Analyzing the fiscal law authorization to use ASFF for aircraft after 15 August 2021 was a nuanced issue, and measuring the cost-benefit of funding

contractor logistic support to maintain and pre-position these aircraft became a complex problem as well. The overarching requirement to transfer these items to DoD stocks, however, became the primary driver of the planning process.

A Season of Change

The time of death for GIRoA marked the true birth of DSCMO-A. Up until this point, DSCMO-A was living in the shadow of CSTC-A, having adopted many of its practices and personnel to advance the ANDSF. Now, with the fall of GIRoA, a new mission emerged—to forge a path for the DoD and Department of State (DoS) to parlay defense articles intended for the ANDSF towards other USG needs. This was a season of change and roles were redefined. The new FY was approaching, and the staff now turned to DSCMO-A Legislative Affairs more than ever, scouring updates to draft legislation for news on rescission or reprogramming of existing ASFF.²⁶ Stakeholders outside of the organization emerged as well. The Departments of the Army and Air Force became significantly more invested in the planning process as potential heirs to the ANDSF estate and its associated costs. To that end, geographic combatant commands began to survey their footprint in order to gauge demand for ASFF-funded defense articles to support their varied missions.

As the sweltering Qatar summer finally broke for a cooler fall, the DSCMO-A team worked through uncertainty, diligently continuing to blaze the trail. Unfortunately, ambiguous law and nascent policy dimly lit the path. The defense article transfer program is based on the Foreign Assistance Act of 1961 (FAA) as amended,²⁷ the Arms Export Control Act of 1976 (AECA) as amended,²⁸ the International Traffic in Arms Regulation (ITAR) with U.S. Munitions List,²⁹ and the Security Assistance Management Manual (SAMM).³⁰ These laws, policies, and regulations combined to define, authorize, and appropriate the ASFF that was used to provide the ANDSF with aircraft, and sustain them as well. Prior to 15 August 2021, these authorities, along with annual authorization and appropriation laws, were seemingly full and complete.³¹ As DSCMO-A soon discovered,

however, this compilation of authorities provided little guidance regarding the dissolution of a partner force.

Security Cooperation and the ANDSF

While DSCMO-A's partner force dissolution planning matured, a truth became self-evident: that, in this space, not all agencies are created equal. Specifically, the DoS, through the FAA, is the controlling agency for security assistance programming. The DoS uses 12 different Title 22 programs to provide defense articles and other support to foreign partners worldwide.³² Typical security assistance arrangements include a combination of grants, loans, sales, or leases.³³ For many of these security assistance programs, the DoS has delegated action authority to the DoD. The DoD uses these delegated authorities, falling under the title of security cooperation, to facilitate the DoS vision of building foreign partner military capacity in order to enable shared response to mutual challenges worldwide.³⁴ For security cooperation planning concerning the ANDSF, the Afghanistan Resources Oversight Council was tabbed as the congressionally-chartered board to validate acquisition strategies for unique and high-dollar ASFF procurements.³⁵ Once planned and validated, security cooperation initiatives were passed to the Defense Security Cooperation Agency (DSCA) and DSCMO-A for action. The DSCMO-A, as the manager of ASFF, delivered the funds, and DSCA, as the execution arm of DoD, provided the defense articles.

The DSCA has an interesting history in its own right. It was conceived because of a problem in disposing surplus equipment after World War II and then developed by the government's solution to leverage that surplus toward other military assistance initiatives abroad. What was once a small office in Arlington, Virginia, is now a security cooperation juggernaut, leading the DoD mission to transfer defense articles from DoD stocks to partner nations worldwide. To assist DSCA, each service has a security program office. For instance, the U.S. Army Security Assistance Command (USASAC), headquartered at Redstone Arsenal, Alabama, manages upwards of 5,000 FMS cases for the Army, spread across 145 countries

and totaling over \$160 billion.³⁶ In Afghanistan, the DoD, through DSCA and DSCMO-A, relied heavily on variations of FMS programming to support the ANDSF.³⁷

The FMS program is a primary vehicle for the DoS to broker the sale of U.S.-origin defense articles on a government-to-government basis. The AECA and FAA establish eligibility prerequisites for the sale of defense articles to foreign purchasers. These acts also require that such sales be for specific authorized military purposes and subject to end-use monitoring.³⁸ Although the DoD may employ 10 U.S.C. § 333 or other authorities to transfer defense articles to foreign partners, the primary means of DoD security cooperation is by FMS through the Foreign Military Financing (FMF) program.³⁹ As with all security cooperation programming, FMS takes a coordinated village to be successful. A letter of request (LOR) starts the process to transfer articles via FMS. The LOR is the official application by a foreign applicant to receive defense articles. Once received, the DoD forwards the letter to the DoS for vetting, consideration of policy implications, and export licensing.⁴⁰ Depending on the dollar value of the nominative defense articles, consultation with congressional committees or notice to Congress may also be required.⁴¹ Once the DoS concurs with the sale and meets any or all congressional requirements, the USG sends a letter of offer and acceptance (LOA; "the case") to the applicant. The LOA sets the terms.⁴² For FMS, the LOA is the instrument the DoS uses to sell articles from the USG to recipient nations.⁴³ Once the applicant accepts the terms of the LOA, it is considered legal tender and case execution begins.⁴⁴ At this point, the defense articles are delivered from DoD stocks to the recipient. Once accepted and services performed, the recipient is billed and the case is closed. On average, the FMS process takes six-to-twelve months to complete.⁴⁵

For the ANSDF, the DoD employed a specific flavor of FMS called pseudo-FMS programming. Pseudo-FMS is distinct from FMS-at-large in one key aspect: funding. Specifically, the DoD pays for pseudo-FMS defense articles that are divested to foreign partners with OCO funds. Foreign Military Financing is not used. Prior to the transfer,

the FAA and AECA both require the DoS to effectuate an agreement with the recipient to ensure compliance with U.S. law and policy goals.⁴⁶ This is called the “505” agreement, named after section 505 of the FAA. Although pseudo-FMS defense articles function as grants, the strings of a 505 agreement are still attached. The recipient, such as the ANDSF, must agree to the terms of section 505 of the FAA prior to receiving the defense article.⁴⁷

For the past twenty years, multiple iterations of “505 agreements” were brokered in Afghanistan. For example, on behalf of the USG, the DoS at the U.S. embassy in Kabul entered into a “505 agreement” through an exchange of diplomatic notes with the GIRoA Ministry of Defense on 13 June 2017 and again on 25 June 2018.⁴⁸ These notes significantly overlapped in form and substance with prior instruments dating back to the earliest days of pseudo-FMS use in Afghanistan. In accordance with the notes, GIRoA agreed, among other things, to: 1) maintain security of the defense articles they were about to receive from the USG; 2) allow use of the articles by GIRoA personnel only; 3) transfer articles only after USG approval; 4) return articles to USG when no longer needed for the purposes for which they were furnished; and 5) after consent of transfer from the USG, return the net proceeds of any follow-on transfer to the USG.⁴⁹ The exchange of notes served as an offer and acceptance between the parties.⁵⁰ Once the “505 agreement” was signed by the recipient, the articles were transferred, and DSCA managed the end-use monitoring program to ensure compliance.⁵¹ As a grant program, it is often the tactical-level security cooperation office that unilaterally identifies the capability gap of the partner force, and facilitates the pseudo-FMS process to transfer defense articles that meet the need.

Throughout the war in Afghanistan, the pseudo-FMS roles and responsibilities for each agency, directorate and section were intricate but synchronized. Congress identified the Secretary of Defense (SecDef) as the manager of ASFF. The Secretary of Defense designated this responsibility to DSCMO–A, a direct reporting unit to USCENTCOM. The U.S. Army is the executive agent for ASFF even though

Congress appropriated ASFF in support of a joint operation. As such, the Army Budget Office (ABO) receives ASFF from the Office of Management and Budget (OMB) and apportions approximately half to USCENTCOM. In turn, USCENTCOM uses a pass-through account at U.S. Army Central Command (USARCENT)—USCENTCOM’s executive agent for funding—to allot that amount of the ASFF budget to DSCMO–A. The ABO allots the other approximate half of the appropriation to DSCA for pre-identified security cooperation programming, namely pseudo-foreign military sales. Within DSCMO–A, the Security Assistance Office (SAO) coupled with Office of Security-Logistics (OS-Log) identified the materiel needs of the ANDSF. On a rolling basis, they coordinated with DSCA to open cases for the procurement and transfer of these needs. The DSCMO–A Comptroller validated and disbursed ASFF within his warrant and the Afghanistan Resources Oversight Council validated all other cases. Once on contract, DSCMO–A would meet weekly with Program Executive Offices (PEO) such as PEO-Simulation, Training and Instrumentation (PEO-STRI), and Program Management Offices such as PEO Aviation’s Multi-National Aviation Special Project Office, in order to monitor contract performance. As needed, the PEOs would communicate DSCMO–A needs to contracting activities such as Army Contracting Command, who would monitor or modify contracts with contractors. The PEOs would also work with the aviation section of DSCMO–A to engage directly with foreign government-run maintenance depots, such as the Advanced Military Maintenance Repair and Overhaul Center in the United Arab Emirates, to streamline depot use issues, customs procedure, and service support.⁵²

Building the Plane in Flight

Returning Defense Articles to DoD Stocks for Follow-on Disposition

The process to transfer defense articles to the ANDSF was fine-tuned over the two decades of war in Afghanistan. Unfortunately, from a security cooperation perspective, probating the precipitous end of the ANDSF was far less harmonious. As the

taxpayers’ fiduciary, and at the direction of USCENTCOM, DSCMO–A sought to recover ASFF-funded defense articles for future DoD needs. However, before this could happen, DSCMO–A needed to account for the restrictions of the 2011 Budget Control Act (BCA).⁵³ The ASFF is an OCO fund.⁵⁴ Absent congressional intervention, it was generally improper to transfer OCO funds or the items procured with OCO funds to base budgets. To do so would have invoked the BCA.⁵⁵ Congress passed the BCA to bake discretionary spending limits into how much Congress could appropriate towards DoD base budgets, using sequestration among other tools.⁵⁶ Overseas Contingency Operations funds were an exception though. The Balanced Budget and Emergency Deficit Control Act of 1985⁵⁷ allowed emergency funding to be excluded from some BCA budget control limitations. After 11 September 2001, the USG focused security cooperation on counter-terrorism, to include build partner capacity programs funded by ASFF.⁵⁸ Congress and the President designated OCO funds such as ASFF as emergency funding to support the Global War on Terror. As such, the Balanced Budget and Emergency Deficit Control Act of 1985 exempted ASFF, a discretionary funding stream,⁵⁹ from sequestration and other BCA enforcement tools. For DSCMO–A, this meant that ASFF-funded aircraft should not be comingled into DoD stocks where defense articles are purchased with procurement or other base budget funds. The result of doing so would be to augment the service budgets. To ensure comingling did not occur, Congress passed a provision in section 1531 of the FY 2014 National Defense Authorization Act (NDAA), and every NDAA thereafter.⁶⁰ These provisions required notice from the DoD prior to any transfer of ASFF interests into base budgets. Although intended to protect the BCA rather than account for the disbandment of the ANDSF, this provision provided DSCMO–A with an opportunity to meet the current need.

DSCMO–A had previously used this claw back provision in the spring of 2021 to return Wolfhound equipment (handheld radio frequency finder) not yet accepted by the ANDSF.⁶¹ This particular batch was found to be damaged upon



An ASFF-funded M1151 HMMWV, now in DoD stocks and stored at Ali Al Salem Air Base, Kuwait. (Photo courtesy of author)

arrival, and returned to sender, where it was absorbed into DoD stocks and presumptively repaired for follow-on use. Never before, however, had this process been accessed to this breadth and scale. On 15 August 2021, the ANDSF abandoned the defense articles they received from the USG. In doing so, they defaulted on the 505 agreement. As such, section 1531 of the FY 2014 NDAA authorized the DoD to retrieve the ASFF-funded defense articles as constructively “returned by the ANDSF” and place them into DoD stocks. Section 1531 provided a broad scope of transfer eligibility for defense articles. Subsequent NDAAs, however, appeared less permissive. Specifically, within section 1521 of the FY 2021 NDAA,⁶² Congress seemingly narrowed the scope of section 1531 to no longer allow the DoD to transfer ASFF-funded defense articles into DoD stocks that were already accepted by the ANDSF. However, in a later proviso of the same law, Congress declared executive use of prior year authorizations simply required notice.⁶³ Although the broad allowance of section 1531 was potentially curtailed by later NDAAs, this ambiguity as to whether 1531 could still be accessed created space for the DoD to operate. It was here that the power of congressional notice was fully realized.

Congressional notice is a deceptively powerful tool to pair a need to what the law allows, no matter how incompatible the two may seem on their face. On 10 Decem-

ber 2021, SecDef notified Congress of his intent to transfer nominative ASFF-funded defense articles into DoD stocks pursuant to section 1531 of the FY 2014 NDAA. This packet was assembled by DSCMO-A, reviewed at echelon, vetted by the Afghanistan Resources Oversight Council, and staffed by congressional committees prior to official submission to Congress. With no objection, Congress constructively informed the executive branch that SecDef’s intended use of section 1531—to transfer ASFF-funded defense articles with varying status of title to DoD stocks—complied with current law, or at a minimum, would not be challenged.

Back to Square One: Transferring Defense Articles from DoD Stocks

Once ASFF-funded defense articles were legally transferred to DoD stocks, the services owned them, along with the current and future costs associated with their remaining lifecycle. This will be paid with base budget funds until such time that the defense articles are again transferred out of DoD stocks by DSCA.⁶⁴ For example, the Department of the Army would be required to provide base budget funds to store, maintain, modify, field, and dispose the cache of ASFF-funded UH-60s, HMMWVs, or any other defense article they acquired through the 1531 process.

In general, budget planning centers on the two-step legislative process in which

Congress establishes policy and then funds that policy with taxpayer dollars.⁶⁵ Congress usually completes this process by pairing the National Defense Authorization Act (NDAA) with appropriations bills, such as the Consolidated Appropriations Act, to inform the DoD on how, how much, and what type of appropriated funds each department of the DoD should use for their respective programs.⁶⁶ This inductive, iterative process is time intensive and planned with granularity.⁶⁷ Funding is itemized by budget activity group and sub-activity groups.⁶⁸ Sum certain allowances are then tabulated by line, down to the unit level, often with little room for error.⁶⁹

To be clear, funding these unanticipated requirements is a big deal for the services. Consider storage alone. The cost to store one HMMWV can surpass \$400 annually. This seemingly small number is large in the aggregate when multiplied by the thousands of defense articles that are mothballed across the enterprise. Further, the cost to remove hazardous fluids and other activities just to make defense articles fit for storage can surpass thousands of dollars per item.⁷⁰ Not only are these costs not programmed into their budget, they will draw funds away from previously identified needs. For these reasons, the services take on budget risk when assuming control of the ASFF-funded defense articles. For the services to relieve themselves of the unanticipated financial burden of maintaining these defense articles, they turn to DSCA. The DSCA averages an aggregate of \$50 billion in defense article sales per year.⁷¹ Generally, DSCA requires use of DoD stocks as a pass-through in order to consummate these sales. It was primarily for this reason that the ASFF-funded aircraft were transferred into DoD stocks. However, this is not to say that the ASFF-funded defense articles must be leveraged for future security cooperation initiatives. The slate is clean upon their receipt by the DoD and it is immaterial that they were originally procured with ASFF. They can either remain in the DoD for future use or be re-transferred by DSCA as part of a security cooperation program. If re-transferred, DSCA has a number of ways to do so, some of which are briefly described below.⁷²

Defense Trade and Arms Transfers

The Excess Defense Article (EDA) program, first established in 1961 through the FAA, is a subset of FMS programming.⁷³ Generally, recipients of EDA already have U.S.-origin articles in their inventories.⁷⁴ As such, the DoS facilitates EDA cases to supplement those earlier acquisitions.⁷⁵ First, the service takes inventory of their defense articles to determine if they have an excess based on force-determined stock retention allowances, among other things.⁷⁶ Once the excess is identified, the service determines whether the defense articles should be decommissioned or sold “as is, where is.”⁷⁷ Defense articles to be sold are offered to foreign partners by solicitation. Along with the solicitation, interest amongst foreign partners is generated by geographic combatant commanders.⁷⁸ Interested parties reply to the solicitation with a letter of interest, and upon expiration of the solicitation, the service generates an order of merit list of perspective buyers based on strategic imperatives. This order of merit list is packaged by DSCA for the DoS and congressional approval. Once the foreign partner is approved to receive, they jointly inspect the defense articles. If the partner is satisfied, they submit a LOR, which is answered via LOA.⁷⁹ The nominative defense articles are often offered at a reduced cost or grant to the recipient based on its level of depreciation. After some time, if the defense article cannot be sold, it is destroyed to avoid mounting storage and other lifecycle costs. The EDA program is not distinct from FMS in terms of time to process a case or manner in which it is processed, but rather in status of articles. For EDA, the military department concerned owns the defense article, but has determined it is excess, as opposed to other FMS programming where the defense article is specifically produced for foreign partner sale. When authorized, this process has the aptitude to match excess articles with capability gaps for warfighters worldwide. This process best works when the receiving foreign forces have interoperable stocks and available field services representatives to assist the integration of the platform. It could also develop into an ongoing relationship where future parts are sold as well. Once the defense articles are purchased, the foreign partner must pack-

age and transport the defense article from its location. If a repair or other modification to the defense articles is required, the receiving party pays that bill as well.

Before a defense article can be sold as EDA, the service must first offer it to the DoD and USG at-large. If a suitor is found, the DoD executes a direct sale to customers at-cost. For example, the Combined Joint Task Force (CJTF) operating out of Kuwait and Iraq could purchase defense articles on behalf of eligible Iraqi forces using the Counter-ISIS Train and Equip Fund (CTEF). Prior to acceptance, CJTF would inspect the items for suitability and condition. The Defense Logistics Agency (DLA) often assists in storing and transporting DoD stock for both FMS cases and these other disposition approaches as well. Similar to DSCA in origin, the idea of DLA was born from the DoD’s inability to divest 17,000 courier pigeons at the close of World War II. The organization that would become DLA received them, housed them, then sold or gave them away to the public. Since its official inception in 1972, DLA has served the DoD in receiving its defense articles for demilitarization, reutilization, or destruction.⁸⁰ In this capacity, DLA is central to many divestment strategies, whether as a portal to share solicitations, a shipyard to store defense articles, or a logistics partner worldwide.

Presidential drawdown authority is the final security cooperation option discussed in this article. Under this authority, the President may transfer defense articles from DoD stocks to vetted foreign partners in emergency situations. In order to exercise this authority, the President must identify the existence of an unforeseen emergency that requires immediate military assistance. The President must then determine that only his drawdown authority, and no other law, can quell this emergency. Upon making this finding, the President reports their intent to use drawdown authority to Congress. For example, in 2013, then-President Obama used his drawdown authority to support counterterrorism missions in Mali with airlift capabilities and fuel.⁸¹ Under 22 U.S.C. § 506(a)(1), the aggregate value of drawdowns cannot exceed \$100 million in any fiscal year.

All of the processes listed above have a common theme in that they require a close nexus to the use of DoD stocks as a conduit for transfer activity. For many defense articles, this makes sense as DSCA is the subject matter expert on transferring defense articles from DoD stocks, and has delegated DoS authorities. For some defense articles, however, the return to DoD stocks is nonsensical because of two reasons: time and money. As previously stated, the FMS process often takes six-to-twelve months to complete.⁸² During that time, the services accrue bills for defense articles they may have no intention of keeping.

The End Around: Bypassing DoD Stocks

The story of the Afghan Mi-17 may best illustrate the utility of bypassing DoD stocks. The Afghan Air Force (AAF) used Russian Mi-17 rotary wing in their fight against the Taliban.⁸³ The CSTC-A purchased many of these Mi-17s for the AAF through Rosoboronexport State Corporation, the Russian business entity that, under Russian law, has the exclusive right to negotiate the export of Russian military aircraft. On 23 October 2008, the DoS imposed sanctions on Rosoboronexport for violating U.S. nonproliferation laws, and largely prohibited USG agencies from contracting with them.⁸⁴ On 21 May 2010, the DoS ended the sanctions;⁸⁵ however, U.S. policy to transition the AAF fleet from Russian-made to U.S.-made aircraft remained until the fall of GIRoA.⁸⁶ Nonetheless, from 2010 to 2014, CSTC-A used ASFF to procure 63 Mi-17 aircraft from Rosoboronexport and transfer them to the AAF. Although lawful, this procurement sparked significant backlash in Congress.⁸⁷ On 26 December 2013, Congress passed the FY 2014 NDAA into law.⁸⁸ Section 1255 of the FY14 NDAA prohibited the DoD from obligating appropriated funds to enter into contracts or agreements with Rosoboronexport.

Notwithstanding the FY14 NDAA, Mi-17s remained a key component to DoD security assistance efforts with the ANDSF. Due to the nature of the conflict, and AAF use of the Mi-17, a contracted logistical support solution was necessary for requisite sustainment and overhauls of the fleet.⁸⁹ Simply put, in the interest of security cooperation, the DoD paid for the AAF Mi-17s



Afghan National Army Air Corps aviators land an MI-17 helicopter at Bagram Air Base, Afghanistan. (Credit: Sergeant Stephanie van Geete)

and funded their maintenance throughout the war. Despite this, the DoD has generally not maintained Mi-17s in DoD stocks and has little need to purchase or use Mi-17s moving forward. Taking these Afghan Mi-17s into DoD stocks would serve only to provide a time-consuming, base-budget crunching pass-through for follow-on security cooperation initiatives.

The DoD is encouraged by the FY 2021 NDAA to explore alternatives prior to invoking the 1531 process and returning the ASFF-funded articles to DoD stocks.⁹⁰ A proposal for future legislation is to create more mainstream opportunities for the DoD to transfer OCO-funded defense articles to vetted foreign partners without first using DoD stocks as a pass-through. The problem with using DoD stocks as a pass-through is that security cooperation programs can take twelve months or longer to transfer defense articles to foreign partners. While in DoD stocks, the aircraft will need to be inducted, stored, and maintained. This costs money and the bill will go to the DoD organization maintaining the aircraft on their property books, regardless of whether that organization has any use for them. For those defense articles, such as the Mi-17, the use of DoD stocks as a conduit for re-transfer is expensive, time consuming, and generally not necessary.

For the Legal Advisor

Throughout the planning process, DSCMO-A remained impartial to which approach would best meet the USG needs, understanding that the DoS and the Office of the Secretary of Defense-Policy Division were in many regards the decision makers. This article matches that objective spirit. It is a recitation of the planning process to consolidate ASFF-funded defense articles in the fog after the war by DSCMO-A, a tactical-level organization that is leading up to provide strategic input on the dissolution of the ASFF-funded ANDSF estate.

The ASFF is just one security cooperation fund available to the DoD. As Congress continues to train and equip foreign forces in the Middle East, Eastern Europe, the South Pacific, and around the world, the lessons of ASFF remain applicable to legal practitioners in any operating environment seeking to understand the fiscal and operational landscape of defense article transfers.⁹¹ For example, concurrent with the release of this article, security assistance initiatives are underway to support the defense of Ukraine against the Russian invasion. As FMS cases, ASFF-funded defense articles will pass through the DoD and into Ukraine stocks. Judge advocates working in this space will need to understand security assistance mechanisms in order to contribute to this mission.⁹²

The lessons of DSCMO-A are also value-added to the OIR retrograde from Iraq and Syria. Since FY 2015, Congress has used NDAAs to authorize CTEF through section 1209 in support of vetted Syrian groups and individuals, and section 1236 to provide assistance to counter the Islamic State of Iraq and Syria.⁹³ Similar to ASFF, the authority to use CTEF to fund partner forces will diminish commensurate with the phasing of its operation. When that happens, it remains unclear if the law is structured for proper CTEF dissolution planning. In its current state, section 1209 does not appear to authorize the DoD to accept all states of CTEF-funded defense articles into DoD stocks. In addition, defense articles purchased with Counterterrorism Partnerships Funds, reprogrammed to provide assistance to vetted Syrian groups and individuals are not eligible for a transfer to DoD stocks.⁹⁴

Although the BCA expired in 2021, legacy defense articles and antiquated law persist. As such, this case study re-tells the disestablishment of ASFF as a matter of historical importance for OIR planners to contemplate and also to underscore the need for contract and fiscal law competency in operational assignments. It is the judge advocate who must be ready to close the gap between law, policy, and the mission when navigating end state operations of foreign partner funds.

In many regards, the dissolution of the ANDSF was a case of first impression. Congress did not design security assistance law to retrieve the estate of a collapsed partner nation. The DSCMO-A, assembled largely from retrograded United States Forces-Afghanistan personnel and CSTC-A holdovers, was stood up to validate and obligate funds in support of the ANDSF war machine, not navigate strategy and policy to take it apart. This was not the mission they deployed for, but the mission they received, and the staff understood its importance. For the legal advisor, it is imperative to build relationships across the staff and outside of the organization in order to leverage expertise beyond traditional legal disciplines and assist the command in meeting its mission.⁹⁵ Networking means speed means mission accomplishment. For the national security law specialist, contract and fiscal law speaks

to the very core of your competency. Embrace the full spectrum of your chosen craft or make room at the table for your contract attorney counterparts.⁹⁶ Today, more than ever, these two disciplines are one. For the contract and fiscal law practitioner, buckle up—your time is now.

Winding up the Estate

The DSCA celebrates its fifty-year anniversary this year.⁹⁷ From a security cooperation perspective, the operating environment DSCA was born into is not so different than today. In 1971, DSCA worked to provide the South Vietnamese forces with defense articles in their fight against the North. In the chaos of retreat, more than \$1 billion in U.S.-made defense articles—vehicles, tanks, aircraft, and more—were lost to the North. By March 1973, the final American troops departed Vietnam, but the conflict carried on. The DSCA continued to provide defense articles to the South until the fall of Saigon in the spring of 1975. In the aftermath, Army Chief of Staff General Frederick C. Weyand was tapped by President Gerald Ford to assess the loss and determine what, if anything, could be salvaged.⁹⁸

Today, as it did fifty years prior, the law seemingly limits how the United States can transfer defense articles away from disbanded partner forces. This leaves a large gap in DoD capabilities in their attempt to consolidate all ANDSF defense articles in U.S. possession. The DSCMO-A will soon change commanders. After that, the FY 2022 continuing resolution will expire. Congress may develop the law surrounding the disposition of ASFF-funded defense articles in future legislation, but until then, DSCMO-A will continue to refine and execute the options at hand to responsibly closeout ASFF activities, moving to friction. **TAL**

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Notes

1. The Judge Advocate General's (JAG) Corps's mission is: "Provide principled counsel and premier legal services, as committed members and leaders in the legal and Army professions, in support of a ready, globally responsive, and regionally engaged Army." *Mission*, JAGCNET, <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> (last visited Jan. 26, 2022).

2. The JAG Corps's vision is: "In an increasingly complex and legally dynamic world, remain the most highly trained and values-based Corps of adaptive, ready, and dedicated legal and Army professionals who excel in our Joint Force and Army missions, at home and abroad, both today and against emerging threats." *Vision*, JAGCNET, <https://www.jagcnet.army.mil/Sites/jagc.nsf/homeContent.xsp?open&documentId=DEE613DFEC84B73B852579BC006142CE> (last visited Jan. 26, 2022).

3. The JAG Corps's Four Constants are: Principled Counsel, Stewardship, Mastery of the Law, and Servant Leadership. The Judge Advoc. Gen.'s Corps, U.S. Dep't of Army, Four Constants, at slide 2 (2021), [https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46D-CA0CA1EE75266852586C5004A681F/\\$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf](https://www.jagcnet.army.mil/Sites/jagc.nsf/0/46D-CA0CA1EE75266852586C5004A681F/$File/US%20Army%20JAG%20Corps%20Four%20Constants%20Smart%20Card.pdf).

4. General Frederick Weyand, U.S. Army Chief of Staff, Address at the George Catlett Marshall Memorial Reception and Dinner (Oct. 18, 2000), <https://www.i-served.com/weyandspeech.htm>.

5. Carlotta Gall *Ashraf Ghani Says He Flew Afghanistan to Avoid Being Lynched*, N.Y. TIMES (Aug. 18, 2021), <https://www.nytimes.com/2021/08/18/world/middleeast/ashraf-ghani-afghanistan-taliban.html> (accused of stealing duffel bags full of money when fleeing to the United Arab Emirates, Ghani replied "I came with just with my clothes, and I was not even able to bring my library").

6. CHRISTINA L. ARABIA, CONG. RSCH. SERV., IN11728, THE COLLAPSE OF THE AFGHAN NATIONAL DEFENSE AND SECURITY FORCES: IMPLICATIONS FOR U.S. SECURITY ASSISTANCE AND COOPERATION (2021) (the ANDSF was the professional military force established in 2002 to defend GIROA. It remained active until the fall of GIROA in 2021. The ANDSF was composed of the Afghan Air Force, Afghan National Army, and Afghan Special Security Forces under the direction of the GIROA Ministry of Defense, and the Afghan National Police under the direction of the GIROA Ministry of Interior.).

7. *Aircraft*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/aircraft> (the plural of "aircraft" is "aircraft," not "aircrafts").

8. Andrew Kramer, *An Iconic Bridge Sees U.S. Allies Flee Afghanistan as the Soviets Did*, N.Y. TIMES, <https://www.nytimes.com/2021/08/16/world/middleeast/afghanistan-taliban-soviet-friendship-bridge.html> (Aug. 18, 2021) (the Friendship Bridge was also used by Russians retreating from Afghanistan thirty-two years earlier).

9. Mukhammadsharif Mamatkulov, *Uzbekistan Says Hundreds of Afghan Soldiers Flee over Border with Dozens of Aircraft*, REUTERS (Aug. 16, 2021, 12:16 PM), <https://www.reuters.com/world/asia-pacific/uzbekistan-says-hundreds-afghan-soldiers-flee-over-border-with-dozens-aircraft-2021-08-16/>; Catherine Putz, *Afghan Forces Flee, Fly, to Central Asia*, DIPLOMAT (Aug. 17, 2021), <https://thediplomat.com/2021/08/afghan-forces-flee-fly-to-central-asia/>; Alan Cullison, *Afghan Pilots Who Flew Taliban to Tajikistan Begin Transfer to U.S.*, WALL ST. J. (Nov. 10, 2021), <https://www.wsj.com/articles/afghan-pilots-who-flew-taliban-to-tajikistan-begin-transfer-to-u-s-11636575146>.

10. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS (July 2021) [hereinafter JULY 2021 SIGAR REPORT] ("As of June 30, 2021, the U.S. Congress had appropriated nearly \$88.61 billion to help the Afghan government provide security in Afghanistan. This accounts for 61% of all U.S. reconstruction funding for Afghanistan since FY 2002." The total of \$88.61 billion does not include rescissions.) From 2002 to 2004 there was no ASFF per se. The FY 2002 NDAA contemplates funding the establishment of an Afghanistan Army with certain conditions. See Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, ch. 6, 115 Stat. 2230, 2310. The FY 2005 NDAA reimbursed service budgets (\$500 million) for funds provided from 2002 to 2004 for ANDSF defense articles. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, §1202, 118 Stat. 1811, 2078 (2004).

11. *Id.*; U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-116, AFGHANISTAN SECURITY: SOME IMPROVEMENTS REPORTED IN AFGHAN FORCES' CAPABILITIES, BUT ACTIONS NEEDED TO ENHANCE DoD OVERSIGHT OF U.S.-PURCHASED EQUIPMENT 6 (2018).

12. See generally EMILY M. MORGENSTERN, CONG. RSCH. SERV., IF10143, FOREIGN AFFAIRS OVERSEAS CONTINGENCY OPERATIONS (OCO) FUNDING: BACKGROUND AND CURRENT STATUS (2001).

13. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004). See also *id.* §§ 1201-1202 (the pre-cursor to ASFF appropriations for security assistance to the ANDSF. Its language provided up to \$300 million to Afghanistan for their development of a civilian-controlled Afghan Army.)

14. See generally Major General Daniel P. Hughes, *The Continuing Mission in Afghanistan*, ARMY AL&T, Apr.-June 2016, at 9.

15. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (in accordance with Title IX, Overseas Contingency Operations, of the Fiscal Year (FY) 21 Consolidated Appropriations Act, Congress authorized the Secretary of Defense (Sec-Def), or the Secretary's designee to administer ASFF. On 22 June 2021, SecDef established DSCMO-A, a direct reporting unit to USCENTCOM, and designated administration of ASFF previously held by CSTC-A to DSCMO-A).

16. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-10 (17 Jan. 2017) (C1, 22 Oct. 2018).

17. OFF. OF SEC'Y OF DEF., DEPARTMENT OF DEFENSE BUDGET FISCAL YEAR (FY) 2021: JUSTIFICATION FOR FY 2021 OVERSEAS CONTINGENCY OPERATIONS (OCO) AFGHANISTAN SECURITY FORCES FUND 7 (2020); OFF. OF SEC'Y OF DEF., DEPARTMENT OF DEFENSE BUDGET FISCAL YEAR (FY)

2022: JUSTIFICATION FOR FY 2022 AFGHANISTAN SECURITY FORCES FUND 7 (2021).

18. *But see US Exit from Afghanistan Gives Taliban Access to Several Weapons Including Guns, Ammunition, Helicopters and More*, FIRSTPOST (Aug. 18, 2021, 7:41 AM), <https://www.firstpost.com/world/us-exit-from-afghanistan-gives-taliban-access-to-several-weapons-including-guns-ammunition-helicopters-and-more-9892981.html>.

19. U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-90, OFFENSE AND DEFENSE para. 4-116 (31 July 2019).

20. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING ch. 1 (1 Dec. 2020).

21. 22 C.F.R. § 121.1, category VIII—Aircraft and Related Articles (2021). SIGAR REPORT, *supra* note 10, at 50.

22. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-667R, AFGHANISTAN SECURITY: U.S.-FUNDED EQUIPMENT FOR THE AFGHAN NATIONAL DEFENSE AND SECURITY FORCES (2017) (the ANDSF air fleet consisted of (fixed) A-29, AC-208, C-208, and C-130, and (rotary) Mi-17, MD-530, and UH-60).

23. Frustrated stock is an overseas shipment which is en route but cannot be continued onward or diverted to reach its intended destination. *See* 41 C.F.R. § 101.26.311(a) (2022).

24. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, DIVIDED RESPONSIBILITY: LESSONS FROM U.S. SECURITY SECTOR ASSISTANCE EFFORTS IN AFGHANISTAN 39 (2019) (“Depot-level maintenance must be performed outside of Afghanistan and can take up to 12 months . . .”).

25. Major General Curtis Buzzard, U.S. Army, DSCMO—A Director, coined the phrase “move to friction” as a means to describe enterprise-level coordination for DSCMO—A to responsibly close-out ASFF activities. This assertion is based on the author’s recent professional experiences as the Chief, Contract & Fiscal Law for DSCMO—A from 16 June 2021 to 16 November 2021.

26. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, QUARTERLY REPORT TO THE UNITED STATES CONGRESS (Oct. 2021) (in August 2021, Congress reprogrammed \$1.46 billion ASFF towards the noncombatant evacuation of over 160,000 Afghans and others from Afghanistan).

27. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §§ 2151–2450).

28. Foreign Military Sales Act, Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2).

29. International Traffic in Arms Regulations, 22 C.F.R. §§ 120–130 (2021).

30. DEF. SEC. COOP. AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (2021) [hereinafter DSCA MANUAL 5105.38-M].

31. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1521, 134 Stat. 3388, 4035 (Afghanistan Security Forces Fund).

32. *See* DEF. SEC. COOP. UNIV., SECURITY COOPERATION MANAGEMENT ch. 1 (41st ed. 2021) (commonly referred to as *The Green Book*) [hereinafter THE GREEN BOOK].

33. *Id.*

34. *Mission, Vision, Values*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/mission-vision-values> (last visited Jan. 27, 2022).

35. U.S. DEP'T OF DEF., DIR. 5132.03, DoD POLICY AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION (2016). The Afghanistan Resources Oversight Council is chaired by the Office of the Secretary of Defense Undersecretaries for Policy, Comptroller, and Acquisition and Sustainment.

36. Tommy L. Lancaster, *Divest and Prosper*, ARMY AL&T, Oct.–Dec. 2015, at 144.

37. JOINT CHIEFS OF STAFF, JOINT PUB. 4-01, THE DEFENSE TRANSPORTATION SYSTEM ch. 15, para. 1.4.1. (6 June 2013) (C1, 18 July 2017). *See also Evaluating DoD Equipment and Uniform Procurement in Iraq and Afghanistan: Hearing Before the H. Subcomm. on Oversight & Investigations*, 115th Cong. (2017) (joint statement of Pete Velez, Afghanistan (Resources & Transition), Office of the Undersecretary of Defense, Policy, and Colonel David Navratil, Country Director for Iraq, Office of the Undersecretary of Defense, Policy).

38. NATHAN J. LUCAS & MICHAEL J. VASSALOTTI, CONG. RSCH. SERV., IF11437, TRANSFER OF DEFENSE ARTICLES: FOREIGN MILITARY SALES (FMS) (2020).

39. *Id.*

40. THE GREEN BOOK, *supra* note 32, ch. 5, tbl.5-1.

41. *Id.*

42. *Id.*

43. DEF. SEC. COOP. AGENCY, LETTER OF OFFER AND ACCEPTANCE (LOA) STANDARDIZATION GUIDE (2020), https://www.dsca.mil/sites/default/files/2020_dsca_loa_standardization_guide.pdf.

44. THE GREEN BOOK, *supra* note 32, ch. 5, tbl.5-1.

45. *Id.*

46. *Id.*

47. *Id.* *See also* SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, DIVIDED RESPONSIBILITY: LESSON FROM U.S. SECURITY SECTOR ASSISTANCE EFFORTS IN AFGHANISTAN (2019).

48. *See* DSCA MANUAL 5105.38-M, *supra* note 30, para. C15.1.3.1.

49. *Id.* (citing 22 U.S.C. § 2314(a)).

50. *Id.*

51. *See* PAUL K. KERR & LIANA W. ROSEN, CONG. RSCH. SERV., IF 11533, MODIFYING OR ENDING SALES OF U.S.—ORIGIN DEFENSE ARTICLES (2020) (citing 22 U.S.C. § 2785).

52. COMBINED SEC. TRANSITION COMMAND—AFGHANISTAN, AFGHANISTAN SECURITY FORCES FUND STANDARD OPERATING PROCEDURE 18 (2020) (on file with author).

53. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240.

54. CONG. BUDGET OFF., LONG TERM COSTS OF THE ADMINISTRATION’S 2022 DEFENSE BUDGET (2022) (“The base budget was intended to fund normal, peacetime operations and other activities anticipated during the regular budgeting process, and OCO funding was intended for major overseas operations (primarily the wars in Afghanistan and Iraq). However, appropriations for OCO were also used to fund base-budget activities because the base budget was capped under the BCA of 2011. Funding provided for OCO and for emergencies such as natural disasters was not subject to those caps. There was no need to separate base-budget costs from

anticipated OCO costs in the 2022 request because FY 2021 was the final year in which the base budget was subject to caps under the BCA . . .”).

55. OFF. OF THE UNDER SEC’Y OF DEF. (COMPTROLLER)/CHIEF FIN. OFFICER, DEFENSE BUDGET OVERVIEW: UNITED STATES DEPARTMENT OF DEFENSE FISCAL YEAR 2022 BUDGET REQUEST 7-2 (2021) (in conjunction with the 2021 expiration of the BCA, and perhaps the discontinuation of OCO budgeting, “the DoD is shifting funds that had previously been designated as OCO to the base budget. The discretionary request also discontinues requests for OCO as a separate funding category, instead funding direct war costs and enduring operations in the DoD base budget, a significant budgetary reform.”).

56. *See* 2 U.S.C. § 901 (sequestration is the exercise of cancelling previously enacted appropriations by an amount necessary to reach pre-specified levels).

57. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038.

58. NINA M. SERAFINO, CONG. RSCH. SERV., R44444, SECURITY ASSISTANCE AND COOPERATION: SHARED RESPONSIBILITY OF THE DEPARTMENTS OF STATE AND DEFENSE (2016).

59. BRENDAN W. MCGARRY & EMILY M. MORGENSTERN, CONG. RSCH. SERV., R44519, OVERSEAS CONTINGENCY OPERATIONS FUNDING: BACKGROUND AND STATUS (2019) (“Since the terrorist attacks of September 11, 2001, Congress has appropriated \$2 trillion in discretionary budget authority designated as *emergency requirements* or for *Overseas Contingency Operations/Global War on Terrorism* (OCO/GWOT) in support of the broad U.S. government response to the 9/11 attacks and for other related international affairs activities. This figure amounts to 9.5% of total discretionary spending during this period.”) Overseas Contingency Operations funding is a discretionary funding stream, hence the unique importance of its exemption from BCA ceilings on discretionary funding.

60. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1531, 127 Stat. 672, 937 (2013) (Afghanistan Security Forces Fund).

61. Summer Barkley, *Wolfhound Electronically Tracks Enemy C2 in Afghanistan*, U.S. ARMY (March 11, 2013), https://www.army.mil/article/98025/Wolfhound_electronically_tracks_enemy_C2_in_Afghanistan/.

62. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1521, 134 Stat. 3388, 4035 (Afghanistan Security Forces Fund).

63. *Id.* The FY21 NDAA mandates certain reporting requirements that would comply with the FY14 § 1531; however, Congress limited these requirements by the scope of FY21 § 1521 (“during the period in which the authority provided under paragraph (1) is exercised . . .”).

64. LUCAS & VASSALOTTI, *supra* note 38, fig.1.

65. JAMES V. SATURNO, CONG. RSCH. SERV., R46497, AUTHORIZATIONS AND APPROPRIATIONS PROCESS (2020).

66. BRENDAN W. MCGARRY & VALERIE HEITHUSEN, CONG. RSCH. SERV., IF10516, DEFENSE PRIMER: NAVIGATING THE NDAA (2021).

67. Before the NDAA and CAA becomes law, the President’s Budget Request is used to calculate the executive branch request for funds. The Budget Request is a milestone document in the Planning, Programming, Budgeting and Execution process: an inductive series of steps used to develop the request for funds by the executive to the legislative branch. *See* MICHELLE D.

CHRISTENSEN, CONG RSCH. SERV., R42633, THE EXECUTIVE BUDGET PROCESS: AN OVERVIEW (2012).

68. For the ASFF, the four branches of the ANDSF represented the budget activity group. Congress then delineated the sub-activity groups into four buckets of need represented across each budget activity group, namely, sustainment, infrastructure, equipment and transportation, and training and operations. See sources cited *supra* note 17.

69. See sources cited *supra* note 17.

70. Lancaster, *supra* note 36.

71. *Major Arms Sales*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/press-media/major-arms-sales> (last visited Jan. 27, 2022).

72. Although not a security assistance program, the General Services Administration provides another avenue to transfer equipment out of DoD stocks. This process includes internal inventory assessments, and recipient prioritizing in which federal agencies have first rights to the articles, followed by state and local, and then the public. In some instances, the DoD can abandon, destroy, or recycle the articles. *Personal Property Management for Federal Agencies*, U.S. GEN. SERVS. ADMIN., <https://www.gsa.gov/buying-selling/government-property-for-sale-or-disposal/personal-property-for-reuse-sale/personal-property-management-for-federal-agencies> (Nov. 16, 2021).

73. See 22 U.S.C. § 2321b (authorizing the President to transfer excess defense articles to foreign governments. The President delegated this to the Department of State on 29 September 1979 by Executive Order Number 12163, § 1-102(1), 44 Fed. Reg. 56,673 reprinted as amended in 22 U.S.C. § 2381).

74. Foreign Assistance Act of 1961, Pub. L. No. 87-195, §644(g), 75 Stat. 424, 461 (“excess defense articles” (EDA) is defined as “the quantity of defense articles (other than construction equipment, including tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators and compressors) owned by the U.S. government and not procured in anticipation of military assistance or sales requirements or pursuant to a military assistance or sales order, which is in excess of the Approved Force Acquisition Objective and Approved Force Retention Stock of all DoD components at the time such articles are dropped from inventory by the supplying agency for delivery to countries or international organizations under this Act.”)

75. *Excess Defense Articles*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/programs/excess-defense-articles-eda> (last visited Aug. 6, 2021).

76. *Id.*

77. Foreign Assistance Act of 1961, § 516(b)(1)(e) (EDA transfers must not negatively impact the U.S. national technology and industrial base, nor diminish opportunities of U.S. industry to sell new or used equipment to the nominative recipient).

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82. LUCAS & VASSALOTTI, *supra* note 38.

83. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 22.

84. Imposition of Measures Against Foreign Persons, Including a Ban on U.S. Government Procurement, 73 Fed. Reg. 63226–63227 (Oct. 23, 2008).

85. Termination of Measures Against a Russian Entity, 75 Fed. Reg. 28673 (May 21, 2010).

86. See generally Bureau of Pol.-Mil. Affs., *European Recapitalization Incentive Program (ERIP)*, U.S. DEP’T OF STATE (Mar. 17, 2020), <https://2017-2021.state.gov/european-recapitalization-incentive-program-erip/index.html>.

87. Tom Cole, *Pentagon Purchase of Russian Helicopters an Outrage*, CONGRESSMAN TOM COLE (July 15, 2013), <https://cole.house.gov/pentagon-purchase-russian-helicopters-outrage>.

88. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

89. *Supra* note 17 (for the Mi-17, depot-level overhauls that are required every 8 years or 2,000 flight hours). See generally U.S. DEP’T OF DEF., DIR. 4151.18, MAINTENANCE OF MILITARY MATERIEL (31 Mar. 2004) (C1, 31 Aug. 2018).

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92. Ben Zeisloft, *Biden Could Move Weapons Meant for Fallen Afghan Government to Ukraine*, DAILY WIRE (Dec. 18, 2021), <https://www.dailywire.com/news/biden-could-move-weapons-meant-for-fallen-afghan-government-to-ukraine>.

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94. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 9016, 134 Stat. 1182, 1349 (2020).

95. SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, *supra* note 24, at xvi (“When the U.S. government empowers a temporary organization like CSTC–A to transfer equipment to a partner nation, DSCA must establish a formal process that ensures all relevant

U.S.-based stakeholders approve of and provide input on equipping decisions.”).

96. “I am he as you are he as you are me, And we are all together.” THE BEATLES, I AM THE WALRUS (EMI 1967).

97. *Defense Trade and Arms Transfers*, DEF. SEC. COOP. AGENCY, <https://www.dsca.mil/defense-trade-and-arms-transfers> (last visited Jan. 27, 2021).

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IMPROVE
STAFF **ABILITY** PLAN
DECREASED OCCUPATIONAL STRESS
BUSINESS STAFF
INCREASED PERSONAL WELL-BEING
**EMOTIONAL
INTELLIGENCE**

DECREASED OCCUPATIONAL STRESS
**INCREASED
LEADERSHIP ABILITY**
IMPROVE DECISION MAKING
WELL-BEING

INCREASED TEAM PERFORMANCE
LEADERSHIP
increased leadership ability

TEAM
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No. 3

Emotional Intelligence Practice for JAG Corps Leaders

By Major Pearl K. Sandys

[E]motional intelligence is the sine qua non of leadership.¹

There are very few downsides to becoming more emotionally intelligent, even for the militantly rational like some lawyers.²

Of the approximately 200-plus military occupational specialties (MOS) in the Army,³ the 27A MOS is the only one that requires a license to practice the law.⁴ Because of this specialized field of practice, judge advocates (JAs) are charged to deal with a wide range of issues in the Army, all of which involve communicating, negotiating, counseling, and advising.⁵ Especially in the fields of legal assistance and military justice,⁶ JAs often face moral and ethical dilemmas, which require sound judgment, competence in the law, and emotional maturity.⁷ To lead these JAs, the Judge Advocate General's (JAG) Corps needs leaders who are experienced, competent, and emotionally equipped.⁸

As leaders and officers in the Army, JAs are expected to rely on Army leadership doctrine as outlined in Army Doctrine Publication (ADP) 6-22.⁹ The doctrine “establishes and describes the Army profession and the foundations of Army leadership,”¹⁰ as well as “what leaders should be and do.”¹¹ Delving further into the fundamental principles of leadership on a practical level, ADP 6-22 dedicates a chapter to that topic “Leadership in Practice.”¹²

While Army doctrine does “acknowledge and account for human nature,”¹³ ADP 6-22 does not fully address the practical aspects of leadership principles. Essentially, Army doctrine lacks the “how-to.” Doctrine is merely the “last refuge of the unimagi-

native,”¹⁴ unless it can be practically adopted and applied. Just like war, the legal field is much more than a “contest of wills; it is also the province of fear, passion, camaraderie, heroism, and grief.”¹⁵ In this regard, war and the legal field both stem from the domain of human emotion and, by consequence, the actions stemming from human emotion. Leadership in practice requires—at least in successful practice—an understanding of self and others within the human domain; it requires emotional intelligence (EI).

Emotional intelligence is the mechanism through which JAs can apply leadership doctrine to fit their system of values and beliefs, personality, and current professional and personal situations, while thoughtfully considering the system of values and beliefs, personalities, and professional and personal situations of their subordinates, peers, and leaders. Because understanding what EI is (or is not) is a necessary step to practicing EI in thought and action, this article begins with an overview of EI, specifically delving into Daniel Goleman's EI model, and how it is embodied within and correlates to Army leadership doctrine.¹⁶ The article then explains how obstacles can prevent effective training and learning even though EI is adoptable and changeable. These obstacles, however, can be overcome, leading to the conclusion that because emotional competence can be learned,¹⁷ EI training should be embedded

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within all stages of a JA's career development.¹⁸ Building on that proposed practical application, EI is explored within a JA's legal practice, explaining how leaders can better understand and lead their subordinates through learning EI. The article concludes by highlighting how EI training can equip JAs to be better leaders, going beyond what is written in leadership doctrine and embracing a motivated leadership practice of increased self-awareness, empathy, and humility.

Emotional Intelligence and Army Leadership Doctrine

Emotional intelligence is "the capacity for recognizing our own feelings and those of others, for motivating ourselves, and for managing emotions well in ourselves and our relationships."¹⁹ In other words, EI is the ability to understand and manage your own emotions and those of the people around you. In defining the concept, it is helpful to also state what it is not. Emotional intelligence is not a set of personality traits or qualities, such as agreeableness, optimism, and calm.²⁰ Emotional intelligence is a set of "interrelated abilities"²¹ and the capacity to recognize "one's and others' emotional states to solve problems and regulate behavior."²² Emotional intelligence is also not intelligence quotient (IQ), although "the emotional brain is as involved in reasoning as is the thinking brain."²³ Intelligence quotient is "a measure of your personal information bank—your memory, vocabulary, mathematical skills, and visual motor coordination."²⁴ Although IQ has been studied, researched, and tested for more than 100 years,²⁵ studies show that IQ does not have as much significant impact on job performance, success, or leadership capability.²⁶ Intelligence quotient is "just a

threshold competence; you need it to get in the field, but it does not make you a star. It's the emotional intelligence abilities that matter more for superior performance."²⁷ Consider the JAG Corps, which fosters an underlying assumption of a base-line level of legal competence in its officers: all JAs are required to have graduated from law school and hold a valid license to practice law.²⁸ The technical skills to practice law (and underlying baseline IQ level required to graduate from law school and pass the bar), are merely "threshold capabilities."²⁹ Without EI, "a person can have the best training in the world, an incisive, analytical mind, and an endless supply of smart ideas, but he still won't make a great leader."³⁰

Emotional Intelligence and Emotional Competence

To understand how EI³¹ can serve as the conduit through which Army leadership doctrine can be put into practice, it is important to first delve into the EI framework using Daniel Goleman's model.³² This informs how JAs might compare Army doctrine to commonly accepted norms of EI. Under Goleman's EI model, EI is comprised of five domains: 1) self-awareness ("knowing one's internal states, preferences, resources, and intuitions"),³³ 2) self-regulation ("managing one's internal states, impulses, and resources"),³⁴ 3) motivation ("emotional tendencies that guide or facilitate reaching goals"),³⁵ 4) empathy ("awareness of others' feelings, needs, and concerns"),³⁶ and 5) social skills ("adeptness at inducing desirable responses in others").³⁷ Domains 1, 2, and 3 fall under what Goleman refers to as "personal competence," which are competencies that determine "how we manage ourselves."³⁸ Domains 4 and 5 fall under "social competence," which

are competencies that determine "how we handle relationships."³⁹ Goleman lists twenty-five competencies that fall under one of those five domains.⁴⁰

According to Goleman, a successful performer or leader does not need all twenty-five competencies, but only requires approximately six competencies "spread across all five areas of EI."⁴¹ This is because these competencies are distinct, yet "interdependent" on each other, and different jobs or tasks may demand more of one competency over another.⁴² When EI is learned, either through experience or training (or both), it results in emotional competence—or growth in that emotional competence. Having EI "determines our potential for learning . . . self-awareness, motivation, self-regulation, empathy, and adeptness in relationships."⁴³ Having a high level of EI means that a person has "excellent potential to learn" emotional competencies.⁴⁴ When JAs and JA leaders utilize these emotional competencies, productively tailor them to manage their own emotions, and recognize and acknowledge the emotions of others in any given situation, they possess "emotional agility."⁴⁵

Army Leadership Doctrine and Correlating Emotional Intelligence Competencies

Army leadership doctrine already contemplates many of the EI competencies, which indicates their importance to personal leadership development. When the Army leadership requirements model is examined using Goleman's framework, it becomes clear how Army leadership doctrine is embedded within and correlates to the EI model.⁴⁶

The Army leadership requirements model, as outlined in ADP 6-22, "establishes a core set of requirements that inform leaders of the expectations for what they need to be, know, and do."⁴⁷ The model consists of two components: attributes ("Be and Know") and competencies⁴⁸ ("Do").⁴⁹ Attributes are "internal" to an individual and comprise three categories: character, presence, and intellect.⁵⁰ Competencies are actions that are expected of Army leaders.⁵¹ The three competency categories are: leads, develops, and achieves.⁵² According to Army leadership doctrine, the difference between attributes and competencies

is that competencies can be “trained and developed,” while attributes are “personal characteristics, which are molded through experience over time.”⁵³ Under Goleman’s EI theory, however, most Army leadership attributes, if they fall within the EI domains, can also be “trained and developed” or—in other words—learned.

An examination of Army leadership attributes and competencies show that with the exception of the “expertise” attribute, all attributes and competencies fall within one or more of Goleman’s EI domains.⁵⁴ Expertise, as an attribute, does not fall within an EI domain because it is in the domain of IQ.⁵⁵ Accounting for this exception, there is significant overlap between Army leadership doctrine and EI domains, especially in the concept of self-awareness.⁵⁶ Army doctrine specifically mentions self-awareness in the context of leadership:

Self-awareness is fundamental to understanding one’s abilities. . . . Leaders require self-awareness if they are to accurately assess their own experience and competence as well as earn the trust of those they influence. Being self-aware means seeing one’s self as viewed by others and understanding the levels of influence one is likely to have with followers.⁵⁷

Self-awareness is also discussed in the context of resilience.⁵⁸ Even leaders with high EI may lack self-awareness when overwhelmed by professional or personal stressors. Managing stressors or “overcoming obstacles . . . takes mental discipline and resilience.”⁵⁹ Resilience, as an Army leadership attribute, falls within Goleman’s personal competence domains of self-awareness, self-regulation, and motivation.⁶⁰

While ADP 6-22 does not explain how to put these attributes—such as resilience—and competencies into practice,⁶¹ the acknowledgement and learning of EI can become the “how-to.” Specifically, within the realm of a JA’s legal practice, both as a practitioner and leader, a high level of EI is required to be successful and is essential to develop a sense of personal meaning and satisfaction. Although EI levels can be enhanced through learning and training,

recognizing specific obstacles that hinder learning can lead to more effective training.

Emotional Intelligence Learning and Obstacles

Psychological research, studies, and EI training programs have proven the potential for EI growth in individuals.⁶² These studies and programs show that EI is not rigid and can be increased with deliberate practice and training.⁶³ Willingness and motivation to learn, empathy, and accurate self-perception open the door for higher levels of EI. On the other hand, some JAs might assume their EI levels are acceptable—and they probably are. But “[i]f you always do what you’ve always done, you’ll always be where you’ve always been.”⁶⁴ In the spirit of continual growth throughout JAG Corps careers, it is important to examine possible obstacles to such self-development in the realm of leadership, and address each possible roadblock in turn. The three primary obstacles to learning or expanding EI are: 1) ego,⁶⁵ 2) lack of empathy, and 3) inaccurate feedback from peers, subordinates, and supervisors.⁶⁶

Obstacle 1: Ego

Ego is the “self” and “[w]hen properly balanced with [EI], ego can be an important pillar to success (in the form of self-confidence, assuredness, conviction, clear decision making, and more).”⁶⁷ On the other hand, having too much ego means having “an exaggerated sense of self-importance.”⁶⁸ This exaggeration manifests itself in several ways. First, it leads to resistance to and unacceptance of feedback⁶⁹ because there is an underlying fear of vulnerability⁷⁰ and shame. People who have too much ego often hide behind their positions of authority,⁷¹ surround themselves with people who will not disagree, and, instead, feed their need for self-aggrandizement. They are often blind to their weaknesses⁷² and underestimate how much others are observing their leadership failures.

Having an exaggerated sense of self-importance shuts out opportunities for reflection and change. People with too much ego lack self-awareness⁷³ and often overestimate their abilities and emotional competence; they have an inaccurate perception of themselves. Although they can

benefit most from EI training, they are the least likely to be aware of and acknowledge their need to manage their egos. When too much ego presents as an obstacle to learning, leaders and trainers need to spend significant time and effort emphasizing the importance and benefits of EI and accurately assess and boldly present the individual’s current state of EI.⁷⁴ Having these “tough conversations”⁷⁵ will be necessary to help an individual overcome this obstacle, and these conversations may also be a reality check on the individual’s ability to empathize.

Obstacle 2: Lack of Empathy⁷⁶

Empathy is about connecting and “tak[ing] the perspective of someone else.”⁷⁷ Empathy is not sympathy or concern.⁷⁸ It is also not about making a problem go away or fixing a situation. Empathy is a “vulnerable” choice because “if I were to choose to connect with you through empathy, I would have to connect with something in myself that knows that feeling.”⁷⁹ Army leadership doctrine recognizes empathy as a character attribute and defines it as a “realization that leads to a deeper understanding” of “what others are experiencing and feeling,” while also “genuinely relat[ing] to another person’s situation, motives, or feelings.”⁸⁰

Lack of empathy implies that a person does not have the genuine will or desire to step into the shoes of another and experience something from another’s point of view. This becomes a significant obstacle to learning EI because EI is all about the capacity to understand others’ emotional states, as well as one’s own.⁸¹ Lack of empathy also correlates to lack of self-awareness because people lacking self-awareness do not realize how their indifference or lack of empathy is affecting another person: “Self-awareness allows [people] to understand not only their own motivations and tendencies, but also how that behavior affects and influences others.”⁸²

Emotional intelligence training can explain the essence of empathy and help individuals be more self-aware of their level of empathy. By taking the time and effort to learn about oneself through thoughtful and deliberate questioning, contemplation, and discussion, individuals can conceptualize—distill into words—their ability (or lack of ability) to empathize.⁸³ Although it is pos-

sible to go through this EI training alone, it is particularly helpful and eye-opening when people who frequently interact with an individual offer “honest and productive” feedback.⁸⁴

Obstacle 3: Inaccurate, Vague, and Disingenuous Feedback

Feedback is important to self-development, which is “continuous and begins with the motivated individual, supplemented by a concerted team effort.”⁸⁵ This “team effort” includes “quality feedback from . . . peers, subordinates, and superiors . . .”⁸⁶ Providing feedback is a three-way street: leaders, subordinates,⁸⁷ and peers can all provide valuable feedback to each other.⁸⁸ Inac-

curate, vague, and disingenuous feedback occurs when people fear repercussions for saying something wrong or being wrong.⁸⁹ People may also be inclined to give this type of feedback when they want to “take the easy way out” or perpetuate a “cultural norm of nice and polite.”⁹⁰ Feedback like this becomes an obstacle to learning EI because EI training and development requires an honest and critical assessment of an individual’s performance and behavior, based on thoughtful, focused, and genuine observations over time. Translating these assessments into feedback requires “tough conversations” and integrity, “choosing courage over [one’s own] comfort.”⁹¹ Inaccurate, vague, and disingenuous feedback can be overcome when leaders create a “climate of psychological safety”⁹² that fosters honest and constructive feedback, “without threat of repercussion or blame.”⁹³ Psychological safety is the “belief that the work environment is safe for interpersonal risk taking,”⁹⁴ such as feeling free to speak up, offer new or different ideas, and discuss concerns and mistakes, without fear of reprisal or judgment. Leaders are in a position to create the conditions for a psychologically safe workplace by acknowledging and limiting the role of fear in the process of learning and developing.⁹⁵ Leaders should also recognize that the lower-ranking Service members are more likely to feel less “psychologically safe” than higher-ranking Service members.⁹⁶ Lower-ranking Service members may “constantly [be] assessing [their] relative status, monitoring how [they] stack up against others . . . [even] subconsciously.”⁹⁷ When conditions

*How can we expect to influence and motivate [our clients and fellow Soldiers] to accomplish inherently emotional missions without first seeking to learn what makes them tick?*⁹⁸

EI Within a Judge Advocate’s Legal Practice

Judge advocates are officers who have gone through recognized and widely-accepted legal training.⁹⁹ Many JAs have been trained under the traditional legal view that the law is “above emotions.”¹⁰⁰ This may be why legal practice is often “aggressively rational, linear, and goal oriented,”¹⁰¹ masking the important emotional components that are also involved.¹⁰² Emotions provide valuable information and insight into any given situation and can enhance a JA’s ability to navigate the complex realm of legal practice.¹⁰³ And when legal analysis is coupled with thoughtful consideration of one’s “emotion and intuition” (and the emotions and intuitions of all parties involved), it can result in a “more fully informed, and therefore better reasoned and more appropriate decision.”¹⁰⁴

For JAs, EI comes into play in all aspects of legal practice, including representing clients, managing and understanding victims, advising commanders, and in relationships with other JAs and leaders. The ability to communicate, build and manage relationships with different people in various settings—practicing EI—is as important as mastery in a particular area of law.¹⁰⁵ When JAs manage relationships with emotional competence, JAs can navigate their way through complex situations and make better decisions—decisions based on thorough analysis and critical thinking, coupled with thoughtful consideration of underlying emotional factors. Awareness of one’s and others’ emotional states in a decision-making process can “reduce[] results tainted by extraneous or damaging emotions . . . like fear or pride.”¹⁰⁶

More importantly, EI can help JAs reduce the overwhelming amount of stress and anxiety they face on the job.¹⁰⁷ For example, consider trial and defense counsel negotiating the outcome of a case. Both counsel may come to the table with specific, rational objectives, such as certain pleas and sentences. Anxiety exists on both sides, whether they recognize it or not,

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are set to allow members of an organization to outwardly be honest, bold, and challenge the status quo, the quality of feedback will be more accurate, clear, and genuine. When the three obstacles discussed can be overcome, EI training can be effective at every stage of a JA’s career. As JAs rise in rank and positions of responsibility, their circle of involvement becomes broader. Judge advocates in all stages of their careers need EI to navigate their way through lawyering, leadership, and relationship management in a rapidly changing and complex environment.

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EI Within a Judge Advocate’s Legal and Leadership Practice

Is there another profession that needs to grasp the complex human domain more than the military, where trust is our currency and lives hang on our decisions?

Inaccurate, vague, and disingenuous feedback can be overcome when leaders create a “climate of psychological safety”⁹² that fosters honest and constructive feedback, “without threat of repercussion or blame.”⁹³ Psychological safety is the “belief

because both trial and defense counsel are “anxious about whether any agreement . . . can be reached, whether the other side is trustworthy or intentionally cutthroat, and whether their own abilities are sufficient to produce the best deal.”¹⁰⁸ If anxiety is not “properly recognized and . . . managed . . . it can make [both parties] defensive and . . . less effective.”¹⁰⁹ Trial and defense counsel, instead of focusing on the negative emotions surrounding the process, can work on 1) understanding their own and opposing counsel’s limitations or constraints;¹¹⁰ and 2) analyzing the legal issues involved from both perspectives, with a focus on values,¹¹¹ such as cooperative relationship-building, trust, and appreciation for each other’s roles in the military justice process.

Anxiety during negotiations is just one specific example of how job-related pressure and stress can manifest itself in practice. Over the years, numerous studies have been conducted, showing that lawyers have above-average cases of substance abuse, depression, and other psychological problems.¹¹² Exhaustion and burnout,¹¹³ coupled with high expectations, and a “psychologically unsafe” work environment has a direct effect on physical health as well.¹¹⁴ Possessing EI is pivotal because JAs with higher EI can better regulate their emotions and overcome negative ones with “value[s]-based”¹¹⁵ and “accurate” thinking.¹¹⁶ By utilizing EI, JAs will have sound mental and physical health,¹¹⁷ and be better and more effective lawyers and leaders.

EI Within a Judge Advocate’s Leadership Practice¹¹⁸

*Leaders must either invest a reasonable amount of time attending to fears and feelings, or squander an unreasonable amount of time trying to manage ineffective and unproductive behavior.*¹¹⁹

Judge advocate leaders must have emotional antennas that point both inward and outward. As mentioned above, even leaders with high EI may lack self-awareness when overwhelmed by professional or personal stressors.¹²⁰ Self-awareness can help leaders understand and accept the reality of aggregated stressors that might hinder them from making values-based, cognizant deci-

sions—decisions they would usually make easily and correctly without the burden of these stressors clouding their judgment.¹²¹ When leaders are able to “take a sober, down-to-earth view”¹²² of their stressors, it will prepare them “to act in ways that allow [them] to endure and survive extraordinary hardship”; it will allow leaders to build and sustain resilience.¹²³ The ability to understand and accept reality can also help leaders point their emotional antennas outward and allow them to recognize and tune into subordinates’ struggles and emotional states in any given situation. This recognition will enable leaders to tailor their counseling, coaching, and mentoring to focus on how subordinates can accurately assess their struggles and emotional states (as well as those of other parties involved) to influence follow-on decisions and actions.

Counseling, coaching, and mentoring can be most effective—and, quite frankly, easiest—when subordinates are motivated. Judge advocate leaders should understand that a subordinate’s motivation is strongly influenced by the climate of the office;¹²⁴ “leadership sets the tone.”¹²⁵ No amount of proven EI development or training will be effective if the office environment does not support and encourage learning.¹²⁶ Leaders should also be aware even in a psychologically-safe environment,¹²⁷ learning does not end with mere training. The process of learning EI to acquire emotional competence and agility requires a continuous cycle of reflection and receptiveness to feedback on the learner’s part. It also requires meaningful and thoughtful observance and providing of honest feedback on the leader’s part. When it comes to meaningful and thoughtful observance and honest feedback, subordinates can also play a part and take on a leadership role.¹²⁸

Subordinates’ role in the feedback process¹²⁹ will also encourage engagement in the workplace. “Engaged workers . . . have bought into what the organization is about and are trying to make a difference.”¹³⁰ Engaged JAs will better foster relationships with leaders, peers, clients, and subordinates, creating a sense of purpose and belonging in their work.¹³¹ Engagement is also strengthened as JAs learn—throughout their careers—how to be leaders by being good followers first.

“Being a good [follower] is part of being an effective leader.”¹³² From initial entry, JAs are taught to switch between leading and following, reinforcing the “servant follower-leader mindset.”¹³³ One of the strengths of the JAG Corps is that its people know “how to step in and step out of their follower and leaders roles.”¹³⁴ This means that when it comes to EI training, all JAs would benefit from learning EI from a follower and leader perspective. This perspective-based EI concept alone can introduce JAs to view the world from another JA’s perspective, thereby increasing social competence, to include empathy. When JA leaders can learn to shift perspectives and approach each relationship in a mindful, values-driven, and productive way, servant-leadership can be put into practice—and also enhanced.¹³⁵

Conclusion

Army leadership doctrine,¹³⁶ while acknowledging the role of human nature and emotions in leadership practice, does not address the practical aspects of leadership principles. Emotional intelligence is the mechanism through which Army leadership doctrine can be put into practice. Emotional intelligence can be learned and developed further, even when obstacles—such as too much ego; lack of empathy; and inaccurate, vague, and disingenuous feedback—stand in the way. These obstacles can be overcome with deliberate and thoughtful training.¹³⁷ When JAs use emotional intelligence to navigate their way through lawyering, following, leadership, and relationship management, the JAG Corps can be more engaged, productive, and effective.

The uncharted territory of emotions should be explored with enthusiastic and analytical curiosity, as well as a dose of humility, so that it becomes an additional competence in a JA’s toolkit. Ignoring the domains of emotional intelligence in a JA’s legal and leadership practice can lead to the danger of counter-productive leadership.¹³⁸ When JAs use steady emotional intelligence in each act of leadership or legal practice (through self-awareness, self-regulation, motivation, empathy, and social skills), those collective actions can become stories of the emotionally intelligent leader, and those collective stories will blossom

into a system that produces and inspires more emotionally intelligent JA leaders.¹³⁹ Through our collective actions and stories, JAs can continue to elevate the quality of leadership in the JAG Corps. **TAL**

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Notes

1. Daniel Goleman, *What Makes a Leader*, in *MILITARY LEADERSHIP: IN PURSUIT OF EXCELLENCE* 39, 39 (Robert L. Taylor et al. eds., 2009).

2. *How Emotional Intelligence Makes You a Better Lawyer*, ABA (Oct. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/october-2017/how-successful-lawyers-use-emotional-intelligence-to-their-advan/> (providing *YourABA's* interview with Ronda Muir, founder and principal of Law People Management, LLC).

3. *Army Career Match*, U.S. ARMY, <https://www.goarmy.com/careers-and-jobs/career-match.html> (July 1, 2020). On this website, a list of all military occupational specialties can be generated by conducting an advanced search for all active duty jobs.

4. U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 9-2 (24 Jan. 2017) [hereinafter AR 27-1] (outlining eligibility for appointment as judge advocates (JAs)).

5. See generally *id.*

6. See generally U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (26 Mar. 2020) [hereinafter AR 27-3]; U.S. DEP'T ARMY, REG. 27-10, MILITARY JUSTICE (20 Nov. 2020) [hereinafter AR 27-10].

7. See Lieutenant General Charles N. Pede, *Putting Principled Counsel into Action*, *ARMY LAW.*, no. 4, 2020, at 2.

8. Army Doctrine Publication (ADP) 6-22 defines leadership as:

[T]he activity of influencing people by providing purpose, direction, and motivation to accomplish the mission and improve the organization. . . . An *Army leader* is anyone who by virtue of assumed role or assigned responsibility inspires and influences people by providing purpose, direction, and motivation to accomplish the mission and improve the organization.

U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para.1-74 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22]. Compare this definition to General Stanley McChrystal's definition of leadership: "[L]eadership is a complex system of relationships between leaders and followers, in a particular context, that provides meaning to its members." STANLEY MCCHRISTAL ET AL., *LEADERS: MYTH AND REALITY* 397 (2018). See also MICHAEL MACCOBY, *THE LEADERS WE NEED: AND WHAT MAKES US FOLLOW*, at xvi-xvii (2007) (explaining that leadership "always implies a relationship between leader and led, and the relationship exists within a context").

9. ADP 6-22, *supra* note 8.

10. *Id.* at v.

11. *Id.* at vii. See also *MILITARY LEADERSHIP IN PURSUIT OF EXCELLENCE*, *supra* note 1, 1-140 (where parts I and II provide various perspectives on leadership and successful leadership traits).

12. *Id.* ch. 8.

13. U.S. DEP'T OF ARMY, DOCTRINE PUB. 1-01, DOCTRINE PRIMER para. 3-4 (31 July 2019) [hereinafter ADP 1-01].

14. JIM MATTIS & BING WEST, *CALL SIGN CHAOS: LEARNING TO LEAD* 54 (2019) (discussing effective joint operations at a strategic operational level and how each service's doctrine and culture is a starting point toward working together).

15. ADP 1-01, *supra* note 13, para. 3-4.

16. The goal of this article is not to teach the nuances of emotional intelligence (EI). The article, however, seeks to introduce the concept and its applicability for leadership development and training within the Judge Advocate General's (JAG) Corps. For an example of an EI training vignette for field-grade JAs, see appendices A and B. Appendix B was modified from the content in Susan David & Christina Congleton, *Emotional Agility: How Effective Leaders Manage Their Thoughts and Feelings*, reprinted in *ON EMOTIONAL INTELLIGENCE* 119, 119-126 (2015).

17. DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 24-29 (3d ed. 2006).

18. The Judge Advocate General is responsible for integrating Army profession and leadership training in courses of instruction at The Judge Advocate General's Legal Center and School. U.S. DEP'T OF ARMY, REG. 600-100, ARMY PROFESSION AND LEADERSHIP POLICY para. 2-10 (5 Apr. 2017) [hereinafter AR 600-100].

19. DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* 317 (4th ed. 2006). See also GOLEMAN, *supra* note 17, at 4 (explaining that EI has been "[t]alked about loosely for decades under a variety of names, from 'character' and 'personality' to 'soft skills' and 'competence.'"). Howard Gardner was one of the first psychologists to point out the difference between intellectual and emotional capacities in 1983. GOLEMAN, *supra* note 19, at 317. Several years later, in 1990, the concept of EI theory was developed by Peter Salovey and John Mayer. See Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 *IMAGINATION, COGNITION, & PERSONALITY* 185, 185-211 (1990). Daniel Goleman also acknowledges that psychologist Reuven Bar-On developed another early model of EI in 1988. See GOLEMAN, *supra* note 19, at 317.

20. John D. Mayer, *What Emotional Intelligence Is and Is Not*, *PSYCH. TODAY* (Sept. 21, 2009), <http://www.psychologytoday.com/blog/the-personality-analyst/200909/what-emotional-intelligence-is-and-is-not>.

21. John D. Mayer et al., *Emotional Intelligence: New Ability or Eclectic Traits?*, 63 *AM. PSYCH.* 503, 503 (2008).

22. Salovey & Mayer, *supra* note 19, at 189.

23. GOLEMAN, *supra* note 19, at 28 (explaining that humans have two different kinds of intelligence, both rational and emotional, and how we succeed in life is determined by both IQ and EI).

24. STEVEN J. STEIN, *THE EQ LEADER: INSTILLING PASSION, CREATING SHARED GOALS, AND BUILDING MEANINGFUL ORGANIZATIONS THROUGH EMOTIONAL INTELLIGENCE* 28 (2017).

25. *Id.* at 26-28. Psychologist Alfred Binet and psychiatrist Theodore Simon developed the first intelligence

test. *Id.* See also Edmund B. Huey, *The Binet Scale for Measuring Intelligence and Retardation*, 1 *J. EDUC. PSYCH.* 435, 435-44 (1910).

26. STEIN, *supra* note 24, at 28 (explaining one study estimates that IQ accounts for twenty-five percent of an individual's job performance and a more thorough review indicates the number is closer to four to nine percent of the variance). See Richmar K. Wagner, *Intelligence, Training, and Employment*, 52 *AM. PSYCH.* 1059, 1059-69 (1997). See also Robert J. Sternberg et al., *Testing Common Sense*, 50 *AM. PSYCH.* 912, 912-27 (1995).

27. GOLEMAN, *supra* note 17, at 19 (quoting Lyle Spencer, co-founder of Competency International, a research consultancy for competency-based assessment and development).

28. See AR 27-1, *supra* note 4, para. 9-2.

29. Goleman, *supra* note 1, at 39. In assessing the U.S. Government and other executive and leadership positions in business, Goleman found that EI competence became increasingly more important than cognitive abilities, intellectual superiority, or technical skills in higher level positions—"emotional competence made the crucial difference between mediocre leaders and the best On average, close to 90 percent of their success in leadership was attributable to emotional intelligence." GOLEMAN, *supra* note 17, at 33-34.

30. Goleman, *supra* note 1, at 39. Research into 130 criminal and corporate practitioners' and judges' EI assessment found that "those few who scored above average in emotional intelligence were the star performers—stood out from the rest." RONDA MUIR, *BEYOND SMART: LAWYERING WITH EMOTIONAL INTELLIGENCE* 82 (2019). See also Claudio Fernández-Aráoz, *Ignore Emotional Intelligence at Your Own Risk*, *HARV. BUS. REV.* (Oct. 22, 2014), <https://hbr.org/2014/10/ignore-emotional-intelligence-at-your-own-risk> (explaining that in analyzing the correlation of experience, IQ, and EI in job candidates, those with vast experience and high IQ, but had low EI, had a failure rate as high as 25 percent); Kelly A. Hudson, *Emotional Intelligence and Self-Efficacy in Military Leaders* (Mar. 25, 2016) (Ph.D. dissertation, Brandman University) (on file with Brandman Digital Repository) (finding that there is a relationship between a leader's EI and self-efficacy and the higher a leader's EI, the higher the leader's self-efficacy).

31. For a general overview of the evolution of EI, see Parvesh K. Chopra & Gopal K. Kanji, *Emotional Intelligence: A Catalyst for Inspirational Leadership and Management Excellence*, 21 *TOTAL QUALITY MGMT.* 971, 973-75 (2010). See also GOLEMAN, *supra* note 19, at 9-29, app. C (providing a detailed explanation of the intricacies of human brain anatomy, neurology, and physiology that enable humans to think, feel, and react). It is important to understand the "circuitry" in the human brain (amygdala, related limbic structures, and the neocortex) because it scientifically explains why "emotion is so crucial to effective thought, both in making wise decisions and in simply allowing us to think clearly." See *id.* at 27.

32. Psychologist Daniel Goleman developed this EI model in 1998. A couple of years later, Goleman developed a newer model, collapsing the twenty-five competencies into twenty and the five domains into four (self-awareness, self-management, social awareness, and relationship management). See Daniel Goleman, *An Emotional Intelligence-Based Theory of Performance*, in *THE EMOTIONALLY INTELLIGENT WORKPLACE* 27, 29-30 (The Consortium for Research on Emotional Intelligence in Organizations ed., 2001). See also Daniel Gole-

man & Richard E. Boyatzis, *Emotional Intelligence Has 12 Elements: Which Do You Need to Work On?*, HARV. BUS. REV. (Feb. 6, 2017), <https://hbr.org/2017/02/emotional-intelligence-has-12-elements-which-do-you-need-to-work-on> (further reducing the competencies down to twelve). The author uses Goleman's earlier model because it is more comprehensive and comparable to Army leadership competencies and attributes.

33. See GOLEMAN, *supra* note 17, at 49–72. See also *id.* at 318 (describing self-awareness as “[k]nowing what we are feeling in the moment, and using those preferences to guide our decision making; having a realistic assessment of our own abilities and a well-grounded sense of self-confidence”).

34. *Id.* at 73–104. See also *id.* at 318 (describing self-regulation as “[h]andling our emotions so that they facilitate rather than interfere with the task at hand; being conscientious and delaying gratification to pursue goals; recovering well from emotional distress”).

35. *Id.* at 105–32. See also *id.* at 318 (motivation is “[u]sing our deepest preferences to move and guide us toward our goals, to help us take initiative and strive to improve, and to persevere in the face of setbacks and frustrations”).

36. *Id.* at 133–62. See also *id.* at 318 (describing empathy as “[s]ensing what people are feeling, being able to take their perspective, and cultivating rapport and attunement with a broad diversity of people”).

37. *Id.* at 26–27, 163–234. See also *id.* at 318 (describing social skills as “[h]andling emotions in relationships well and accurately reading social situations and networks; interacting smoothly; using these skills to persuade and lead, negotiate and settle disputes, for cooperation and teamwork”). Although there are various models of EI developed over the years, the author focuses on Daniel Goleman's model. See generally STEIN, *supra* note 24, at 28–40 (discussing other models of EI and how the concept of emotion has been studied and analyzed, even as early as the 1870s).

38. GOLEMAN, *supra* note 17, at 26.

39. *Id.* at 27.

40. *Id.* at 26–27.

41. This is the minimum requirement, as long as a competency exists in each EI domain. *Id.* at 25.

42. *Id.* at 25, 28.

43. *Id.* at 24.

44. *Id.* at 25 (providing an example of a musically gifted person, who never has lessons, and thus, is never able to hone the skills necessary to have a successful musical career, “a Pavarotti who never had the chance to blossom.”). See *infra* text accompanying notes 62–97 (elaborating on how EI can be learned).

45. David & Congleton, *supra* note 16, at 120.

46. Fourteen attributes fall under categories of character, presence, and intellect in Army doctrine. ADP 6-22, *supra* note 8, tbls.2-1, 3-1, 4-1. Ten competencies fall under categories of leads, develops, and achieves. See *id.* tbls.5-1 to 5-5, tbls.6-1 to 6-5, tbl.7-1. Army doctrine's attributes and competencies can be listed in more than one domain because as indicated earlier in this article, just like Goleman's competencies are interdependent, so are Army leadership doctrine's attributes and competencies. See *supra* note 42 and accompanying text.

47. ADP 6-22, *supra* note 8, introductory fig.1. See also *id.* fig.1-3, The Army Leadership Requirements Model.

48. Both the Army leadership requirements model and Goleman's EI model use the word “competency.” For the purposes of this paper, it is important to distinguish under what context the word “competency” is being used. Army leadership doctrine's explanation of “core leader competencies” is confusing, in that the term “competency” is described as a “component” having three categories, while also describing a core set of competencies that fall under one of the three categories. Compare ADP 6-22, *supra* note 8, para. 1-84 and fig.1-3, with *id.* para. 1-88 and fig.1-4.

49. *Id.* para. 1-84.

50. *Id.* para. 1-86. See also *supra* note 48.

51. ADP 6-22, *supra* note 8, para. 1-87.

52. *Id.* See also *supra* note 49.

53. ADP 6-22, *supra* note 8, para. 1-85.

54. See *supra* note 46.

55. See *supra* text accompanying notes 31–45 (comparing EI with intelligence quotient (IQ)). See also GOLEMAN, *supra* note 17, at 18–21 (describing IQ as part of a set of “technical skills[s]” or “total body of specialized information and practical skills” that comes from “in-the-trenches learning”).

56. See ADP 6-22, *supra* note 8, para. 8-50 (“All leaders . . . must monitor their personal behavior.”).

57. *Id.* para. 1-92. See also *id.* paras. 6-14 to 6-19 (discussing developing self-awareness through self-critique and self-regulation).

58. *Id.* para. 10-26 (“[I]mproving self-awareness and self-mastery helps build and sustain resiliency.”). See *id.* paras. 2-31 to 2-32, 4-11, 5-65 (discussing self-awareness in the context of humility, interpersonal tact, leading with confidence, and leader preparation). See *id.* tbl.3-1 (defining resilience as the “tendency to recover quickly from setbacks, shock, injuries, adversity, and stress, while maintaining a mission and organizational focus”).

59. *Id.* para. 8-39.

60. See *supra* note 46.

61. Army leadership doctrine dedicates a chapter to “Leadership in Practice.” See ADP 6-22, *supra* note 8, paras. 8-1 to 8-7. This chapter, however, is more about examining factors that may arise when applying leadership. *Id.* The chapter delves into challenges of an operational environment, management, and stress, but does not address how to apply leadership doctrine on a daily basis. Chapter 8 also discusses counterproductive leadership, “demonstration of leader behaviors that violate one or more of the Army's core leader competencies or Army Values, preventing a climate conducive to mission accomplishment.” *Id.* para. 8-46. This section on counterproductive leadership, however, only provides explanations of what a leader should not do, which are exhibiting behaviors that are antithetical to leadership attributes and competencies. See *id.* paras. 8-45 to 8-50.

62. See Cary Cherniss & Daniel Goleman, *Training for Emotional Intelligence: A Model*, in THE EMOTIONALLY INTELLIGENT WORKPLACE, *supra* note 32, at 209–33. See also GOLEMAN, *supra* note 17; STEIN, *supra* note 24, at 306 (discussing the wide ranging studies and examples of programs designed to improve a leader's EI); Jennifer Kahn, *Can Emotional Intelligence Be Taught?*, N.Y. TIMES (Sept. 11, 2013), <https://www.nytimes.com/2013/09/15/magazine/can-emotional-intelligence-be-taught.html>; HARV. BUS. REV., THE EI ADVANTAGE: DRIVING INNOVATION AND BUSINESS SUCCESS

THROUGH THE POWER OF EMOTIONAL INTELLIGENCE (2019), <https://hbr.org/sponsored/2019/08/the-ei-advantage-driving-innovation-and-business-success-through-the-power-of-emotional-intelligence> (“Including [emotional intelligence] in leadership training is often the way many organizations start to develop [emotional intelligence] more broadly.”); Delphine Nelis et al., *Increasing Emotional Intelligence: (How) Is It Possible?*, 47 PERSONALITY & INDIVIDUAL DIFFERENCES 36, 36–41 (2009) (discussing the improvement of EI in young adults after training, but that people will go back to their “baseline” EI level, if competences are not practiced).

63. Richard E. Boyatzis, *How and Why Individuals Are Able to Develop Emotional Intelligence*, in THE EMOTIONALLY INTELLIGENT WORKPLACE, *supra* note 32, at 234–53; Tomas Chamorro-Premuzic, *Can You Really Improve Your Emotional Intelligence?*, HARV. BUS. REV. (May 29, 2013), <https://hbr.org/2013/05/can-you-really-improve-your-em> (discussing successful programs, yet admitting that “no program can get someone from 0 to 100%.”). See also Goleman, *supra* note 17, at 239–41; Kevin B. Oden et al., *Embedding Emotional Intelligence into Military Training Contexts*, 3 PROCEEDIA MANUFACTURING 4052, 4052–59 (2015) (explaining their research on how EI can be used to improve human performance in both kinetic and non-kinetic operations); Raquel Gilar-Corbi et al., *Can Emotional Intelligence Be Improved? A Randomized Experimental Study of a Business-Oriented EI Training Program for Senior Managers*, PLOS ONE (Oct. 23, 2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0224254> (finding that a thirty-hour EI training course for senior managers resulted in EI improvement). See appendices A and B for an example of an EI training vignette for field-grade JAs.

64. Shelby Skrhak, *12 Motivational Quotes About Improving Yourself*, SUCCESS (Apr. 13, 2017), <https://www.success.com/12-motivational-quotes-about-improving-yourself/> (quoting T.D. Jakes).

65. Too much ego encompasses resistance to criticism, fear of vulnerability, inaccurate self-perception, overestimation of one's EI, and lack of self-awareness.

66. See generally Chamorro-Premuzic, *supra* note 63; STEIN, *supra* note 24, at 177–78 (discussing “leadership derailers”); GOLEMAN, *supra* note 19, at 297–300 (discussing neural circuitry of fear); GOLEMAN, *supra* note 17, at 235–36 (discussing the “yuck factors” in business, “emotional battles people faced daily that were distasteful and painful,” such as rejections, overwhelming workload, fear of not being able to support themselves, confusion, and imbalance).

67. *Ego*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ego> (last visited Jan. 25, 2022); JEN SHIRKANI, *EGO V. EQ: HOW TOP LEADERS BEAT 8 EGO TRAPS WITH EMOTIONAL INTELLIGENCE*, at xvi (2014).

68. *Egotism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/egotism> (last visited Jan. 25, 2022). “[T]oxic leadership . . . is defined as a combination of self-centered attitudes, motivations, and behaviors.” AR 600-100, *supra* note 18, para. 1-11(d). Army regulation 600-100 also defines the “toxic self-centered abuser” as those leaders who are “[c]apable of producing spectacular short term results, but are arrogant, abusive, intemperate, distrusting, and irascible.” *Id.* para. 1-11(e)(4).

69. Some leaders who lack competence are aware of their weaknesses and instead of overcoming their weaknesses, instead behave in “counterproductive or

negative ways to cover up their shortcomings . . . refusing to listen to subordinates.” ADP 6-22, *supra* note 8, para. 8-49. On the contrary, “[s]elf-aware leaders are open to feedback from others and actively seek it.” *Id.* para. 6-15.

70. “Vulnerability is not weakness Vulnerability is our most accurate measure of courage.” DOUG CRANDALL & MATT KINCAID, PERMISSION TO SPEAK FREELY: HOW THE BEST LEADERS CULTIVATE A CULTURE OF CANDOR 93 (2017) (quoting Brené Brown).

71. “Counterproductive behaviors can span a range of behaviors to include . . . abusing authority.” AR 600-100, *supra* note 18, para. 1-11(d). Self-serving behaviors in counterproductive leaders include behaviors that “result from self-centered motivations, where they act in ways that seek primarily to accomplish their own goals and needs before those of others.” ADP 6-22, *supra* note 8, para. 8-49. Examples include “distorting information to favor own ideas, exaggerating accomplishments or abilities, putting own work and accomplishments ahead of others and the mission, displaying narcissistic tendencies, or exhibiting a sense of entitlement.” *Id.*

72. Counterproductive leaders are “often associated with arrogant or abusive leaders who are not aware of their shortcomings and do not seek to correct their shortcomings.” ADP 6-22, *supra* note 8, para. 8-49.

73. *See id.* paras. 6-14 to 6-19 (discussing adaptability and humility in the context of developing self-awareness).

74. *See generally* Major Patrick Sandys, *Assessing Leaders from the Bottom Up*, ARMY LAW., no. 4, 2020, at 60 (discussing the need for subordinates to provide input on their leaders’ leadership quality to develop leaders in the JAG Corps).

75. *See supra* text accompanying notes 85–97.

76. Army Leadership doctrine directly addresses lack of empathy under self-serving behaviors of counterproductive leaders. ADP 6-22, *supra* note 8, para. 8-49. Self-serving behavior examples of counterproductive leaders include “lacking concern or empathy for others . . . distorting information to favor own ideas.” *Id.* *See generally* Brigadier General Joseph B. Berger & Major Courtney M. Cohen, *The Critical Character Attribute of Empathy*, ARMY LAW., no. 6, 2019, at 30, 31–33.

77. BRENE BROWN, DARE TO LEAD 140 (2018). “Empathy is not connecting to an experience; it’s connecting to the emotions that underpin an experience.” *Id.* *See also* Berger & Cohen, *supra* note 76, at 31.

78. BROWN, *supra* note 77, at 140. Empathy is also “infinite and renewable.” *Id.* “Empathy is feeling with people. Sympathy is feeling for them.” *Id.* at 152. *See also* ADP 6-22, *supra* note 8, para. 2-23.

79. BROWN, *supra* note 77, at 142. Army regulation recognizes destructive leadership styles to include those who are “inattentive to the morale of their organization.” AR 600-100, *supra* note 18, para. 1-11e(3). Leaders who are “inattentive” may lack empathy because they are not aware.

80. ADP 6-22, *supra* note 8, para. 2-23. *See also* BROWN, *supra* note 77, at 143–48, 152–56 (discussing five empathy skills and six empathic failures).

81. *See supra* text accompanying notes 19–61 (discussing EI and Army leadership doctrine).

82. Berger & Cohen, *supra* note 76, at 32.

83. This could be fear of vulnerability, shame, and “emotional exposure.” *See* BROWN, *supra* note 77, at 19–43.

84. *Id.* at 7–9. For example, in an Army setting, feedback from subordinates, peers, and leaders may reveal things about a JA that the JA has not realized before.

85. ADP 6-22, *supra* note 8, para. 6-8.

86. *Id.*

87. “Hearing the unfiltered, authentic thoughts of those you lead is more valuable than their presentation skills.” CRANDALL & KINCAID, *supra* note 70, at 62.

88. “Providing feedback is a common element of interacting with others, regardless of developmental role or process.” ADP 6-22, *supra* note 8, para. 6-52. “We can get better at recognizing and mitigating both our biases and the contextual factors that are influencing our judgment, especially by enabling others to speak up and call us out.” CRANDALL & KINCAID, *supra* note 70, at 62–63.

89. BROWN, *supra* note 77, at 9.

90. *Id.* at 7–8. Brown explains that avoiding “honest and productive” feedback or “tough conversations” results in “lack of clarity, diminishing trust and engagement . . . an increase in problematic behavior, including passive-aggressive behavior, talking behind people’s backs, pervasive back channel communication, [and] gossip.” *Id.*

91. *Id.* at 227. “Integrity is . . . choosing what’s right over what’s fun, fast, or easy . . . practicing your values, not just professing them.” *Id.*

92. *See generally* AMY C. EDMONSON, THE FEARLESS ORGANIZATION: CREATING PSYCHOLOGICAL SAFETY IN THE WORKPLACE FOR LEARNING, INNOVATION, AND GROWTH (2019) (explaining how psychological safety, as opposed to a culture of fear, in the workplace leads to thriving employees, effective teamwork, and organizational success).

93. ADP 6-22, *supra* note 8, para. 8-13. *See also* CRANDALL & KINCAID, *supra* note 70, at 100 (“Leaders must facilitate vital interpersonal exchanges by creating a climate of psychological safety in which it’s expected people will speak up and disagree.”).

94. EDMONSON, *supra* note 92, at 8.

95. *Id.* at 14 (discussing how fear is not an effective motivator and “inhibits learning”). “[H]ow psychologically safe a person feels strongly shapes the propensity to engage in learning behaviors, such as information sharing, asking for help, or experimenting.” *Id.* Psychological safety is not about a set of personality traits, being nice and trustworthy, or lowering performance standards. Psychological safety, instead, pushes boundaries through “candor and willingness to engage in productive conflict so as to learn from different points of view.” *Id.* at 15.

96. *Id.*

97. *Id.*

98. Chaplain (Major) John McDougall, *Empathetic Leadership: Understanding the Human Domain*, MIL. REV., Nov.–Dec. 2019, at 28, 29.

99. MUIR, *supra* note 30, at 45.

100. *See generally* ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER” (2007). *See also* Susan A. Bandes, *Introduction to THE PASSIONS OF LAW* 1, 6 (Susan A. Bandes ed., 1999) (underlying “the law’s insistence on neutral emotion-

less judging” and “law’s devotion to the myth of an emotionless, cognition-driven legal system”).

101. MUIR, *supra* note 30, at 45 (quoting Melissa Nelken, faculty chair of the Hastings Center for Negotiation and Dispute Resolution). *See also* Melissa Nelken, *Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School*, 46 J. LEG. EDUC. 420, 421 (1996). Most lawyers are taught that “how they feel about the cases they read is irrelevant; what matters is the soundness of their logic Resistance to the human dimension of the lawyer’s work is built into most law training.” MUIR, *supra* note 30, at 48 (quoting Melissa Nelken).

102. In the context of “pain and suffering” damages in civil lawsuits, lawyers resort to “complex analysis” or “a simple formula” to “avoid[] assessments or calculations of actual emotional damage.” MUIR, *supra* note 30, at 46. Muir explains how the legal community is challenged by the “inability of [the] conventional justice system to adequately assess the complex interplay between brain function, emotion management, and criminality” *Id.* at 47.

103. Christine C. Kelton, *Clients Want Results, Lawyers Need Emotional Intelligence*, 63 CLEV. STATE L. REV. 459, 493 (2015). *See also* MUIR, *supra* note 30, at 44 (explaining how a study on lawyers’ EI scores was “significantly below the national average”).

104. Alan M. Lerner, *From Socrates to Damascio, from Langdell to Kandel: The Role of Emotion in Modern Legal Education*, in AFFECT AND LEGAL EDUCATION; EMOTION IN LEARNING AND TEACHING THE LAW 151, 161 (Paul Maharg & Caroline Maughan eds., 2011); Ronda Muir, *The Importance of Emotional Intelligence in Law Firm Partners*, LEGAL PRAC. MAG., July/Aug. 2007, at 60 (quoting Peter Salovey) (“Law is human interaction in emotionally evocative climates. Any lawyer who can understand what emotions are present and why is at tremendous advantage.”).

105. *See generally* MUIR, *supra* note 30, at 82–85. “[O]nce you’re in a high-IQ position, intellect loses its power to determine who will emerge as a productive employee or an effective leader. [T]o be a productive employee or an effective leader], how you handle yourself and your relationships”—emotional intelligence—“matters more than IQ.” *Id.* at 88 (quoting Daniel Goleman).

106. *Id.* at 90.

107. “[B]iological pathways that make the mind, the emotions, and the body [are] not separate, but intimately entwined.” GOLEMAN, *supra* note 19, at 166. *See also id.* at 166–85 (discussing the relationship between emotions and health and how people who experience “chronic anxiety, long periods of sadness and pessimism, unremitting tension or incessant hostility, relentless cynicism or suspiciousness . . . [are] found to have double the risk of disease”).

108. MUIR, *supra* note 30, at 94.

109. *Id.*

110. Trial counsel may have specific directions from the chain of command not to negotiate beyond a specific sentence. Defense counsel, on the other hand, may be considering specific wishes from the client.

111. *See generally* *What Are Your Values: Deciding What’s Most Important in Your Life*, MINDTOOLS, https://www.mindtools.com/pages/article/newTED_85.htm (last visited Nov. 21, 2020); *Values Exercise*, THINK2PERFORM, <https://www.think2perform.com/our-approach/values> (last visited Nov. 21, 2020) (walking through the user’s behaviors with “ideal values” to define what

- the user values most and “set the stage for behaviors and performance more closely aligned with your ideal self”); David & Congleton, *supra* note 16, at 126 (discussing acting aligned with values, not negative emotions).
112. MUIR, *supra* note 30, at 131–47 (citing several studies and reports on law students and lawyers mental health and substance abuse issues). See generally Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46 (2016).
113. See generally Major Rebecca A. Blood, *Preventing Burnout in the JAG Corps*, ARMY LAW., no. 6, 2019, at 39–41.
114. See MUIR, *supra* note 30, at 133.
115. David & Congleton, *supra* note 16, at 126 (discussing acting or responding in a way that “aligns with your values,” not immediate negative emotions).
116. Compare accurate thinking with positive thinking. Joel Minden, *The Problem with Positive Thinking: Aim for “Accurate” and “Useful” Instead*, PSYCH. TODAY (Aug. 25, 2016), <https://www.psychologytoday.com/us/blog/cbt-and-me/201608/the-problem-positive-thinking>. See KAREN REIVICH & ANDREW SHATTÉ, *THE RESILIENCE FACTOR: 7 ESSENTIAL SKILLS FOR OVERCOMING LIFE’S INEVITABLE OBSTACLES* (2002); MUIR, *supra* note 30, at 134.
117. U.S. DEP’T OF ARMY, REG. 350-53, COMPREHENSIVE SOLDIER AND FAMILY FITNESS (19 June 2014) (discussing the five dimensions of strength and resilience skills).
118. Army Regulation 600-100 recognizes destructive leaders who are “incompetent managers.” Incompetent managers are those who “possess inadequate cognitive or emotional fitness” AR 600-100, *supra* note 18, para. 1-11e(1).
119. BROWN, *supra* note 77, at 67.
120. See *supra* text accompanying notes 47–64 (discussing how resilience falls within Goleman’s personal competence domains).
121. “Facing reality . . . is grueling work,” but “when we truly stare down reality, we prepare ourselves to act in ways to allow us to endure and survive extraordinary hardship.” Diane L. Coutu, *How Resilience Works*, reprinted in ON EMOTIONAL INTELLIGENCE, *supra* note 45, at 111–12.
122. *Id.* at 108.
123. *Id.* at 112. See *id.* at 108–09 (explaining how resilience can be cultivated by facing down reality, searching for meaning, and continually improvising).
124. See *supra* notes 92–97 and accompanying text (discussing psychological safety in the workplace).
125. Cherniss & Goleman, *supra* note 62, at 221. See MUIR, *supra* note 30, at 254 (noting that while emotionally intelligent workers are the best performers, people in leadership positions are more likely to have the lowest EI level).
126. Cherniss & Goleman, *supra* note 62, at 220–33.
127. See *supra* notes 92–97 and accompanying text.
128. “All Army members who witness [counterproductive leadership behaviors] have a responsibility to prevent, intervene, counter, or mitigate them.” ADP 6-22, *supra* note 8, para. 8-50.
129. See generally Sandys, *supra* note 74.
130. MUIR, *supra* note 30, at 290 (quoting Susan Sorenson and discussing how “engaged” workplaces have lower turnover and higher productivity).
131. *Id.* at 291 (explaining how “affective” or “emotional attachment” type engagement “produces strongest commitment . . . rais[ing] job satisfaction and mental and physical well-being”).
132. ADP 6-22, *supra* note 8, at vii.
133. STEIN, *supra* note 24, at 294.
134. *Id.* at 296.
135. Servant leaders “accurately assess [their] follower’s highest priority needs.” STEIN, *supra* note 24, at 296. Servant leadership “begins with the natural feeling that one wants to serve . . . first Then conscious choice brings one to aspire to lead.” ROBERT K. GREENLEAF, *SERVANT LEADERSHIP: A JOURNEY INTO THE NATURE OF LEGITIMATE POWER & GREATNESS* 27 (25th anniversary ed. 2002). See also HERMANN HESSE, *THE JOURNEY TO THE EAST* (1932).
136. ADP 6-22, *supra* note 8.
137. See *supra* text accompanying notes 62–97 (discussing emotional intelligence learning and obstacles).
138. See ADP 6-22, *supra* note 8, paras. 8-45 to 8-50; AR 600-100, *supra* note 18, para. 1-11.
139. Inspired by Baratunde Thurston, a futurist comedian, writer, and cultural critic. See BARATUNDE, <https://www.baratunde.com/> (last visited Oct. 20, 2020).

Appendix A

Emotional Intelligence Practical Exercise–Vignette (with Facilitator Guide in Red)

Vignette Role-Play Instructions: Each participant in the group is assigned a role and given coinciding name tags. Depending on the number of participants in the group, some may be assigned two or more roles and will switch name tags depending on the role they are playing. When this exercise begins, every participant is informed of the scene by the facilitators. One or more participants will be provided additional information that the other participants are not aware of. The participants will then role-play based on the biographical information provided and the new, additional information inserted. The scene develops organically.

“Time-out” sessions will occur when the facilitator calls “time-out.” These sessions will be used for the participants (with a focus on Major Price) to walk through the emotion evaluation questions in Appendix B and discuss among the participants. During these sessions, participants are encouraged to analyze various interactions that occurred during the role-play.

Roles:

Major Austin Price	Chief of Justice
Major Joe Grave	Special Victim Prosecutor
Captain Lori James	Trial Counsel
Captain Sara Bolton	Military Justice Advisor
Sergeant Brie Perez	Court Reporter
Major Ben Tezioni	Senior Defense Counsel

Biography:

1. Major (MAJ) Austin Price: Major Price has been chief of justice in this office for twelve months. Major Price is married with two children, ages four and eight months. **How could these facts be relevant to the discussion? Is it stressful sometimes to raise two young children?** Major Price has been under stress lately because the government has lost three sexual assault cases in a row. **Although justice is not about winning, but how might this affect him?** Major Price feels that his office is being scrutinized and the losses have led to low morale. He has noticed that MAJ Grave has been ill-treating his trial counsel by being condescending. Instead of trying to teach the new attorney, MAJ Price feels that MAJ Grave has been taking pleasure in watching her fail. **Look out for whether MAJ Price takes the opportunity to address this observation with MAJ Grave in the role-play.**

2. MAJ John Grave: Major Grave is an experienced trial attorney and has been in the office for eighteen months. Major Grave and MAJ Price have known each other since the Officer Basic Course. Although they are on friendly terms professionally, MAJ Grave does not think MAJ Price is competent to perform his job as the chief of justice. **Does MAJ Grave express his “disapproval” through words or actions?** Major Grave is dissatisfied with the quality of trial counsel in the office. Major Grave is not married and is loving life as a single bachelor. **Major**

Grave's personal situation may inform how he expects junior counsel to work in terms of work-life balance.

3. Captain (CPT) Lori James: Captain James has been a trial counsel for three weeks. **Three weeks means that CPT James is inexperienced. What do inexperienced trial counsel deal with? What are their fears?** She has already tried a case with MAJ Grave and dreads working with him. Captain James is not a good public speaker and has trouble remembering basic rules under pressure. Captain James is married with three children: ages two, four, and eight. Captain James is also on profile and has not been able to conduct physical training for the past three months. **Take note of how other leaders are empathetic or not to CPT James's situation.**

Scene I:

Wednesday, 18 November 2021. Day three of a sexual assault trial. Major Grave's direct examination of the victim did not go well. **How does this make MAJ Grave feel? Bruised ego?** The military judge has ordered a recess for ten minutes.

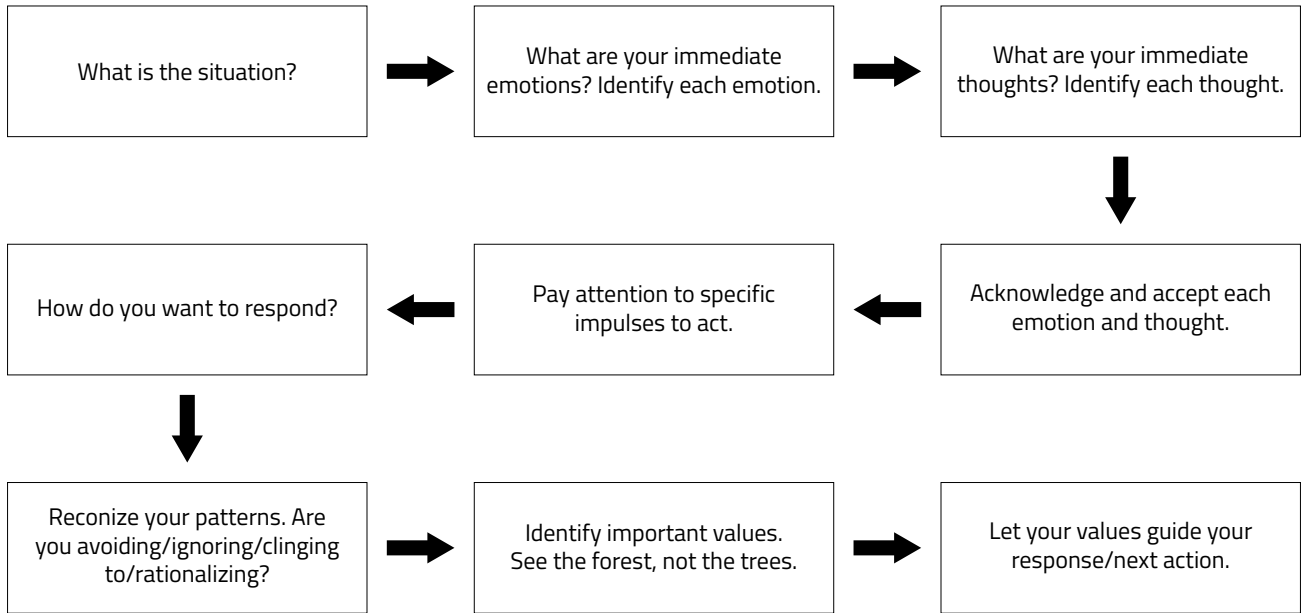
Additional information for CPT James: During trial, you are not able to find the right evidence for MAJ Grave to use during questioning. As soon as he sits down after direct, he leans over and whispers, "Get your s*** together. This is not your first f***ing trial." You are feeling overwhelmed and on the verge of a breakdown. **Does anyone notice CPT James's change of demeanor?** Go talk to MAJ Price, your supervisor.

Additional information for MAJ Grave: During the direct examination of the victim, you asked CPT James for an exhibit to refresh the victim's recollection and she was not able to find it. The direct did not go well and you feel that CPT James's inability to do her job was the cause. After the direct, you leaned over and whispered, "Get your s*** together. This is not your first f***ing trial." **Was this impulse? If MAJ Grave had thought his emotions through, would he have worded it differently? Would he have waited until a later time to address it?** You noticed during the direct that Sergeant White, the court reporter, was aggressively rolling his eyes and smirking while you questioned the victim. **This could be an opportunity to walk through the emotion evaluation questions.** When the judge calls recess, you see CPT James heading toward MAJ Price's office.

Scene II: It is 2000 and the military judge has called a recess until tomorrow morning at 0900.

Depending on how the participants play their roles, look for opportunities to walk through the emotion evaluation questions in Appendix B, for both self and others to point out specific emotions, thoughts, and impulses involved. What are the underlying values (empathy, coaching, justice, fairness, etc.) that can be discussed to bring out different outcomes?

Appendix B
Emotion Evaluation for Self





The 2d Infantry Division legal team engages in some friendly competition and team building at PTI! (Photo courtesy of author)

Closing Argument

“How Can I Help?”

Servant Leadership and Why It Creates a Healthy Team

By Colonel Keirsten H. Kennedy

When you're a leader—no matter how long you've been in your role or how hard the journey was to get there—you are merely overhead unless you're bringing out the best in your employees.¹

Hello! First-time staff judge advocate (SJA) here, long-time fan of *The Army Lawyer*. I have recently discovered that SJAs have kind of hard jobs; yes, folks, you heard it here first. Of course, every Judge Advocate General's (JAG) Corps job seems to begin with the firehose-drinking analogy, but then it calms down after a few months of applying what you've learned, and you start to feel more comfortable in your new role. Having had several new assignments over the last nineteen years, I assumed SJA-ing would follow a similar pattern. But every day is a new adventure, tackling issues that I know some, little, or nothing about—to include issues where my skills are either rusty or nonexistent. This daily situation keeps me humble, but it also keeps me turning

to my office of the staff judge advocate (OSJA) team: branch chiefs, young judge advocates (JAs) and paralegals with the time and talent to begin gaining subject-matter expertise in legal areas, and—most importantly—the OSJA leadership foundation. I frequently ask myself where I can fit in and lead effectively as the OSJA hums along, driven by the incredible professionals who do the hard work and keep our legal practice at an incredibly high level of success. Spoiler alert: it's servant leadership.

The magic that happens when a leader places followers' needs over their own desires (for personal success, recognition, etc.) is the most incredible lesson of leadership: the more you help others, the easier your job as a leader becomes. And the most

exciting thing of all is this: servant leadership is for anyone! Second-most exciting thing: everyone can practice being a servant leader right now and watch as their teams transform into a cooperative, high-functioning community—all because they know that you, their leader, are there to help them as your primary purpose.

Though you might in fact already be practicing servant leadership, it is important to understand what servant leadership is, the effect this leadership approach can have on your team, and how to embrace and ultimately embody this highly-effective style of leadership. Experts in leadership studies agree there are myriad effective ways to lead,² and individuals usually gravitate toward one or two approaches as their primary “leadership language.”³ In general, five leadership styles have emerged as the most popular way to define a leader's approach to heading up teams and organizations: transformational leadership, participatory leadership, values-based leadership, situational leadership, and servant leadership.⁴ We may employ each, depending on the situation and role we currently serve; we may also dabble early on in our careers in each, learning which style suits us best and is most authentic to our personalities. In sum, leadership styles—though often presented as four, five, or even six distinguishable lanes we can organize ourselves into—do tend to vary subjectively, as applied to each individual leader.

Servant leadership is a simple concept. First coined in the 1970s, “servant leadership” was Robert K. Greenleaf's way of describing a leader who puts serving others above all else.⁵ This leader “ensures that followers are growing in all areas—their profession, knowledge, autonomy, and even their health and physical development.”⁶ If this sounds familiar, it should: the Army's leadership doctrine delves extensively into growth and investing in those we lead.⁷ Beyond simply developing subordinates in a rigid, formulaic way, servant leaders “help their people feel purposeful, motivated, and energized so they can bring their best selves to work.”⁸ This relationship between leader

and follower is absolutely essential to the success of a team, office, and (ultimately) an organization, and Army leaders strive to make that connection with the officers and Soldiers they lead—all to ensure they accomplish their missions. Most persuasive here is the Army’s definition of a leader: “An Army leader influences others to accomplish missions.”⁹ Notably, it does not say, “An Army leader accomplishes the mission.” Influencing others is thus essential in getting our work done, and that leader definition emphasizes the “others” involved in leading. When leaders expressly serve others as their top priority, organizational success almost always follows.

No matter a leader’s personality or leadership abilities, adopting an attitude of servant leadership will reverberate among that leader’s followers. In the military, servant leadership seems to underpin each type of leadership style, due mainly to our role as “honorable servants of the Nation.”¹⁰ In our capacity as officers, warrant officers, civilians, and noncommissioned officers, we have “distinctive roles as honorable servants, Army experts, and stewards of the profession.”¹¹ These three roles, in turn, relate to the Three Cs that The Judge Advocate General emphasizes in most of his discussions on leadership: character (honorable servant), competence (Army experts), and commitment (stewards of the profession).¹² A servant leader’s humility and desire to help and improve subordinates is part of their character; a servant leader monitors and provides opportunities for subordinates to maximize and grow their competence; and a servant leader creates an environment where subordinates want to show up and give their best, inspiring commitment to the team (and, as a result, to the organization). The inevitable effect of a leader whose followers know wants to help those followers set and achieve their personal and professional goals is this: those followers trust their leader more, work harder toward shared goals/missions, and—best of all—feel like they are an essential part of a team.¹³ There is no better feeling than coming to work and knowing you are valued, your needs will be met, and you are surrounded by encouraging teammates.

So, how should you try to embrace servant leadership in your everyday

interactions? The best way is to be helpful. That’s essentially it. Talk to people, find out what they need or want, figure out—together—a path or a series of smaller goals to get there, and then ask, “How can I help?” Young leaders or informal leaders can do this with their peers or co-workers, with other staff members, and with clients. Mid-level and senior leaders must get to know those they lead¹⁴ and ask what you can do to help them do their jobs better/run that marathon/spend more quality time with their families/anything the subordinate indicates is a goal or priority. “By nurturing participatory, empowering environments, and encouraging the talents of followers, the servant leader creates a more effective, motivated workforce and ultimately a more successful organization.”¹⁵

The most natural human action is to form a community, to cooperate with each other and to help each other—why should leading be any different? Leaders are truly in the best position to ask their team members, “How can I help?” and follow through with that help, all for the benefit of that individual. The race for personal success and acclaim subsides as the spirit of servant leadership features prominently in our actions; the individual leader does tend to fade into the background, in favor of featuring and highlighting those whom we serve. Senior leaders thus model servant leadership so the next generation of JAG Corps leaders achieve their goals, love their workplace (or at least enjoy it), and learn how to espouse servant leadership themselves as they grow and move into their own bigger leadership roles. We all joined this noble profession of arms to serve our country; as servant leaders, we simply view our country on a micro-scale, serving individuals in service to our country. **TAL**

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Notes

1. Dan Cable, *How Humble Leadership Really Works*, HARV. BUS. REV. (Apr. 23, 2018), <https://hbr.org/2018/04/how-humble-leadership-really-works>.
2. *How to Be an Effective Leader: 8 Styles of Leadership*, MASTERCLASS (Jan. 19, 2022), <https://www.masterclass.com/articles/how-to-be-an-effective-leader#the-8-most-effective-leadership-styles>.

3. See GARY CHAPMAN, *THE FIVE LOVE LANGUAGES* (1992).

4. Leslie Doyle, *Leadership Styles: The Five Most Common & How to Find Your Own*, NE. UNIV. (Mar. 7, 2019), <https://www.northeastern.edu/graduate/blog/leadership-styles/> (“First coined by Robert K. Greenleaf, the term servant leader refers to a person who makes a conscious decision to aspire to lead in a way that places other people’s needs as their highest priority. The servant leader dedicates himself or herself to the growth and well-being of people in the community. Instead of focusing on accumulating power, this leader shares power and helps others perform as highly as possible.”).

5. *Start Here: What Is Servant Leadership?*, Robert K. Greenleaf Ctr. for Servant Leadership, <https://www.greenleaf.org/what-is-servant-leadership/> (last visited Jan. 27, 2022). For more information on servant leadership, see generally RICHARD SHERIDAN, CHIEF JOY OFFICER: HOW GREAT LEADERS ELEVATE HUMAN ENERGY AND ELIMINATE FEAR ch. 7 (2018).

6. Brian Tait, *Traditional Leadership Vs. Servant Leadership*, FORBES (Mar. 11, 2020, 8:40 AM), <https://www.forbes.com/sites/forbescoachescouncil/2020/03/11/traditional-leadership-vs-servant-leadership/?sh=7395d827451e>.

7. See generally U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION paras. 1-82 to 1-88 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22] (explaining the Leadership Requirements Model).

8. Cable, *supra* note 1.

9. ADP 6-22, *supra* note 7, para. 1-90.

10. *Id.* paras. 1-9, 1-56, 1-59 to 1-63.

11. *Id.* fig.1-2.

12. Major General Stuart W. Risch, *Resilience Is a Shared Responsibility*, ARMY LAW., no. 6, 2019, at 2, 2 (“By being ready and resilient—rather than reactive—by striving to take care of ourselves and those around us, we are better positioned to be principled counselors, substantive masters, servant leaders, and effective stewards of our great Corps.”). See also ADP 6-22, *supra* note 7, fig.1-2.

13. I know I have a Pollyanna outlook reputation—it’s true! I do, however, realize that some (very few) subordinates might wish to take advantage of your servant leader approach to leading; or their interests are not in line with your team’s/organization’s best interests. (“No, Kyle, you cannot show up to work at 1000 and leave at 1400 every day.”) If the soft approach to rallying the team through your dedication to them personally does not initially resonate with a follower, of course reconsider, reflect, and mix up your leadership approach to reach and help the individual to grow. It has been my experience that in the Judge Advocate General’s Corps those types of subordinates are few and far between. My point is, adopting a servant leadership approach and using it to a smaller or larger extent in managing people most effectively builds the type of positive community where people want to work. Kyle will come around eventually.

14. Fred L. Borch III, *Understanding People Is the Key to Successful Leadership*, ARMY LAW., no. 6, 2019, at 10.

15. Carol Smith, *Servant Leadership: The Leadership Theory of Robert K. Greenleaf* (Dec. 4, 2005) (course paper), https://www.boyden.com/media/just-what-the-doctor-ordered-15763495/Leadership%20%20Theory_Greenleaf%20Servant%20Leadership.pdf.



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