Army Lawyer

U.S. Army Judge Advocate General's Corps

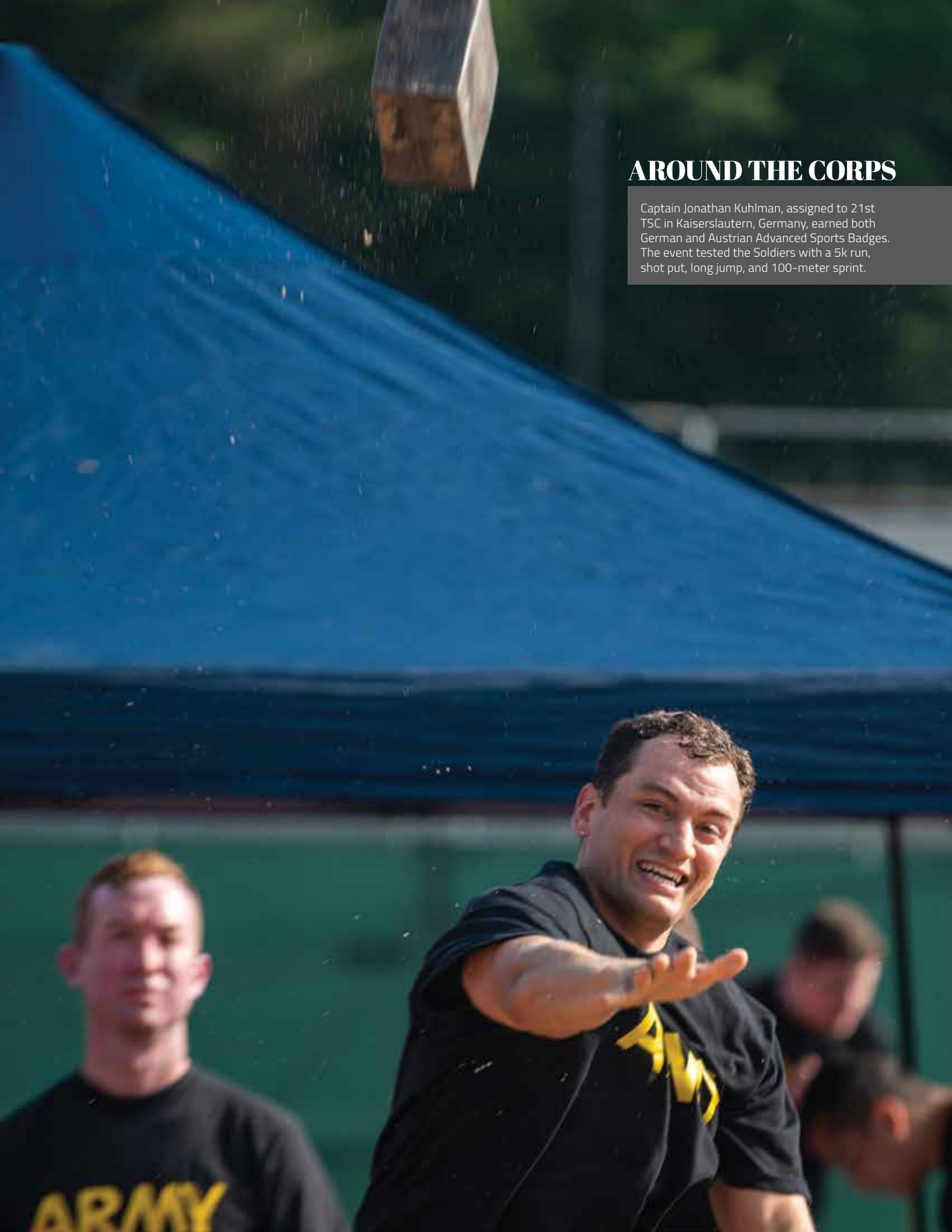
Issue 2 • 2021

AROUND THE CORPS

Lieutenant Colonel Adam Hill, 13th LOD(E), surrounded by the graves of those who gave the last full measure of devotion, performed "Taps" at the Gettysburg National Cemetery as part of the "100 Nights of Taps" program.

AROUND THE CORPS

Captain Jonathan Kuhlman, assigned to 21st TSC in Kaiserslautern, Germany, earned both German and Austrian Advanced Sports Badges. The event tested the Soldiers with a 5k run, shot put, long jump, and 100-meter sprint.



Army Lawyer

Editorial Board

Issue 2 • 2021

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

On the cover: Colonel Sean McGarry, Dean, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, administers the Counsel's Oath to Officer Basic Course students. (Credit: Jason Wilkerson, TJAGLCS)

Table of Contents

Departments

Practice Notes

Features

Members of 22d Judge Advocate Warrant Officer Advanced Course graduate from The Judge Advocate General's Legal Center and School in March 2021. (Credit: Jason Wilkerson/TJAGLCS)

Court Is Assembled

Stewarding the Workplace of Tomorrow

By Chief Warrant Officer 5 Ron E. Prescott

The constants of Principled Counsel, Stewardship, Mastery of the Law, and Servant Leadership help members of the Judge Advocate General's (JAG) Corps navigate immediate issues and guide our actions in shaping the future. For those supporting the practice of law, the constant that most resonates is Stewardship. Stewardship is the careful and responsible management of something entrusted to one's care. As stewards of the legal profession and the JAG Corps, we are responsible to our subordinates, our peers, our leaders, and our clients. Our individual priority is to demonstrate care for the people and resources entrusted to us and to ensure the organization we bequeath is better than the one we inherit. Simply put, it is working to improve our organizations beyond our tenure, so that they are better for our successors.

When I contemplate stewardship, I consider Will Allen Dromgoole's *The Bridge Builder*.[1] The poem relates the story of an old man who, having crossed a vast, deep chasm on a cold evening, stopped, even though he did not need to, and built a bridge for a young man who would soon follow. To support the practice of law, I charge legal administrators to steward the profession and bolster legal practice by improving organizations and systems—to build a bridge for those who will soon follow. In the business component of our legal practice, this means ensuring that future manning documents have the right mix and number of personnel to effectively deliver legal services. It means ensuring that orga-nizational requirements for Future Year's Defense Program funding are communi-cated to higher headquarters. It means pro-ducing training plans that capture the legal education and developmental requirements of our teammates. And, it means developing automation lifecycle replacement plans, and

information management and knowledge management collaboration plans, that make the organization agile and adaptable.

The rapid shift in operations that resulted from COVID-19 exposed the value of adequate inventories of computing equipment, continuity of operation plans, and an attitude of "being ready" for the "fight tonight." Suddenly, mobile computer systems that would facilitate operations in a telework environment were a necessity and, due to the foresight of our personnel, we rapidly adapted, though not seamlessly, to our new reality. Similarly, we realized the value of collaboration platforms that could be accessed from outside of the office. We embraced technology, flattened communications, disseminated information freely and rapidly, and solved problems collaboratively. Many of us even became experts at various virtual meeting software platforms—using them to host meetings, conduct boards, collaborate on projects, and check in on teammates.

Nearly overnight, we accomplished many of the things that we were struggling to accomplish as a Corps (i.e., pushing people to better embrace digital platforms). In terms of infrastructure, much of the initial push to navigate the challenges of the COVID-19 environment was facilitated by legal administrators, legal professionals, and other support personnel who distributed equipment, set up collaboration spaces, and liaised with our G6 and Network Enterprise Center personnel to manage and preempt user issues.

The COVID-19 pandemic has significantly impacted all of us; it changed the way we interact with each other, and it transformed our thoughts on a number of issues—telework perhaps being the most impactful and transformational. I think that many of us learned—while balancing other challenging situations (e.g., ensuring kids sharing our spaces were doing their work, playing the role of the teacher aide, and performing "cafeteria duty")—that working from home did not mean not working; it certainly did not mean being disengaged. Perhaps, it meant being too engaged. Many of us struggled to bring an end to the duty day as we pored over email coming in at 1900, 2000, or 2100 (it seems our teammates struggled too). We were also unable to let email sit unanswered—during the traditional duty day, for more than five minutes—for fear perhaps that it would communicate that we were not working. Having lived the reality of telework, however, I appreciate the value in ensuring that we invest in network infrastructure and fully embrace an organizational philosophy that supports information sharing and collaboration, which will allow us to be equally as effective at the dining room table as we are in the office.

We all embrace Chief of Staff of the Army General James McConville's philosophy that the Army cannot telecommute to combat.[2] Further, if you have listened to The Judge Advocate General (TJAG), Lieutenant General Charles Pede, over the last four years, you know that there is no substitute for face-to-face client interaction. Lieutenant General Pede's views are unmistakable as he, for example, makes every Judge Advocate Officer Basic Course class repeat the mantra, "I will not practice law by text." We understand intuitively that many relationships are built via in-person interaction, and we recognize TJAG's other maxim that "we can't surge relationships." We do recognize, however, that there is quite a bit of work that can be accomplished in the quiet of the office, or in the quiet of the morning before the chaos of readying three school-aged kids and a toddler for their day erupts.

As leaders who seek to be good organizational stewards, it is imperative that we contemplate the environment and the workplace of the future just like we think about the next battlefield. We must plan, prepare, and take appropriate steps to ensure that our work environments contribute to organizational success. If we embrace the findings in the Department of Defense (DoD) Inspector General (IG) report, we recognize that 88 percent of respondents (54,665 employees) who were in a telework status from March through August 2020 stated that "their productivity level remained the same or increased during maximum telework, regardless of . . . initial telework challenges."[3] Consequently, we recognize that telework is, at times, an adequate substitute for working from the office.

The DoD IG report also highlighted that many of the initial challenges that the DoD faced at the start of the pandemic arose because we (the DoD) had never conducted telework exercises or tested our networks to determine if they could support largescale telework. As we think about our globally-connected planet, we recognize that the frequency of the current "once in a century" pandemic will likely occur more frequently than once in a century.[4] Further, we could face traditional attacks or cyberattacks that disrupt our ability to come into the workplace. Being prepared for an uncertain future and stewarding the organization means, in keeping with the DoD IG recommendations, that we update plans to revise telework assumptions and continue to invest in the infrastructure and resources that can improve collaboration and sustain the efficiency of a distributed workforce.

I hope that operations during COVID-19 have reinforced the value of embracing technology and improving our organizations for our successors. I challenge us to capture and share our lessons learned, to suggest areas where we can improve, and to steward our Corps for the next challenge. Like the old bridge builder, let's build, improve, and refine our many bridges, and steward our organizations for the legal professionals who will follow.

Be safe, stay healthy, and keep ready! **TAL**

CW5 Prescott is the Chief Warrant Officer of the Judge Advocate General's Corps at the Pentagon in Washington, D.C.

Notes

1. Will Allen Dromgoole, *The Bridge Builder*, Poetry Found., https://www.poetryfoundation.org/poems/52702/the-bridge-builder (last visited May 17, 2021).

2. Abraham Mahshie, '*We Can't Telecommute to Combat': Army Calls Cadets Back to West Point for Graduation*, Wash. Exam'r (Apr. 30, 2020, 5:53 PM), www.washingtonexaminer.com/policy/defense-national-security/we-cant-telecommute-to-combat-army-calls-cadets-back-to-west-point-for-graduation.

3. U.S. Dep't of Def., Inspector Gen., Evaluation of Access to Department of Defense Information Technology and Communications During the Coronavirus Disease-2019 Pandemic ii (30 Mar. 2021) (survey of 54,665 employees who were in a telework status from March through August 2020).

4. *See* Walter Dodds, *Disease Now and Potential Future Pandemics*, *in* The World's Worst Problems 31 (2019).

News & Notes

Photo 1
SPC Erica Rohach, 8th Army court reporter, proudly displays the U.S. Army Trial Judiciary coin she received for her recent success as the Distinguished Honor Graduate for the 64th Basic Court Reporter Course. The supporting team for the Korea/Japan Trial Judiciary, from L to R: SSG Browne, SSG Thompson, SPC Rohach, LTC Martin, and SFC Lewis.

Photo 2
PFC Zanard Allison, 504th MI BDE, sketched a scene from a recent court-martial at Fort Hood, Texas. The SVP, LTC Cormac Smith, was cross-examining the accused while CPT Gabs Lucero looked on as second chair.

Photo 3
On 9 April 2021, SGT Mojet and SPC Richards continued the 2d Armored Brigade Combat Team, 1st Cavalry Division, tradition of winning, with both leaders winning the 1CD Paralegal NCO/Soldier-of-the-Quarter Board. This is the second quarter in a row that 2ABCT has won both the NCO and Soldier category. Pictured from L to R: SGT Moton, SPC Richards, SGT Mojet, SFC Graves, and PFC Lindgren

Photo 4
On 23 April 2021, SPC Jonathan Alvarado (right), of DIVARTY, 4th ID, re-enlisted for 4 years at the Air Force Academy Scenic Lookout. SPC Alvarado used his station-of-choice re-enlistment option to go to Oahu, Hawaii. SPC Alvarado received the oath of enlistment from MAJ KJ Harris (left), DIVARTY, 4th ID, Brigade Judge Advocate.

Photo 5
Members of the U.S. Army Aviation Center of Excellence and Fort Rucker OSJA as well as the 7th SFG and Alabama National Guard legal teams welcomed MG Risch, Ms. Carlisle, COL Erisman, CW5 Richmond, SGM Quinton, CW3 Marrisette, and MSG Cantrell during an Article 6 visit to the home of Army Aviation in May 2021.

Photo 6
The Fort Belvoir OSJA supported the Fort Belvoir SHARP Office's Denim Day 2021. The wearing of denim is an affirmation of the participant's commitment to establishing a command climate of dignity and respect, as well as demonstrates the participant's pledge to support survivors of sexual assault. Pictured in the back row L to R: Mrs. Karen Shaner (SAUSA Paralegal), Mr. Daryl Coleman (MJ paralegal), SFC Deborah Denney (Chief Paralegal NCO), CPT Brandon Gaskew (AdLaw), CPT Kim Bowman (AdLaw); Kneeling: CPT January Turner (Chief, Military Justice).

Photo 7
On 12 May 2021, the Spartan Brigade Legal Team hiked Mt. Baldy in the "warm" 33-degree weather in Anchorage, Alaska. Pictured from L to R: CPT Weston Harlan (MJA), SGT Robert Perkins (6th BEB Paralegal), SSG Desmond Bradley (Senior Paralegal), PFC Amado Delgado (1-40th CAV Paralegal), SGT Kyle Custer-Jones (725th BSB Paralegal).

Photo 8
MSG Kenneth Acevedo (ARCENT Forward CPNCO), LTC Michael Pratt (ARCENT Forward SJA), and LTC Steven Meints (ASG-K CJA) completed the Norwegian Foot March (30k with 25lbs Ruck) on 7 March 2021 at Camp Arifjan, Kuwait.

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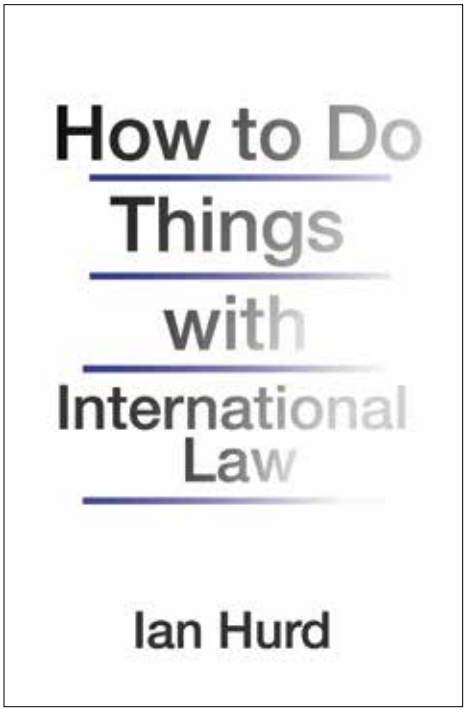

Book Review

Re-Thinking International Law Advice

A JA's Guide to *How to Do Things with International Law*

Reviewed by Lieutenant Commander Dennis E. Harbin III

This year marks the 75th anniversary of an event consequential to the practice of military law—the International Military Tribunal (IMT) at Nuremberg. While the IMT, held from November 1945 to October 1946, was reserved for the highest-ranking German leaders, subsequent tribunals held over the preceding years would carry forward the IMT's precedence and legacy in determining how international law principles would apply to individual conduct. Specifically, in the trial of Wilhelm List and Others before the United States Military Tribunal,[1] high-ranking German army officers were charged with having practiced reprisal killings while occupying Greece, Yugoslavia, Albania, and Norway. The war crimes court had to judge whether military necessity, an international humanitarian law principle, was a viable defense.[2] It was the German officer defendants who invoked the principle of military necessity to justify their killing of innocent civilians and destruction of towns and villages throughout the occupied territories.[3] They claimed that this international humanitarian law principle, developed for mitigating harm to civilians in wartime, had given them authorization to kill. The judges concretely dismissed such a defense, stating, "[m]ilitary necessity or expediency do not justify a violation of positive rules. International [l]aw is prohibitive law."[4]

Ian Hurd's *How to Do Things with International Law* proposes a theory that introduces nuance to the war crime court's statement that "[i]nternational law is prohibitive law" and provides a concise theory challenging this conventional view. With support from a thorough examination of controversial cases related to national security, such as torture and targeted killings by drones, Hurd proves that international law is not a fixed set of rules applied consistently to "prevent the misuse and abuse of political power,"[5] but rather is a strategic tool used to accomplish national interests.[6] Hurd's point is simple: "in practice, law and politics are closely intertwined, even inseparable," and, therefore, "[i]nternational law is political because it is useful."[7] The idea that international law is political is controversial because the contemporary view is that international law enforces the rule-of-law ideology and replaces self-interested politics in international relations. The idea that international law is a tool to be used also offers an insightful way of thinking about how lawyers, such as judge advocates (JAs), advise their clients. Hurd's argument gives a unique perspective on the practice of international law that is relevant to JAs as they balance the expectations of their clients with the challenges of future conflict.

The intent of this review is to summarize Hurd's theory in a manner that is easily digestible for JAs and, as a result, causes them to re-think how to provide international law advice. To accomplish this goal, one must first consider a brief explanation of Hurd's primary premise—that international law does not enforce a rule-of-law ideology, but is a tool used to achieve strategic, political ends. Then, discussion turns to key takeaways from Hurd's examination of three cases that effectively "demonstrate[] law's capacity to enable, permit, and constitute state action"[8]: 1) self-defense and the use of force; 2) use of new weapons, such as drones; and 3) torture. Finally, this review discusses ways in which Hurd's book may cause JAs to re-think their roles as legal advisers and how they provide principled counsel under his theory of international law.

International Law Is a Tool

Instead of interpreting the law in a way that restricts and constrains the client, Hurd argues that states use the law to justify and gain legitimacy for action that would otherwise not be acceptable. Historically, justification of state action relied on sources such as "divine right, economic exigency, self-preservation, ethnic self-determination, claims to modernity, and scientific racism."[9] While he leaves the how and why of the transition away from these sources to other scholars, Hurd adopts what seems to be the position of international legal and relations experts—that the primary source of legitimacy in modern international relations is the law. Because there is currently "widespread belief in rule-of-law ideology, whereby acting lawfully is a determinant of state legitimacy," states are now incentivized to "frame their choices and goals within legal categories."[10] Therefore, because state legitimacy is now a matter of legality, the incentive to legalize issues makes the role of lawyers more important, but potentially at the cost of miscategorizing the issue. By solving every problem with a legal answer, Hurd convinces the reader that this legalization of international relations can ultimately dilute the "morality or strategic wisdom"[11] of our national security decision-making.

Hurd's book also serves as an excellent companion to any study of how law interacts with national security and military operations. "Lawfare," a term well known to JAs, is a state's practice of "us[ing] international law to discredit its rivals in pursuit of its sovereign interests,"[12] or "the use of law as a weapon of war."[13] Hurd believes that "[l]awfare is better seen as the typical condition of international law."[14] Although his book is not a manual for its practical exercise, it does provide an intellectual foundation of lawfare by showing clearly how "international law and international power cannot be separated."[15]

Rule-of-Law Is Not the Rule

Fully grasping Hurd's heady theory requires the reader to understand the distinction he makes between the rule-of-law ideology in domestic law and the lack of it in international relations. Put simply, if international law is a tool, then the rule-of-law ideal cannot exist. This is an important concept to grasp because it considerably alters how the reader thinks of international law's purpose and power. A system based on the rule-of-law ideology has three characteristics: 1) "knowability and stability"; 2) "individuals and governments are equal under the law"; and 3) the "law is applied consistently across cases" by independent judiciary.[16] Hurd expertly argues, however, that these ingredients cannot be found within international relations. After the devastation of World War II, the victors—led by the United States—attempted to transplant a liberal, rule-of-law ideology that the Founding Fathers instituted at home to the international stage. With the United Nations (U.N.) Charter as its cornerstone, war would be illegal, disputes would be resolved through diplomatic deliberation, and a global respect for the rule of law would bring an everlasting peace. This ideal has not become reality. Hurd's insightful analysis walks the reader through why it has not.

First, international law fails to "offer this stability and clarity"[17] because states, unlike citizens at home, can change the legality of their conduct by either signing a treaty, modifying an existing treaty, or withdrawing from a treaty altogether. Simply put, the state has the power to determine what rules to follow and, thus, what is legal and what is not. Next, if "diminishing the absolute power of government is, of course, the objective of the rule of law,"[18] then this objective fails. Although the Security Council under the U.N. Charter has the perceived "decisive governing authority over the member states,"[19] Hurd shows otherwise.

To prove this, he points out how the "Council's relationship to international law has long been debated," and how the Court of Justice of the European Union affirmed that the "Council is a political rather than a legal organ" because it does not respond to violations of international law.[20] Last, for the reader that believes in the existence of an independent judiciary that enforces international law consistently—which is the third ingredient to a rule-of-law-based system—Hurd proves them wrong again. There is no international compulsory jurisdiction. In fact, the International Court of Justice's (ICJ) own statute states that ICJ decisions "have no binding force except between the parties and in respect of that particular case."[21] If there is compulsory jurisdiction in international relations, it is only because the state consented to it. Moreover, the state can just as easily withdraw that consent. Hurd's logic and analysis in applying the three ingredients found in the domestic rule-of-law ideology to international relations forces the reader to reconsider international law's purpose and power. By proving that rule-of-law ideology does not exist in international relations, Mr. Hurd lays the foundation to better understand the causes of the following cases.

War Still Happens

Most military professionals are familiar with some translated version of Carl von Clausewitz's famous proclamation that "war is simply a continuation of political intercourse, with the addition of other means."[22] Whether one views Clausewitz's statement as cynical or as an enlightened reflection of warfare in a past era, the contemporary view is that, with aggression now outlawed,[23] war has become a legal matter. As Hurd illustrates for the reader, the vagueness of post-war international law and the legalization of international relations has likely started more conflicts than it has prevented. "By defining what wars are lawful and in bending to the changing interests of powerful states, the ban on war constitutes a resource that states use to legitimate their use of force."[24] To those readers that may perceive international law as "an improvement on the 'bad old days' when the decision to go to war was purely political and unconstrained by legal obligations,"[25] Hurd offers an effective counter-claim. He argues that, in reality, "[g]overnments are freer to use force under the interpretation that prevails today than they would be if the rules were read a more formal way as black-letter law."[26] As an example, because of what he calls the "juridification"[27] of power and politics, the self-defense exception "has come to refer to the defense of the interests of the state, not of its physical borders and territory."[28]

The simple fact is, despite the prohibition of war since it was outlawed by the U.N. Charter, states continue to fight each other and spend billions of dollars on their armed forces. For example, the United States has "gone to war" in Korea, Vietnam, Lebanon, Granada, Panama, Iraq (twice), Afghanistan, and Syria since war was prohibited in 1945.[29] His examination of the legalization of self-defense clearly shows how international law fails to constrain state action. Instead, the law of self-defense has become a tool used to go to war, often forcing states to justify their actions using legal concepts when politics or national interest are the obvious reason.

Filling the Gap

Hurd next examines how international law is such a powerful tool that it is used to fill the gaps where no law actually exists. Specifically, he provides insight into how and why states rely on legal concepts to justify the use of new weapons when there are not explicit regulations in force. Hurd's analogy of drones to nuclear weapons helps illustrate his point. "With nuclear weapons in the twentieth century and drones in the twenty-first, states and their advisers were confronted with policy possibilities that were not foreseen by the then-existing international rules on warfare."[30] Instead, however, of articulating policy reasons to gain legitimacy for the use of new weapons, states have used international law to fill the justification gap. His review of the ICJ's *Nu-*

clear Weapons advisory opinion is insightful. When the ICJ was asked, "Is the threat or use of nuclear weapons in any circumstances permitted under international law,"[31] the Court found that nuclear weapons were, in fact, lawful. How they arrived at that conclusion, however, supports Hurd's theory and is especially useful for JAs. The dissent's opinion centered on the application of the 1927 *Lotus* decision, which developed the principle that "where no law exists, states are free to act as they wish."[32] Therefore, because there was no treaty banning nuclear weapons, their existence was lawful. The majority in the *Nuclear Weapons* advisory opinion, however, took the logic further. In an effort to "search for ways that state behavior might be connected with legal obligations,"[33] the Court determined that "if [nuclear weapons] were illegal, then this is tantamount to a death sentence for the law abiding state."[34] Therefore, because it would be "inconceivable that the governments of the world intended to make nuclear weapons illegal," they must be lawful.[35] Hurd's takeaway is that the ICJ "link[ed] state interests and self-defense in determining international legality."[36]

Applying this takeaway to drones, the reader can see why the debate of their use centers on legal justifications when, in fact, no law regulating them actually exists. "As with nuclear weapons before them, it is not self-evident which, if any, legal rules apply or how they should be applied to this new weapon."[37] As Hurd argues, this proves the power of international law as a tool. If the justification for their use was simply that they are cheaper to maintain, more expendable than a pilot, and are just as effective in killing individuals as a Navy SEAL team, then legitimacy would likely be harder to gain. Instead, the United States has focused on legal concepts—such as the characterization of the conflict or compliance with treaty—and customary laws of armed conflict to gain legitimacy, when really the reason is likely more aligned with politics and national interest. Thus, because international law is a tool, the legality of drones "ends up derivative of state security."[38] Hurd's examination of the legalization of the drone debate is strong evidence in support of his theory and provides a helpful example for JAs, many of whom have practical experience in this area. Whether down-range or in the classroom, Hurd forces the reader to re-think and re-frame the issue by asking why the United States uses legal concepts to justify their use of drones when there is no existing law regulating their use. After reading his book, the answer is clear: international law is a tool to justify action, not a set of rules that constrain it. As JAs confront how to advise on new technologies, such as artificial intelligence and autonomous weapons, Hurd's argument may help to discern unforeseen legal and policy challenges.

If It Looks Like a Duck

Hurd's final illustrative case shows just how powerful a tool international law can be. Overcoming universal acceptance on the prohibition on torture, the United States was able to justify its enhanced interrogation program by framing it, not as a moral or national security issue, but as a legal one. Many JAs are aware of the controversy surrounding the military's disturbing interrogation techniques during the early stages of the war on terrorism and the efforts of senior military lawyers who attempted to prevent them on the basis that they constituted torture.[39] That many senior Defense leaders were on the same page regarding the illegality and immorality of torture, yet the United States still legally justified waterboarding, sleep-deprivation, face slapping, and other disturbing techniques, goes to show that Hurd's theory has practical and damaging consequences. "Thus, eschewing moral and strategic concerns, lawyers can argue about whether waterboarding is or is not torture *as a legal matter*."[40] It is unlikely the United States would have ever been successful in getting the interrogation program off the ground if its justification was simply grounded in matters of national security. Instead, as Hurd thoroughly explores, international law was used as a tool to re-frame—and thus justify—state action. That the interrogation program was so controversial at the time, but able to exist for as long as it did under the cloak of legality, further proves his insightful argument of how powerful a tool international law can be.

What This Means for JAs

Hurd's theory that international law is a tool, not a constraint, is instructive and relevant to the practice of JAs in three major ways: 1) how legal questions are answered; 2) how the concept of principled counsel applies in this legal framework; and 3) how the military legal community contributes to the legalization of international relations.

Lawyers are naturally inclined to say "no" because they are trained and educated to view the law as prohibitive in nature. Unless the client understands, and fully supports the lawyer's role to keep them out of jail, there is often an inherent tension between the lawyer and the client when lawyers are seen as obstacles to progress. Nowhere is this tension more exacerbated than in the military profession, where commanders are trained from the earliest phases of their careers to be aggressive leaders of action. Thus, there is significant time and energy spent on the development of JAs. The approach JAs are instructed to take is that, while it may be easier to give a "no" answer, the job is to get clients to the "right" answer. Hurd's theory that international law is not prohibitive law, but instead is a strategic tool, potentially alters how JAs provide legal advice. Often, commanders want the clear legal answer. However, as Hurd has shown, there often is not one. His point regarding international law's lack of stability and clarity means, when advising commanders on matters related to international law, "a clear rule does not mean a clear obligation."[41] Therefore, providing the "legal" answer requires the JA to be innovative, both in how they frame their advice and how they provide value to the staff in helping to maintain or increase the commander's "maneuver space."

This leads to the second practical application. How does Hurd's theory, which clearly shows that law and policy are intertwined, affect principled counsel? Principled counsel is "professional advice on law and policy grounded in the Army Ethic and enduring respect for the Rule of Law, effectively communicated with appropriate candor and moral courage, that influences informed decisions."[42] A critical component to principled counsel is distinguishing between legal advice and policy advice. Judge advocates must ensure that the client knows which type of advice they are receiving. Hurd suggests, however, that this is impossible in international law because

there is no distinction. This argument requires the JA to grasp the political, moral, and strategic consequences of the problem, not just its legal aspects, when providing principled counsel. If the JA's advice is a tool to achieve an objective, then they have a professional obligation to understand fully what the objective is. This requires the JA to take a deliberate and focused approach to their individual development, as both a staff officer and military professional.

Finally, Hurd's theory should force JAs to reflect on how the military legal community contributes to the legalization and "juridification" of national security issues. It is well known that modern military commanders rely heavily on their JAs to navigate complex situations. In fact, the U.S. Army requires such reliance. "If the question is more complex, seek legal counsel."[43] As Hurd shows with his examination of nuclear weapons and drones, the contemporary approach to addressing novel concepts is to legalize the issue. Whereas adherence to legal obligations has its place in developing solutions to these matters, it is important to consider that the solution may be framed in legal concepts because—in today's international security environment—legality provides the most legitimacy.

The role then of the national security lawyer, and specifically the JA, may very well be influenced by the legalization of non-legal problems. Whether this reliance on the use of international law as a tool will benefit or constrain the United States in the future is worth considering. Will legality continue to be the measure of legitimacy in an era of Great Power competition when China and Russia blatantly ignore legal norms? Will military operations still be constrained by self-imposed policy and legal restrictions, which were required to gain legitimacy in fighting a counterinsurgency, when the United States transitions its focus to winning the next world war? After all, in winning World War II and defeating fascism on two continents, General Patton or Admiral Nimitz did not rely on their JAs in ways that commanders do today.[44]

Conclusion

How to Do Things with International Law provides an insightful perspective on the power of international law, especially when it comes to matters of national security and military operations. Whereas some of the logic, at times, may be dense, Hurd's argument that international law is a tool is clearly proven after reflecting on the three cases he thoroughly examines. Although war is illegal under the U.N. Charter, states continuously use international law to justify conflict. Although international law is silent on the use of drones to conduct targeted killings, states justify their use with existing legal concepts. Finally, although there was no question regarding the illegality of torture, states used international law to justify activities that many deemed morally repugnant and harmful to national interests. As the justices of the war crimes trials dictated three-quarters of a century ago, these three well-known cases illustrate masterfully Hurd's argument that international law is not prohibitive law, but a tool to achieve national interests. For the JA providing principled counsel in international law, and seeking to be a valuable force multiplier on any staff, Hurd's book is a must-read. **TAL**

LCDR Harbin is a joint legal observer/trainer on the Joint Staff in Suffolk, Virginia.

Notes

1. The trial of Wilhelm List and Others before the United States Military Tribunal is also known as the *Hostages Trial*.

2. U.N. War Crimes Commission, 8 Law Reports of Trials of War Criminals 34–92 (1949).

3. *Id.*

4. *Id.* at 66.

5. Ian Hurd, How to Do Things with International Law 21 (2017).

6. *Id.* at 47.

7. *Id.* at 48.

8. *Id.* at 11.

9. *Id.* at 54.

10. *Id.* at 48.

11. *Id.* at 51.

12. Matthias Vanhullebusch & Wei Shen, *China's Air Defense Identification Zone*, 16 China Rev. 121, 123 (2016).

13. Colonel Charles J. Dunlap Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts* 2 (2001), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6193&context=faculty_scholarship (a paper prepared for presentation at the Humanitarian Challenges in Military Interventions Conference at the Kennedy School of Government, Harvard University, in Washington, D.C., on 29 November 2001).

14. Hurd, *supra* note 5, at 11.

15. *Id.* at 9.

16. *Id.* at 23–24.

17. *Id.* at 32.

18. *Id.* at 24.

19. *Id.* at 39.

20. *Id.* at 40.

21. *Id.* at 43.

22. Carl von Clausewitz, On War 731 (Michael Howard & P. Paret eds., 1993) (1832).

23. *See* U.N. Charter art. 2, ¶ 4 (obligating all states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations").

24. Hurd, *supra* note 5, at 59.

25. *Id.* at 58.

26. *Id.* at 59.

27. *Id.* at 65.

28. *Id.* at 73.

29. Barbara Salazar Torreon, Cong. Rsch Serv., RS21405, U.S. Periods of War and Dates of Recent Conflicts (2020).

30. Hurd, *supra* note 5, at 84.

31. *Id.* at 85. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 6 (July 8).

32. Hurd, *supra* note 5, at 87. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 16 (July 8) (citing The Case of the S.S. Lotus (France v. Turkey), 1927 P.C.I.J. no. 9 (Sept. 7).

33. Hurd, *supra* note 5, at 88.

34. *Id.* at 89.

35. *Id.*

36. *Id.*

37. *Id.* at 91.

38. *Id.* at 92.

39. *See generally* Major General (Retired) Thomas J. Romig, *The Thirty-First Charles L. Decker Lecture in Administrative and Civil Law*, 221 Mil. L. Rev. 257 (2014). *See also* Alberto Mora, *The First Thomas J. Romig Lecture in Principled Legal Practice*, 227 Mil. L. Rev. 443 (2019).

40. Hurd, *supra* note 5, at 51.

41. *Id.* at 33.

42. TJAG and DJAG Sends, Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals (9 Jan. 2020).

43. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 2-22 (31 July 2019) (C1, 25 Nov. 2019).

44. *See* Frederic L. Borch, Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (2001) (exploring the development of the judge advocate's role in providing operational law advice and noting what began during the Vietnam War "came to full bloom in the 1990s").

(Credit: Feng Yu – stock.adobe.com)

Azimuth Check

In Athena's Footsteps

Inclusion Through Mentorship

By Colonel Katherine K. Stich & Colonel Luis O. Rodriguez

A Formal or Informal Effort?

Today, the Army and the Judge Advocate General's (JAG) Corps places a plethora of attention on mentorship. Specific to our Corps, "grassroots" informal efforts—such as the Buffalo JAGs, the Hispanic Mentorship Group (HMG), and the Asian-Pacific American Network (APAN)—have recently come together to help address a perceived need for engaged mentorship among those in our ranks. These groups recognize that, with our nation grappling with troubling societal concerns in and outside our military,[1] mentorship is a useful tool that can help our JAG Corps leaders address these real and existential concerns in our formation.

According to Army doctrine, mentorship is the "voluntary developmental relationship that exists between a person of greater experience and a person of lesser experience that is characterized by mutual trust and respect."[2] Leaders who engage in mentorship help develop those of lesser experience into fellow leaders who feel trusted and respected in an organization. Ultimately, mentorship is a transformational tool in an organization that enables seasoned leaders to strengthen the character of mentored personnel and, thereby, increase their devotion and loyalty to an organization's goals and ethos.

The question then becomes whether to institute a formal mentorship program in our JAG Corps. Many young judge advocates or paralegal Soldiers say they would welcome a formal mentorship program akin to what has been offered by some law firms for years. However, a formal JAG Corps mentorship program may run contrary to Army doctrine because mentorship in the Army is defined as a *voluntary* relationship based on mutual trust.[3] On the other hand, Army doctrine also states that actively offering mentoring is considered an *obligation* of all Army professionals.[4]

It is possible that, at this point, we are all talking past each other; we are preventing potentially valuable mentor and mentee relationships from forming altogether, as well as inhibiting the Corps and the Army from growing. Perhaps JAG Corps would-be mentors and mentees just need some encouragement from each other to go out there and make it happen. In short, instead of waiting for an institutional decision on whether to organize a formal mentorship program, JAG Corps leaders should follow the example of informal mentorship groups—such as the Buffalo JAGs, the HMG, or APAN—and just "go do it."

As Athena or as Mentor?

In deciding how to go about mentoring, would-be mentors should reflect on the key mentorship relationship contained in Homer's *The Odyssey*,[5] one of the core literary works of Western thought. There, Athena (the Greek goddess of wisdom and warfare), disguised as an older man named Mentor, appears to Telemachus (Odysseus's son). At this point in the story, Odysseus has been away at war for many years, and Telemachus is facing several challenges stemming from men who are trying to take over his family home and seduce his mother. In the shape of Mentor, an old friend of Odysseus's family, Athena is able to reach out to and share her vast wisdom with young Telemachus—encouraging and guiding him successfully throughout many dilemmas during Odysseus's absence.

There are volumes to unpack from the mythological relationship between Mentor-Athena and Telemachus. In Athena's disguised relationship between Mentor and Telemachus, many can see a general tendency or desire of mentees to find mentors of the same gender or to only consider or heed the advice of those with whom they share similar backgrounds and interests. At the same time, others can claim that the "true nature" of the mentorship relationship in this passage of *The Odyssey* was between Athena and Telemachus and highlight the inherent benefit that Athena's gender and perspective brought to Telemachus.[6]

Welcome to the Party

Doctrine states the Army's "culture is one of inclusion that demands diversity of knowledge and perspectives to accomplish missions ethically, effectively, and efficiently."[9] Consequently, Army leaders have a duty to integrate the variety of talents, skills, and backgrounds of their personnel into teams that can accomplish missions. Mentorship can help leaders fulfill this obligation to create the sense of belonging, and of being integral members of the team, that is inherent in the Army's culture of inclusion.

Ultimately, mentorship is a transformational tool in an organization that enables seasoned leaders to strengthen the character of mentored personnel and, thereby, increase their devotion and loyalty to an organization's goals and ethos.

As our Corps's leaders decide to just "go mentoring," they should keep in mind that both the above-described views of the mentor-mentee relationship between Mentor-Athena and Telemachus are equally valid. It is already self-evident that relationships between mentors and mentees who share much in common are beneficial. It is likely that—just like that between Mentor and Telemachus—most existing mentorship relationships in the Corps are of this nature, and these relationships already help grow influential Corps leaders.

Similarly, Athena-Telemachus mentorship relationships (those between mentors and mentees who are of diverse backgrounds and perspectives) can specifically help our Army and Corps reach desired diversity and inclusion goals. Army doctrine recognizes the benefits of diversity in our ranks and values it because "[v]ariation in upbringing, culture, religious belief, and tradition is reflected among those who choose to serve," and "[s]uch diversity provides many benefits for a force globally engaged around the world."[7] Moreover, research has shown that mentorship is considered more important by women and members of minority groups; thus, they are more likely to participate in mentorship programs.[8]

We all want to feel connected and part of a team, and more so if being chosen as a member of that team—such as the JAG Corps—can be quite difficult. When members of the team have less common ground with each other, meaningful connections between team members tend to come more slowly. Effective JAG Corps mentors should consider acting like party planners who know what each of the party's attendees can bring to the table.

We have all been there: invited to an event where you only know the party planner. If you are lucky, that party planner is a good host who will quickly make sure you are appropriately introduced throughout the party; otherwise, you might be on your own. For you to want to continue to engage with that party's crowd, gain new friends, or even influence their conversation in any way, it is likely that you will need to establish the beginnings of a reciprocal bond of trust. We can all appreciate that we are not likely to talk much or want to stay at a party where we do not feel included.

The same holds true within our military relationships, even more so given our hierarchical institutional structure. It may be harder for some to "break into" a

particular crowd; this can be exacerbated by not having already performed in specific assignments or roles that may be common among that crowd's members. Especially at the more junior ranks, this phenomenon may be quite apparent given their brief experience, scant knowledge of different duty stations, and general lack of friends or acquaintances in common that can enable the creation of quick bonds of trust within a particular crowd.

Like a good party host, an engaged mentor recognizes the need for mentees of diverse backgrounds and perspectives to feel welcome in the organization and entrusted with responsibility. Mentorship should be more than just workplace advice or suggesting where to live at a particular duty station. Mentorship requires mentors to offer mentees a relationship premised on wisdom, which ultimately becomes a relationship built on mutual trust that covers the workplace, home, and even the dreams and hopes of one another.

Mentorship and Inclusion

Like Athena disguised as Mentor, our Corps's mentors should continue engaging those of similar interests and backgrounds. The Corps's would-be mentors should also act like an undisguised Athena by 1) reaching out to less experienced personnel who may be of a different gender or background; 2) offering to provide them effective advice on assignments and career options; and 3) suggesting other mentors for the mentee who are able to supplement or provide differing viewpoints. By acting as engaged mentors, our leaders will help ensure mentees of diverse backgrounds and perspectives attain greater influence in our Corps. This is precisely the overall inclusion goal: to grant the ability of making decisions of lasting strategic significance to those with diverse backgrounds and perspectives among our Corps's leaders.

The Judge Advocate General's Corps's mentors should ask themselves several questions. Like Athena, who do you reach out to on your own initiative? Could your group of mentees be more diverse? Have you asked yourself who your subordinates' mentors are, and what they are doing? The challenge lies in making the effort to engage everyone, not just those who seem similar to you or those who may already be "walking in your shoes." Like Athena, good mentors in our Corps should not wait until a putative mentee that looks like them, or shares the same background or perspective as them, shows up.

Mentors engage in mentorship affirmatively. They check on former subordinates to open a door for communication, and keep tabs on overall Army "battle rhythm" events—such as board schedules or personnel policy changes that may affect mentees. Mentors remain aware of new career opportunities that a particular mentee should consider. Engaged mentors affirmatively reach out to someone they have just met, perhaps at a conference, whose diverse background or perspective should be nurtured in our Corps. Engaged mentors also follow up on the requests that peers or subordinates may make concerning the mentorship needs that another colleague they know may need. A simple card, email, or text a few times a year can go a long way.

Mentees should also ask themselves similar questions. Mentees, who are your mentors? Are you a mentee who seeks the advice of seasoned Corps leaders who may be from diverse backgrounds? Mentees should reach out to those leaders, even if known only from a distance. Drop them a line now and then, and check in on them if you happen to be at their new duty station. Ask your peers and leaders who you should model your career after, and reach out to that person. It is perfectly acceptable and not out of the norm for junior judge advocates or Soldiers to seek guidance from those they know only peripherally or based on recommendations. Truly, there is nothing a leader welcomes more than an opportunity to become Athena for a moment while chatting and advising a younger generation of leaders.

Conclusion

Whether done voluntarily or out of a professional obligation to steward the profession, the Army expects its leaders to engage in mentorship. As personnel of diverse backgrounds and perspectives join our Corps as decision-makers, they will gain the necessary influence in the Corps thanks to their effective mentorship relationships with more experienced team members. Thus, engaged mentorship can further not only our diversity goals, but further the Corps's overall inclusion goal. We will all be better off for following in Athena's footsteps. **TAL**

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Notes

1. *See* Memorandum from Sec'y of Def. to Senior Pentagon Leadership et al., subject: Stand-Down to Address Extremism in the Ranks (5 Feb. 2021); *Secretary of the Army Announces Missing Soldier Policy, Forms People First Task Force to Implement Fort Hood Independent Review Committee (FHIRC) Recommendations*, U.S. Army (Dec 8, 2020), https://www.army.mil/article/241490/secretary_of_the_army_announces_missing_soldier_policy_forms_people_first_task_force_to_implement_fort_hood_independent_review_committee_fhirc_recommendations. *See also* Haley Britzky, *This Army Lieutenant Colonel Has Built a Playbook to Kill the "Cancer" of Sexual Assault in the Ranks*, Task & Purpose (Mar. 1, 2021), https://taskandpurpose.com/news/scott-stephens-army-sexual-assault-harassment/.

2. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 6-56 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].

3. *Id.*

4. *Id.* para. 1-25.

5. Homer, The Odyssey (c. 675–725 B.C.E.).

6. W. Brad Johnson & David Smith, Athena Rising: How and Why Men Should Mentor Women 3-12 (2016) (discussing "perceiving everyday Athenas").

7. ADP 6-22, *supra* note 2, para. 2-14.

8. Valerie Bolden-Barrett, *Women, Ethnic Minorities More Likely to Find Mentorship Programs Helpful*, HR-Dive (Jan. 2, 2018), https://www.hrdive.com/news/women-ethnic-minorities-more-likely-to-find-mentorship-programs-helpful/513798/.

9. ADP 6-22, *supra* note 2, para. 6-24.

Lore of the Corps

"Go Down the Road and Get a Few [Germans]"[1]

A War Crime in Germany and Its Aftermath

By Fred L. Borch III

Major General John M. Devine, the 8th Armored Division commanding general, decided that 2LT Schneeweis and the three enlisted men must be prosecuted for war crimes. (Photo courtesy of author)

On the morning of 27 March 1945, twenty-four-year-old U.S. Army Second Lieutenant (2LT) Robert A. Schneeweis crossed the Rhine River into Germany with his unit, Company B, 36th Tank Battalion, 8th Armored Division. Shortly after the unit's arrival in the town of Vorde, Schneeweis told three of his Soldiers—Privates (PVTs) Glen D. Joachims, William Peppler, and Francis F. Nichols—that they were to come with him to "shoot Krauts." Peppler later reported that 2LT Schneeweis told him that they were going to "go down the road and get a few Krauts," which he understood to mean they were going to kill Germans.[2]

The four Americans went into a German home, where they discovered two German men dressed in civilian clothes. Schneeweis ordered Nichols and Joachims to shoot the men, so the two Soldiers took the Germans down into the basement and fatally shot them. About the same time, Peppler walked down a nearby road, searching for Germans. Looking through the window of a home, Peppler saw two women. When he reported their presence to Schneeweis, he was told to shoot them.

Peppler hesitated to obey the order; but, ultimately, accompanied by PVT Nichols, he returned to the home. The two Americans then opened fire on the women, wounding them in the legs. Schneeweis appeared on the scene; and, after Peppler refused to obey Schneeweis's order to kill the two German women, Schneeweis "finished them off" by shooting them with a "clip and a half" of bullets from his .45 caliber pistol.[3]

A short time later, accompanied by Peppler and Nichols, Schneeweis shot and killed two middle-aged German men with his M-1 rifle. The civilians had been walking in a field near the home where Schneeweis had previously killed the women.[4] As a result of his unlawful killing of four unarmed and unresisting German civilians, Schneeweis was tried by general court-martial for murder. Privates Joachims, Peppler, and Nichols were prosecuted for murdering the two civilian men in the basement. What follows is the story of this war crime in Germany and its unusual aftermath.

While the war crime was investigated immediately, and written statements taken from the accused and other witnesses, the 8th Armored Division was in almost continual combat until the end of hostilities in Europe.[5] Consequently, 2LT Schneeweis and PVTs Joachims, Peppler, and Nichols were not tried by courts-martial until the division was at rest in Czechoslovakia in July 1945. Schneeweis was, however, immediately relieved of all duties on the day of the murders and placed on "arrest in quarters."[6]

As Schneeweis had ordered Joachims and Nichols to shoot the men in the basement, Schneeweis could have been prosecuted for six killings. The government, however, decided to charge him only with the murders he personally carried out. The command also could have conducted a joint trial of the four Soldiers at a single proceeding. Presumably, the government decided that it would be better to try the officer accused alone, and that charging four homicides was sufficient. Perhaps the prosecutor also feared that, if Schneeweis were convicted of the killings that had been carried out by PVTs Joachims and Nichols, it might be more difficult to convince a court-martial panel that the enlisted men should still be convicted of the same killings.

In any event, 2LT Schneeweis was tried first. His general court-martial began in Rokycany, Czechoslovakia, on 21 July 1945, when he was arraigned on four specifications of premediated murder in violation of Article 92 of the Articles of War. There were two trial counsel (both infantry captains) and two defense counsel (also infantry captains). The panel consisted of ten officers—a brigadier general, a colonel, and seven lieutenant colonels. Given the rank-heavy composition of the court-martial, there is no question that Major General (MG) John M. Devine, the 8th Armored Division commander, understood the importance of this trial.[7]

While PVT Nichols did testify at Schneeweis's trial, it was PVT Peppler who was the chief witness for the prosecution. Peppler told the panel that he witnessed the accused shoot to death the two women and the two men walking in the field. He also testified that Schneeweis was acting "unusual" on the date of the offense and that

8th Armored Division shoulder sleeve insignia; Schneeweis, Peppler, Nichols and Joachims wore this patch on their left shoulder of their uniforms. (Photo courtesy of author)

he "had a funny laugh . . . a kind of snicker or half-laugh" at the time of the killings.[8]

In cross-examining Peppler, defense counsel suggested that this behavior might suggest some sort of temporary insanity, but the prosecution rebutted this claim with the testimony of Major (MAJ) (Dr.) Nathan M. Root, the division psychiatrist. He told the panel members that a three-member medical board, of which he was a member, had examined the accused and concluded that Schneeweis was "free from any mental condition that would prevent him from determining right from wrong" and that he was competent to stand trial.[9]

While Schneeweis did testify on his own behalf, he did not present much of a defense. Schneeweis did not deny the truth of any testimony given by PVT Peppler; he did not dispute the facts presented by him. But Schneeweis did tell the panel that, prior to crossing the Rhine, his battalion commander had given the unit a "pep talk" in which he said that the battalion's "mission was to kill Krauts."[10] Under cross-examination by the prosecution, however, the accused acknowledged that "it is improper to shoot an unarmed human being who is not offering any resistance or threatening you."[11] Schneeweis also insisted that, when it came to identifying the enemy, "a German is a German" and that he considered "unarmed German civilians, regardless of age and sex" to be a threat to him personally. "I was afraid of them all," Schneeweis said on re-cross-examination.[12] "I didn't trust any of them."[13]

Schneeweis's defense counsel recalled MAJ Root—the Army psychiatrist who had examined the accused—and attempted to get him to admit that the accused might have been suffering from "a temporary psychological disorder" that might have been the trigger for the killings. Major Root, however, was having none of it. "From a medical standpoint," he told the defense counsel and panel members, "there actually isn't any such thing as a temporary form of insanity."[14] In his expert opinion, Schneeweis knew the difference between right and wrong, and he knew what he was doing when he shot and killed the four unarmed and unresisting civilians.[15]

At the close of the government and defense cases, the court-martial panel heard arguments from both sides. The record of trial does not contain a verbatim transcript of these arguments, so the arguments are not known. The record is similarly silent on how long the court was closed for deliberation. But, when the court was opened, the president, Brigadier General (BG) Charles F. Colson[16] announced that the panel found the accused not guilty of murder but guilty of the lesser included offense of manslaughter. The panel sentenced Schneeweis to a dismissal, total forfeitures of all pay and allowances, and confinement at hard labor for twenty-five years.[17]

Lieutenant Colonel (LTC) Sam W. Russ, the division judge advocate, reviewed the court-martial for factual and legal sufficiency on 4 August 1945. His boss, MG Devine, took action on the court-martial two days later.

The record then went to the Staff Judge Advocate, U.S. Forces European Theater, for another review prior to confirmation by General George S. Patton, who was then serving as the most senior Army commander in Europe. Judge advocate Captain Abraham S. Hyman concluded that the record was legally sufficient to support the findings and sentence.

When Hyman's work product got to BG E. C. Betts, the top Army lawyer in Europe, Betts wrote, "I concur, except that I recommend that the court be criticized for the inadequacy of the sentence."[18] Consequently, it should come as no surprise that, when General Betts took the confirmation paperwork to Patton for his action on 13 November 1945, the confirmation signed by Patton stated that the sentence was "wholly inadequate punishment for an officer guilty of such grave offenses. In imposing such meager punishment the court has reflected no credit upon its conception of its responsibility."[19] This was strong language from a commander who had been less concerned about war crimes committed by Americans in Sicily in 1943. But Patton may well have been incensed because Schneeweis had murdered unarmed and unresisting civilians—a very different situation from the execution of prisoners of war in Sicily.[20]

The Board of Review for the European Theater (the forerunner of today's Army Court of Criminal Appeals), affirmed the findings and sentence on 15 December 1945, but not without noting that it was "somewhat incomprehensible" that Schneeweis had been convicted of manslaughter rather than premeditated murder.[21]

Schneeweis soon left for the United States, where he was incarcerated in the U.S. Penitentiary in Leavenworth, Kansas. Over the next few years, Schneeweis's wife and mother, joined by other members of the public, agitated for clemency on his behalf. The Army Clemency Board, which considered clemency for Schneeweis on a yearly basis, would have none of it—at least initially.

In 1948, however, the future improved markedly for Schneeweis. It seems that he volunteered to take part in a "malaria infection" research study conducted on prisoners. As a result of his participation in what seems to have been a dangerous experiment, the Secretary of the Army remitted all confinement "in excess of eight years, eight months and fifteen days."[22] With this greatly reduced sentence, Schneeweis was transferred to the Federal Correctional Institution in Seagoville, Texas, and placed on parole shortly thereafter.[23] Although the record of trial is silent on where Schneeweis went after his release from prison, it seems likely that he returned to his home in Milwaukee, Wisconsin.

What happened to PVTs Joachims, Peppler, and Nichols? The three Soldiers were tried jointly for the murder of the two

civilians taken to the basement and shot to death on the orders of 2LT Schneeweis and for the murder of the two women that Peppler and Nichols had shot and Schneeweis had "finished off."[24]

The court-martial began hearing evidence on 26 July 1945. The prosecution used admissions made by the accused to the investigating officer and others to prove that Joachims and Nichols had killed the men in the basement, that Nichols and Peppler had shot and wounded the two women, and that Peppler had assisted 2LT Schneeweis in shooting the two civilian men walking through the field. The government's theory of the case seems to have been that all three accused were responsible for the four murders because they were either principals or had aided and abetted 2LT Schneeweis in carrying out the killings, and they had the requisite mens rea.

Interestingly, the trial judge advocate called Schneeweis to testify. The lieutenant admitted on cross-examination that on the morning of 27 March, he had said to the three accused "Let's go out and get some Krauts."[25] Schneeweis also conceded that he ordered PVT Peppler to shoot "certain persons" and that Peppler had hesitated to obey the order.[26] But most of Schneeweis's replies to questions at trial were evasive and self-serving, as he either could not "recall" or "wasn't sure" what had happened that morning.[27]

After being advised by the court that they need not testify, and that their testimony might incriminate them, all three accused elected to testify under oath. Joachims and Nichols both told the court that they had protested when 2LT Schneeweis told them to take the two German civilians into the basement and shoot them, but that Schneeweis told them to do it "anyway." As Joachims put it, "He told me to go down and shoot them and when an officer tells you to do something, you do it and ask questions later."[28]

As for nineteen-year-old PVT Peppler, he admitted that he and Nichols had shot and wounded the two German women when they fired through the window of the house. But when 2LT Schneeweis told them to kill the women, Peppler did not obey the order. Peppler also denied shooting at the two Germans in the field.[29]

Private Nichols, who was the last to testify, told the court that "we were always told in the States to obey an order and ask questions afterward if you got any faults about them."[30]

> **Q:** Did you feel that the lieutenant had authority to order you to shoot unarmed civilians?
>
> **A:** (Nichols): I would say yes.[31]

The court started hearing evidence against Joachims, Peppler, and Nichols at 0930 on 27 July. At 1530 that same day, the members were back with their verdict: Not Guilty of all charges and specifications.[32]

In retrospect, the result was not much of a surprise. As LTC Sam Russ noted in his post-trial review of the case, 2LT Schneeweis's order to kill civilians was "clearly an illegal one."[33] But Russ explained further:

> I do not believe that the court should be criticized for its findings. Under the then-existing conditions of combat when every German was a potential threat to the lives of the advancing American troops, and the troops had been repeatedly impressed with that fact by higher authority, it cannot be reasonably expected that an enlisted man should stop and deliberate the legality of an order of his superior officer to kill the potential enemy. Rather, it would seem, that he should follow a course of obedience, leaving to the superior officer the responsibility of consequences of the execution of the order. It is my opinion that the court was justified in its findings.[34]

What conclusions may be drawn from these two courts-martial? Historian James J. Wiengartner insists that the trials reflect that the American Army "judged war crimes committed by its own members *by a more indulgent standard* than it applied to comparable crimes committed by the enemy."[35]

This is an unfair criticism. Hitler's *Wehrmacht*, especially when in combat against the Soviets on the Eastern Front, was committed as an institution to the widespread killing and mistreatment of prisoners of war and enemy civilians. Moreover, the

Brigadier General Charles F. Colson, the panel president in *United States v. Schneeweis*. (Photo courtesy of author)

destruction of villages, wanton destruction of civilian property, and other war crimes were committed by the *Wehrmacht* as a matter of routine. The U.S. Army, however, whether in Europe or the Pacific, adhered as an institution to obeying the law of armed conflict. Consequently, while American Soldiers did commit war crimes, these resulted from individual rather than institutional shortcomings. After all, no "indulgent standard" could be applied to German war crimes when these offenses were not only vastly greater in number and scope, but were also the direct result of the *Wehrmacht*'s intentional failure to obey the law of armed conflict.

The import of both the *Schneeweis* and *Joachims-Peppler-Nichols* courts-martial is that the U.S. Army did not shy away from bringing war crimes to trial. The 8th Armored Division certainly understood that the trial of a lieutenant for the murder of German civilians was a serious undertaking, as reflected in MG Devine's selection of a brigadier general and nine other senior officers as panel members.

Moreover, the judge advocates reviewing Schneeweis's record of trial recognized that the findings were wrong—he was guilty of murder, not manslaughter—and the sentence wholly inadequate. Additionally,

General George S. Patton confirmed the findings and sentence in *Schneeweis*. The wording of his action expressed great unhappiness with the result in the trial. (Photo courtesy of author)

they had the courage to voice this opinion in writing—for all to read. One must assume that, while General Patton signed the confirmation in *United States v. Schneeweis*, it was BG Betts or another Army lawyer in his office who drafted the language in the confirmation. This is principled counsel at its finest. While our rules governing admonishment of panel members have evolved over time, the candor expressed between judge advocates and their commanders exemplify principled counsel at its finest.

As for the young enlisted men who were acquitted, many who have served as Soldiers will readily understand the result. Obeying the order of a superior commissioned officer is at the heart of military discipline. It is so critical to having an efficient and effective fighting force that this obedience may sometimes legally excuse bad behavior. Consequently, it seems likely that the three teenaged privates (two were eighteen years old and one was nineteen) were acquitted not because the court-martial panel approved of their conduct, but rather because the members were loath to convict them for following an officer's orders—even though those orders were criminal. What is important is that the 8th Armored Division was willing to prosecute these privates for murder and was not afraid to subject them to the possibility of severe punishment. Nothing was "swept under the rug" or hidden from view.

Having been found not guilty, PVTs Joachims, Peppler, and Nichols returned to duty in the 34th Tank Battalion. Since the war was over, and they had survived, they presumably went home and re-entered civilian life in the United States. **TAL**

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Notes

1. The actual statement used at trial was "Go down the road and get a few Krauts." "Kraut" is a pejorative nickname derived from "sauerkraut," which is a distinctive feature of German cuisine. Soldiers commonly referred to Germans as "Krauts" during World War II. The British slang term for Germans was "Jerry," the origin of which is uncertain. As for the Germans, they referred to American troops as "Amis," from the German word "Amerikaner." Paul Dickson, War Slang: American Fighting Words & Phrases Since the Civil War 179, 183 (2003) (1994).

2. United States v. Schneeweis, No. 309215 (European Theater of Operations (ETO) No. 18436), at 18 (8th Arm. Div., Rokycany, Czechoslovakia, July 21, 23, 1945).

3. United States v. Joachims, Peppler, and Nichols, No. 308661 (ETO No. 17041), Allied Papers: Division Judge Advocate's Review (8th Arm. Div., Rokycany, Czechoslovakia, July 26, 1945).

4. *Schneeweis*, No. 309215, Allied Papers: Report of Staff Judge Advocate, Headquarters, 8th Armored Division, to Commanding General, 8th Armored Division, 28 April 1945.

5. Organized in April 1942 and de-activated in November 1945, the 8th Armored Division nevertheless had a distinguished combat history in its short history. The division reached France in January 1945 and immediately joined General George S. Patton's Third Army. The 8th first saw combat in the attack against the Moselle-Saar salient and then moved to the Netherlands before crossing the Rhine on 27 March. The division then took on the 116th Panzer Division in its drive to grind down German opposition in the area of the Ruhr River. The 8th Armored Division's last tank-infantry assault was against Blankenburg, at the foot of the Harz Mountains. After V-E Day, the division moved to Czechoslovakia. E. J. Kahn Jr. & Henry McLemore, Fighting Divisions 174–75 (1945).

6. *Schneeweis*, No. 309215, War Dep't. Adj. Gen. Office Form No. 115, Charge Sheet, Data as to Restraint of Accused.

7. John M. Devine graduated from the U.S. Military Academy in 1917 and served as an artillery officer until 1940, when he transferred to the newly-created Armor branch. Devine commanded the 8th Armored Division from October 1944 to August 1945. After retiring from active duty in 1952, he served as the Commandant of Cadets at Virginia Tech until 1961. Devine died in 1971. He was 75 years old. The West Point Register of Graduates and Former Cadets 197 (1992).

8. *Schneeweis*, No. 309215, at 20, 23.

9. *Id.* at 37–38.

10. *Id.* at 55.

11. *Id.* at 58.

12. *Id.* at 59.

13. *Id.*

14. *Id.* at 62

15. *Id.* at 63.

16. Born in South Carolina in November 1896, Charles Frederick Colson graduated from West Point in 1918. Commissioned in the Infantry, he served in Europe with the 8th Armored Division from 1944 to 1945, and was awarded the Silver Star and two Bronze Star Medals. While in Korea in 1952, Colson was in the news when he was appointed commandant of the Koje Prison Camp after Brigadier General Francis Dodd was seized by North Korean and Chinese prisoners of war. Colson retired in 1953 and died in 1970. General Court-Martial Convening Order No. 155, Headquarters, 8th Armored Division, 7 July 1945.

17. *Schneeweis*, No. 309215, at 67–68.

18. *Id.* Allied Papers: Abraham S. Hyman, Review by Staff Judge Advocate, Headquarters, U.S. Forces European Theater.

19. *Id.* Allied Papers: Action, Headquarters, United States Forces European Theater, 13 Nov. 1945.

20. For more on the American execution of German and Italian prisoner of war in Sicily, and Patton's involvement in the war crime, see Fred L. Borch, *War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943*, Army Law., Mar. 2013, at 1.

21. *Schneeweis*, No. 309215, Allied Papers: Holding by Board of Review No. 1, Branch Office of The Judge Advocate General, European Theater of Operations, 15 Dec. 1945.

22. *Id.* Allied Papers: Secretary of the Army, Remittance of confinement, 30 July 1948.

23. *Id.*

24. *Schneeweis*, No. 309215, Allied Papers: Holding by Board of Review No. 1, Branch Office of The Judge Advocate General, European Theater of Operations, 15 Dec. 1945.

25. United States v. Joachims, Peppler, and Nichols, No. 308661 (ETO No. 17041), at 25 (8th Arm. Div., Rokycany, Czechoslovakia, July 26, 1945).

26. *Id.* at 26.

27. *Id.* 21–27.

28. *Id.* Exhibit A, Testimony of PVT Joachims to Captain Francis A. Chamblin, Investigating Officer.

29. Joachims, Peppler, and Nichols, No. 308661 (ETO No. 17041), at 39–40 (8th Arm. Div., Rokycany, Czechoslovakia, July 26, 1945).

30. *Id.* at 46.

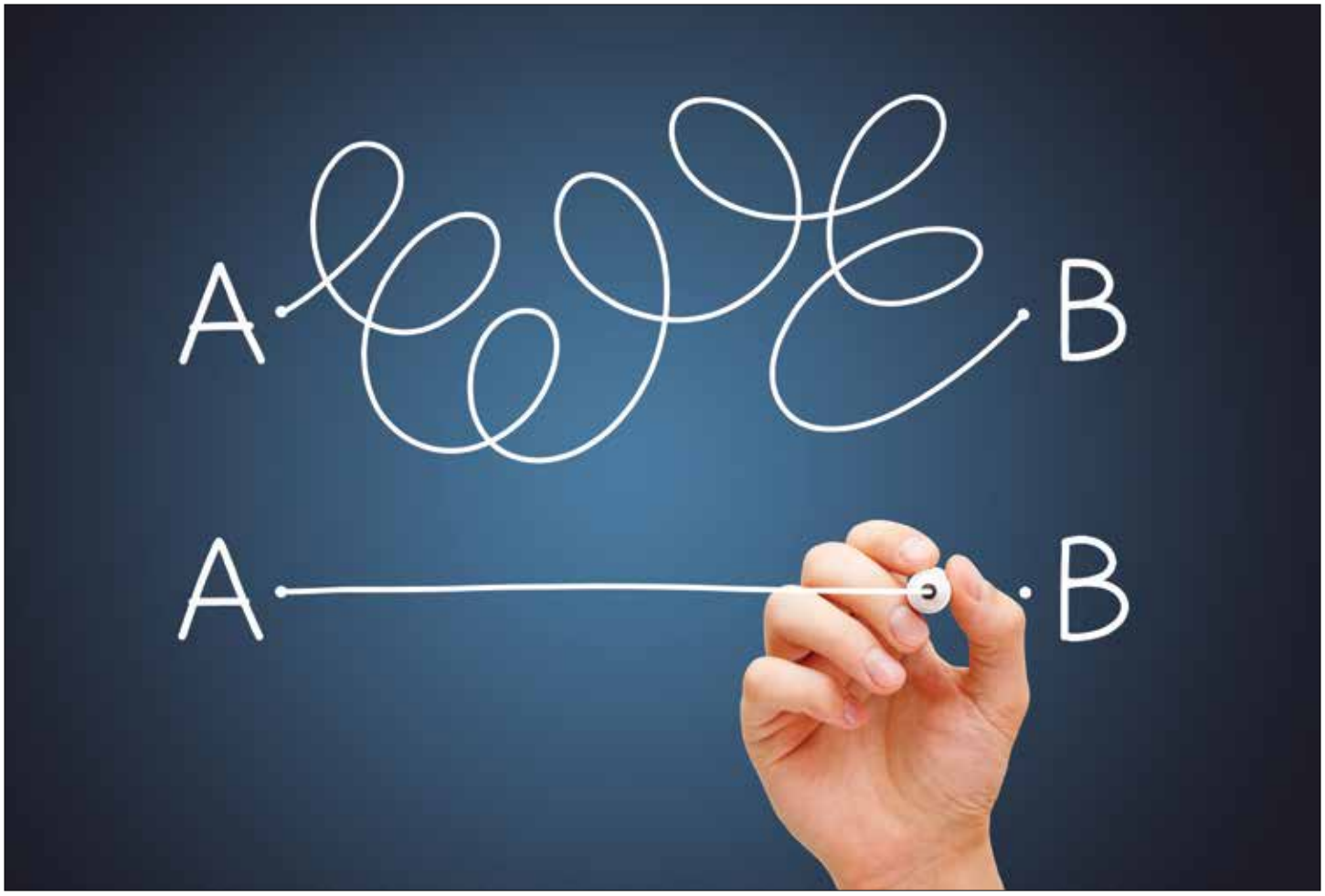
31. *Id.*

32. *Id.* 46–47.

33. *Id.* Allied Papers: Division Judge Advocate's Review, at 3.

34. Joachims, Peppler, and Nichols, No. 308661 (ETO No. 17041), at 46–47 (8th Arm. Div., Rokycany, Czechoslovakia, July 26, 1945); Allied Papers: Division Judge Advocate's Review, at 3.

35. James J. Weingartner, *Americans, Germans and War Crimes: Converging Narratives from "The Good War,"* 94 J. Am. Hist. 1164, 1167 (2008) (emphasis added).



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Practice Notes

A View from the Bench

How to Uncomplicate the Easy—One Judge's Rules and Guidelines for Plea Agreements and Stipulations of Fact

By Colonel Charles L. Pritchard Jr.

There's no such thing as an easy guilty plea.[1]

At its core, a plea agreement contains two ingredients: the accused's anticipated pleas and the convening authority's promise to do something beneficial for the accused in return. A stipulation of fact supports the agreement by explaining, factually, what actions the accused took and what mental state the accused harbored for each offense to which he will plead guilty. It sounds pretty simple. Yet, trial practitioners routinely make the simple complicated by trying to do too much with the plea agreement and stipulation of fact. The quote at the beginning of this article is the result, when the opposite should be true. This article attempts to reverse that trend by providing trial practitioners rules and guidelines for crafting plea agreements and stipulations of fact. The "rules" should

be followed in every case; the "guidelines" should be considered in every case. The former are central to avoiding legal pitfalls; the latter are helpful to the same.

Plea Agreements

Judge Thomas Berg summed up the rules and guidelines for drafting plea agreements with the central concept of simplicity.

> Mindful that the accused is generally untrained in the law, writing the terms of the [plea agreement] . . . briefly and in plain English rather than "legalese" will go a long way toward insuring [sic] that the accused actually understands these documents and their purposes. Keeping things simple and unambiguous makes it much more likely that the plea will survive appellate scrutiny.[2]

Rules

Practitioners should heed the following rules when drafting plea agreements:

1. Plead correctly.
2. Define important terms and use precise language.
3. Identify and explain waivers and legal consequences.
4. Do not include illegal or impossible terms.
5. Do not leave it unsaid.

Plead Correctly

Entering the plea matters. It is axiomatic that entering the plea is a legally significant event and guides the rest of the court-martial. Rule for Courts-Martial (RCM) 910[3] lists the permissible forms of pleas, and the accused's plea to each specification and charge must be clear. Consider the following example plea agreement excerpts.[4]

1. The accused pleads as follows: to Specification 1 of Charge I, Guilty; to Specification 2 of Charge I, Guilty; to Specification 1 of Charge II, Guilty; to Specification 2 of Charge II, Not Guilty.
2. The accused pleads as follows: to Specification 1 of Charge I, Guilty except the words "and shoes" and the figure "$1,400.00" substituting therefore the figure "$1,200.00"; to the excepted words, Not Guilty; to the Charge and its Specification with the substituted figure, Guilty; to Specification 2 of Charge I, Not Guilty; to Charge II and its Specification, Guilty.
3. The accused pleads as follows: to the Specification of Charge I, Guilty except the words "on or about 27 December 2014," "thighs and knees," "drop-kicking her hip with his foot, kicking her back with his foot, punching her head with his fist," substituting therefore the words, "pushing her down on the stairs," except the words, "pushing her head down in a sink full of dishes, squeezing her neck with his hands," except the words, "which resulted in mental harm, to wit: watching her father assault her mother"; to the excepted words, Not Guilty, to the substituted words, Guilty.

The first example is deficient because it only pleads to the specifications and fails to plead to the charges. This is a common deficiency.

The second example is deficient for several reasons. First, it is unclear which of the two excepted phrases the substituted language is intended to replace. Second, a plea is not entered to the excepted figure, only to the excepted words. Third, it jumbles together a plea to language in a specification with a plea to a charge. Fourth, the language "to the Charge and its Specification with the substituted figure," references one charge and one specification when there are clearly multiple charges with multiple specifications.

The third example is a technically correct plea, but it is overly complicated because it virtually rewrites the entire specification. For a much easier and cleaner plea to this specification, the parties could agree that the government will move to amend the specification to reflect the accused's plea. The defense counsel should then write a specification that reflects the result of the exceptions and substitutions, ask the military judge to mark it as an appellate exhibit, and then announce the following: To the Specification of Charge I as charged, not guilty, but guilty to the amended specification reflected on Appellate Exhibit III. In addition to clarity, this has the benefit of simplifying announcement of the plea—and the military judge's later announcement of the finding—as well as not disturbing the charge sheet.

The plea agreement typically forms the basis of the defense counsel's announcement of the accused's pleas in trial. Counsel should take care, therefore, when listing the accused's pleas in the agreement. Although the defense counsel necessarily provides the accused's anticipated plea, the government counsel must serve as quality control; the plea agreement is a joint document, and both parties share responsibility for its contents.[5]

Define Important Terms and Use Precise Language

Words have meaning, and some words have legal significance. To the former, use the right ones and mean to say them. To the latter, define them so the parties have a common understanding of the provisions. Consider the following example plea agreement excerpts.

1. This agreement will be null and void if I fail to fulfill any material promise or violate any of the material terms of this agreement.
2. This agreement may become null and avoid upon occurrence of any of the following events.
3. The convening authority will not be bound by this agreement if I commit any additional misconduct between the date the agreement is signed and the close of trial.

For the first example, the phrases "material promise" and "material terms" clearly have import. Yet, they are not defined. How can a military judge or appellate court determine which provisions the parties agreed would permit withdrawal from the agreement? Even more troubling, many times the parties themselves (and the accused) do not know, or offer differing answers regarding, which provisions of the agreement are "material."

The second example includes the imprecise and almost useless term "may." If the agreement "may" become null and void, who is authorized to make that determina-

tion? Is the withdrawal subject to negotiation between the parties, or is it unilateral? Which party may withdraw? Usually, the parties do not know the answer to these questions at trial or agree that they did not really mean to use the word "may."

In the last example, the date range for the misconduct is uncertain. The word "close" has a legal meaning in a court-martial. The court is "closed" for deliberations or "closed" to the public (e.g., for discussion of classified evidence), but the trial is not over until the military judge "adjourns" it. What the parties likely meant was to end the period of probation at adjournment; what they wrote ends the probation when the military judge begins deliberations on the sentence.

A plea agreement is, or should be, a meeting of the minds between the accused and the convening authority. Every ambiguity in the wording of the agreement raises the specter that a meeting of the minds did not occur.[6] If there is no agreement on a provision, what do the parties intend for the rest of the document—particularly, where the lack of agreement is on an important term? Clarity is the foundation of agreement[7] and is attained through the use of precise language and the definition of terms.

Identify and Explain Waivers and Legal Consequences

Many times, the accused agrees to waive legal rights or agrees to events with legal consequences. The accused and the counsel need to understand and be able to articulate the scope of those. Consider the following example plea agreement excerpts.

1. The accused agrees to waive any motion his counsel would otherwise have filed in the case, but he understands his counsel did not intend to file any motions.
2. The accused agrees to waive an administrative separation board if the judge does not adjudge a punitive discharge.
3. The accused agrees the convening authority may withdraw from the agreement if the accused engages in any other misconduct punishable by a year or more of confinement after the convening authority signs the agreement.

The waiver in the first example is vague and too broad. If the defense counsel did not intend to file motions, is the accused really not waiving motions at all? If that is true, the provision actually says the accused intends to waive motions and simultaneously intends to waive no motions. Additionally, the waiver purports to include all motions the defense counsel would have filed. If the defense counsel had intended to file a motion challenging jurisdiction or asserting a speedy trial violation, the accused could not legally waive it.[8]

The second waiver, without more, does not indicate the accused understood the rights he would be waiving in the administrative separation board process. If the accused does not understand that he would be waiving the right to appear with counsel, to make a statement and call witnesses, etc.,[9] it is not self-evident that the waiver is a knowing one.

The third example imposes a condition of probation pursuant to RCM 705(c)(2)(D)—the accused agrees to "conform his conduct" to avoid committing additional felonies.[10] However, the accused and the convening authority did not identify the provision as a probationary condition and did not identify that the procedure in RCM 1108 will be used to adjudicate an alleged violation of the probation.[11] It is not apparent that the convening authority and the accused understood (or agreed) that a separate hearing would be required where the accused would have many of the rights associated with a court-martial. Sometimes this provision is bounded in time—for example, where the accused commits the misconduct between the date the convening authority signs the agreement and the announcement of the sentence. But, because it fails to address whether the convening authority may withdraw from the agreement if the convening authority discovers the misconduct after the sentence is announced—or whether the discovery must also occur during the bounded time frame, even that is usually ambiguous.

The accused and counsel should not discover the meaning of a waiver or legally significant provision of the agreement when the military judge asks about it at trial.[12] Waivers should be specific and explicit. Legally significant events should be explored and explained in the agreement.[13]

Do Not Include Illegal or Impossible Terms

Rulemaking tends to be a reactive process. Humans behave in certain ways, and, having observed that behavior, rule makers craft rules to govern that behavior. The rule stated here, which appears obvious, results from observed behavior. Consider the following example plea agreement excerpts.

1. The accused agrees to direct his defense counsel not to argue for confinement in lieu of a punitive discharge.
2. The convening authority agrees to approve the accused's medical retirement.
3. The accused agrees to plead by exceptions and substitutions to the following specification: In that the accused did, at or near Fort Bradley, North Carolina, between on or about 14 January 2020 and on or about 17 January 2020, wrongfully use cocaine. The plea excepts the words and figures, "17 January 2020" substituting therefore the words and figures "1 February 2020" and excepts the word "cocaine" substituting therefore the word "methamphetamine." The convening authority agrees to direct the trial counsel, after the military judge accepts the plea, to dismiss with prejudice the language to which the accused pleaded not guilty.

The first example unlawfully interferes with the accused's right to counsel and to due process.[14] It interposes the convening authority between the accused and defense counsel, limits the accused's sentencing strategy, and undermines the accused's opportunity to be heard.

The second and third examples are not legally possible. In the second example, a court-martial convening authority does not have the ability to approve a medical retirement. That authority is reserved to the Secretary of the Army, delegated to the Commanding General, U.S. Army Physical Disability Agency.[15] The convening authority can recommend a medical evaluation board over an adverse administrative separation and can refer the accused to a physical evaluation board for processing in the disability evaluation system; but, the

convening authority cannot do what the parties agreed he would.[16]

The third example leaves a defective specification for which the military judge cannot enter a finding. The government's motion to dismiss will occur after the military judge accepts the accused's plea but before entering findings. The military judge can grant the government's motion to dismiss language, but the military judge has no power to inject new language into a specification. Hence, the resulting specification would read as follows: "In that the accused, did, at or near Fort Bradley, North Carolina, between on or about 14 January 2019 and on or about, wrongfully use." The specification then alleges neither a specific date range nor any controlled substance—it fails to state an offense. The parties could have agreed the government would move to amend the specification in conformity with the accused's plea after acceptance of the plea, but they did not; instead, they drafted a legal nullity.

Once counsel have drafted the agreement's terms, they should walk each term through the procedure of fulfilling the term to its conclusion. This will highlight whether the term is legally possible. Also, it should go without saying that counsel must eye every term to ensure it does not run afoul of RCM 705(c).[17] If counsel think that RCM 705(c) might be implicated, they should turn to case law and be prepared to tell the military judge why the term is permissible.[18] But, if counsel find themselves researching case law for this purpose, they should think twice about the term's importance to the deal. Is the term important enough to risk having a sentence rehearing after the case is overturned on appeal?

Do Not Leave It Unsaid

RCM 705(e)(2) says,"[a]ll terms, conditions, and promises between the parties *shall* be written."[19] Further, Article 53a(b)(5), Uniform Code of Military Justice, requires the military judge to reject an agreement that is contrary to RCM 705.[20] So if the parties *mean* it, they must *say* it in the agreement. Consider the following example plea agreement omissions.

1. The accused pleads guilty to some, but not all of the specifications. The agreement is silent regarding the specifications to which the accused is pleading not guilty.
2. The convening authority agrees to waive automatic forfeitures for the benefit of the accused's dependents. The agreement is silent on the accused's responsibilities in this respect.
3. The accused pleads guilty to multiple specifications, and the sentence limitation says, "Confinement: a minimum of 60 days total and a maximum of 120 days total may be adjudged for all charges to be served concurrently." The agreement is silent as to other forms of punishment.

Usually when a plea agreement allows an accused to enter mixed pleas, the parties also agree that the end result will be that the accused is convicted only of the offenses to which he pleads guilty. The first example does not address this. Is the government permitted to attempt to prove the offenses to which the accused pleaded not guilty? Will the government move to dismiss those specifications or offer no evidence on them? Surely, the parties agreed one way or the other on this subject, but the plea agreement does not contain that understanding; therefore, it risks rejection by the military judge.

Waiver of automatic forfeitures is done for the benefit of an accused's dependents.[21] This involves identifying those dependents and the bank routing information for direct deposits from the accused's pay to them. Additionally, automatic forfeitures take effect fourteen days after the sentence is announced.[22] The agreement does not address the accused's responsibility to provide this information to the convening authority or the suspense for doing so. In order to effect the waiver, the parties must have agreed to these things. Again, the absence of this from the plea agreement risks its rejection.

Rule for Court-Martial 705(d)(2)(A)(i) states that a sentence limitation in a plea agreement that includes a term of confinement "shall include separate limitations [on confinement] for each . . . specification."[23] The third example does not do this. It states a cumulative total rather than limitations on confinement for each specification. The confusing injection of the phrase "to be served concurrently" hints that the intent of the parties is to authorize 60 to 120 days of confinement for each specification and that confinement for all specifications would be served concurrently. Rather than saying this, the confusing drafting appears to be contrary to RCM 705(d)(2)(A)(i) and risks being rejected.[24]

Before signing the agreement, counsel for both parties should analyze each provision and ask themselves whether any provision requires the reader to make assumptions or guess at intent. If a party believes a provision means something or requires additional action for implementation that is not written, the party should write the additional information into the agreement.

The Guideline

One guideline supplements the above rules: keep it simple. For every term that counsel draft, they should first pretend to be the accused and then pretend to be the judge. Considering the accused's age, rank, education, and experience, counsel should ask whether the accused will understand the provision. Envisioning the role of the judge who must explain the provisions of the agreement to the accused,[25] counsel should ask how they would explain it in layman's terms. If it seems overly complicated, it probably is and may turn into an appellate troublemaker. Counsel should also ask whether each term serves a useful purpose. Many plea agreements contain long recitations of rights that appear to be copied directly out of the *Military Judges' Benchbook*.[26] The military judge will advise the accused of his rights, including the ones the accused is waiving by pleading guilty. Further, the defense counsel should have done the same prior to allowing the accused to enter a plea agreement.[27] No additional purpose is served by also including those rights advisements (phrased as acknowledgements) in the plea agreement.

The plea agreement is a contract, and trial practitioners should approach it in that manner. They should only include important terms, draft the terms carefully, record pleas correctly, explain and define terms that are important, identify waivers and events with legal consequences, stay expressly within the bounds of the law and possibility, express everything the parties intend, and, throughout, keep it simple.

Because the stipulation of fact which supports the plea agreement is another legal document that needs careful crafting, the rules and guideline for plea agreements should presage those applicable to stipulations.

Stipulations of Fact

One judge advocate has commented, "The stipulation of fact should be the most extensive and elaborate document introduced by either party at trial because a thorough stipulation will bolster the providence inquiry and foreclose later appellate challenges to the legal sufficiency of the plea."[28] Whether the stipulation is elaborate, it should be useful, factual, and legal. The following rules and guidelines are designed to meet those criteria.

Rules

Trial practitioners should heed the following rules when drafting stipulations of fact.

1. Help the military judge with the providence inquiry.
2. Help the accused with the providence inquiry.
3. Tell the real story, not the story you want to tell.
4. Include facts, not legal conclusions.
5. Do not circumvent the law.

Help the Military Judge with the Providence Inquiry

The stipulation of fact can serve several purposes, but first and foremost it is evidentiary support for the accused's guilty plea. The military judge relies on the stipulation to prepare for the extensive inquiry of the accused into the facts surrounding the offenses. The military judge will determine whether all essential facts are elicited for each element of each offense and whether potential defenses are raised and disclaimed. The military judge will use the *Military Judges' Benchbook* to prepare, so the parties should use it to draft the stipulation. Consider the following examples.

1. The accused is charged with cocaine distribution. The stipulation says the following: "The accused collected money from Private First Class (PFC) A and Specialist (SPC) B for the purpose of purchasing cocaine. The accused took PFC A and SPC B to PFC X's room and handed PFC X the money. PFC X cut three lines of cocaine on his coffee table, and the accused, PFC A, and SPC B each snorted a line of cocaine.
2. The accused is charged with willfully disobeying a superior commissioned officer. The stipulation says the following: "On 1 March 2020, Captain (CPT) Jones ordered the accused to have no contact with his daughter by any means, because the accused was suspected of having physically and verbally abused her. On 1 April 2020, on the accused's birthday, at around 0500 hours, the accused received a call from his daughter on his personal cell phone. He recognized his daughter's number before answering, and then talked to her for 30 minutes after she wished him a happy birthday."
3. The accused is charged with stealing cash from his friend's wallet. The stipulation says the following: "Although the accused was drinking on the night of 24 March 2020 and was intoxicated at the time he stole the money, he was not so intoxicated that he could not form the specific intent to permanently deprive PFC A of the money."

The first example fails to elicit all the relevant facts. It is not clear how the accused distributed anything. A distribution can be an actual, attempted, or constructive transfer of possession.[29] Was this a constructive transfer? What facts support that? Was PFC X serving as the accused's agent when he laid out the lines of cocaine?[30] Was the accused serving as the agent of PFC A and SPC B when he handed over the money? These are questions the military judge will ask the accused, so they should be factually addressed in the stipulation.

The second example demonstrates the importance of the definitions provided by the *Military Judges' Benchbook* (borrowed from the *Manual for Courts-Martial* and case law). Willful disobedience is defined as an "intentional defiance of authority."[31] Moreover, the failure to comply with an order "through heedlessness, remissness, or forgetfulness" is not a violation of Article 90.[32] What facts support the former versus the latter? There is no indication that, when the accused answered his daughter's call on his birthday—a month after receiving the order, he was thinking about CPT Jones's prohibition and intentionally defying him. When drafting the stipulation, counsel must analyze the elements as well as the definitions; they must address both.

For every term that counsel draft, they should first pretend to be the accused and then pretend to be the judge. Considering the accused's age, rank, education, and experience, counsel should ask whether the accused will understand the provision.

The third example attempts to address a defense, but it is so hollow that it is unhelpful. It is conclusory rather than explaining why the accused's level of intoxication did not prevent him from forming the required specific intent. What was the accused drinking? How much? How often had he imbibed before? In what quantities? Were there other times where he believes his state of intoxication would have prevented the formation of specific intent? How was that different than during his commission of the charged offense?

A stipulation that fails to elicit the facts required by the elements, definitions, and potential defenses not only fails to prepare the military judge and the accused for the providence inquiry, it also hides potential problems with the guilty plea. What if the accused really did not think about his commander's order during the birthday call from his daughter? That potential incon-

sistency will then be discovered for the first time after the accused pleads guilty to the offense. The military judge may have to reject the plea, and the plea agreement could be in jeopardy. There are remedies for each, but the failure of the parties to carefully draft the stipulation will have worked contrary to judicial economy and speedy justice.

Help the Accused with the Providence Inquiry

Some accused Soldiers are highly articulate. Most are not. When you add the natural stress a court-martial presents to an accused with the certainty of a federal conviction, the uncertainty of life beyond the conviction, the prospect of having a discussion with a senior officer, and airing embarrassing facts to anyone who wishes to listen, you get an accused whose nervousness will—most likely—decrease his ability to articulate his guilt. The stipulation of fact can be a haven to which the accused returns both to help him articulate his guilt and to supplement his memories. Consider the following examples.

1. The accused is charged with obstruction of justice, alleged as an Article 134, Clause 1 and Clause 2, offense. The stipulation includes the following: "The act of the accused, a Soldier, in requesting another Soldier to wrongfully dispose of evidence, knowing that an investigation by military authorities was ongoing, caused a reasonably direct and obvious injury to good order and discipline. It encouraged another Soldier to violate military law, and it impeded the ability of military authorities to determine whether a crime occurred and to take action to correct it. Further, the accused's action tends to harm the reputation of the Army and lower it in public esteem. Members of society would think less of the Army if they knew Soldiers were asking other Soldiers to violate the law and impede official investigations. The civilian victims themselves were disappointed and hurt that an Army Soldier would commit these crimes and then act so brazenly to cover them up when confronted with an investigation into his wrongdoing."
2. The accused is charged with assault consummated by a battery on a police officer and drunken operation of a motor vehicle. The stipulation says the following: "The accused does not specifically recall the incident in question, although he does have flashes of memory of portions of the incidents. Having reviewed the report of investigation and the interview of Officer A, the accused is convinced that the facts are as set forth in this stipulation and he did commit the offenses."

It seems that the hardest thing for an accused to articulate is why his conduct was prejudicial to good order and discipline or service discrediting. Usually, the accused simply repeats the legal standard. But the legal standard must be supported by facts,[33] and the first example does that. More, it helps the accused tell the military judge why his conduct was prejudicial and service discrediting.

An accused need not personally know all the facts surrounding his offenses in order to plead guilty.[34] The second example appropriately alerts the military judge that the accused has no memory of the facts, and it provides the accused a reference from which he can discuss the source of his knowledge with the judge.

A guilty plea belongs to the accused, and the accused has the responsibility to convince the military judge that he is actually guilty. The stipulation should support that effort and help the accused accomplish this goal.

Tell the Real Story, Not the Story You Want to Tell

Many times, trial practitioners approach drafting the stipulation of fact with a zeal for presenting their presentencing cases. To this end, one judge advocate wrote the government-oriented view that,

> [a]n effective stipulation is, quite simply, the Government's perfected theory of the case. It represents the trial that would have occurred if all witnesses testified in the most persuasive fashion to all pertinent facts; all documents contained only incriminating facts without distracting complications or exculpatory information; all evidentiary questions were resolved in favor of the Government; and the whole sum of the tale left no opportunity for the accused to assert a defense or provide plausible extenuation or mitigation.[35]

A countervailing defense-oriented view follows:

> Counsel must not allow the successful negotiation of a highly favorable sentence limitation to become an excuse for rubberstamping whatever the government wishes to place in a stipulation of fact. Instead, counsel should aggressively pursue a fair stipulation of fact in the case. . . . [C]ounsel must strongly oppose inclusion of matters that are highly speculative, inflammatory, and not directly related to the offense.[36]

Yet, this focus on the adversarial aspect of the document has led trial practitioners to present a story that is not the one the accused experienced or is willing to tell. Consider the following example.

1. *The Specification.* The accused pleads guilty to child endangerment in violation of Article 134. The specification alleges the accused battered his wife by strangling her, pushing her over a couch, beating her with a chair, kicking her, punching her in the head, and pushing her head in a sink while the children were watching which caused them mental distress.
2. *The Stipulation.* The stipulation of fact reads as follows: "The accused grabbed Mrs. AV's neck with his hands and pushed against her throat. Throughout the duration of the argument, 2-year-old A, 3-year-old B, and 4-year-old C were present and witnesses to the altercation. All three children were crying and pleading for it to stop."
3. *The Providence Inquiry.* During the providence inquiry, the accused tells the military judge the following: "The girls didn't know we were arguing most of the time. The girls started crying after I pushed my wife over the couch. My wife told the girls to go upstairs, and my oldest daughter asked why. My wife insisted they go upstairs, and the three

girls went upstairs crying because they saw me push their mom over the couch. They were upstairs long before I ever pushed my wife into the wall or any of the other stuff."

What accounts for this discrepancy? It could be that the defense counsel did not understand the facts and did not properly advise the accused before permitting him to plead guilty. It could be that the accused was willing to agree to anything just to get the process over with. Or, it could be that the prosecutor was so strongly advocating the case he had built that the stipulation reflected the story he wanted to tell. To paraphrase the government-oriented viewpoint quoted above, it became the best version of facts the prosecutor could have hoped for. Or, perhaps a combination of the above factors played a role. The danger in treating the stipulation of fact as primarily an adversarial document is that it may result in rejection of the stipulation and an improvident plea. That is not a result either party or the accused wants, and it is not in the interests of justice. To avoid this, trial practitioners should treat the stipulation primarily as the foundation for the pleas and secondarily as pre-sentencing evidence. They should present the real facts that the accused is willing to admit, rather than the facts which support their strongest sentencing case.

Include Facts, Not Legal Conclusions

A stipulation of fact is an agreement about *facts.* Yet, many stipulations contain legal conclusions that do not belong in a document about facts. Consider the following examples of stipulation excerpts.

1. The accused specifically disclaims any defense of "reasonable mistake of fact" as to consent.
2. The accused agrees and admits that the search of his residence was lawful in all respects and that all evidence seized during the search or derived therefrom was legally obtained.
3. This court-martial has jurisdiction over the accused and the charged offenses.

In the first example, a disclaimer of a defense is a legal action; it is not a fact. In the second and third examples, the parties stipulate to a legal conclusion: the lawfulness of the search and seizure and the existence of jurisdiction. For the latter, the accused could not waive a motion pertaining to jurisdiction; similarly, a stipulation that jurisdiction exists is a nullity. For each of the examples, the parties should have simply related the facts that supported the legal conclusions or actions. With respect to the second example, the accused could alternatively have waived a motion to suppress the search and seizure in the plea agreement.

Trial practitioners must remember the scope and purpose of the stipulation of fact. It is a factual document and should not purport to be anything else. The parties should identify the factual predicate for any legal issues the military judge should discuss with the accused. However, the parties must leave the legal conclusions to the military judge.[37] Even if the parties agree that the facts support a legal conclusion that will uphold the plea, the military judge may conclude that the legal result is inconsistent with the plea. For example, the parties might "stipulate" that the accused is mentally competent to stand trial (a legal conclusion that does not belong in a stipulation of fact). But the military judge, after hearing evidence of the accused's mental conditions and interacting with the accused during the guilty plea, could ultimately determine the accused is not competent notwithstanding the "stipulation."[38]

Do Not Circumvent the Law

As in Rule #4, many trial practitioners try to make the stipulation into more than it can be. Because it warns against attempts to escape the confines of the law, this rule is qualitatively different than the previous. Consider the following examples of stipulation excerpts.

1. The following stipulated facts are admissible into evidence without regard to any Military Rule of Evidence or Rule for Courts-Martial 1001.
2. Any objection to or modification of this stipulation without consent of the Trial Counsel amounts to a breach of the plea agreement from which the Convening Authority may withdraw.
3. Private First Class A and the accused were acquaintances through SPC B. Specialist B was in a sexual relationship with the victim of the charged sexual assault, Ms. V, prior to 22 August 2020.

The first example is simply not true and attempts to rob the military judge of his evidentiary gatekeeping responsibility.[39] At the very least, all evidence in a case must be relevant.[40] During the providence inquiry, relevance is related to the determination of the accused's guilt. Many times, trial practitioners include facts in the stipulation that they believe are relevant to aggravation, extenuation, or mitigation—but not to the charged offenses. During the pre-sentencing proceedings, relevance is related to the categories listed in RCM 1001.[41] The parties cannot do away with these evidentiary rules. Nor can they usurp the military judge's responsibility to determine whether evidence is admissible.

The second example represents a plea agreement term that has been injected into the stipulation of fact. If that agreement to a legal consequence is not written into the plea agreement itself, the plea agreement violates Article 53a, UCMJ, and RCM 705, and may be rejected by the military judge.[42]

The third example introduces evidence of the victim's prior sexual conduct in violation of MRE 412.[43] That evidentiary rule applies equally during the merits and the pre-sentencing proceedings,[44] and it requires a closed hearing to determine admissibility of the evidence.[45] It also requires notice to the victim and an opportunity for the victim to be heard on the issue.[46] By injecting the evidence into the stipulation of fact, the parties circumvent the law and prevent the military judge from determining its admissibility.

To be clear, the parties cannot agree to the admissibility of evidence. They can agree not to object to the introduction of evidence. The military judge is the ultimate arbiter. If the parties find themselves straying from the facts in a stipulation, much less attempting to skirt the law, they need to go back to the drawing board.

The Guideline

In addition to conforming stipulations to the above rules, trial practitioners should

consider the following guideline in drafting: have a good reason for everything you include in the stipulation. Sometimes trial counsel insist on putting extraneous information in a stipulation of fact. Trial counsel may have spent significant time building the case for a contested trial and then want to showcase that work in the stipulation of fact. Consider the following example.

In a child pornography case, the stipulation says the following:

> Detective A used the law enforcement version of the peer-to-peer software "Roundup Ares" during his investigation. This software is used by civilian law enforcement to download files from a single source during a computer crime investigation. A single source download occurs when a user requests to download a file from another user rather than pieces of the file from several different users. Detective A conducted a single source download of a file from IP address 123.456.789.

None of this detail is important either to the military judge's determination on the accused's guilt or to the sentencing decision. If the defense challenged the investigatory procedure, it is administrative trivia that might have been important in a contested case. It shows a lack of understanding as to the role of the stipulation and possibly an inability to shift mindset from a contested trial to a guilty plea. Trial practitioners should be alert to and eliminate superfluous and unimportant details from stipulations.

Conclusion

A successful guilty plea ensures speedy justice is achieved and saves judicial resources. It generally benefits an accused, the Army, and crime victims. The parties to a guilty plea have a vested interest in ensuring the plea is provident and the parties' agreements are valid. Each of the examples used in this article were drawn from actual documents submitted in courts-martial. The rules and guidelines were crafted based not on single occurrences but on recurring issues. Each of the issues presents an opportunity to undermine the parties' goal of achieving a successful guilty plea. Trial practitioners should understand the purpose of the plea agreement and stipulation of fact, use that as their guiding star in drafting, and avoid trying to do too much with those documents. Trial practitioners should heed these rules and guidelines to avoid legal obstacles and achieve their goal. Perhaps then there will someday be such a thing as an easy guilty plea. **TAL**

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Notes

1. Every military judge ever.

2. Colonel Thomas S. Berg, *A View from the Bench: A Military Judge's Perspective on Court-Martial Providency*, Army Law., Feb. 2007, at 35, 36.

3. Manual for Courts-Martial, United States, R.C.M. 910 (2019) [hereinafter MCM].

4. All examples used in this article are closely (if not exactly) based on real language in documents encountered by the author when presiding over courts-martial.

5. *See, e.g.*, Major Stefan R. Wolfe, *Pretrial Agreements: Going Beyond the Guilty Plea*, Army Law., Oct. 2010, at 27, 32 (the plea agreement "is a tripartite effort, requiring the attention of government and defense counsel, as well as the military judge").

6. *See id.* ("Generally, the less specific the term, the more scrutinized the case will be on appeal. Additionally, if the parties have a material misunderstanding over what the terms of the pretrial agreement were, a guilty plea entered based on the plea agreement may be found improvident.").

7. *See, e.g.*, Major Bruce A. Haddenhorst & Captain Maryalice David, *Guilty Pleas: A Primer for Trial Advocates*, A.F. L. Rev., vol. 39, 1996, at 87, 102.

8. *See* MCM, *supra* note 3, R.C.M. 705(c)(1)(B).

9. *See* U.S. Dep't of Army, Reg. 635-200, Active Duty Enlisted Administrative Separations sec. II (19 Dec. 2016) [hereinafter AR 635-200].

10. MCM, *supra* note 3, R.C.M. 705(c)(2)(D).

11. *Id.* R.C.M. 1108.

12. *See, e.g.*, Colonel John Siemietkowski, *A View from the Bench: Preparing Your Client for Providency*, Army Law., Apr. 2008, at 42, 46.

13. There are some standard waivers, such as a waiver of trial by members and a waiver of rights when pleading guilty, which need not be explained in the agreement. The military judge explains these rights to the accused as a matter of course in every guilty plea. Explaining them again in a plea agreement is an unnecessary repetition. These waivers should be simply stated.

14. *See* MCM, *supra* note 3, R.C.M. 705(c)(1)(B).

15. U.S. Dep't of Army, Reg. 635-40, Disability Evaluation for Retention, Retirement, or Separation para. 2-2f (19 Jan. 2017).

16. *See* AR 635-200, *supra* note 9, para. 1-33.

17. MCM, *supra* note 3, R.C.M. 705(c) (listing permissible and prohibited terms for plea agreements).

18. *Id.*

19. *Id.* R.C.M. 705(e)(2) (emphasis added).

20. UCMJ art. 53a(b)(5) (2017); MCM, *supra* note 3, R.C.M. 705.

21. UCMJ art. 58b(b) (2017); MCM, *supra* note 3, R.C.M. 1103(h).

22. UCMJ art. 58(a)(1) (2006); UCMJ art. 57(a)(1)(A) (2016).

23. MCM, *supra* note 3, R.C.M. 705(d)(2)(A)(i).

24. *Id.*

25. *Id.* R.C.M. 910(f)(4).

26. *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook (29 Feb. 2020).

27. *See* Siemietkowski, *supra* note 12, at 46.

28. Major Alexander N. Pickands, *Writing with Conviction: Drafting Effective Stipulations of Fact*, Army Law., Oct. 2009, at 1, 3.

29. MCM *supra* note 3, pt. IV, para. 50.c.(4).

30. Note that agency is not required for a constructive transfer of possession, but it could be a helpful fact. *Id.*

31. *Id.* pt. IV, para. 16.c.(2)(f).

32. *Id.*; UCMJ art. 90 (2016).

33. United States v. Jordan, 57 M.J. 236, 239 (C.A.A.F. 2002) (finding that the accused's "yes" response to legally conclusive question whether his conduct was prejudicial or service discrediting failed to establish factual predicate).

34. *See* United States v. Axelson, 65 M.J. 501, 510–11 (A. Ct. Crim. App. 2007) (citing United States v. Moglia, 3 M.J. 216, 218 (C.M.A. 1977)).

35. *See* Pickands, *supra* note 28, at 1.

36. Lieutenant Colonel Dayton M. Cramer, *Trial Defense Service Note: Attacking Stipulations of Fact Required by Pretrial Agreements*, Army Law., Feb. 1987, at 43, 46.

37. *See, e.g.*, United States v. Simpson, 80 M.J. 33, 36 n. 3 (C.A.A.F. 2021) (carving out legal conclusions from the facts in a stipulation).

38. The military judge who suspects there may be an issue with competency will likely order a sanity board under RCM 706 and then, if necessary, hold a competency hearing under RCM 909 before ultimately concluding the accused lacks the mental competence to stand trial. *See* MCM, *supra* note 3, R.C.M. 706, 909.

39. *Id.* Mil. R. Evid. 104(a).

40. *Id.* Mil. R. Evid. 401. *See* Cramer, *supra* note 36, at 46. *See also* Pickands, *supra* note 28, at 9.

41. MCM, *supra* note 3, R.C.M. 1001.

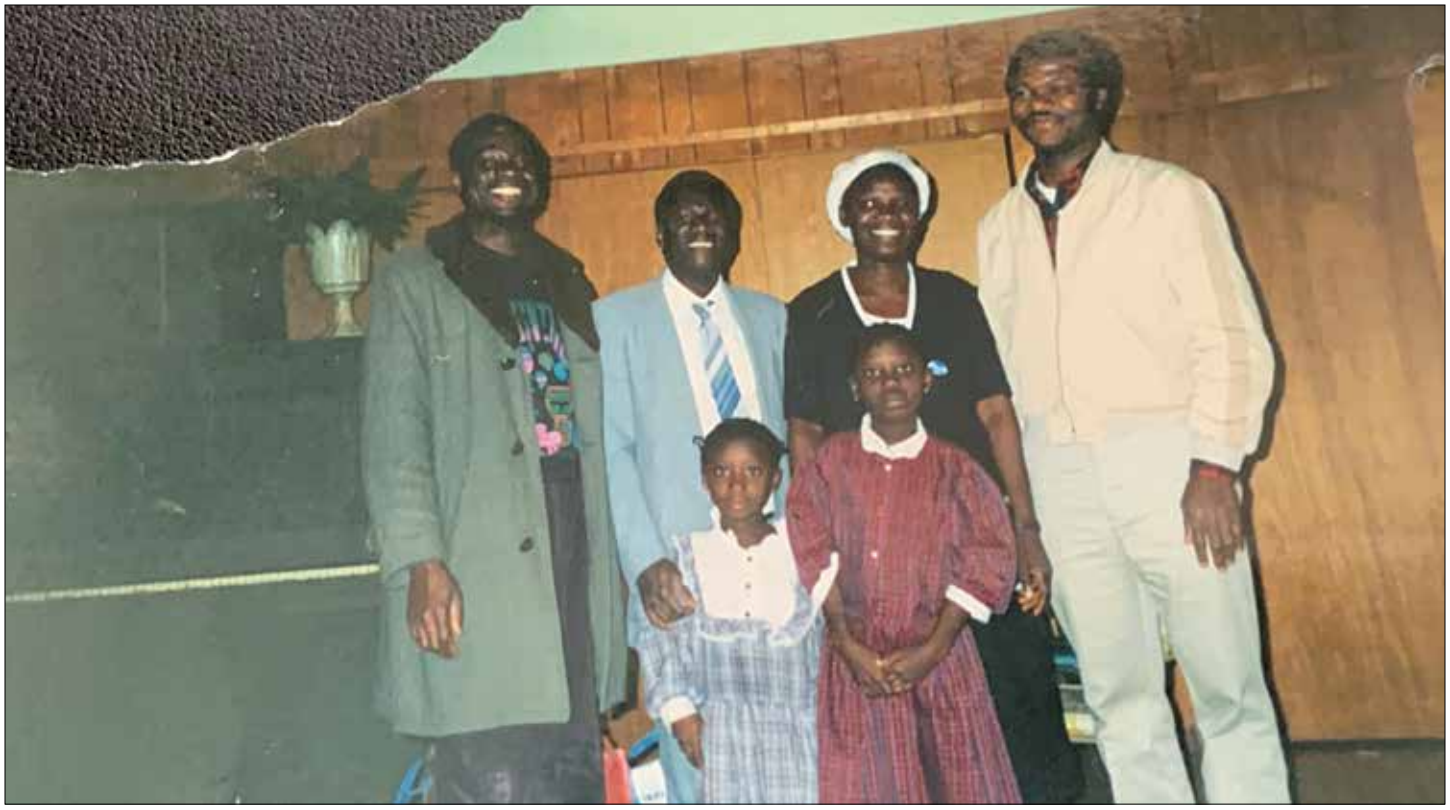
42. UCMJ art. 53a (2017); MCM, *supra* note 3, R.C.M. 705.

43. MCM, *supra* note 3, Mil. R. Evid. 412.

44. United States v. Fox, 24 M.J. 110, 112 (C.M.A. 1987).

45. MCM, *supra* note 3, Mil. R. Evid. 412(c)(2).

46. *Id.* Mil. R. Evid. 412(c)(1)(B), (c)(2).



Major Awoniyi (bottom left) with her father, mother, sister, and two family friends on her first night in the United States in April 1993. (Photo courtesy of author)

Practice Notes

Dear Private Matthews

By Major Oluwaseye "Mary" Awoniyi

Sometimes, I feel like the poster child for the American dream. I have known what it is to live in want and in plenty. I have lived in a small structure in a rural village, walking miles every day to and from school. I remember crying one day on the long walk home because I broke the strap on my shoe. I was terrified of the punishment I would receive at home. These were my school shoes—one of only two pairs of shoes I owned—and my carelessness would upset my mother. We did not have the luxury to just buy new shoes. Later, my family lived in a one-room apartment (yes, one *room*, not one *bedroom*). At the end of the hallway, there was a hole in the floor that served as a toilet for everyone in the apartment complex. At the opposite end of the hallway sat a giant barrel. The women in the building would fetch water from outside and fill it; we did not have running water in our homes. Now, almost a quarter of a century later, I am embarrassed at the number of shoes in my overflowing closet, and I live by myself in a townhouse with indoor plumbing and (not one, but two!) toilets. It is not lost on me how fortunate I am.

When asked to write this personal statement, I really struggled. Despite the negative experiences that have shaped my understanding of race and how some in society view me, a Black woman, I was raised to keep my head down, work hard, and not complain. "Go along to get along." My parents sacrificed everything to bring our family to America. I have been given opportunities I am not allowed to squander. I am one of the lucky ones. Who am I to criticize a country that has made so much possible?

America and I

While grateful, I also see that America, like so many of us, is a work in progress. The land of equal treatment to which America aspires is not yet the reality for all her children. It has not been mine. At a high school academic program, my roommate confessed she had been afraid to live with a Black girl for the summer. Fortunately, her fears were assuaged when she saw the Bible on my nightstand because, in her words, "Maybe I wasn't 'that bad' if we shared the same faith." As

an adult, I have been followed in stores and purchased items I did not want just to prove I could afford to shop there. I have been called a diversity hire, the "N-word," and "sensitive" when I dared to express frustration at comments targeted toward my race or gender. I have learned to jokingly laugh off these experiences so as not to be perceived as the "angry Black woman." I have learned to sacrifice, stay late, and push hard in an effort to prove to others—and, admittedly, to myself—that I am not just a token, but that I deserved the position, the award, or the seat at the table. Smile, work hard, keep your head down. Go along to get along.

Yet, these past months have awakened something within me. I'm slowly finding my voice. I have had conversations that I have long been afraid to have. I have been forced to face some of the deep-seated experiences that have grieved me—experiences I pushed down because dwelling on them would neither help me nor honor my parents' sacrifices. I have been grateful for the opportunity to have these conversations and share the experiences that have hurt and burdened me, yet also molded and motivated me to challenge the biases that try to put me in a box because of the color of my skin.

Though emotionally and mentally draining, these conversations have been largely positive. The times when fellow brigade staff officers, commanders, judge advocates, or paralegals came to my office, closed the door, and asked to have a frank conversation in a safe space have been—in a word—refreshing. Although I occasionally have to gently remind people that I am not a spokesperson for my race, these conversations have moved me as I've watched friends become allies when I've been vulnerable enough to share my heart. These experiences have brought me great joy. Yet, I remain skeptical. Will things really change? Are people really changing?

The Space Between Conviction and Grace

Almost seventeen years ago, seventeen-year-old Private First Class Awoniyi was going through basic combat training at Fort Jackson, South Carolina. Over the course of that summer, I built a friendship with a Soldier named Private (PV2) Matthews. Private Matthews grew up in a small town I can no longer recall. I was the first Black person he had ever interacted with in a meaningful way. Although skeptical of me at first, we became fast friends. As graduation approached, he and I spoke more of his family and I looked forward to meeting them. On Family Day, the day before graduation, parents could take their Soldiers out for a day pass. My family could not make the journey to South Carolina, so I spent the day on post with some other Soldiers. When we returned to the unit footprint to sign in at the Charge of Quarters desk, I saw PV2 Matthews with a woman I guessed to be his mother based on our previous conversations. Excited to meet her, I raised my hand above my head and waved at my friend, smiling as I began making my way across the room toward them. The look on PV2 Matthews's face stopped me dead in my tracks. What was that—panic? Disdain? Shame? Fear? Whatever it was, it was enough to clarify the reality of our relationship. I watched PV2 Matthews place his hand on his mother's shoulders and turn her away from me. I stood paralyzed and rejected, looking at the back of someone I naively believed had changed.

Private Matthews avoided me that evening after formation, breaking our routine of shining our boots together. He avoided me the next day after graduation as our platoon members said their goodbyes and exchanged phone numbers, promising to stay in touch. I am ashamed to say that I did not seek him out either. At the time, I was unable to forgive him for the hurt I felt. Looking back, I wonder if things would have been different had I shown him a little grace. I hope that his journey of uncovering his biases continued in spite of my pride and unwillingness to understand his internal battle.

Teaching Moments

After that experience, I can't help but wonder if the conversations that have been taking place since the murder of George Floyd will bring real change. I watched some leaders remain silent, appearing to not realize that their silence was deafening. It led me to wonder if my community seeks real change or whether—like I have done on so many occasions—it is more comfortable to go along to get along. I am encouraged that we're having diversity and inclusion conversations. I am encouraged that we're looking at the racial disparity in the application of the Uniform Code of Military Justice. I am encouraged that we've effectively banned the display of the Confederate Flag on post. However, this is not the first time in our military's history that we've undertaken these very same efforts. As we confront these issues again, let us be mindful that our courage to call things out for what they are today sends a message to our force of tomorrow.

I hold on to hope. Many have the humility to look within, the empathy to listen, and the boldness to speak up. To these leaders, thank you for your courage; thank you for helping me find my voice. To those like PV2 Matthews out there—those who are grappling with what they believe, how they feel, and whether to take a stand—thank you for your honesty. It is only through this authentic, inner struggle that genuine change is possible. But only if we choose to lean into the uncomfortable.

Conclusion

I'm learning that I must show grace. Many want to be allies, but don't know how. Some want to understand, but are afraid to ask questions for fear of being misunderstood or saying the "wrong" thing. Let's create an environment where it is safe to have these conversations. Then, let's move past them. We must be an institution that continuously critiques itself and seeks improvement. We cannot ignore the hard truths, placate, be complacent, or declare a premature victory. We have a duty to better ourselves, our organization, and our country. It is up to each of us to ask: How do I make real change for the good of our military? Our society? My neighbor? And, how do I go about this with courage of conviction and grace? It is only then that we can begin the journey toward healing and understanding. Only then can our collective American dream be truly realized. **TAL**

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A Service member wears religious headgear during a menorah lighting ceremony in December 2020 on Camp Arifjan, Kuwait. The ceremony was made available for all Service members in recognition of the Jewish holiday Hanukkah. (Credit: SGT Khylee Woodford)

Practice Notes

Religious Freedom

An Overview of Religious Accommodation Policies in the Army

By Lieutenant Colonel Nolan T. Koon & Major David L. Ford

While serving in the Army, a Soldier's ability to practice their faith is an important element of personal and institutional readiness. The Army has a robust and comprehensive religious accommodation program that "places a high value on the rights of its Soldiers to observe tenets of their respective religions or to observe no religion at all."[1] It is essential that commanders and Soldiers know and understand the Army's policies on religious accommodations. This ensures Soldiers can practice their faith, consistent with law and policy, while safeguarding the command's ability to maintain readiness. This article provides an overview of the Army's current policies for religious accommodations, and provides practice tips for command teams to consider when evaluating the accommodation of religious practices.[2]

Religious Accommodation

Within the Army, religious accommodations enable a Soldier to exercise tenets of their religion, while continuing to serve. Common phrases that may be associated with religious accommodations are "religious liberty" and "religious freedom." Commanders are responsible for religious programs within the Army, so it is important they understand the policies that will drive their decisions regarding religious accommodations.[3] It is equally important for commanders to utilize their chaplains and judge advocates (JAs) when making decisions concerning religious accommodations. Chaplains and religious affairs specialists can assist the commander in an advisory role and through formal interviews for religious accommodations. Judge advocates can assist by ensuring a commander's decision to approve or deny a religious accommodation is consistent with policy and the U.S. Constitution.

Constitutional and Statutory Basis of Religious Freedom

The foundation of religious freedom in our country is grounded in the First Amendment, which provides, "Congress shall make no

law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] The concept behind religious freedom is that people have a right to their religious beliefs, and may generally practice their religious beliefs, with minimal Government intervention. This idea of the right to *believe* in something versus the right to take some *action or abstain from action*, based on those beliefs, was first examined by the U.S. Supreme Court in the late 19th century;[5] and the Court's opinion of what constitutes "religious freedom," and to what degree the Government can promote or control that freedom, has varied over the decades.[6] Congress passed the Religious Freedom Restoration Act (RFRA)[7] in an effort to provide a more formulaic interpretation and application of Government intervention into religious freedom. The RFRA provides "broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[8] The RFRA, which applies to "'every branch, department[,] agency, instrumentality, and official (or other person acting under color of law) of the United States' . . . also applies in the military context."[9]

Religious Accommodation Policies Within DoD

As a Government institution, all religious accommodation policies within the Department of Defense (DoD) must abide by the First Amendment's Free Exercise Clause and Establishment Clause,[10] while still providing equal protection under the law. The DoD implements RFRA through DoD Instruction (DoDI) 1300.17.[11] It is DoD policy that, "[p]ursuant to the Free Exercise Clause of the First Amendment to the United States Constitution, Service members have the right to observe the tenets of their religion or to observe no religion at all."[12] The DoDI mandates that if "a military policy, practice, or duty substantially burdens a Service member's exercise of religion, accommodation can only be denied if: 1) The military policy, practice, or duty is in furtherance of a compelling government interest[, and] 2) It is the least restrictive means of furthering that compelling government interest."[13]

The Army's Religious Accommodation Policies

The Army implements DoDI 1300.17 through Army Regulation (AR) 600-20, AR 670-1,[14] AR 165-1, Army Techniques Publication 1-05.04,[15] and Field Manual 1-05.[16] Pursuant to AR 600-20, "the Army places a high value on the rights of its Soldiers to observe the tenets of their respective religions or to observe no religion at all; while protecting the civil liberties of its personnel to the greatest extent possible, consistent with its military requirement."[17]

Accordingly,

> "requests for religious accommodations from a military policy, practice, or duty that substantially burdens a Soldier's (to include military prisoner's) exercise of religion may be denied only when the military policy, practice, or duty furthers a compelling government interest and is the least restrictive means of furthering that compelling government interest."[18]

When evaluating requests for religious accommodations, it is helpful for the commander to know how the Army categorizes various forms of religious practices.

Types of Religious Practices Within the Army

The Army divides religious practices into five categories: 1) worship practices; 2) dietary practices; 3) medical care/immunizations; 4) wear and appearance of the uniform; and 5) personal appearance and grooming practices.[19] Worship practices generally involve a religious practice that conflicts with a Soldier's normal availability for duty,[20] e.g., worshipping on a weekday during duty hours. Accommodations for a Soldier's worship practice can typically be approved informally at the company level.[21] Dietary practices involve beliefs that may prohibit the consumption of certain foods or require food to be prepared in a certain manner,[22] (e.g., Kosher foods). Medical practices typically involve exemptions from immunizations or declining certain medical procedures.[23] Religious wear and uniform or grooming practices that are based on religious beliefs generally fall into three sub-categories: accommodation requests that require a policy waiver, accommodation requests that require General Court-Martial Convening Authority (GCMCA) approval, and accommodations currently authorized in policy. Religious jewelry, apparel, and articles that are authorized accommodations to wear are prescribed in AR 670-1, paragraph 3-15.[24]

Religious Accommodations Requiring a Policy Waiver or GCMCA Approval

Requests that require a waiver include growing beards that cannot be rolled or tied to 2 inches or less, body modifications, teeth modifications, carrying concealed weapons on an installation (when not part of an official duty), growing dreadlocks, and wearing kufis that do not comply with AR 670-1.[25] Requests that require GCMCA approval are wearing hijabs, headscarves, turbans, and growing beards (up to 2 inches rolled or tied).[26]

Procedural and Substantive Requirements

Army Regulation 600-20, Appendix P-3, details the procedural process to submit a religious accommodation request to uniform and grooming standards that require a waiver or GCMCA/first designated GO in the chain of command approval. A complete religious accommodation packet that is submitted to the GCMCA or to the Deputy Chief of Staff (DCS), G-1, must have the chain of command's recommendations, the Soldier's religious accommodation request, a legal review completed by the GCMCA's servicing legal office, and a chaplain's interview.[27] Prior to the GCMCA acting on the completed packet, the GCMCA's staff must consult with certain offices at Headquarters, Department of the Army (HQDA): the DCS, G-1, the Office of the Chief of Chaplains (OCCH), and the Office of the Judge Advocate General (OTJAG) Administrative Law Division. For military prisoner requests, the GCMCA staff must also consult with Army Corrections Command.[28] The GCMCA can determine who on their staff completes the consultation; but one way to divide the tasks is to have the installation or senior chaplain consult with OCCH, the GCMCA's administrative law attorney consult with OTJAG, and the requester's higher headquarter's S/G-1 consult with the DCS, G-1.

The command team will most likely use the compelling government interest standard for religious accommodation requests that require a waiver or GCMCA approval. The first step in determining whether the compelling government interest standard applies is to determine if the policy poses a substantial burden on the Soldier's ability to exercise their sincerely held religious belief. As a reminder, policies, practices, and duties that *substantially* burden a Soldier's ability to exercise their religion can only be denied when the policy, practice, or duty furthers a compelling government interest and is the least restrictive means to further that interest.[29]

Substantial Burden

The Soldier making the religious accommodation request bears the burden to demonstrate that the Army's policy or action is a substantial burden on their ability to exercise their religious belief. A substantial burden exists "if it bans an aspect of the person's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice."[30] However, "no court interpreting RFRA has deemed that *any* interference with or limitation upon a religious conduct is a substantial interference with the exercise of religion."[31]

A fact-specific inquiry into each case is necessary to determine if a substantial burden exists. For example, if a Soldier says the practice in question is unimportant to them, there is likely no substantial burden being imposed on the Soldier. If a substantial burden is not imposed on the Soldier, the command is not required to complete a compelling government interest analysis. Instead, "commanders are only required to balance the needs of the Soldier against the needs of mission accomplishment."[32] If, however, a substantial burden is imposed on the Soldier's religious practice, the command can impose that burden only if it is the least restrictive means of achieving a compelling government interest. "This analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative."[33]

Assuming the Soldier has made their request for a religious accommodation and has shown that the policy in question is a substantial burden on their ability to exercise their belief, the chaplain can conduct their interview. The purpose of the Chaplain's interview with the Soldier is to determine whether the Soldier has a sincerely held religious belief. The chaplains are charged with this task because "RFRA only protects actions that are 'sincerely based on a religious belief,'"[34] and chaplains are in the best position to make this assessment. This assessment can be divided into determining "sincerity" of the belief and determining the "religious basis" for the belief.

Sincerity

Determining sincerity can be a challenging task because there is no formula a chaplain can use to make that determination. But there are a variety of factors a chaplain can consider to assist in their analysis. Chaplains can ask how long the Soldier has been practicing the faith; whether the Soldier has been affiliated with other religions in the past; whether the Soldier meets with a religious group; how often and where the group meets; whether the Soldier practices any of the tenets of the religion in question (e.g., abstaining from alcohol); and whether the Soldier has the religion reflected on their personnel records.

Commanders should be cautious of the idea that a Soldier lacks sincerity if the Soldier cannot recite scripture or if the Soldier's concept of the faith is not aligned with the mainstream concept of faith. The inability of a Soldier to accurately recite scripture does not *per se* make the belief insincere. Courts have previously found "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith."[35] Once the chaplain has assessed sincerity, they can assess the religious basis.

Religious Basis

Determining the "religious basis" of a request means determining whether the request is based on religion, as opposed to being a social movement, political belief, or a *post hoc* justification to excuse misconduct. While AR 600-20 provides a definition for "religion," unit level chaplains and JAs should refrain from making a definitive finding that a belief that could be religious is not a religion. Commanders and JAs should consult with HQDA prior to stating that a "belief" or "faith" is not a religion—unless it is completely clear it is not. Political parties, capitalism, labor movements, and utilitarianism are examples of political and social beliefs that are not religious beliefs in and of themselves.

Within the context of religious belief, another issue to consider is whether a religious exercise must be *mandated* by some religious belief. The answer is no, and AR 600-20, paragraph 5-6a(4), illustrates this point by noting, "[a] religious exercise includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[36] For example, Norse Paganism does not *require* its adherents to grow a beard; however, growth of a beard is seen throughout Norse tradition as an element of their faith and is a permissible religious exercise. The regulation's provision should not be interpreted to mean every conceivable practice is a religious practice. Judge advocates and command teams must work together to make a sound assessment based on individual facts. Once the chaplains have assessed there is a sincerely held religious belief, the command must show it has compelling government interest for its policy and is applying the least restrictive means to achieve that interest.

Compelling Government Interest and Least Restrictive Means

Army Regulation 600-20, paragraph 5-6a(4), provides examples of some of the DoD's and Army's compelling government interests. These potentially include: safety, health, good order, uniformity, national security, and mission accomplishment. It is important to remember the compelling government interest is applied to the specific accommodation of the individual Soldier. For example, Sergeant (SGT) John Doe requests a religious accommodation to grow a beard. The command intends to deny the request based on a belief that beards adversely impact good order and discipline. In order to deny the request, the command must show how SGT Doe's beard adversely impacts good order and discipline

within the commander's organization. The command cannot make an overly broad generalization that any deviation from uniform standards inherently undermines good order and discipline. Another important note for commanders is that "uniformity" will rarely be sufficient grounds to justify denying a religious accommodation, if it is the only basis for denial. Uniformity may be a justifiable ground for denial with ceremonial units and events—for example, an assignment with the 3d Infantry Regiment.

Another area that commanders must remember to address is whether they are applying the least restrictive means to further the compelling government interest. If a commander does not explain or demonstrate how the least restrictive means is being employed, they have not met the statutory burden of RFRA. The case *Singh v. McHugh*,[37] illustrates this point. In *Singh*, a Sikh college student requested a religious accommodation to enroll in Army ROTC with his turban and beard. The Army denied his request, arguing that granting the accommodation would undermine unit cohesion, good order and discipline, and adversely impact health and safety.[38] At trial, the Army acknowledged that its denial of Singh's accommodation substantially burdened his religious exercise.[39] The court ultimately determined the Army failed to articulate how denying Singh's specific accommodation request furthered the compelling government interest; and they failed to show how a complete denial was the least restrictive means to achieve the compelling government interest.[40] Commanders will recommend approval or denial of a request upon completion of the analysis regarding a compelling government interest and application of the least restrictive means. The commanders will then route the packet to the GCMCA.

Consultation Requirement

Pursuant to AR 600-20, Appendix P-3a(7), prior to the GCMCA acting on a religious accommodation request for a uniform or grooming standard, the GCMCA's staff must complete consultation with OCCH, DCS, G-1, and OTJAG's Administrative Law Division.[41] While OCCH and OTJAG's assessments are not binding on the GCMCA, the purpose of the consultation is to provide guidance and assistance from the offices best positioned to see Army-wide trends and understand policy objectives and priorities. The GCMCA's staff can complete the consultation, or the subordinate unit's staff (S1, unit chaplain, and brigade judge advocate) may on behalf of the GCMCA's staff. Consultation with OTJAG consists of sending the chain of command recommendations, GCMCA draft legal review, and Soldier's request to OTJAG's email inbox that is provided in AR 600-20, Appendix P-3a(7)(a).[42] The Office of the Judge Advocate General will then respond via email with their consulting comments, which provides an assessment of the legal permissibility of the Soldier's request and the packet. The GCMCA's staff sends OCCH the chain of command recommendations and the Soldier's request, as part of the OCCH consultation requirement. The OCCH will provide their opinion regarding the Soldier's sincerely-held religious belief. The DCS, G-1 reviews the approval or disapproval memorandums to check for consistent standards in processing religious accommodation requests. The GCMCA must also consult with Army Corrections Command if the requestor is a military prisoner.

Legal Review

The JA is responsible for ensuring the packet is legally sufficient. This includes ensuring the packet is complete, procedural processes were properly followed, and substantive requirements were met. The consultation with OTJAG does not constitute the GCMCA legal review; OTJAG only assists the GCMCA's staff. The JA at the GCMCA's level reviews the accommodation packet to ensure the proper approval authority is acting on the request. The JA reviews the chaplain's interview to ensure the chaplain addresses religious basis and sincerity; but, as a reminder, the chaplain does not have to make a recommendation to approve or deny the accommodation. The JA reviews each chain of command recommendation to ensure the memorandums are signed, each recommendation addresses the correct Soldier and their religion, and that commanders provide a rationale when recommending denial of a request. Judge advocates should also be on the lookout for commanders and chaplains citing accurate and up-to-date policies. Upon completion of the legal review, the GCMCA approves or denies the religious accommodation request. Alternatively, the GCMCA elevates the request to the DCS, G-1, with a recommendation to approve or deny the request, if the request is for a waiver or the GCMCA determines the accommodation warrants HQDA final disposition.

Approval Authorities

The Chaplain Corps has devised a helpful informal "category" breakdown to assist their chaplains with understanding the different approval authorities for accommodation requests.[43] Under the OCCH category system, a Category 1 request is a routine request where no waiver or command approval is required (e.g., wear of yarmulke); a Category 2 request is a routine request where local command approval is required (e.g., adjustment to the duty day); a Category 3 request involves uniform and grooming requests that require GCMCA approval (e.g., wear of the hijab); and a Category 4 request requires HQDA decision (e.g., beard longer than 2 inches or immunization exemptions). This may be a helpful way to explain the various approval levels to a commander or Soldiers. Commanders and approval authorities should also be familiar with time constraints for processing religious accommodation requests.

Timeline

Pursuant to DoDI 1300.17, Table 1, religious accommodation requests originating from within the United States must be reviewed, final action completed, and written notification provided to the requestor (or pre-accession recruit) no later than thirty business days from the requestor's submission. For requests originating outside of the United States or for Reserve Component Service members not on Active Duty, requests must be reviewed, final action completed, and written notification provided to the requestor no later than sixty calendar days from the requestor's submission. These deadlines include GCMCA consultation with HQDA.

Accommodations to worship and dietary practices are temporary accommo-

dations and are subject to modification or revocation, in accordance with AR 600-20, paragraph 5-6f. Religious accommodations approved by a GCMCA; The Surgeon General; DCS, G-1; Assistant Secretary of the Army (Manpower and Reserve Affairs); or the Secretary of the Army are permanent accommodations lasting the duration of the Soldier's career. Only the Secretary of the Army, or their designee, may permanently revoke or modify a previously approved accommodation; although, there are limited circumstances when a GCMCA may temporarily suspend an accommodation for health and safety reasons.[44]

Command Considerations

There are a variety of factors commanders can consider when determining whether to approve or deny a religious accommodation request. Army Regulation 600-20, paragraph 5-6e(2), lists the factors: how will it impact the mission; how will it impact the safety of the Soldier making the request or others around them; what is the religious importance of the accommodation to the Soldier; what is the cumulative impact of repeated accommodations of a similar nature; would granting the accommodation result in the sanctioned discrimination of another Soldier; are there alternative means available to meet the requested accommodation; and how have previous requests for the same accommodation been disposed of.[45] Religious accommodations related to uniform and grooming standards are the types of accommodations judge advocates are most likely to encounter. However, there are other forms of religious accommodations a judge advocate may encounter that the following paragraph provides a few practice tips to consider.

Practice Recommendations for Less Common Religious Accommodations

Commanders may encounter situations where a chaplain's religious practice or abstention from some practice could be perceived as discriminatory. Prior to initiating an administrative investigation against a chaplain for issues pertaining to conduct related to religious support, it can be helpful for commanders to notify OCCH and OTJAG for their awareness. If an investigation is initiated against a chaplain for these types of issues, it may also be helpful for the appointing authority to appoint a senior chaplain to serve as a subject matter expert to advise the investigating officer.[46] There are issues internal to the Chaplain Corps that the investigating officer and JA may not be aware of that a chaplain subject matter expert can assist with. All personnel should be aware that AR 165-1, paragraph 8-10, requires notification to OCCH for chaplains who may be pending command adverse action.[47] Appointing authorities can consult with their servicing legal office to determine what information and documents should be released to the Chaplain Corps to facilitate compliance with AR 165-1.[48]

Immunizations

The Army Surgeon General is the decision authority for immunization exemptions, waivers, and appeals. Army Regulation 40-562, *Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases*, prescribes immunization requirements for Soldiers.[49] While AR 40-562 provides a list of some mandatory immunizations, commanders should be cognizant that, depending on the theater of operation, Combatant Commanders may have additional immunization requirements for their Soldiers. Army Regulation 600-20, Appendix P-2b, prescribes the procedures for immunization exemption requests.[50] When providing training to Soldiers or advising commanders about immunizations, JAs and medical personnel should articulate how immunizations are an essential element of Soldier readiness and safety. Dating back to George Washington, who "ordered the inoculation of all men in the Continental Army against smallpox," the U.S. military has long recognized the need to vaccinate Soldiers.[51] The Army's vaccination efforts have continued throughout history to keep Soldiers—and populations coming in contact with Soldiers—safe.

Common Religious Issues on the Installation

Strong Bonds

Strong Bonds is an equal access program aimed at building and maintaining strong family structures and resilient Soldiers.[52] There are cases where a chaplain's religious belief may discourage them from conducting Strong Bonds with specific personnel—same-sex couples, for example. In these cases, a different chaplain should be used to conduct the event. Chaplains who elect not to participate in Strong Bonds, due to their own religious views, cannot receive adverse actions solely for their personal beliefs or for declining to host an event themselves.[53] Soldiers cannot be denied access to Strong Bonds based on the religious views of the chaplain. Army policy supports the idea that religious freedom should not be used to justify discrimination against a fellow Soldier.[54] Discrimination based on a Soldier's race, gender, sexual orientation, and other protected classes, undermines the very values the military stands for and erodes readiness and trust within the formation.

Letters from Non-Federal Entities (NFEs) Related to Religious Support

An installation or command may receive a letter from an NFE stating the command is suppressing religious rights or the command is in violation of the Establishment Clause. Units may encounter NFE letters when units have religious displays on an installation (or a perception that the displays are religious) and religious messages or anti-religious messages on a unit's official social media page. In these cases, it may be helpful to delay taking action until the unit has an accurate picture of the situation and has consulted with the servicing legal office and senior chaplain on the installation. The key is to prevent any "knee-jerk reactions" until the complaint has been assessed and the command or organization has analyzed the situation. The unit will also want to ensure the proper authority is responding to the letter and account for any publicity the response may bring to the unit or Army; be sure to keep the public affairs office informed. Some cases may need to be raised to HQDA for visibility and input.

Social Media Posts of Chaplains in an Official Capacity

Soldiers generally enjoy a certain level of free speech for social media postings.[55] One area of social media use that commands and chaplains should be cognizant of is posting religiously-motivated content on official

government social media platforms (when doing so in their official capacity as government employees). Fortunately, OCCH published an information paper on 4 May 2020, which outlines the appropriate use of social media for religious-type messages posted by chaplains in their official capacity.[56] In addition to the OCCH information paper, chaplains and commanders should refer to public affairs policies, AR 600-20, and the Army's social media use website[57] for additional information regarding the appropriate use of social media. If the information paper does not address a unit's specific issue, the unit should consult with the senior chaplain and servicing legal office, who can then seek assistance from OTJAG and OCCH.

Commanders can use a similar analysis when evaluating religiously-motivated social media posts of Army personnel who are not chaplains. First Amendment factors that may impact the permissibility of a post include, but are not limited to: whether the post was made in the Soldier's personal or official capacity; whether the post has a political overture tied into the religious content; what forum and on what platform the post is made (official unit page versus Soldier's personal page); whether the post public or private; whether the post intended to incite imminent lawless action;[58] whether the content constitutes obscenity; and whether the content is a form of harassment or a "true threat."[59]

Religious Displays on Government Property

The U.S. Supreme Court has applied the Establishment Clause in varying ways to assess the permissibility of a religious display on government property.[60] Generally speaking, if—by a reasonable person standard—the religious display does not appear to endorse a religion, it is permissible. For example, a religious scene that also includes secular decor, such as a Santa Claus figurine and a snowman, is permissible to display on government property. However, displaying just the religious scene on government property may raise Establishment Clause issues. In addition to the type of display emplaced, commanders and JAs must be cognizant of who is emplacing the display. Non-Federal Entities authorized to operate on the installation are subject to the same religious endorsement analysis as the command. Their status as an NFE, even a religious NFE, is irrelevant. The display is still on government property, authorized by a government representative, and could be perceived as an endorsement by the government.

Evangelizing and Proselytizing

Evangelizing is generally defined as the attempt to convert an individual to Christianity,[61] while proselytizing is generally defined as trying to induce someone to convert to their faith.[62] Soldiers can, for the most part, talk about their faith; tell others about their faith; and tell others why their faith may be good to convert to. However, there are instances where evangelizing and proselytizing is or can be prohibited. Examples include: improperly using government resources to engage in evangelizing or proselytizing, engaging in unwanted evangelizing or proselytizing after being asked to cease, or evangelizing or proselytizing in front a mandatory unit formation. Chaplains explaining what services they specifically offer, or what services are generally offered by the Chaplaincy, is permissible.

COVID-19 (Pandemics)

Commanders can limit in-person religious services for health and safety concerns, and recent U.S. Supreme Court actions tend to support this premise.[63] However, if religious services are limited, the limitations should apply equally to other social events or large gatherings that are not in furtherance of essential military duties. Religious support can be a crucial aspect of maintaining readiness during times of difficulty, so it can prove very beneficial for commanders to facilitate Soldiers' ability to receive religious support.

Religious Accommodations and Military Justice

Extremist Groups

If a command team believes a Soldier is involved in a religious extremist group or that a religious accommodation request is tied to extremist ideology, it is essential for the command to consult with their servicing legal office and review AR 600-20's policy regarding extremism.[64] Installation legal offices can work through their technical chain and consult with OTJAG's Criminal Law Division and Administrative Law Division for additional assistance. The accommodation request should be stayed until the issues regarding participation in extremist activities or groups is addressed. Command teams should refrain from making overly broad assertions that an entire religion is "extremist" based on the views of a few practitioners.

Military Prisoner Requests

The Army's religious support policies apply to all military prisoners in Army confinement facilities, regardless of what Service they belong to or their discharge status.[65] For example, a Navy prisoner at U.S. Disciplinary Barracks (USDB) must follow Army policies while in the USDB, to include the Army's religious support policies. It is essential to identify the correct GCMCA for the military prisoner. The JA should also check to see if the prisoner's accommodation request is annotated on a Military Corrections Command Form 510, Inmate Request Slip.

Peyote and Other Illicit Substances

Soldiers who want to use peyote or other illicit substances as part of a religious practice must forward their request to the DCS, G-1. Requests submitted to the DCS, G-1 will be evaluated consistent with DoDI 1300.17, paragraph 3.4.[66]

When in Doubt, Phone a Friend

Judge advocates who have questions or issues related to religious support should consult with their technical chain for assistance. There are also religious support subject matter experts at OTJAG Administrative Law Division who can provide additional assistance. **TAL**

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Notes

1. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 5-6a(1) (24 July 2020) [hereinafter AR 600-20].

2. This article does not provide an overview of religious accommodation policies directly applicable to Department of the Army (DA) Civilians. The authors recommend consultation with the servicing Labor and Employment Law attorney for any religious accommodation issues raised by DA Civilians.

3. U.S. Dep't of Army, Reg. 165-1, Army Chaplain Corps Activities para. 1-10 (23 June 2015) [hereinafter AR 165-1] ("The religious program for the Army is the commanders program."). For purposes of this article, the term "Commander" includes Directors, Commandants, and Superintendents when referring to oversight of religious support programs.

4. U.S. Const. amend. I.

5. Reynolds v. United States, 98 U.S. 145, 164 (1878) ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.").

6. *See* Am. Legion v. Am. Humanist Ass'n 139 S. Ct. 2067, 2080 (2019) ("After grappling with such cases for more than [twenty] years, *Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decision making.").

7. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993). *See also* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (refining the definition of religious exercise).

8. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 696 (2014) (quoting 42 U.S.C. § 2000cc-3(g)).

9. United States v. Sterling, 75 M.J. 407, 410, 415 (C.A.A.F. 2016) ("To establish a prima facie RFRA defense, an accused must show by a preponderance of the evidence that the government action (1) substantially burdens (2) a religious belief (3) that the defendant sincerely holds.").

10. The Establishment Clause prohibits policies and actions respecting the establishment of religion. There are numerous tests the Supreme Court has applied to determine if a law, policy, or action violates the Establishment Clause. The tests are the "Lemon Test," the "Endorsement Test," the "Coercion Test," the "Historical/Monuments Test," and the "Neutrality Test." *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lee v. Weisman, 505 U.S. 577 (1992); Town of Greece v. Galloway, 572 U.S. 565 (2014); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019); Zelman v. Simmons-Harris, 536 U.S. 639 (2002). Applicability for one or more of these tests depends on the specific facts of an individual case.

11. U.S. Dep't of Def., Instr. 1300.17, Religious Liberty in the Military Services (1 Sept. 2020) [hereinafter DoDI 1300.17].

12. *Id.* para. 1.2a.

13. *Id.* para. 1.2e.

14. U.S. Dep't of Army, Reg. 670-1, Wear and Appearance of Army Uniform and Insignia (26 Jan. 2021) [hereinafter AR 670-1].

15. U.S. Dep't of Army, Techniques Publication 1-05.04, Religious Support and Internal Advisement (23 Mar. 2017).

16. U.S. Dep't of Army, Field Manual 1-05, Religious Support (21 Jan. 2019).

17. AR 600-20, *supra* note 1, para. 5-6a(1).

18. *See id.* para. 5-6a(2).

19. *Id.* para. 5-6d.

20. *Id.* para. 5-6d(1).

21. *Id.* para. 5-6d(1), app. P-1.

22. *Id.* para. 5-6d(2).

23. *Id.* para. 5-6d(3), app. P-2.

24. AR 670-1, *supra* note 14, para. 3-15.

25. AR 600-20, *supra* note 1, app. P-3b.

26. *Id.* app. P-3a.

27. *Id.* app. P-3.

28. *Id.* app. P-3a(7).

29. *Id.* para. 5-6a(2).

30. Memorandum from U.S. Att'y Gen. to all Exec. Dep'ts & Agencies, subject: Federal Law Protections for Religious Liberty 4 (Oct. 6, 2017).

31. United States v. Sterling, 75 M.J. 407, 417 (C.A.A.F. 2016).

32. AR 600-20, *supra* note 1, para. 5-6a(3).

33. *See* Memorandum from U.S. Att'y Gen. to all Exec. Dep'ts & Agencies, subject: Federal Law Protections for Religious Liberty 5 (Oct. 6, 2017).

34. *Sterling*, 75 M.J. at 416.

35. Thomas v. Review Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981).

36. AR 600-20, *supra* note 1, para. 5-6a(4).

37. 109 F. Supp. 3d 72 (D.D.C. 2015).

38. *Id.* at 82–84.

39. *Id.* at 87–88.

40. *Id.* at 99–103.

41. AR 600-20, *supra* note 1, app. P-3a(7).

42. *Id.* app. P-3a(7)(a).

43. Major Rob Belton, Chaplain, PowerPoint Presentation at the U.S. Army Chaplain Ctr. & Sch.: Free Exercise: Advise the Command on Religious Accommodation (24 Sept. 2020).

44. AR 600-20, *supra* note 1, para. 5-6f(2)-(3).

45. *Id.* para. 5-6e(2).

46. U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers (1 Apr. 2016) (authorizes the appointment of assistant investigating officers for administrative investigations). To be clear, the authors do not advocate for any permanent changes to AR 15-6 to incorporate this TTP.

47. AR 165-1, *supra* note 3, para. 8-10.

48. *Id.* (requiring the senior chaplain to notify OCCH of impending command adverse action. In cases where adverse action results from an investigation, OCCH may request the information or relevant portions of the investigation that lead to the adverse action. The judge advocate can assist the appointing authority with providing the relevant portions of the investigation or information to OCCH.).

49. U.S. Dep't of Army, Reg. 40-562, Immunizations and Chemoprophylaxis for the Prevention of Infectious Diseases app. D (7 Oct. 2013).

50. AR 600-20, *supra* note 1, app. P-2b.

51. Dan Liebowitz, *Smallpox Vaccination: An Early Start of Modern Medicine in America*, 7 J. Cmty. Hosp. Internal Med. Persps. 61, 62 (2017).

52. *See* 10 U.S.C. § 1789 (authorizes the Secretary of the Army to provide support services to Soldiers and their families, which are led by chaplains).

53. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 532, 127 Stat. 672, 759 (offers protection to chaplains from having to perform rites, rituals, or ceremonies that may be contrary to their religious beliefs).

54. *See* AR 600-20, *supra* note 1, para. 5-6e(2)(d) (commanders should consider whether an accommodation will result in the sanctioned discrimination of other Soldiers).

55. *See* U.S. v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008) (examining the free speech rights of military members, but noting the free speech rights of military members may not be as robust as civilian counter-parts).

56. Off. of Chief of Chaplains, Information Paper, subject: Chaplain Corps' Official Use of Social Media to Advise and Provide Religious/Spiritual Content (1 May 2020) (on file with author).

57. *Army Social Media: Soldiers and Families*, U.S. Army, https://www.army.mil/socialmedia/soldiers/ (last visited Mar. 8, 2021).

58. *See* Schenck v. United States, 249 U.S. 47 (1919) (establishing the Clear and Present Danger Test); Brandenburg v. Ohio, 395 U.S. 444 (1969) (establishing the Brandenburg Test).

59. *See* Virginia v. Black, 538 U.S. 343 (2003).

60. *See* Stone v. Graham, 449 U.S. 39 (1980); Lynch v. Donnelly, 465 U.S. 668 (1984); Allegheny Cnty. v. ACLU, 492 U.S. 573 (1989); Van Orden v. Perry, 545 U.S. 677 (2005); Salazar v. Buono, 559 U.S. 700 (2010).

61. *Evangelize,* Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/evangelize (last visited Mar. 8, 2021).

62. *Proselytize,* Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/proselytize (last visited Mar. 8, 2021).

63. *See* South Bay United Pentecostal Church v. Gavin Newsom, 140 S. Ct. 1613 (2020) (denying injunctive relief to church groups seeking to enjoin Governor Newsom's order emplacing numerical restrictions on public gatherings who were prohibited from conducting church services). *See also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020) (denying injunctive relief to a church group over similar public gathering restrictions).

64. AR 600-20, *supra* note 1, para. 4-12.

65. U.S. Dep't of Def., Dir. 1325.04, Confinement of Military Prisoners and Administration of Military Correctional Programs and Facilities para. 4.7 (17 Aug. 2001) ("Prisoners confined in military correctional facilities shall be subject to the rules and regulations of the confining facility, regardless of the Service affiliation of the prisoner.").

66. DoDI 1300.17, *supra* note 11, para 3.4.

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Practice Notes

Cryptocurrency as a Funding Source

By Lieutenant Colonel Justin P. Freeland

Money, it's a crime/Share it fairly/But don't take a slice of my pie[1]

The Need

To spend money, elements of the Federal Government, including the Department of Defense (DoD), must have a positive grant of authority based in legislation from Congress.[2] Further, without a specific statutory exception, federal entities cannot augment funds appropriated by Congress with outside funds.[3] What should happen when otherwise-authorized DoD cyber activities result in control, or potential control, of a malicious actor's cryptocurrency?[4] Currently, the Miscellaneous Receipts Statute likely would require the DoD to deposit it into the Treasury—after converting it to legal currency.[5] However, the general rule established by the Miscellaneous Receipts Statute has several exceptions.[6] One exception specific to the DoD relates to counterintelligence activities and is found at 10 U.S.C. § 423, Authority to Use Proceeds from Counterintelligence Operations of the Military Departments or the Defense Intelligence Agency.[7]

In 10 U.S.C. § 423, Congress authorized the Secretary of Defense to use proceeds of authorized counterintelligence activities to offset expenses.[8] This relatively short section of Title 10 contains three main parts, each only a sentence long. Part (a) of § 423 provides the operative language that permits the Secretary of Defense to authorize the "use of proceeds from counterintelligence operations . . . to offset necessary and reasonable expenses."[9] Next, part (b) invokes the concept of miscellaneous receipts to, in effect, prevent the creation of a slush fund by requiring the DoD to deposit "the net proceeds" into "the Treasury as miscellaneous receipts" when "no longer necessary for the conduct of those operations."[10] Finally, part (c) of § 423 directs the Secretary of Defense to establish implementing "policies and procedures" to provide oversight, control, and accountability over the use of proceeds to offset expenses.[11] Overall, 10 U.S.C. § 423 provides the DoD flexibility to conduct counterintelligence operations, which are inherently secretive and sensitive by their nature.

Congress should enact a statute similar to 10 U.S.C. § 423 that permits the DoD to use cryptocurrency proceeds from otherwise-authorized cyber activities to offset expenses incurred during such activities.[12] By providing this authority, and proper oversight to control such actions, Congress would enhance the DoD's freedom of maneuver in a contested cyber domain within the bounds of law. The remainder of this article provides draft language for the proposed statute, highlights the benefits, and identifies potential challenges that this authority may present.

The Proposal

The operative language of 10 U.S.C. § 423 permits the Secretary of Defense to authorize the use of proceeds from counterintelligence operations to offset expenses related to such operations.[13] Likewise, in the National Defense Authorization Act (NDAA) for Fiscal

Year (FY) 2019, Congress emphasized that "clandestine military activity or operation in cyberspace" is traditional military activity, which fall outside the requirements of 50 U.S.C. § 3093, the Covert Action Statute.[14] This sets up the potential (but highly likely) practical result that, during some authorized DoD cyber activity, cryptocurrency may be brought under the control (or potential control) of a DoD organization.[15]

Take the Democratic People's Republic of Korea (DPRK) as an example. The DPRK is reliant on cryptocurrency to get around financial sanctions.[16] Likewise, U.S. Cyber Command (USCYBERCOM) is able to scan for and identify DPRK malware that facilitates illegal activities, which implies a level of access and knowledge of DPRK cyber capabilities.[17] Finally, unidentified actors have demonstrated the ability to take control of someone else's cryptocurrency without the owner's knowledge by using a person-in-the-middle technique.[18] Given these facts, it is plausible to posit that the DoD may have the ability to exert control over DPRK cryptocurrency if required and authorized.

Therefore, a need exists for a new statute similar to 10 U.S.C. § 423 to authorize and set the legal boundaries for what can be done with cryptocurrency potentially obtained during DoD cyber activities. Without specific authorization from Congress, the remaining alternative would be to deposit the funds into the Treasury.[19] Depositing the funds in the Treasury is less than ideal because it severs the link between the proceeds and the malicious activity while at the same time depriving the DoD from utilizing the funds to offset operational expenses.

Similar to 10 U.S.C. § 423, the proposed new legislation would have three main parts: (1) authorization and approval guidance; (2) limitations on excess proceeds; and (3) direction to establish implementing policy.[20] Specifically, the new legislation would differ from 10 U.S.C. § 423 in three substantive ways.[21] First, the word "cryptocurrency" is added to modify "proceeds."[22] The addition scopes the statute to address the relatively novel issue created by cryptocurrency. Second, the phrase "counterintelligence operations" is replaced by "otherwise authorized cyber activities."[23] The purpose of changing this language is two-fold: to update the wording to reflect the nature of activity covered and to clarify that the new statute does not create a standalone grant of authority for conducting cyber activities.

Finally, because joint organizations—and other agencies within DoD, but outside of the "military departments or the Defense Intelligence Agency"—may take part in cyber activities, the wording is revised to "elements of the Department of Defense."[24] While 10 U.S.C. § 423 falls within Chapter 21 of Title 10 (DoD Intelligence Matters), due to its subject matter, the proposed statute should more likely fall within Chapter 19 of Title 10 (Cyber and Information Operations Matters).[25] Collectively, these proposed changes would create new legislation modeled after 10 U.S.C. § 423 to provide the necessary authority for DoD to use cryptocurrency proceeds from otherwise authorized cyber activities to offset expenses related to such activities.

The Benefits

Several benefits would follow from the enactment of a statute that permits the DoD to use cryptocurrency to offset expenses, including the establishment of clear guidance, the creation of a lawful source of funds, and the expansion of operational flexibility within the bounds of the law. Clear guidance from Congress on the use of cryptocurrency acquired during cyber activities would not only provide guidance to DoD, but also have a secondary benefit of reducing "interagency friction" in the executive branch by unambiguously assigning a function to a particular agency—in this instance, the DoD.[26] This particular assignment of a function would not have to be exclusive to provide clarity and reduce friction.

Additionally, the DoD's ability to use cryptocurrency acquired during otherwise authorized activities to offset costs is fiscally responsible. The current U.S. "[g]ross Federal debt is now more than $23 trillion,"[27] and national defense spending is projected to contribute $758.5 billion towards that debt in FY 2021.[28] Included in that FY 2021 defense budget amount, the President requested "nearly $10 billion" to specifically support military cyber capabilities.[29] While clear, unambiguous fiscal policy is generally a positive, a potential risk of inappropriate cryptocurrency speculation exists within the new grant of authority. However, Congress and the President can manage and minimize the risk of inappropriate speculation through implementing effective policy and oversight. Considering the risks versus the benefits, the ability to offset even a portion of operating expenses using an adversary's funds would be a net positive for the DoD and U.S. Government.

Ultimately, this new authority would provide freedom of maneuver for cyber activities that would support both civilian and military policy guidance. The 2018 National Defense Strategy emphasizes "[f]ostering a competitive mindset."[30] Innovation in areas of emerging technology, such as those related to cyberspace, fit within this competitive mindset.[31] Similarly, the USCYBERCOM's *Command Vision* specifically states that "seizing and maintaining the tactical and operational initiative in cyberspace" will "increase our freedom of maneuver."[32] Together, the benefits of the proposed new legislation—which would allow the DoD to use acquired cryptocurrency to offset otherwise related expenses—would effectively support the nation's shift toward strategic competition.[33]

The Challenges

Even though the proposed legislation related to cryptocurrency would bring a number of benefits, its enactment may present some challenges, including technical issues, oversight questions, and transparency concerns. First, while the ability to attribute actions in cyberspace continues to improve, issues related to attributing specific acts to particular actors in a timely manner remain.[34] This is especially true for state-sponsored malicious activities, which may include false flag operations that take time to trace.[35] Further, state governments may be reluctant to disclose information publicly due to concerns about disclosing sensitive capabilities.[36] This keeps "[s]ome of the most significant attribution work [] hidden and classified."[37]

Second, the proposed legislation, like any grant of authority from the legislative branch to the executive branch, raises concerns about whether appropriate oversight exists.[38] However, in the area of DoD cyber authorities, Congress has established significant requirements for notification and

reporting—including FY18 NDAA §§ 1631 and 1632, which address "sensitive military cyber operations and cyber weapons," as well as modify "quarterly cyber operations briefings."[39] Under these provisions, the DoD must report all sensitive military cyber operations (SMCO) within twenty-four hours while, for cyber operations that fall below the threshold of a SMCO, DoD must still make quarterly notifications to Congress.[40] Likewise, Congress has several committees dedicated to providing oversight to the armed services and intelligence activities of the government.[41]

Last, the implementation of the proposed authority is likely to create transparency concerns because cyber activities by the DoD potentially involve sources and methods that are classified. One possible option to improve transparency would be to expand the U.S. Privacy and Civil Liberties Oversight Board's mandate to include review and advice related to cyber activities in addition to counterterrorism.[42] Challenges exist related to the proposed legislation, but mechanisms are available to address these risks that make the legislation a net positive as it relates to nation-state competition.

Conclusion—The Beginning, Not the End

By passing new legislation similar to 10 U.S.C. § 423 that permits the DoD to use cryptocurrency proceeds from otherwise authorized cyber activities to offset expenses, Congress would improve the DoD's freedom to maneuver and its ability to compete with other states in cyberspace. The proposed language for the statute is not meant to be the final version, but instead the purpose of the draft is to provide a starting point towards a solution. Further refinement could eliminate some of the potential challenges associated with creating this new authority. However, the requirement to provide fiscal authority to leverage capabilities in cyberspace, outside of just appropriating additional funds, is an issue that Congress needs to address. The proposed statute provides a way. **TAL**

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Appendix A

10 U.S.C. § 423, Authority to Use Proceeds from Counterintelligence Operations of the Military Departments or the Defense Intelligence Agency.

(a) The Secretary of Defense may authorize, without regard to the provisions of section 3302 of title 31, use of proceeds from counterintelligence operations conducted by components of the military departments or the Defense Intelligence Agency to offset necessary and reasonable expenses, not otherwise prohibited by law, incurred in such operations, and to make exceptional performance awards to personnel involved in such operations, if use of appropriated funds to meet such expenses or to make such awards would not be practicable.

(b) As soon as the net proceeds from such counterintelligence operations are no longer necessary for the conduct of those operations, such proceeds shall be deposited into the Treasury as miscellaneous receipts.

(c) The Secretary of Defense shall establish policies and procedures to govern acquisition, use, management, and disposition of proceeds from counterintelligence operations conducted by components of the military departments or the Defense Intelligence Agency, including effective internal systems of accounting and administrative controls.

Appendix B

Proposed New Legislation: Authority to Use Cryptocurrency Proceeds from Department of Defense Cyber Activities.
(changes from the original text of 10 U.S.C. § 423 are underlined)

(a) The Secretary of Defense may authorize, without regard to the provisions of section 3302 of title 31, use of cryptocurrency proceeds from otherwise authorized cyber activities conducted by elements of the Department of Defense to offset necessary and reasonable expenses, not otherwise prohibited by law, incurred in such operations, and to make exceptional performance awards to personnel involved in such operations, if use of appropriated funds to meet such expenses or to make such awards would not be practicable.

(b) As soon as the net cryptocurrency proceeds from such cyber activities are no longer necessary for the conduct of those activities, such proceeds shall be deposited into the Treasury as miscellaneous receipts.

(c) The Secretary of Defense shall establish policies and procedures to govern acquisition, use, management, and disposition of cryptocurrency proceeds from cyber activities conducted by elements of the Department of Defense, including effective internal systems of accounting and administrative controls.

Notes

1. Pink Floyd, *Money*, *on* Dark Side of the Moon (Harvest 1973).

2. U.S. Const. art. I, § 9, cl. 7. *See also* United States v. MacCollum, 426 U.S. 317 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.").

3. *See* U.S. Const. art. I, § 9, cl. 7; Purpose Statute, 31 U.S.C. § 1301(a); Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b) (supporting the general rule against augmentation of appropriations). *See generally* Contract & Fiscal Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., Fiscal Law Deskbook 55 (2020) (explaining the prohibition against augmentation and the concept of miscellaneous receipts).

4. *See generally* Aleksander Berentsen & Fabian Schär, *A Short Introduction to the World of Cryptocurrencies*, 100 Fed. Rsrv. Bank St. Louis Rev. 1 (2018), https://files.stlouisfed.org/files/htdocs/publications/review/2018/01/10/a-short-introduction-to-the-world-of-cryptocurrencies.pdf; Zack Gold & Megan McBride, *Cryptocurrency: A Primer for Policy-Makers*, CNA: Analysis & Solutions (Aug. 2019), https://www.cna.org/CNA_files/PDF/CRM-2019-U-020185-Final.pdf (introducing cryptocurrencies and blockchain technology).

5. Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). *See* Jason Brett, *Crypto Legislation 2020: Analysis of 21 Cryptocurrency and Blockchain Bills in Congress*, Forbes (Dec. 21, 2019, 1:05 PM), https://www.forbes.com/sites/jasonbrett/ 2019/12/21/crypto-legislation-2020-analysis-of-21-cryptocurrency-and-blockchain-bills-in-congress/#6cf56d356c1b (discussing proposed bills related to cryptocurrency that could have an effect in the future if passed into law. However, very few of the proposed bills relate to national defense.). While a person might presume that cryptocurrency is considered currency, the IRS considers virtual currency to be property for the purposes of tax implications. *See generally* I.R.S. Notice 2014-21, 2014-16 I.R.B. (Apr. 14, 2014). The purpose of noting this is to highlight that, at some point in time, the cryptocurrency will likely have to be converted into some form of legal currency (e.g., U.S. dollars) for final disposition within the government. The details of when and how this should occur is beyond the scope of this article.

6. *See, e.g.*, Authority to Use Proceeds from Counterintelligence Operations of the Military Departments or the Defense Intelligence Agency, 10 U.S.C. § 423. *See infra* Appendix A (providing the full text of 10 U.S.C. § 423). *See also* Department of the Treasury Forfeiture Fund, 31 U.S.C § 9705 (allowing for funds from lawful seizures or forfeitures to be used for other enumerated

purposes as administered by the Department of Treasury or U.S. Coast Guard); Civil Forfeiture, 18 U.S.C. § 981 (permitting funds obtained from violations of specific federal laws to be used to reimburse expenses, among other things). These statutes serve as examples of the executive branch repurposing acquired funds. *Id.*

7. Authority to Use Proceeds from Counterintelligence Operations of the Military Departments or the Defense Intelligence Agency, 10 U.S.C. § 423. *See infra* Appendix A (providing the full text of 10 U.S.C. § 423).

8. *Id.* "Proceeds" are not defined in the definitions section of title 10 (section 101). However, the cross-reference in 10 U.S.C. § 423 to 21 U.S.C. § 3302 is informative because it discusses the rules related to "money." While not settled, cryptocurrency has been considered property, not money, by the IRS. Therefore, 10 U.S.C. § 423 would at best be unclear on its application to cryptocurrency and more likely cryptocurrency would not qualify as money (it would be considered property) that would fall outside of 10 U.S.C. § 423 and not be covered. For more information, references, and a brief discussion of the meaning of proceeds, see *supra* note 5.

9. 10 U.S.C. § 423(a).

10. 10 U.S.C. § 423(b).

11. 10 U.S.C. § 423(c).

12. The term "activities" as used in this article refers to all otherwise lawful and authorized actions by DoD elements and is intended to be broader than the term "operations."

13. 10 U.S.C. § 423. Arguably, 10 U.S.C. § 423 permits offset of expenses for cyber activities when they are incurred for counterintelligence purposes. The proposed new statute would expand the offset beyond counterintelligence.

14. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 1632, 132 Stat. 1636, 2123 (2018) [hereinafter NDAA 2019]; Presidential Approval and Reporting of Covert Actions, 50 U.S.C. § 3093 (defining covert action and its exceptions). *See also* Robert Chesney, *The Domestic Framework for US Military Cyber Operations*, Hoover Inst. Aegis Paper Series (July 29, 2020), https://www.hoover.org/research/domestic-legal-framework-us-military-cyber-operations (explaining the role of NDAA 2019, § 1632, as a domestic legal basis for U.S. military cyber operations).

15. *See, e.g.*, Alex Ward, *How North Korea Uses Bitcoin to Get Around U.S. Sanctions*, Vox (Feb. 28, 2018, 11:40 AM), https:// www.vox.com/world/2018/2/28/17055762/north-korea-sanctions-bitcoin-nuclear-weapons; Ionut Arghire, *USCYBERCOM Shares More North Korean Malware Samples*, Sec. Week (Feb. 15, 2020), https://www.securityweek.com/uscybercom-shares-more-north-korean-malware-samples; Catalin Cimpanu, *A Mysterious Group Has Hijacked Tor Exit Nodes to Perform SSL Stripping Attacks*, ZDNet (Aug. 10, 2020, 12:18 PM), https://www.zdnet.com/article/a-mysterious-group-has-hijacked-tor-exit-nodes-to-perform-ssl-stripping-attacks/. For how these articles potentially connect and why this hypothetical example could occur, see the DPRK example in the remainder of the section The Proposal.

16. *See* Ward, *supra* note 15 (explaining how North Korea uses cryptocurrency to avoid the effects of U.S. sanctions).

17. *See* Arghire, *supra* note 15 (highlighting USCYBERCOM activities related to North Korea).

18. *See* Cimpanu, *supra* note 15 (explaining one method—a person-in-the-middle attack—by which what appears to be a profit-motivated group "effectively hijacked the user's funds without the users or the Bitcoin mixer's knowledge").

19. Custodians of Money, 31 U.S.C. § 3302(b). This likely would require a conversion to legal currency. *See supra* note 5.

20. *See* Authority to Use Proceeds from Counterintelligence Operations of the Military Departments or the Defense Intelligence Agency, 10 U.S.C. § 423(a)-(c) (identifying the three main parts).

21. For the full text of 10 U.S.C. § 423 and the new legislation proposed in this article, see *infra* Appendices A and B, respectively.

22. *Compare* 10 U.S.C. § 423(a)-(c) *infra* Appendix A, *with* Proposed New Legislation *infra* Appendix B (changes are underlined).

23. *Id.*

24. *Id.* United States Cyber Command and the National Security Agency are examples of DoD elements that could be covered by the proposed language.

25. *Compare* 10 U.S.C. ch. 21, Department of Defense Intelligence Matters, *with* 10 U.S.C. ch. 19, Cyber and Information Operations Matters (supporting that chapter 19 better relates to the new proposed statute because it encompasses cyber related matters).

26. *See, e.g.*, Robert Chesney, *The Law of Military Cyber Operations and the New NDAA*, Lawfare (July 26, 2018, 2:07 PM), https://www.lawfareblog.com/law-military-cyber-operations-and-new-ndaa (explaining how Congressional legislation clarifying DoD's authority to conduct cyber operations attempts to remove "interagency friction").

27. Off. of Mgmt & Budget, A Budget For America's Future: Budget of the U.S. Government 6 (2020), https://www.govinfo.gov/content/pkg/BUDGET-2021-BUD/pdf/BUDGET-2021-BUD.pdf [herienafter Budget of U.S. Gov't].

28. Off. of the Under Sec'y of Def. (Comptroller), National Defense Budget Estimates for FY 2020 tbl.1-4 (2019), https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/FY20_Green_Book.pdf.

29. Budget of U.S. Govt, *supra* note 27, at 35.

30. U.S. Dep't of Def., Summary of the 2018 National Defense Strategy of the United States of America 5 (Jan. 19, 2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

31. *See id.* (explaining that we must "out-innovate revisionist powers, rogue regimes, terrorists, and other threat actors").

32. U.S. Cyber Command, Achieve and Maintain Cyberspace Superiority: Command Vision for US Cyber Command 7 (2018), https://www.cybercom.mil/Portals/56/Documents/USCYBERCOM%20Vision%20April%202018.pdf?ver=2018-06-14-152556-010.

33. *See* Donald J. Trump, U.S. President, National Security Strategy of the United States of America 2 (2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf (discussing "A Competitive World").

34. *See* Andy Greenberg, Sandworm: A New Era of Cyberwar and the Hunt for the Kremlin's Most Dangerous Hackers 5 (2019) (describing the "so-called attribution problem" and identifying challenges to attribution that include routing internet traffic through proxies and false flag operations that use planted evidence and false narratives to obscure the actual actor conducting the cyber activity).

35. *Id.* In the cyber context, a "false flag" is "[a]n operation designed to deflect attribution to an uninvolved party." *False Flag*, Cyberwire, https://thecyberwire.com/glossary/false-flag (last visited June 1, 2021). "A cyber operation would be a false flag if the threat actor behind it took steps to impersonate or use the distinctive infrastructure, tactics, techniques, or procedures of some other threat actor. The Olympic Destroyer cyberattack against the 2018 Pyeongchang Winter Olympic Games is widely regarded as having been a false flag operation in which Russia's GRU designed its attack to appear as if had been the work of North Korea." *Id.*

36. *See* Greenberg, *supra* note 34 (describing challenges of attribution related to the Olympic Destroyer cyberattack); Brian J. Egan, Legal Adviser, Dep't of State, Remarks on International Law and Stability in Cyberspace at Berkeley Law School (Nov. 10, 2016), https://www.law.berkeley.edu/wp-content/uploads/2016/12/egan-talk-transcript-111016.pdf (examining issues and challenges surrounding attribution); Kristen Eichensehr, *Cyberattack Attribution and International Law*, Just Sec. (July 24, 2020), https://www.justsecurity.org/71640/cyberattack-attribution-and-international-law/ (analyzing issues and challenges surrounding attribution).

37. Thomas Rid & Ben Buchanan, *Attributing Cyber Attacks*, 38 J. Strat. Stud. 4, 33 (2015) (discussing the technical aspects of attribution in cyberspace).

38. For example, inappropriate cryptocurrency speculation could occur if policies are not implemented to manage the potential risk or if there is not appropriate oversight.

39. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 1631–1632, 131 Stat. 1283, 1736–1738 (2017).

40. *Id. See also* Robert Chesney, *The NDAA FY'18's Cyber Provisions: What Emerged from Conference?*, Lawfare, (Nov. 14, 2017, 1:10 AM), https://www.lawfareblog.com/ndaa-fy18s-cyber-provisions-what-emerged-conference (explaining the definition of SMCO, as well as the various reporting requirements found in §§ 1631–1632 of the FY18 NDAA).

41. For example, the U.S. House of Representatives and Senate Armed Services Committees exercise Congressional oversight for the armed forces, and the U.S. House of Representatives and Senate Permanent Select Committees on Intelligence exercise Congressional oversight for intelligence activities of the U.S. Government. Additionally, there are internal oversight controls within the executive branch, such as inspector generals and intelligence oversight officials.

42. *See History and Mission*, U.S. Priv. & Civ. Liberties Oversight Bd., https://www.pclob.gov/About/HistoryMission (last visited June 1, 2021) (select the subsection "What are the Board's Responsibilities?"). While beyond the scope of this article, the U.S. Privacy & Civil Liberties Oversight Board is one possible external organization that could review cyber policy and provide advice. The question of which organization is best situated to provide third-party review of U.S. Government cyber law and policy would benefit from further inquiry.

Sergeant Major of the Army Michael A. Grinston visits the U.S. Army Aeromedical Research Laboratory at Fort Rucker, Alabama. (Credit: Scott C. Childress)

Practice Notes

A New Start for Technology

Mitigating the Impacts of Continuing Resolutions on Research and Development

By Major David J. Ely

Authorization and appropriation acts permit the Government to spend a specified amount of funds for a provided purpose and duration.[1] When Congress fails to pass these laws, however, a funding gap results.[2] Funding gaps, or Government shutdowns, have plagued recent decades and significantly impacted the government's ability to function normally.[3] Usually in such cases, Congress passes temporary appropriation acts, called continuing resolutions (CRs), which permit the Government to fund existing programs and activities at the same rate of operations; however, CRs generally prohibit new programs and activities.[4] This, in turn, impedes the effective and efficient funding of new technologies crucial for the Department of Defense (DoD) to keep pace with near-peer adver-

saries. This article explores the detriments of funding gaps and CRs and proposes that CRs routinely authorize the funding of new programs for research, development, test, and evaluation (RDT&E).

Detriments of Funding Gaps and CRs

Authorization and appropriations laws fund the DoD annually, but in the last twenty years, Congress enacted only five appropriations laws prior to the start of the fiscal year.[5] During a funding gap, the Government must shut down all funding unless it supports emergencies that "imminently threaten the safety of human life or the protection of property."[6] Continuing resolutions are a stop-gap measure to prevent this scenario by temporarily funding existing programs.[7]

Continuing resolutions are problematic in their own right. Generally, CRs prohibit "new production," "the increase in production rates above those sustained with [prior fiscal year] funds," or "the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during [the prior] fiscal year."[8] In the continued absence of appropriations laws during CR periods, Congress often must enact consecutive CRs extending well into the fiscal year, which creates even more uncertainty.[9]

More than just one-year funds, such as Operations and Maintenance, funding gaps and CRs also prohibit the initiation of "multi-year procurements utilizing advance procurement funding."[10] Thus, two-year appropriations—like RDT&E—also suffer from CRs.[11] Although Congress can approve "anomalies" as exceptions to these general prohibitions, they do so only for high-visibility, high-cost projects; even then, they meet significant and prolonged resistance when staffed through DoD leaders, the DoD Comptroller, Office of Management and Budget, and Congressional appropriations committees.[12] In recent years, DoD anomaly requests for new starts and production rate increases have increased exponentially; yet, they are often entirely omitted from CRs.[13]

As a result, contracting officials must delay obligations for scheduled contracts, which burdens contracting officials with heavy workloads at the end of a fiscal year, interrupts programs, and results in higher contractor costs as they price-in the risk of unknown obligations.[14] Many senior level officials have decried the use of CRs.[15] Former Secretary of Defense James Mattis testified to Congress that CRs raise costs; deteriorate ship and aircraft manufacturing and maintenance; delay construction; deplete ammunition, training, and manpower; and delay contracts required to modernize at a rate competitive with our near-peer adversaries.[16] Despite the President's and Congress's stated desires to aggressively pursue new technologies, CRs by their very nature prevent innovation by requiring agencies to do only what they did the prior year.[17]

CR Exemptions for RDT&E

If the United States is to remain competitive with near-peer adversaries, lawmakers must lessen the impacts of funding gaps and CRs on the acquisitions, research, and development processes. Although the simplest solution is to pass timely appropriation bills, the politicization of these bills has rendered this an unreliable approach.[18]

A DoD-wide exemption permitting funding for new programs under CRs is similarly untenable—and against constitutional principles.[19] First, Congress should not abrogate the constitutionally vested power of the purse by funding new DoD programs blindly and without debate. Although Congress would—arguably—be authorizing specific programs presented in DoD budget requests, the idea risks the appearance of granting constitutional power of the purse to the executive branch.[20] At the very least, the broad scale and potentially unlimited duration of such an exemption weakens congressional oversight.[21]

Second, removing the DoD from the regular appropriations process would eliminate Congress's incentive to pass timely and suitable appropriation bills.[22] Without thoughtfully debated, regular appropriations and authorizations, acquisitions programs could be left rudderless, with unrestrained budgets, and without checks and balances.

Ideally, then, a solution lies somewhere between giving the DoD free reign over the power of the purse and subjecting the DoD and our national defense to Congress's disruptive political whims. As Congress and the DoD both emphasized the importance of technological development, RDT&E seems a natural focus for this compromise.

Congress should exempt all RDT&E appropriations from new start prohibitions in all CRs. Notably, this provision would not give the DoD free reign; Congress could still prohibit specific RDT&E programs if desired. As the DoD already submits budget requests each year, Congress has full visibility over the RDT&E programs the CR would fund. Congress would exercise more control and oversight by examining only this slice of appropriations, instead of exempting new starts across the entire DoD budget. Moreover, continued debate over most military programs, as part of other appropriations, would still incentivize timely, controlled appropriations bills. Rather than presume exclusion for RDT&E programs, this provision would presume authorization—in line with national priorities for technological overmatch.

Furthermore, Congress should explicitly declare its intent to make RDT&E new start exemptions a regular feature of future CRs. This expression of intent will provide the DoD and contractors the political stability required to focus on continuous and rapid development of current and new technologies at more reasonable costs.

Conclusion

A CR exemption for RDT&E start-ups balances incentives for timely appropriation bills with the need to fund new technologies. Continuing resolutions should not be the norm, but, given their historical frequency and duration, a solution must encompass the reality of CRs. Congress can enact CRs permitting new RDT&E programs so long as political support for technological development remains bipartisan. The cost and operational impacts of interruptions and delays for general military programs would still incentivize timely appropriations legislation, but at least the national priority for technological dominance would survive the thrashing. **TAL**

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The U.S. Army Aeromedical Research Laboratory collaborates with the U.S. Army School of Army Aviation Medicine to conduct testing inside their man-rated altitude chamber. The goal of this effort was to test three patient isolation units (PIUs) to determine if they will operate correctly when exposed to simulated altitudes from ground level up to 18,000 feet. (Credit: Scott C. Childress)

Notes

1. 31 U.S.C. §§ 1301, 1341(a)(1), 1502(a).

2. *See* CETA Appropriation Under 1979 Continuing Resolution, 58 Comp. Gen. 530, 532 (1979).

3. *See* 3 David A. Drabkin et al., Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 221 (2019) [hereinafter Report of the Advisory Panel].

4. 2 U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law 8-24 to -25 (3d ed. 2006) [hereinafter GAO Red Book].

5. *See* Report of the Advisory Panel, *supra* note 3, at 221.

6. 31 U.S.C. § 1342.

7. GAO Red Book, *supra* note 4, at 8-2.

8. *Id.* at 8-24 to -25. *See, e.g.*, Continuing Resolution for Fiscal Year 2020, Pub. L. 116-59, § 102(a), 133 Stat. 1093, 1094 (2019).

9. *See* Report of the Advisory Panel, *supra* note 3, at 222.

10. *Id.* at 239. *See, e.g.*, Continuing Resolution for Fiscal Year 2020, Pub. L. 116-59, § 102(b), 133 Stat. 1093, 1095 (2019).

11. 1 Walter Scott et al., Federal Contract Management ¶ 1.05[7][a] (2019); Letter from James Mattis, Sec'y of Def., to Sen. John McCain (Sept. 8, 2017) ("Funding limitations [from the CR] for research and development will result in . . . providing only minimum sustaining funding to the selected programs.").

12. *See* Report of the Advisory Panel, *supra* note 3, at 223–24, 237; Pat Towell et al., Cong. Rsch. Serv., R45870, Defense Spending Under an Interim Continuing Resolution: In Brief 5–6 (2019).

13. Towell et al., *supra* note 12, at 6 (noting the first 3 continuing resolutions (CRs) for fiscal year 2018 permitted no anomalies despite Department of Defense requests for 115 programs, and the fourth CR for that year contained only 1 anomaly).

14. *See* Report of the Advisory Panel, *supra* note 3, at 224; Towell et al., *supra* note 12, at 7.

15. Report of the Advisory Panel, *supra* note 3, at 224–27.

16. *The National Defense Strategy and the Nuclear Posture Review: Hearing Before the H. Comm. on Armed Servs.*, 115th Cong. (2018) (statement of Sec'y of Def. James Mattis).

17. Donald J. Trump, U.S. President, National Security Strategy of the United States of America 21 (2017) (stating the intent to "regain the element of surprise and field new technologies at the pace of modern industry"); S. Rep. No. 115–125, at 191 (2017) (advising agreements officers to "use a variety of established acquisition tools, including a modification to the original consortium-based or individual prototype project award, a separate [other transaction authority], or a [federal acquisition regulation] acquisition instrument" to "allow for a swifter, seamless transition of cutting-edge technologies to the warfighter"). *See U.S. National Security Challenges and Ongoing Military Operations: Hearing Before the S. Comm. on Armed Servs.*, 114th Cong. (2016) (statement of Sec'y of Def. Ash Carter).

18. *See* Report of the Advisory Panel, *supra* note 3, at 230–31.

19. U.S. Const. art. I, § 9, cl. 7; *See* Report of the Advisory Panel, *supra* note 3, at 234.

20. *See* Report of the Advisory Panel, *supra* note 3, at 228.

21. *See id.*

22. *See id.* at 228, 235–36.

CPT Allen and other 25th Infantry Division Soldiers executed the Green Mile, a physical endurance course that concluded their training for the Jungle Operations Training Course in April 2021 at Lightning Academy near Schofield Barracks, Hawaii. (Credit: SGT Sarah D. Sangster)

Practice Notes

Tropic Blitz
Discovering the Unknown

By Captain Cora Allen

[T]here are known knowns. There are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know.[1]

The Problem

As a direct commissioned judge advocate (JA) arriving at your first duty station, straight out of the Officer Basic Course, there are many known unknowns. New JAs know that they do not know everything about Army culture and that they will have to research issues that will, eventually, become second nature. However, there are even more unknown unknowns—the things we do not even realize that we do not know. While new JAs know that they do not

know everything about Army culture, they do not know that the things that they don't know include the fact that you never walk on Ardennes Street on Fort Bragg, North Carolina, or that you never eat the spinach fettucine Meals Ready-to-Eat. And while we may strive for fewer and fewer unknowns with each day on the job, these first duty positions often only give young JAs a narrow viewpoint of the larger office of the staff judge advocate (OSJA).

The Solution

In an effort to close the knowledge gap for new JAs, the 25th Infantry Division (ID) OSJA created a professional development program to push them outside their comfort zones, teach them more about the U.S. Army, and give them broader exposure to different leadership styles. In August 2019, this idea materialized into the "Tropic Blitz" program.[2] Prior to May 2020 and the imposition of Coronavirus Disease-2019-related restrictions, five participants had enrolled in the program. Each participant rotated through the 25th ID OSJA and the five subordinate brigade legal sections, charting and observing thirty experiences to grow as lawyers and leaders. Tropic Blitz prepares JAs to operate as part of a staff, advise commanders at different echelons, lead and develop paralegals, and understand their clients.

In April 2019, the 25th ID and U.S. Army Hawaii Staff Judge Advocate (SJA) challenged the brigade JAs and OSJA branch chiefs with a supersized project—develop a program that gives new JAs a "liberal arts degree" of experiences from the 25th ID OSJA. As envisioned, Tropic Blitz would build on the academic learning required in the Judge Advocate Tactical Staff Officer Course (JATSOC) and focus on those foundational experiences all JAs deserve. Additionally, by introducing new JAs to several different leaders within the OSJA, the Tropic Blitz program also broadens the feedback for the JA's 120-day evaluation. The idea to give new JAs exposure outside of their initial job placement is not new. While other OSJAs have created programs allowing new JAs to walk in the boots of line officers,[3] the Tropic Blitz program focuses on exposing participants to the brigade legal sections (BLS) and demonstrating how the BLS supports the brigade mission.

The Experience

As an overview of the Tropic Blitz program, there are two distinct checklists of activities for participants to observe. The first list includes fifteen brigade-level activities and opportunities that new JAs must complete within their first year in the 25th ID OSJA. This list includes, but is not limited to, observing a preferral of charges, first and second readings for non-judicial punishment, and a court-martial proceeding. Likewise, JAs should experience an internal legal tracker meeting, an in-brief to an Army Regulation 15-6 investigating officer, and a command and staff meeting at the brigade level. The prioritization of understanding brigade-level operations allows Tropic Blitz participants to learn about the tactical Army. The second list then encourages participation in operational Army experiences at the division level. Participants are encouraged to lead a physical training session for the division OSJA, participate in a field or combat training exercise, or attend a chief of staff brief.

Individual participants, assisted by the Tropic Blitz program coordinator, are responsible for their own progression through the Tropic Blitz program; they are expected to complete activities while balancing their initial job training and responsibilities. They have up to one year to complete the program. Participants rotate monthly between the Sustainment Brigade, the Combat Aviation Brigade, Division Artillery, 2d Infantry Brigade Combat Team, and 3d Infantry Brigade Combat Team. After each rotation with a brigade, the participants complete an after action review with the brigade judge advocate and submit a monthly report to the program coordinator.

The Coordination

The Tropic Blitz program coordinator is vital to the success of the program. The program coordinator carries the additional responsibilities to align participants, coordinate participation, and compile monthly reports from all the participants—in addition to their regularly assigned duties and responsibilities. Selecting the right program coordinator is crucial. The program coordinator must be organized, responsible, and mature as they mentor new JAs and resolve issues that come up between different OSJA sections and units. As a problem solver, the program coordinator must be approachable and have strong communication skills. As an office organizer, the program coordinator aligns participants with the subordinate brigades, which requires de-conflicting several calendars and priorities. Creating the position of program coordinator has given the 25th ID OSJA an opportunity to fill an informal leadership position with a junior captain. This gives the added benefit of allowing the program coordinator to refine their leadership skills.

The Challenges

One obstacle to overcome has been balancing initial job training, duty performance, and the Tropic Blitz checklists. Tropic Blitz is an important and valuable program for new JAs; however, it does not take priority

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over the participants' assigned duties. It can be a struggle and source of healthy stress for new JAs to make time in their schedules for Tropic Blitz. It is also incumbent on supervisors to remain flexible to allow participants to complete the Tropic Blitz requirements. Clear communication between participants, officers-in-charge, and brigade judge advocates can mitigate this problem. Early notice of future alignment with brigade legal sections and early feedback on upcoming events empowers collective planning.

A second challenge is the ever-present ethical responsibility to current and former clients required by state and local bars and Army Regulation 27-26.[4] Tropic Blitz participants may be assigned as a legal assistance or client services attorney. After the first year, JAs may serve as a special victims' counsel or military justice advisor. The activities and observed discussions at the brigade level may involve a current or former client. Participants should be aware of their ethical responsibilities, and supervisors must discuss these possible situations and plan for this issue to come up. Supervisor engagement about ethical responsibilities is essential for a successful Tropic Blitz program, and it should happen early and often. Practically, it encourages healthy habits for client services attorneys to be aware of potential conflicts of interest, to keep a list of current and former clients, and to professionally handle any meetings or discussions if a client's name or case is mentioned.

The Result

As the initial group of participants neared the end of the program, the benefits for not only the participants, but also for the OSJA and the Army as a whole, have become clear. It gives those JAs who might not get the opportunity to be assigned to a brigade while at 25th ID an opportunity to better understand the Army's brigade-centered approach. Captain Phillip Brown—one of the participants who went from legal assistance to a division trial counsel position—said,

> Tropic Blitz has provided me with an opportunity to see how the Army functions at the brigade level and the role of the various [JAs] and paralegals within the brigades. I witnessed how crucial the brigades are in winning the close fight and how that role differs from the division and corps. Most of my [Tropic Blitz] experience took place during my time in legal assistance, and I think this made the experience even more valuable. I do not think I would have become as good of an officer without Tropic Blitz. Tropic Blitz helped me understand the Army much better and filled in a lot of the gaps from [the Direct Commission Course and the Officer Basic Course].[5]

the Tropic Blitz Program creates more known knowns, more known unknowns, and fewer unknown unknowns about the diverse opportunities that the Judge Advocate General's Corps has in store

Perhaps the most meaningful aspect of the program is that it builds and strengthens relationships between the participants and OSJA members they would not have worked with if not for Tropic Blitz. In addition to growing interpersonal relationships, participants are also exposed to the different leadership styles of commanders and JAs. Some leaders spend more time curating in-depth experiences for the participants, while others allow the participants and program coordinator to work directly with the other captains and paralegals to complete requirements on the checklist. Whichever way you choose, the Tropic Blitz Program creates more known knowns, more known unknowns, and fewer unknown unknowns about the diverse opportunities that the Judge Advocate General's Corps has in store. **TAL**

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Notes

1. *See* David A. Graham, *Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip*, Atlantic (Mar. 27, 2014), https://www.theatlantic.com/politics/archive/2014/03/rumsfelds-knowns-and-unknowns-the-intellectual-history-of-a-quip/359719/ (quoting Secretary of Defense Donald Rumsfeld).

2. Captain Cora Allen, *Direct Commissionee Professional Development Program*, MilBook (Jan. 31, 2020, 9:57 PM), https://www.milsuite.mil/book/thread/225895 (Tropic Blitz resources are available in the Leadership, Management, and Training Group on milSuite).

3. For comparison, the First Armored Division OSJA created the "Muddy Boots" program. Muddy Boots started in February 2016 and was designed to introduce new JAs to the day-to-day operations of a company-sized unit. Muddy Boots assigned participants to shadow another first lieutenant, ideally a company executive officer, in a line unit for one week. This meant junior JAs benefitted from following company executive officers around motor pools, platoon meetings, maintenance meetings, company training meetings, and battalion meetings. Through this program, JAs learned a greater appreciation for the demands on companies, which then also enabled the participants to better advise Army commanders.

4. *See* U.S. Dep't of Army, Reg. 27-26, Rules of Professional Conduct for Lawyers (28 June 2018).

5. Email from author to Tropic Blitz participants, subject: Program Feedback (Mar. 15, 2020) (on file with author).

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Practice Notes

Leadership Has Changed from Toxic to Counterproductive

What the Semantic Change Means for Legal Advisors

By Captain Alan H. Kennedy & Major Kevin J. O'Neil

Since 2003, when then-Secretary of the Army Thomas E. White first asked officers at the U.S. Army War College to determine how the Army could identify commanders with "destructive leadership styles,"[1] the Army has attempted to define, identify, and eliminate toxic leadership. In an effort to identify and define the problem, the Army conducted studies, distributed command climate surveys, wrote articles, appointed investigations, and relieved commanders. A decade later, top commanders publicly admitted that the Army had a problem: too many "toxic leaders."[2] In 2012, the Army even added the term "toxic leadership" to its core doctrinal publication, Army Doctrine Publication (ADP) 6-22, *Army Leadership*, as "one form of negative leadership."[3]

Yet, in the latest version of ADP 6-22, the Army replaced the term "toxic leadership" with the term "counterproductive leadership," briefly noting that "the term toxic has been used when describing leaders who have engaged in what the Army now refers to as counterproductive leadership behaviors."[4] Nowhere in the new version of the doctrinal publication does the term "toxic leadership" appear. You may be wondering: What is the definition of toxic leadership? What is the definition of counterproductive leader-

ship? Is the recent change in nomenclature semantic or substantive? Finally, what does the change mean for judge advocates tasked as legal advisors for command investigations into allegations of behavior formerly called "toxic leadership"?

This article tackles these questions by 1) defining toxic leadership and counterproductive leadership in the Army legal context, and comparing and contrasting the Army's old and new definitions; 2) offering ten takeaways for Army lawyers who advise or review leadership-related investigations to help orient investigating officers to the problem; and 3) providing additional steps that Army leaders can take to eliminate toxic and counterproductive leadership.

Toxic Leadership

The former version of ADP 6-22, which minimized the extent of negative leadership by asserting that it only surfaces "occasionally," defined "toxic leadership" in the following way:

> *Toxic leadership* is a combination of self-centered attitudes, motivations, and behaviors that have adverse effects on subordinates, the organization, and mission performance. This leader lacks concern for others and the climate of the organization, which leads to short- and long-term negative effects. The toxic leader operates with an inflated sense of self-worth and from acute self-interest. Toxic leaders consistently use dysfunctional behaviors to deceive, intimidate, coerce, or unfairly punish others to get what they want for themselves. The negative leader completes short-term requirements by operating at the bottom of the continuum of commitment, where followers respond to the positional power of their leader to fulfill requests. This may achieve results in the short term, but ignores the other leader competency categories of leads and develops. Prolonged use of negative leadership to influence followers undermines the followers' will, initiative, and potential and destroys unit morale.[5]

Army lawyers generally viewed this definition as creating a two-part test. To be deemed a toxic leader in the Army, two things must occur: 1) a leader must exhibit toxic attitudes, motivations, and behaviors, and 2) those toxic attitudes, motivations, and behaviors must result in adverse effects on subordinates, the organization, and mission performance.[6] From a legal standpoint, an Army leader would only be considered toxic if they both displayed toxic characteristics or traits *and* those characteristics or traits led to negative effects on personnel, unit morale, or the mission. A leader would, theoretically, not be deemed toxic if their toxic traits did not negatively affect others, or if unit members suffered negative consequences from decisions made in good faith.

The rest of the definition listed an amalgam of toxic traits and consequences—such as lack of concern for others and the climate of the organization; inflated sense of self-worth; and using dysfunctional behaviors to deceive, intimidate, coerce, or unfairly punish others. Despite all of this, the 2012 publication still lacked definitional clarity. As Colonel George E. Reed aptly put it, "toxic leadership, like leadership in general, is more easily described than defined."[7] Yet, paraphrasing Justice Potter Stewart's oft-quoted concurrence, Soldiers knew it when they saw it.[8] Surveys found that a majority of Soldiers considered leaving because of treatment by a supervisor;[9] more than eighty percent of Soldiers witnessed toxic leadership; and twenty percent of Soldiers had toxic leaders.[10]

After 2012, the military community partnered with the academic community and found that toxic leadership had a devastating array of negative consequences for Soldiers. Researchers found that toxic leadership triggered alcohol abuse and undermined unit civility and individual commitment.[11] Another study found that the kinds of behaviors, then known as toxic leadership, doubled female Service members risk of sexual assault in the military at non-deployed locations.[12] Other researchers found that "suicidal behavior can be triggered by . . . toxic command climate."[13] Researchers also found that perception of toxic leadership engendered organizational cynicism.[14] The problem of toxic leadership proved pervasive and profound, yet remained difficult to define.

Counterproductive Leadership

The 2019 version of ADP 6-22, which uses the term "counterproductive leadership" instead of "toxic leadership," defines the term as:

> *Counterproductive leadership* is the 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. Counterproductive leadership generally leaves organizations in a worse condition than when the leader arrived and has a long-term effect on morale and readiness. The term toxic has been used when describing leaders who have engaged in what the Army now refers to as counterproductive leadership behaviors. Counterproductive leadership is incompatible with Army leadership doctrine and Army Values. It often violates regulations and can impede mission accomplishment.[15]

From a doctrinal standpoint, ADP 6-22 nests the new definition of counterproductive leadership with the Army's core leader competencies and Army Values. Army Doctrine Publication 6-22 establishes and describes the Army's approach to leadership. It establishes a standard set of core leadership competencies and attributes, and describes the values and competencies required of Army leaders. These principles are grounded in historical experience.[16] Core leader competencies include: leading others, extending influence, leading by example, building trust, creating a positive environment, preparing self, developing others, stewarding the profession, and getting results.[17] The Army Values are loyalty, duty, respect, selfless service, honor, integrity, and personal courage.[18]

The new definition of counterproductive leadership, like the old definition of toxic leadership, appears to create a two-part test. To be deemed a counterproductive leader, an Army leader seemingly must: 1) exhibit behaviors that violate at least one of the Army's core leader competencies or Army Values, and 2) those behaviors must prevent a climate conducive

to mission accomplishment.[19] From a legal standpoint, an Army leader would presumably only be deemed counterproductive if they display counterproductive behaviors *and* those behaviors stand in the way of a mission-friendly climate. Is counterproductive the new toxic? It seems so.

Understanding what it means to prevent a climate conducive to mission accomplishment requires first posing the following question: what is a climate conducive to mission accomplishment? Army Doctrine Publication 6-22, paragraph 6-20, requires Army leaders to "create the conditions for a positive environment, build trust and cohesion on their team, encourage initiative, demonstrate care for their people, and enhance esprit de corps."[20] Failure by Army leaders to foster these conditions are indicators that leaders are not prompting a positive environment, and thus not fostering a climate conducive to mission accomplishment. Table 6-2 offers investigating officers a set of conditions suitable for assessing failure to create a climate conducive to mission accomplishment.[21] For example, an investigating officer could gauge the absence of teamwork, cohesion, cooperation, loyalty, and esprit de corps (items from the first column) by deriving questions from the second column—for example: Does the Army leader encourage people to work together effectively?[22] Do they promote teamwork and team achievement?[23] Do they draw attention to the consequences of poor coordination?[24] Do they integrate new members into the unit quickly?[25] Failure to affirmatively answer questions derived from Table 6-2 are all indicative of a leader who has failed to establish a positive environment, and is thus preventing a climate conducive to mission accomplishment.

Other sections of ADP 6-22 shed light on how to gauge when Army leaders are not creating a positive environment or are preventing a climate conducive to mission accomplishment. Paragraph 9-18 states generally that an "organization's climate springs from its leader's attitudes, actions, and priorities communicated through choices, policies, and programs," and requires that leaders assess organizational climate "from the bottom up" through command climate surveys.[26] Paragraph 9-19 specifically identifies "successful" climates as having "a clear, widely known purpose; well trained, confident Soldiers and DA Civilians; disciplined, cohesive teams; and trusted, competent leaders," who "value honest feedback" and adhere to the Army Values. The paragraph ends with a nod to the law, emphasizing that "*legal advisors assist the organizational leader with maintaining a positive environment.*"[27]

Yet, the new definition of counterproductive leadership raises more definitional questions than it answers. For example, the comma suggests that the second part of the test is whether the behavior "prevent[s] a climate conducive to mission accomplishment."[28] Such a two-part test is consistent with the previous test for toxic leadership.[29] However, it is inconsistent with the last sentence, which states that counterproductive leadership "can impede mission accomplishment."[30] Does the word "can" mean the test may be met if behaviors do not impede mission accomplishment? If this is the case, then is the new test a one-part test, with an optional second part? If not, how will we know it when see it? These semantic questions are unanswered by the other five paragraphs.

The rest of the new definition of counterproductive leadership consists of a paragraph describing some potential negative effects of counterproductive leadership and a non-exclusive list of counterproductive behaviors,[31] along with descriptive sub-lists of examples of each.[32] The new list of behaviors is much longer than the old list of traits, attempting to refine the definition through greater context. Finally, reasonable minds will disagree on whether the second part's application should turn on organizational climate or mission accomplishment.

What the Change Means for Legal Advisors

Army lawyers advising or reviewing command investigations involving allegations of counterproductive leadership should offer the following considerations to orient investigating officers:

1. *The Army's broader command policy framework remains the same.* Although ADP 6-22 terms have changed from toxic leadership to counterproductive leadership, Army Regulation (AR) 600-20, *Army Command Policy*, has not changed and includes the same requirements for Army leaders to "build a positive command climate."[33]
2. *Counterproductive leadership is more expansive than toxic leadership.* Although the change is likely more semantic than substantive, the new list of negative behaviors is expansive and non-exclusive, making negative behavior examples easier to identify but tougher to isolate.[34]
3. *Violation of a single core leader competency or Army Value is sufficient.* According to the new ADP 6-22, counterproductive leadership behaviors violate "one or more" of the Army's core leader competencies or Army Values.[35]
4. *A single instance of negative behavior is likely insufficient.* According to the new ADP 6-22, "infrequent or one-time negative behaviors do not define counterproductive leadership."[36]
5. *Counterproductive leadership combines climate with harm.* If the two-part test still applies, then the change is more semantic than substantive. Experts will disagree, however, as to whether the focus of enforcement should be on "climate" or on "mission accomplishment."[37]
6. *Formerly ancillary issues are now also counterproductive behaviors.* According to the new ADP 6-22, violations of Army laws and regulations, Equal Employment Opportunity/Sexual Harassment and Assault Response and Prevention violations, and other negative actions formerly handled elsewhere now can be investigated as counterproductive behaviors.[38]
7. *Preventing counterproductive leadership is partially aspirational.* The new definition ends by promoting leadership reliance on "positive behaviors to influence others and achieve results," as well as commitment to stop "these negative behaviors," signaling a general shift in aspirations.[39]
8. *Preventing counterproductive leadership is everyone's responsibility.* Although studies show "superiors are in the best position to deal with toxicity because they have the positional authority to counter it,"[40] ADP 6-22 places respon-

sibility on commanders and leaders, as well as witnesses.[41]

9. *The Army's legal advisor requirements remain the same.* Although the description of what is being investigated has changed, AR 15-6 has not. Legal advisors must continue to guide the investigating officer in planning, identifying witnesses, protecting rights, meeting legal requirements, ensuring evidentiary support, and requiring recommendations to follow findings.[42]
10. *The Army's legal review requirements remain the same.* Although the description of what is being investigated has changed, again, AR 15-6 has not. Legal reviewers must still continue to require that investigations comply with legal requirements, remediate errors, establish findings by a preponderance of the evidence, and ensure recommendations are consistent with findings.[43]

Conclusion

Overall, the change in terminology from toxic leadership to counterproductive leadership in 2019 is likely more semantic than substantive. Specifically nesting the new definition in the Army's core leader competencies and Army Values, enumerating many counterproductive behaviors, and describing how to know when a leader is not creating the right climate does not change the underlying test. Definitional clarity remains elusive. Soldiers will continue to know counterproductive leadership when they see it. Upon reviewing the more inclusive—yet non-exhaustive—list of behaviors reflected in the ADP, Soldiers may recognize more of these behaviors in their ranks; this could potentially lead to increased reporting of counterproductive leadership allegations. Yet, because the second part of the two-part test leaves unclear whether leaders should be judged on the climate they create or harm they cause, investigating counterproductive leadership will not be easy. It is also unclear whether part one of the two-part test is more about recurring or serious behavior. In short, questions applicable to definitional scope and enforcement remain.

That said, the aspirational desire to prevent counterproductive leadership is an important addition—given the pervasiveness of counterproductive leadership[44] and the serious harm it has done to Soldiers who have suffered under counterproductive leadership.[45] Hopefully, the Army's renewed focus on such behaviors will result in cultural changes. However, there must be recognition that those at the highest echelons are most able to effect change—even though those at the top are least likely to know destructive behaviors when they see them.[46] In short, renaming what used to be called "toxic" to "counterproductive" will only benefit Soldiers if the change in name actually leads to less counterproductive leadership. **TAL**

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Notes

1. Colonel George E. Reed, *Toxic Leadership*, Mil. Rev., July-Aug. 2004, at 67, 67.

2. Daniel Zwerdling, *Army Takes On Its Own Toxic Leaders*, NPR (Jan. 6, 2014, 12:16 PM), http://www.npr.org/2014/01/06/259422776/army-takes-on-its-own-toxic-leaders.

3. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership para. 11 (1 Aug. 2012) (C1, 10 Sept. 2012) [hereinafter 2012 ADP 6-22].

4. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 8-46 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter 2019 ADP 6-22].

5. 2012 ADP 6-22, *supra* note 3, para. 11.

6. *Id.*

7. Reed, *supra* note 1, at 71.

8. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

9. Colonel (Retired) George E. Reed & Lieutenant Colonel (Retired) Richard A. Olsen, *Toxic Leadership: Part Deux*, Mil. Rev., Nov.-Dec. 2010, at 58, 61.

10. Lieutenant Colonel Joe Doty & Master Sergeant Jeff Fenlason, *Narcissism and Toxic Leaders*, Mil. Rev., Jan.-Feb. 2013, at 55, 55.

11. Jessica A. Gallus et al., *Intolerable Cruelty: A Multilevel Examination of the Impact of Toxic Leadership on U.S. Military Units and Service Members*, 25 Mil. Psych. 588, 588 (2013).

12. Anne G. Sadler et al., *The Relationship Between US Military Officer Leadership Behaviors and Risk of Sexual Assault of Reserve, National Guard, and Active Component Servicewomen in Nondeployed Locations*, 107 Am. J. Pub. Health 147, 147 (2017).

13. Zwerdling, *supra* note 2; Gary L. Winn & Ava C. Dykes, *Identifying Toxic Leadership and Building Worker Resilience*, 64 Pro. Safety J. 38, 39 (2019).

14. James M. Dobbs & James J. Do, *The Impact of Perceived Toxic Leadership on Cynicism in Officer Candidates*, 45 Armed Forces & Soc'y 3, 3 (2019).

15. 2019 ADP 6-22, *supra* note 4, para. 8-46.

16. *Id.* para. 1-82.

17. *Id.* para. 1-88.

18. *Id.* para. 1-71.

19. *Id.* para. 8-46.

20. *Id.* para. 6-20.

21. *Id.* tbl.6-2.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* para. 9-18.

27. *Id.* para. 9-19 (emphasis added).

28. *Id.* para. 8-46.

29. 2012 ADP 6-22, *supra* note 3, para. 11.

30. 2019 ADP 6-22, *supra* note 4, para. 8-46.

31. *Id.* para. 8-47 (an example of counterproductive leadership in this example would be an interference with "mission accomplishment, especially in highly complex operational settings." A non-exhaustive list of counterproductive behaviors include: abusive behaviors, self-serving behaviors, erratic behaviors, leadership incompetence, and corrupt behaviors.).

32. *Id.* para. 8-49.

33. U.S. Dep't of Army, Reg. 600-20, Army Command Policy para. 1-6(b) (24 July 2020).

34. 2019 ADP 6-22, *supra* note 4, para. 8-49.

35. *Id.* para. 8-46.

36. *Id.* para. 8-48.

37. *Id.* para. 8-46.

38. *Id.* para. 8-49.

39. *Id.* para. 8-50.

40. Mike Rybacki & Chaveso Cook, *Switching the Paradigm from Reactive to Proactive: Stopping Toxic Leadership*, Joint Forces Q., Issue 82, 3d Quarter 2016, at 33, 38; *accord* Reed & Olson, *supra* note 9, at 63.

41. 2019 ADP 6-22, *supra* note 4, para. 8-50.

42. U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers para. 2-6 (1 Apr. 2016).

43. *Id.* para. 2-7.

44. *See, e.g.*, Reed & Olsen, *supra* note 9; Doty & Fenlason, *supra* note 10, at 55.

45. *See, e.g.*, Gallus et al., *supra* note 11, at 588; Zwerdling, *supra* note 2; Sadler et al., *supra* note 12, at 147; Winn & Dykes, *supra* note 13, at 39; Dobbs & Do, *supra* note 14, at 3.

46. Rybacki & Cook, *supra* note 40, at 38; Reed & Olsen, *supra* note 9, at 59.

(Credit: TAlex – stock.adobe.com)

No. 1

"Alexa, I Want the Truth!"

A Prosecutor's Guide to the Collection and Use of Evidence from Virtual Assistants

By Major Benjamin A. Mills

On November 21, 2015, James A. Bates hosted three men—Victor Collins, Owen McDonald, and Sean Henry—at his Bentonville, Ark., home to watch football. Henry left late in the evening. The remaining men spent time in the hot tub, drinking. McDonald was reportedly back at his home by 1230. Later the morning of the 22nd, after Bates called 911, police and medics found Collins dead in the hot tub and noted the rim of the hot tub and concrete patio appeared to have been recently sprayed with water. Collins had a black eye. Bates had bruises and scratches on his shoulder, back, and stomach. Collins's cause of death was determined to be primarily strangulation with drowning as a secondary cause. . . .

During a search of Bates's residence on December 3, the Bentonville Police seized an Echo device located in the kitchen. On December 4, the police emailed a preservation request to Amazon for all the records associated with the Echo and served a search warrant on Amazon. On January 29, 2016, the police obtained an extension of the warrant. Both the original warrant and the extension noted that law enforcement should search for and seize "audio recordings, transcribed records, or other text records related to communications and transactions" between the Echo device and Amazon's servers during the 48-hour period of November 21 through 22, 2015, in addition to subscriber and account information—to see if the device might hold any clues about the murder in the form of audio recordings, transcribed words, text or other data.[1]

What do you call a home network of digital devices that control every appliance and function of your domestic routine? If you were to ask Siri (Apple's virtual assistant), you would get a link to a webpage for the "internet of things" (IoT).[2] In fact, the IoT is proliferating at break-neck speed—invading every aspect of life. Beyond mere entertainment, smart devices now influence medical care, fitness, security, indoor climate, environmental aesthetics, all manner of appliances, clothing, personal accessories, transportation, even beds and toilets.[3] Among the most powerful devices in the IoT universe are the "virtual assistants," like Amazon's Alexa Echo and Google's Voice, which are always on and always listening.[4] Whenever a virtual assistant hears its "wake word," it activates and records what is heard, as well as any given reply.[5] Because little or no data is stored on virtual assistant devices,[6] their function depends on access to powerful "cloud" computing—networked servers with the ability to analyze, record, and respond to users.[7]

Although cloud computing connects virtual assistant users to an unprecedented capability to command and control their world, it comes at the cost of enormous amounts of personal data being digested into the cloud.[8] Thus, in a world where everything is heard and everything is connected, it requires no imagination to

discern that criminal evidence can also be heard, created, and documented through the IoT, including virtual assistants.[9]

As illustrated by the case study of *Arkansas v. Bates*,[10] prosecutors will likely face future scenarios requiring collection and use of information from the IoT. Thus, this article is organized into two main sections that aim to assist a military prosecutor in the collection and use of digital evidence derived from virtual assistants. The first section outlines the controlling legal framework for collecting and using digital content from virtual assistants, including important case law.[11] In the second section, given the unique properties of digital content derived from virtual assistants and the custody interests of digital service providers, this article offers specific planning guidance to help practitioners implement their own strategy for data collection and use. This guidance includes specific consideration at each step of the evidentiary lifecycle, from warrant request to introduction at trial.

Although cloud computing connects virtual assistant users to an unprecedented capability to command and control their world, it comes at the cost of enormous amounts of personal data being digested into the cloud.

The Legal Framework

Arkansas v. Bates recounts one of a growing number of cases in which the government attempts to collect digital contents of potential criminal evidence captured by a virtual assistant.[12] In *Bates*, the Alexa Echo was located in the kitchen near the back patio where Collins's body was found, and witnesses indicated that the device was playing music during the evening gathering—suggesting that its operation resulted in the capture of some data that might shed light on events surrounding the mysterious death.[13] Interestingly, a separate device in Bates's home, a smart water meter, recorded that the home had used 140 gallons of water between 0100 and 0300 on the night of the murder, corroborating investigators' observations that someone had recently hosed down the area surrounding the body.[14] Although the government has now dismissed charges against Bates,[15] the case highlights the importance of collecting evidence from the IoT and the likelihood that similar evidentiary scenarios will replicate frequently in the very near future.[16] When that happens, a prosecutor's use of the proper legal framework will ensure successful collection and admission of that evidence at trial. The following sections set out the proper legal framework, beginning with evidence preservation.

The Law of Data Preservation

One of the many functions available to a user of virtual assistants is the ability to easily review and delete data at any time.[17] Because digital evidence can be highly perishable, a prosecutor should issue a preservation order to freeze the data as soon as possible. Both military and federal prosecutors enjoy broad authority to order data preservation. For military prosecutors, the authority for a preservation order is found in Rule for Courts-Martial (RCM) 703A(f)[18] and invokes the parallel federal authority for data preservation found in the Stored Communications Act (SCA) at 18 U.S.C. § 2703(f).[19]

Besides invoking the correct legal authority, the careful prosecutor should also incorporate proper terminology[20] into the request that is expansive enough to cover all possible content from all known sources.[21] Additionally, as the need arises in specific cases, a practitioner should consider adding clauses in the preservation request for delayed customer notice and future data preservation. With regard to delayed customer notice, digital service providers do not typically report when data is merely subject to preservation (since the providers are not yet disclosing any user information), but there may be unique commercial practices or user agreements that could result in case-damaging disclosure to a suspect.[22] Where case-appropriate, avoid this scenario by making a simple request for delayed notice.[23] Likewise, a request to preserve future categories of data may be important, depending on the type of data and unique case factors at play in an investigation.[24] While neither delayed notice nor future preservation are specifically addressed by the text surrounding preservation rules, the concepts are rooted in the same statutes discussing compulsory instruments and can be important facets of an ongoing investigation.[25] Notwithstanding a lack of case law on these specific clauses, the SCA gives data holders a complete civil defense for actions in "good faith reliance on . . . a court warrant or order . . . or a statutory authorization (including a request of a governmental entity under section 2703(f) [preservation orders]."[26] And since preservation of data is distinct from actual disclosure, the risk of successful adverse litigation for these clauses is extremely low. Thus, digital service providers are incentivized to fully comply with reasonable preservation requests.

Once drafted, the preservation order must be properly served on the digital service providers. For Amazon, service of regular preservation orders, subpoenas, and search warrants (including emergency requests) are processed through an Amazon-specific platform called "Amazon Law Enforcement Request Tracker" (ALERT) that requires the requester to set up an account.[27] Google prefers receiving all legal process through a central email address, but also accepts service through standard mail and fax.[28] A preservation order is effective for ninety days, but it can be extended for an additional ninety days if necessary.[29] This gives the prosecutor plenty of time to follow-up with a compulsory instrument for collection.

The Law of Data Collection

Under current regulations, there are three possible methods for collecting digital data: 1) RCM 703A(b)'s warrant process, 2) RCM 703A(c)'s "order" (with notice) process, or 3) an investigative subpoena under RCM 703(g)(3)(C).[30] For the reasons discussed

below, a probable cause warrant issued under the procedures of 703A(b) will usually be the best method for the collection of data generated by virtual assistants.[31]

Applying the Stored Communications Act

The Electronic Communications Privacy Act of 1986 (ECPA) and its Title II, the SCA, are the federal statutory framework for protecting digital information.[32] Similar to the military framework, the SCA offers three options for compelling the production of digital information: a warrant, a court order, or a subpoena.[33] By federal statute, the selection between these compulsory instruments depends on 1) whether the digital information contains a user's "content," 2) whether the information holder is providing "electronic communications" services (ECS) or "remote computing" services (RCS), and 3) whether the information (held by an ECS) is older than 180 days.[34]

The ECPA defines "content" as "any information concerning the substance, purport, or meaning of that communication."[35] An ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications,"[36] and an RCS is "the provision to the public of computer storage or processing services by means of an electronic communications system."[37] For practitioners seeking to categorize a data holder in relation to virtual assistants and their associated cloud computing,[38] the statutory definitions of ECS and RCS are particularly unhelpful.[39] Sometimes it is easy to classify the type of data holder based on the item being sought. For example, an internet service provider (ISP) that is holding an unopened email for a user is an ECS. But these definitions begin to breakdown when scrutinizing data in the cloud.[40] How do you classify the data holder of a music playlist? Or calendar alerts? Or dictation edits to a Google doc? The problem compounds when something that appears to be non-content, like a log of accessory activity, aggregates to reveal the daily "contents," activities, and habits of a home's occupants.[41] For the practitioner, cloud computing is often a ubiquitous chimera that frustrates classification of content, non-content, ECS, and RCS. Importantly, recent precedent modifying the Third Party Doctrine and focusing on the privacy expectations attached to "content" has made the distinctions between new data, old data, ECS, and RCS nearly irrelevant.

The Third Party Doctrine

Before 2018, prosecutors could use court orders or subpoenas to compel most digital information instead of the more stringent warrant process.[42] The "court order" process (from SCA section 2703(d) and RCM 703A(c) allowed the government to collect certain digital information if the government offered "specific and articulable facts showing that there are reasonable grounds to believe that the contents . . . are relevant and material to an ongoing criminal investigation."[43] The subpoena power is also broad, since investigative subpoenas can issue on the "low threshold of relevance."[44] These two warrantless compulsory tools survived Fourth Amendment scrutiny for several decades under the Third Party Doctrine that an individual who has voluntarily surrendered custody and control of evidence to a third party (like an ISP) has a diminished right to privacy in that evidence.[45]

Nevertheless, in 2018, the Supreme Court decided *Carpenter v. United States*,[46] and, therein, cast serious doubt on the application of the Third Party Doctrine to various types of digital information. In *Carpenter*, the defendant challenged the application of the third party doctrine, specifically, government use of a court order under SCA section 2703(d),[47] to collect his cell-site location information (CSLI) without a warrant.[48] The Supreme Court sided with the defendant and held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI," and, absent exigent circumstances, "the Government will generally need a warrant."[49] Although the Court claimed that *Carpenter* was a "narrow" decision, the opinion's language suggests broader applications:

> We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the *deeply revealing nature* of CSLI, its *depth, breadth, and comprehensive reach*, and the *inescapable and automatic nature of its collection*, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.[50]

Thus, *Carpenter* is likely not limited to the specific "location" data of CSLI, but includes the private information, collection methods, and "inescapable" sorts of data typified by CSLI—regardless of the duration or medium of storage or the precise type of digital services being utilized. This indicates that any voice recordings captured by Bates's Alexa Echo enjoyed Fourth Amendment protections. Even before *Carpenter*, the Supreme Court was telegraphing the expansion of Fourth Amendment protections for digital information.

In the 2014 decision of *Riley v. California*, the Court held that the warrant exception for searches incident to arrest does not apply to cell phone content.[51] The Court based its decision primarily on the quantitative and qualitative characteristics of private data on cell phones that indicate a socially-recognized reasonable expectation of privacy. Speaking quantitatively, the Court noted:

> The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone *collects in one place many distinct types of information*—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's *capacity allows even just one type of information to convey far more than previously possible.* The sum of an individual's private life can be reconstructed . . . . Third, *the data on a phone can date back to the purchase* of the phone, or even earlier.[52]

Speaking qualitatively, the Supreme Court noted the pervasiveness of cellphones and the types of data they contain, such as "browsing history" and "application software" that "form a revealing montage of the user's life."[53] These digital aspects of cell phones are certainly not unique.[54] In the same way, data captured by virtual assistants and stored in the cloud is comprised of

many private types of information that can be retained indefinitely,[55] and only a single type of data can be used to reconstruct one's private life—especially since most of these devices collect information from inside a home.[56]

Because of the expanding and seismic impact of Supreme Court decisions, military precedent has yet to develop; but the Court of Appeals for the Armed Forces (CAAF) signaled support for the Third Party Doctrine in the 2017 case of *United States v. Langhorne*.[57] In that case, CAAF relied on Supreme Court precedent (the same precedent that was later considered and rejected in *Carpenter*), and found that Langhorne had no reasonable expectation of privacy in his Facebook account after giving his login information to a friend over a phone line which he knew was being monitored while in confinement.[58] Separately, in a string of email privacy cases, CAAF found that individuals have a reasonable expectation of privacy in personal email accounts,[59] but no expectation of privacy in personal password-protected government email accounts (where the log-in banner gave notice of monitoring),[60] including government email accounts breached by routine operations of system administrators.[61]

For comparison, the United States Court of Appeals for the Sixth Circuit considered a case where the government used the SCA's subpoena and court-order process to compel email messages from a suspect's internet service provider (ISP).[62] In *United States v. Warshak*, the Sixth Circuit held that "a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP,'" and "to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional."[63] Together, this precedent reasonably indicates that Fourth Amendment protections extend to the data associated with virtual assistants.

The Supreme Court's emphasis on the nature of private information at issue in *Carpenter* and *Riley* signal that nearly all data collected from virtual assistants should be categorized as "content" that will require a warrant (under RCM 703A(b)) in the absence of exigent circumstances.[64] A side benefit of using the warrant process is that distinctions between ECS, RCS, and the length of storage no longer matter, since the probable cause standard is sufficient to compel all content.[65] Two types of data—subscriber information and some types of transaction history—can still likely be obtained without a warrant[66] (and may assist in the development of probable cause), but this type of data will rarely be the collection priority for investigators needing access to data gathered by virtual assistants, as was the case for prosecutors seeking recordings in *Arkansas v. Bates.* Moreover, the First Amendment litigation in *Arkansas v. Bates* highlights another potential hurdle for trial counsel.

First Amendment Implications

Recent cases indicate that digital service providers are fiercely litigating production of content gathered by virtual assistants,[67] primarily on First Amendment grounds.[68] Apart from obscenity precedent,[69] there is little case law on the digital cross-sections of the First and Fourth Amendments. Instructively, the 1970 case of *Zurcher v. Stanford Daily* gave the Supreme Court occasion to consider a suit against the government for executing a warrant to seize film and negatives from a university newspaper to identify protestors involved in assaults on police officers.[70] Students and newspaper staff argued that a subpoena *duces tecum* was less intrusive of First Amendment privacy rights and ought to have precluded execution of the warrant.[71] But the Supreme Court rejected the argument, stating:

> The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena *duces tecum*, whether on the theory that the latter is a less intrusive alternative or otherwise.[72]

The Supreme Court also rejected the notion that there are "additional factors derived from the First Amendment" that should be considered to justify the use of a warrant.[73] Rather, "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'"[74] A warrant's exactitude, including the requirement of particularity, should "leave as little as possible to the discretion or whim of the officer in the field."[75]

Consistent with this standard, CAAF rejected First Amendment challenges for two warrants concerning the seizure of obscene material. In *United States v. Allen*, the court considered challenges to a warrant executed at the accused's off-base residence and said that "[t]here is no requirement for a higher standard of probable cause for material protected by the First Amendment; a showing that there is a fair probability that the material sought is obscene is sufficient."[76] Similarly, in *United States v. Monroe*, the court upheld a warrant to search for obscene material in the suspect's dormitory room on Osan Air Base, Korea, stating that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally."[77]

Notwithstanding this precedent, digital service providers for virtual assistants continue to urge an expansion of First Amendment protections, as illustrated in *Arkansas v. Bates*. In that case, Amazon moved to quash the warrant's demands for "electronic data in the form of audio recordings, transcribed records, text records, and other data contained on an Amazon Echo device."[78] In its motion, Amazon asserted independent privacy rights on its own behalf as well as that of the suspect/customer, stating that the government was seeking information "that may include expressive content protected by the First Amendment."[79] Amazon argued that the warrant was invalid because the government was obligated (but failed) to "make a heightened showing of relevance and need for any recordings," by meeting a *compelling interest test.*[80] Specifically, the compelling interest test would require the government to demonstrate "1) a compelling need for the information sought, including that it is not available from other

sources; and 2) a sufficient nexus between the information and the subject of the criminal investigation."[81] Amazon further asked that, in the event the court ruled that the government had presented a *prima facie* showing for the compelling interest test, the court conduct an in camera review of the information to determine if the "heightened standard for disclosure has been satisfied."[82] In support of this argument, Amazon cited the following cases.

First, in *Amazon.com LLC v. Lay*, the North Carolina Department of Revenue (DOR) issued a subpoena for information linking Amazon sales to specific customers in North Carolina for purposes of tax investigation.[83] The court applied the compelling interest test (outlined by Amazon's motion above) and ruled that the subpoena violated customers' First Amendment rights and the Video Privacy Protection Act.[84] Second, in *In re Grand Jury Subpoena to Amazon.com dated August 7, 2006*, the court applied the compelling interest test for a grand jury subpoena and modified an order seeking identification of potential book buyers as witnesses to prove tax evasion and fraud by a used bookseller.[85] Third, the court applied the compelling interest test and quashed a grand jury subpoena seeking customer names of potentially obscene video purchases in *In re Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461*.[86]

Fourth, in *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, Special Prosecutor Kenneth Starr subpoenaed a list of Monica Lewinsky's book purchases, and both she and the booksellers moved to quash.[87] The court found that, because the subpoena chilled both Ms. Lewinsky's and the bookseller's First Amendment rights, the Independent Counsel must show, ex parte, "a compelling need for the information," and "a sufficient connection between the information sought and the grand jury investigation."[88]

Fifth, Amazon relied on *Tattered Cover, Inc. v. City of Thornton*, where the Supreme Court of Colorado invalidated, on state constitutional grounds, a local warrant seeking purchase information for a suspect's "how to" books on drug manufacturing.[89] The *Tattered Cover* court acknowledged that the warrant would likely be valid under *Zurcher* but chose to apply the compelling interest test from *Kramerbooks* under the authority of state law.[90] Sixth, and finally, Amazon cited (and attached) a warrant from a state homicide investigation in Florida wherein the court followed state law and applied a compelling interest test:

> [F]inding that the requested information includes expressive content and private information protected by the First Amendment, the Florida Constitution, and the Video Privacy Protection Act of 1988, and that a heightened showing of relevance and need must be made before issuing the Search Warrant, and having found that a compelling need does exist only for the requested information identified by this Court in the Affidavit, a substantial nexus is demonstrated between the information identified by this Court in the Affidavit and the subject of the criminal investigation; and the State of Florida has exhausted all other avenues to obtain the information in ways that do not burden First Amendment rights, a Search Warrant is hereby allowed.[91]

Although *Arkansas v. Bates* ended with the suspect's capitulation and Amazon's subsequent withdrawal of its motion to quash,[92] the tech giant continues to litigate its privacy interests in active cases.[93] Thus, if the prosecution desires to avoid needless litigation—as in the case where a search warrant seeks data collected in the United States at an off-base residence—such warrant requests should comply with the compelling interest test outlined previously. The following planning guidance offers methodology for incorporating appropriate legal standards into working products.

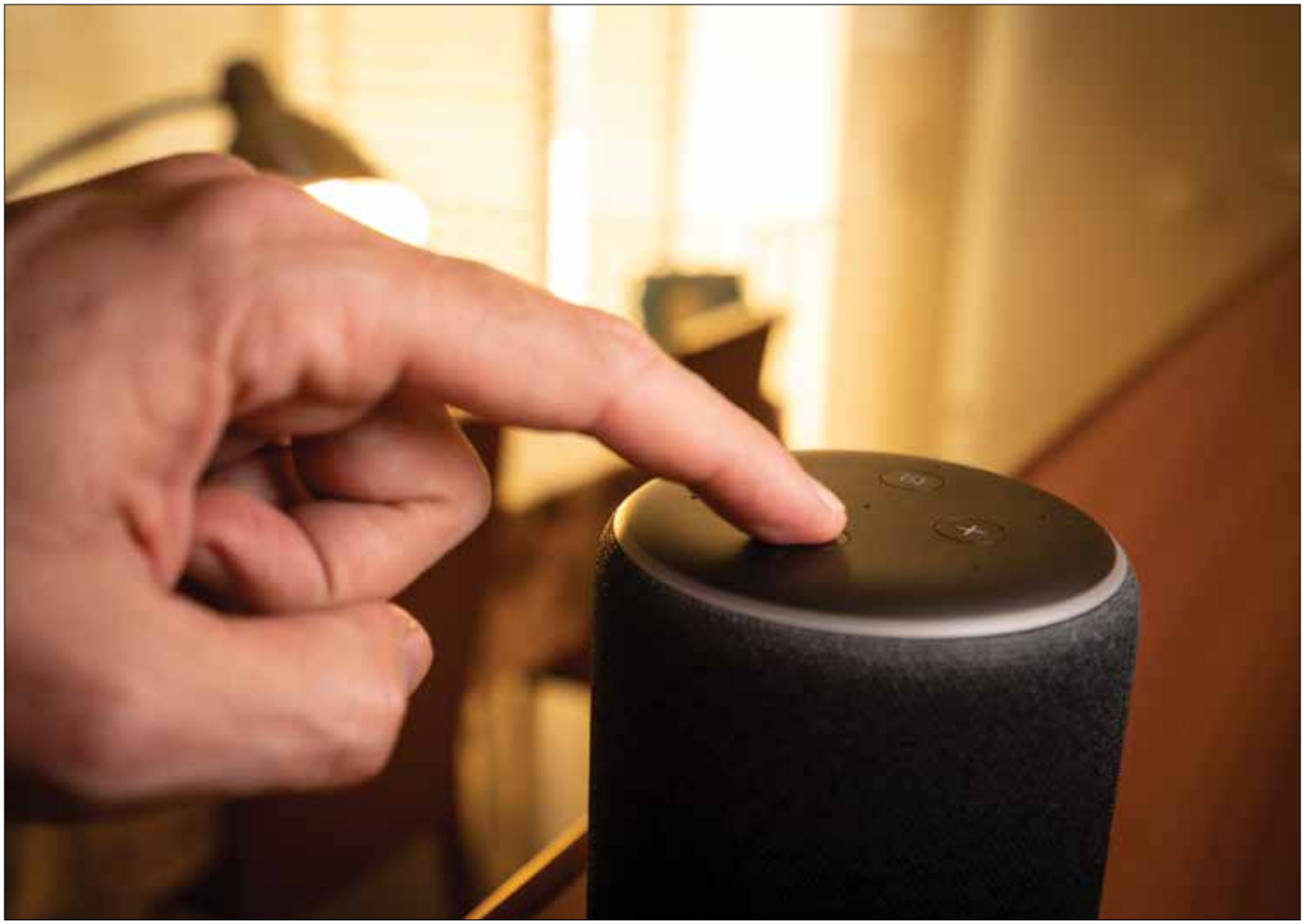
(Credit: Karneg – stock.adobe.com)

Planning Guidance

To assist in the data acquisition process, the practitioner should refer to Army Regulation (AR) 27-10, *Military Justice*,[94] Article 46 of the Uniform Code of Military Justice (UCMJ), and RCMs 309, 703, and 703A. The following discussion on 1) affidavits, 2) warrant requests, 3) post-warrant matters, and 4) trial usage, provides an overview of the process indicated by those sources.

The Affidavit

The first challenge is to determine what data is available. This is a difficult question to answer for many reasons, including the proprietary interests of digital service providers, and the internal compartmentation of their own system knowledge.[95] Government[96] and public organizations[97] help to fill this knowledge gap with sharing, consultation, and training. An obvious example of evidence available from virtual assistants is audio recordings (even accidental) from a relevant time period;[98] but investigators are



(Credit: tanaonte – stock.adobe.com)

realizing other opportunities—as in a recent investigation of a double-homicide investigation, in which police wanted to confirm a suspect's presence by collecting data on which cellular devices were paired with a virtual assistant at the time of death.[99] Research, networking, and expert consultation (including consultation with the digital service provider itself), will help determine what data exists.

Once the trial counsel is aware of the available data and the need for a warrant, they should consult with investigators, judge advocates, and disposition authorities concerned in the investigation.[100] Based on that consultation, the trial counsel will assist the investigators in preparing a probable cause affidavit,[101] which will be an attachment to DD Form 3057, *Application for Search and Seizure Warrant Pursuant to 18 U.S.C. § 2703.*[102] In line with *Zurcher* and *Tattered Cover*, the affidavit should emphasize the compelling need for sensitive information, the narrow scope of the request, and the lack of alternate sources.[103]

The Warrant Request

In tandem with the affidavit, the trial counsel must draft the warrant request in DD Form 3057 and describe with *scrupulously* exact particularity the type of data to be seized.[104] The method of particularity depends on the type of data, and the request should limit data to exclude categories of irrelevant information where possible, such as the titles of expressive material like podcasts, videos, music, or audio books.[105] In the event that the warrant is seeking particularly sensitive data, such as medical information or the content of expressive material, the trial counsel may request that the returns be submitted directly to the military judge for in camera inspection and relevance determination.[106] Usually, the trial counsel should include a no-notice or delayed notice provision in the warrant request, citing SCA authority.[107] When requesting no-notice or delayed notice, the request should include a justification of reasonably foreseeable "adverse" results if notice is given.[108]

If the case is in the pre-referral stage, the trial counsel should follow RCM 309 procedures in drafting and sending the warrant request, affidavit, and supporting evidence—via an ex parte email—to the military judge[109] with docket jurisdiction over the investigation.[110] Throughout the application process, it is the trial counsel's responsibility to correspond with the military judge for any requirements, such as requests for additional information or evidentiary reviews.[111] To the maximum ex-

tent possible, correspondence should occur via email to preserve the record.

Post-Warrant Matters

If the military judge issues the warrant, the trial counsel will task a law enforcement officer to serve the warrant on the appropriate recipient;[112] and, when the recipient delivers the information, the trial counsel will then document the return on the warrant and email an inventory of received items to the military judge.[113] In the event that the return is delivered to the military judge for in camera inspection, the trial counsel should document the receipt of sealed material and update the record once information is released. To protect item content from unnecessary exposure and litigation, the inventory should not include any indication of specific content.[114] All the records from the RCM 309 process (which should ideally consist only of email correspondence and attachments) must be maintained by the trial counsel[115] and submitted to the trial judge for inclusion in the record of trial if there is a resulting referral.[116] The trial counsel must also deliver a copy of the RCM 309 proceedings to the military commander who has jurisdiction over the investigation and subjects.[117] Importantly, upon expiration of any delayed notice provision, the trial counsel must ensure that the virtual assistant customer receives notice of the search consistent with RCM 703A(d)(3).

At Trial

The trial admission of data from virtual assistants has not been directly tested in military appellate courts. In one instructive case, *United States v. Lubich*, CAAF had occasion to consider the admission of user data extracted from electronic information stored on a government account.[118] In *Lubich*, the defense objected to a lack of confrontation and lack of authenticity under Military Rule of Evidence (MRE) 901, because the testifying agent could not give detailed information on the "collection processes" that allowed technicians to capture and copy visited websites (and username and password data) to a compact disc.[119] The Court of Appeals for the Armed Forces rejected the defense arguments and found that the information was properly authenticated under MRE 901, and the defense arguments went to the weight of the evidence rather than its admissibility.[120] Importantly, the court noted that "[i]f a computer processes data rather than merely storing it, authentication issues may arise."[121]

It is likely that this type of data use in litigation will eventually become commonplace. Until that happens, the military practitioner can use the information outlined in this article to confidently pursue vital evidence captured by virtual assistants.

In contrast, the United States District Court for the Ninth Circuit has evaluated foundation and authenticity questions in a bankruptcy suit involving electronic business records, and approved the trial judge's refusal to admit electronically generated billing statements.[122] The Ninth Circuit adopted an eleven-part test for authenticating electronic records.[123] Elaborating on the fourth step ("built-in safeguards to ensure accuracy and identify errors"), the court said that it should include "details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup practices, and audit procedures to assure the continuing integrity of the records."[124] Two years later, in *Lorraine v. Markel American Insurance Co.*, the United States District Court of Maryland considered a civil suit involving the question of admissibility of electronically stored information (ESI) and suggested that other courts "might not be so demanding" as the Ninth Circuit.[125] Instead, the *Lorraine* court suggested the following framework:

> Whenever ESI is offered as evidence, either at trial or in summary judgment, the following evidence rules must be considered: (1) is the ESI relevant as determined by Rule 401 (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be); (2) if relevant under 401, is it authentic as required by Rule 901(a) (can the proponent show that the ESI is what it purports to be); (3) if the ESI is offered for its substantive truth, is it hearsay as defined by Rule 801, and if so, is it covered by an applicable exception (Rules 803, 804 and 807); (4) is the form of the ESI that is being offered as evidence an original or duplicate under the original writing rule, [or] if not, is there admissible secondary evidence to prove the content of the ESI (Rules 1001–1008); and (5) is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or one of the other factors identified by Rule 403, such that it should be excluded despite its relevance.[126]

Ultimately, *Lorraine* found that both parties had failed to establish the authenticity of their respective evidence,[127] but the lengthy analysis and supporting citations are a helpful case study for the proponent of data taken from the cloud. Importantly, with the proper method of authentication, a motion *in limine* could save the prosecution the trouble of calling a foundational witness.[128] Using this guidance, the military practitioner is empowered to successfully introduce the hard-fought evidence at trial and protect the interests of justice.

Conclusion

Generally, the collection and use of criminal evidence is a familiar pattern for experienced litigators. Yet, there is always a first time for everything—as is the case for criminal evidence generated by virtual assistants in military trials. It is likely that this type of data use in litigation will eventually become commonplace. Until that happens, the military practitioner can use the information outlined in this article to confidently pursue vital evidence captured by virtual

assistants. In a rapidly developing case, the practitioner can act quickly to preserve data and confidently construct legal documents to compel its swift production, while avoiding unnecessary litigation risks. Once the evidence is collected, practitioners can build a strategy for trial use around existing case law that minimizes the likelihood of successful challenge—both at the trial and appellate stage. Much more remains to be settled at the intersection of criminal law and the IoT, but this article may temporarily ease the navigation of that crossroads. **TAL**

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Notes

1. Holly Kathleen Hall, Arkansas v. Bates*: Reconsidering the Limits of a Reasonable Expectation of Privacy*, 6 U. Balt. J. Media L. & Ethics 22, 25–26 (2017).

2. *Internet of Things*, Wikipedia, https://en.wikipedia.org/wiki/Internet_of_things (last visited May 20, 2021) (results of author's voice query on iPhone 8, Siri function).

3. Ryan Haines, *Best Alexa-Compatible Devices for Your Home: Our Top 12*, Android Authority (Apr. 7, 2021), https://www.androidauthority.com/best-alexa-devices-953301/; Kate Kuzoch, *The Best Google Home Compatible Devices in 2021*, Tom's Guide (May 3, 2021), https://www.tomsguide.com/best-picks/google-home-compatible-devices; Brad Stephenson, *The 7 Best Smart Clothes of 2021*, Lifewire, https://www.lifewire.com/best-smart-clothes-4176104 (Jan. 4, 2021); Paige Leskin, *The Most Bizarre Things That Work with Amazon Alexa, from a Twerking Teddy Bear to a Smart Toilet*, Bus. Insider (Oct. 1, 2019, 12:31 PM), https://www.businessinsider.com/amazon-echo-alexa-enabled-products-devices-most-interesting-weirdest-bizarre-2019-8.

4. Bernadette Johnson, *How Amazon Echo Works*, How Stuff Works, https://electronics.howstuffworks.com/gadgets/high-tech-gadgets/amazon-echo.htm (last visited May 26, 2021) ("Echo connects to the Internet via your home WiFi network. It's always on and listening for the magic word to wake it up. Once it hears that, the device gathers the voice commands that follow and sends them to a natural voice recognition service in the cloud called Alexa Voice Service, which interprets them and sends back the appropriate response."). *See also* Peggy Keene, *Are You OK?: Amazon Files New Patent to Detect Emotions,* 82 Tex. Bar J. 492 (2019) (discussing Amazon's new patent for Alexa Echo's emotion and accent detection skills).

5. Johnson, *supra* note 4 (noting the ability to mute the device). *See also* Allegra Bianchini, *Always on, Always Listening: Navigating Fourth Amendment Rights in a Smart Home*, 86 Geo. Wash. L. Rev. Arguendo 1, 6 (2018).

6. *But see* Hyunji Chung et al., *Digital Forensic Approaches for Amazon Alexa Ecosystem*, 22 Digit. Investigation S15–S25 (2017) (presentation on forensic study of Alexa Echo devices, noting certain models' memory capacity and successful extraction of stored data).

7. Bianchini, *supra* note 5, at 6–7.

8. *See* Anna Karapetyan, *Developing a Balanced Privacy Framework*, 27 S. Cal. Rev. L. & Soc. Just. 197, 199 (2018) ("The rapid and continuous integration of voice assistants and their millions of embedded sensors into everyday appliances has resulted in the collection of an unprecedented amount of data. This digital universe doubles in size nearly every two years, and by 2020 is predicted to contain as many bits of data 'as there are stars in the universe.'" (quoting Dell EMC, The Digital Universe of Opportunities: Rich Data and the Increasing Value of the Internet of Things 2 (Apr. 2014), https://www.iotjournaal.nl/wp-content/uploads/2017/01/idc-digital-universe-2014.pdf)).

9. Jordan P. Shuber, *"Hey Alexa . . . Are You Discoverable Evidence?,"* Strassburger McKenna Gutnick & Gefsky (Feb. 27, 2017), https://www.smgglaw.com/blog/hey-alexaare-you-discoverable-evidence.

10. Arkansas v. Bates, Case No. CR-2016-370-2 (Ark. Cir.).

11. This primer does not address intercepted communications regulated by federal wiretap statute (see 18 U.S.C. §§ 2510–2523), nor does it address specific collection and use of devices in the IoT beyond virtual assistants.

12. *But see* George Steer, *Judge Says Amazon Must Hand Over Echo Recordings in Stabbing Case*, Time (Nov. 12, 2018, 10:28 AM), https://time.com/5451863/amazon-echo-stabbing/ (quoting the court order: "'The court directs Amazon.com to produce forthwith to the court any recordings made by an Echo smart speaker with Alexa voice command capability . . . as well as any information identifying cellular devices that were paired to that smart speaker during that time period,' the statement read."); J. Fingas, *Florida Police Obtain Alexa Recordings in Murder Investigation: This Time, Though, Officers Are More Realistic About What They May Find*, Engadget (Nov. 2, 2019), https://www.engadget.com/2019-11-02-florida-police-obtain-alexa-recordings-in-murder-case.html ("Investigators want to know if the smart speakers inadvertently picked up audio of a July altercation between Adam Crespo and his wife Silvia Crespo. She died of a spear wound to the chest; Adam maintained that it was the result of an accident.").

13. Affidavit for Search Warrant (June 28, 2016) at 5–6, Arkansas v. Bates, Case No. CR-2016-370-2 (on file with author) (noting that the device was networked to other devices in the home; that it was capable of being remotely controlled through Bates's cell phone, or through voice commands; and that "the Echo is equipped with sensors that use beam-forming technology to hear users from any direction . . . even while the device is playing music or if there is background noise.").

14. Shuber, *supra* note 9.

15. Colin Dwyer, *Arkansas Prosecutors Drop Murder Case That Hinged On Evidence From Amazon Echo*, NPR, (Nov. 29, 2017, 5:42 PM), https://www.npr.org/sections/thetwo-way/2017/11/29/567305812/arkansas-prosecutors-drop-murder-case-that-hinged-on-evidence-from-amazon-echo; *see also* Affidavit for Search Warrant (June 28, 2016), *supra* note 13 (investigators speculated that the Alexa Echo "records any command, inquiry, or verbal gesture . . . *possibly at all times without the 'wake word' being issued*;" but the speculation appears to be unproven). *Cf.* Chung et al., *supra* note 6 (noting possible data retention from the device's on-board memory); Steer, *supra* note 12 (citing a judicial order for "any recordings"); Fingas, *supra* note 12 (noting prosecutor's "realistic" hope that the device might have been "accidentally activated").

16. *See* Steer, *supra* note 12; Fingas, *supra* note 12.

17. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant at 5, Arkansas v. Bates, No. CR-2016-370-2 ("Customers have the ability to listen to their voice recordings, view transcripts of those recordings, and delete any or all past recordings.").

18. Manual for Courts-Martial, United States, Rule for Courts-Martial 703A(f) (2019) [hereinafter MCM].

19. 18 U.S.C. § 2703(f) ("(1) In general—A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process. (2) . . . Records referred to in paragraph (1) shall be retained for a period of ninety days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.").

20. Telephone interview with James Emerson, Vice President, Nat'l White Collar Crime Ctr. (Mar. 18, 2020) (discussing digital service providers' general complaints about incorrect terminology in evidentiary requests, but hesitance to assist in perfecting such requests).

21. Telephone interview with Captain John Shirts, Cir. Trial Couns.–W. Cir., U.S. A.F. Reserve (Mar. 19, 2020) (noting the importance of broadly preserving evidence in the early stages of a case).

22. *See Google Support: Transparency Report Help Center*, https://support.google.com/transparencyreport/answer/9713961?hl=en&visit_id=637209102720134468-2568071530&rd=1 (last visited May 26, 2021) (discussing public reports in relation to preservation requests and noting that "[w]e report the number of preservation requests received, but we do not include preservation requests in the total number of user data disclosures because we don't disclose any user information in response to a preservation request. If a government agency does come back with a legal order to disclose preserved information, we account for those disclosures in the appropriate legal process category."); *see also Amazon Law Enforcement Guidelines*, Amazon, https://d1.awsstatic.com/certifications/Amazon_LawEnforcement_Guidelines.pdf (last visited May 26, 2021) ("Unless it is prohibited from doing so or has clear indication of illegal conduct in connection with the use of Amazon products or services, Amazon notifies customers before disclosing content information."); *cf. Google, Inc. (DBA Gmail.com) Subpoena Compliance Contact*, Epic.org, https://epic.org/privacy/ecpa/EPIC-16-06-15-SEC-FOIA-20170720-Appeal-production1.pdf (last visited May 26, 2021) ("At Google's request, please include the following language in any subpeona [sic]: 'Please do not disclose/notify the user of the issuance of this subpoena. Disclosure to the user could impede an investigation or obstruct justice.'").

23. United States v. Warshak, 631 F.3d 266, 283 (6th Cir. 2010) ("Per the government's instructions, Warshak was not informed that his messages were being archived.").

24. *Id.* at 283, 283 n.14 ("In October 2004, the government formally requested that NuVox prospectively preserve the contents of any emails to or from War-

shak's email account. The request was made pursuant to 18 U.S.C. § 2703(f) and it instructed NuVox to preserve all future messages. . . . Warshak appears to have accessed emails from his NuVox account via POP, or 'Post Office Protocol.' When POP is utilized, emails are downloaded to the user's personal computer and generally deleted from the ISP's server. . . . NuVox acceded to the government's request and began preserving copies of Warshak's incoming and outgoing emails—copies that would not have existed absent the prospective preservation request.").

25. *Id.* at 283. *Cf. Google Support*, *supra* note 22 (discussing preservation requests and noting that "[p]reservation requests only apply to information that Google has at the time of the request, not information that may be generated in the future.").

26. 18 U.S.C. § 2707(e); *cf.* MCM, *supra* note 18, R.C.M. 703A(e) ("As provided under 18 U.S.C. § 2703(e), no cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a warrant or order under this rule.").

27. *Amazon Law Enforcement Guidelines*, *supra* note 22 ("Amazon does not accept service of subpoenas, search warrants, or other legal process except through Amazon Law Enforcement Request Tracker ("ALERT"). . . . Legal process must be served by uploading the appropriate documentation through ALERT.").

28. The central email is USLawEnforcement@google.com, and the fax number is 650-249-3429. *See Google, Inc. (DBA Gmail.com) Subpoena Compliance Contact*, *supra* note 22 and accompanying text.

29. MCM, *supra* note 18, R.C.M. 703A(f)(2) (authorizing a 90-day extension, parallel to 18 U.S.C. § 2703(f)).

30. *See* UCMJ art. 46 (2016).

31. *See generally* MCM, *supra* note 18, R.C.M. 703A.

32. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2523; Stored Communications Act, 18 U.S.C. §§ 2701–2713.

33. 18 U.S.C. § 2703; *see* Military Justice Review Group, Report of the Military Justice Review Group Part I: UCMJ Recommendations 413 (22 Dec. 2015) (discussing the recommendation to adopt UCMJ amendments conforming to the SCA, and stating "[a]lthough this is an area of federal law that is currently in flux, with various appellate court decisions making proper application of the [SCA] uncertain, these amendments would ensure that military criminal investigations and courts-martial have the same access provided to state and federal investigators and courts with respect to this type of highly relevant information"); *see also* Christina Raquel, *Blue Skies Ahead: Clearing the Air for Information Privacy in the Cloud*, 55 Santa Clara L. Rev. 467, 482 (2015).

34. *See generally* UCMJ art. 46 (2016); MCM, *supra* note 18, R.C.M. 703A, 703(g)(3)(C); *see also* Raquel, *supra* note 33, at 483.

35. 18 U.S.C. § 2510(8)

36. 18 U.S.C. § 2510(15).

37. 18 U.S.C. § 2711(2).

38. Jonathan Strickland, *How Cloud Computing Works*, HowStuffWorks, https://computer.howstuffworks.com/cloud-computing/cloud-computing1.htm (last visited May 26, 2021) (discussing multi-faceted cloud computing characteristics, and noting the variety of applications, programs, and storage methods available).

39. Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1215 (2004) ("The distinction between providers of ECS and RCS is made somewhat confusing by the fact that most network service providers are multifunctional. They can act as providers of ECS in some contexts, providers of RCS in other contexts, and as neither in some contexts as well. In light of this, it is essential to recognize the functional nature of the definitions of ECS and RCS. The classifications of ECS and RCS are context sensitive: the key is the provider's role with respect to a particular copy of a particular communication, rather than the provider's status in the abstract."); Raquel, *supra* note 33, at 489 (discussing that "many cloud computing services either fluctuate between an ECS and RCS status or completely fall outside the SCA's purview" (citing William J. Robison, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1209 (2010))).

40. Kerr, *supra* note 39, at 1215; Raquel, *supra* note 33, at 489.

41. Fed. Trade Comm'n, Internet of Things: Privacy and Security in a Connected World (2015) ("[B]y intercepting and analyzing unencrypted data transmitted from a smart meter device, researchers in Germany were able to determine what television show an individual was watching." (citing Dario Carluccio & Stephan Brinkhaus, Presentation, Smart Hacking for Privacy, 28th Chaos Comm. Congress, Berlin, (Dec. 2011))).

42. Kerr, *supra* note 39, at 1218.

43. 18 U.S.C. § 2703(d); *cf.* MCM, *supra* note 18, R.C.M. 703A(c)(1)(A).

44. *See* United States v. Wuterich, 67 M.J. 63, 77 (C.A.A.F. 2008) (citations omitted) (discussing the relevant and necessary standard for subpoenas in the context of a motion to quash); *see also* Raquel, *supra* note 33, at 483.

45. United States v. Miller, 425 U.S. 435, 443 (1976) (finding no expectation of privacy in financial records held by the bank, even when the records are surrendered with an expectation for limited use); Smith v. Maryland, 442 U.S. 735, 740 (1979) (finding no expectation of privacy in records of telephone numbers help by the phone company).

46. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018).

47. *See* 18 U.S.C. § 2703(d) (providing for the collection of digital information from an RCS via court order if the government "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents . . . are relevant and material to an ongoing criminal investigation"); *cf.* MCM, *supra* note 18, R.C.M. 703A(c) (containing nearly identical authority allowing the government to collect digital information from an RCS if the order "offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation").

48. *Carpenter*, 138 S. Ct. at 2212–13, 2223 (explaining that "if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances.").

49. *Id.* at 2217, 2222.

50. *Id.* at 2223 (emphasis added).

51. Riley v. California, 573 U.S. 373, 386 (2014).

52. *Id.* at 394 (emphasis added).

53. *Id.* at 394–97, 401 (citations omitted) ("Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.").

54. Sarah Murphy, *Watt Now: Smart Meter Data Post-*Carpenter, 60 B.C. L. Rev. 785, 811 (2020) (citations omitted) ("Every appliance in a person's home has an electric load signature that is unique to that appliance. By comparing smart meter data and electric load signatures, it is possible to identify what appliances a person is using at a given time. If this data is aggregated over time, it could reveal a person's daily home life. For example, smart meter data could show that a person is not home every Saturday morning from 0900 to 1100. It could show that a person typically goes to sleep at 1000. It could show that a person cooks dinner three times per week. If a person has visitors for the weekend, smart meter data can show that, too.").

55. Robert D. Lang & Lenore E. Benessere, *Alexa, Siri, Bixby, Google's Assistant, and Cortana Testifying in Court*, N.Y. State Bar Ass'n J., Nov./Dec. 2017, at 9–10.

56. *See* Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 Cal. L. Rev. 805, 863 (2016) ("In the context of the Internet of Things, the right to be secure offers a compelling justification about why the data and signals should be protected against governmental intrusion. The data at issue is largely private, encompassing sensitive home, personal, travel, and health information among other things. The data trails reveal private patterns and information. Even individualized data points—a single device monitored over time—invades a sense of personal autonomy."). *See also* Karapetyan, *supra* note 8, at 199.

57. United States v. Langhorne, 77 M.J. 547, 555 (C.A.A.F. 2017).

58. *Id.* (citations omitted).

59. United States v. Maxwell, 45 M.J. 406, 418 (C.A.A.F. 1996).

60. United States v. Larson, 66 M.J. 212, 219–20 (C.A.A.F. 2008) (finding that the accused "fails to rebut and overcome the presumption that he had no reasonable expectation of privacy in the government computer provided to him for official use"); *cf.* United States v. Long, 64 M.J. 57, 63-65 (C.A.A.F. 2006) (emphasizing the fact-specific holding and stating "[t]he totality of the circumstances in this case leads us to conclude that . . . Appellee's expectation of privacy was objectively reasonable. . . . If [the system administrator] had been doing the monitoring described in the log-on banner when he came across Appellee's incriminating e-mails, this case would . . . [present] a different analytic framework and potentially a different result.").

61. United States v. Monroe, 52 M.J. 326, 330 (C.A.A.F. 2000) ("In this case, the system was owned by the Government and instead of a contractual agreement not to read or disclose messages, there was

a specific notice that 'users logging on to this system consent to monitoring by the Hostadm [sic].'").

62. United States v. Warshak, 631 F.3d 266, 288 (2010).

63. *Id.* (citations omitted) ("The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of Warshak's emails.").

64. *See* Murphy, *supra* note 54, at 788–89 (noting that courts used to find that collection of utility data was not a search under third party doctrine, but "*Carpenter* effectively limited the blanket application of the third-party doctrine and required a case-by-case evaluation"); U.S. Dep't of Army, Reg. 27-10, Military Justice paras. 5-15–5-19 (20 Nov. 2020) [hereinafter AR 27-10] (directing trial counsel to obtain a warrant to compel the "content" of electronic communications); *Law Enforcement Information Requests*, Amazon, https://www.amazon.com/gp/help/customer/display.html?nodeId=GYSDRGWQ2C2CRYEF (last visited May 26, 2021) ("We have repeatedly challenged government demands for customer information that we believed were overbroad. . . . We also advocate . . . to require law enforcement to obtain a search warrant from a court to get the content of customer communications.").

65. *See* 18 U.S.C. § 2703.

66. *See* Carpenter v. United States, 138 S. Ct. 2206, 2222 (2018) (distinguishing CSLI from other types of business records, stating "[t]his is certainly not to say that all orders compelling the production of documents will require a showing of probable cause. The Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations. We hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."). *See also* United States v. Ohnesorge, 60 M.J. 946, 949 (N-M. Ct. Crim. App. 2005) (finding no reasonable expectation of privacy in subscriber data surrendered to the government from a commercial web site); United States v. Felton, 367 F.Supp. 3d 569, 575 (W.D. La. 2019) (distinguishing *Carpenter*, and upholding FBI subpoena of subscriber data linked to IP address that was using a U.S. Postal Service website to track drug shipments).

67. Meagan Flynn, *Police Think Alexa May Have Witnessed a New Hampshire Double Homicide. Now They Want Amazon to Turn Her Over*, Wash. Post (Nov. 14, 2018, 7:28 AM), https://www.washingtonpost.com/nation/2018/11/14/police-think-alexa-may-have-witnessed-new-hampshire-double-slaying-now-they-want-amazon-turn-her-over/ (reporting that, despite a judicial order, "an Amazon spokesman indicated that Amazon wouldn't be turning over the data so easily, appearing to prioritize consumer privacy as it has done in the past").

68. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant, *supra* note 17, at 9–10 (stating the First Amendment argument as follows: "The recordings stored by Amazon . . . will usually be both (1) the user's speech . . . and (2) a transcript or depiction of the Alexa Voice Service response . . . the First Amendment protects not only an individual's right to speak, but also his or her 'right to receive information and ideas.' (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969), citing Griswold v. Connecticut, 381 U.S. 479, 482 (1965)) At the heart of the First Amendment protection is the right to browse and purchase expressive materials anonymously, without fear of government discovery. (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); Lamont v. Postmaster Gen., 381 U.S. 301, 307 (1965))").

69. *See* New York v. P.J. Video Inc., 475 U.S. 868, 875 (1986) (in the context of a warrant to seize allegedly obscene material, the Court rejected "any suggestion that the standard of probable cause in the First Amendment area is different than in other contexts," and holding "that an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally." (citations omitted)).

70. Zurcher v. Standard Daily, 436 U.S. 547, 563 (1970).

71. *Id.*

72. *Id.* at 559.

73. *Id.* at 563.

74. *Id.* at 564–65 (citing Stanford v. Texas, 379 U.S. 476, 485 (1965)) ("Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.").

75. *Id.* at 564 ("'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.'" (quoting Roaden v. Kentucky, 413 U.S. 496, 501 (1973))).

76. United States v. Allen, 53 M.J. 402, 407 (C.A.A.F. 2000) (citing New York v. P.J. Video Inc., 475 U.S. 868, 868 (1986)).

77. United States v. Monroe, 52 M.J. 326, 330 (C.A.A.F. 2000) (quoting *P.J. Video Inc.*, 475 U.S. at 875).

78. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant, *supra* note 17, at 6–7, Ex. A-1 at 38-39 (noting Amazon compliance with the preservation order and partial compliance with the warrant demands by turning over Bates's subscriber data and purchase history).

79. *Id.* at 2.

80. *Id.*

81. *Id.*

82. *Id.* at 3.

83. Amazon.com LLC v. Lay, 758 F. Supp. 2d 1154, 1167–69 (W.D. Wash. 2010).

84. *Id.* at 1168–69.

85. *In re* Grand Jury Subpoena to Amazon.com dated August 7, 2006, 246 F.R.D. 570, 572–74 (W.D. Wis. 2007) ("Amazon, however, has a legitimate concern that honoring the instant subpoena would chill online purchases by Amazon customers. This First Amendment concern is a factor for the court to consider . . . . So, although no Supreme Court precedent yet has required the government to pass a test of substantial relation or compelling need, I have required the government to explain the grand jury's investigative need for the identities of people who purchased used books . . . . [A]t this juncture (and perhaps at every juncture), the government is not entitled to unfettered access to the identities of even a small sample of this group of book buyers.").

86. *In re* Grand Jury Investigation of Possible Violation of 18 U.S.C. § 1461, 706 F.Supp. 2d 11, 18–19 (D.D.C. 2009) ("Therefore, the United States may only obtain the records if it demonstrates a compelling need for them and a sufficient nexus between the records and the grand jury's investigation, or if it shows that they are not entitled to the protection of the First Amendment, which it has not attempted to do.").

87. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant, *supra* note 17, at Ex. 1 (*In re* Grand Jury Subpoena to Kramerbooks & Afterwards Inc., 26 Med. L. Rptr. 1599 (D.D.C. 1998)).

88. *In re* Grand Jury Subpoena to Kramerbooks & Afterwards Inc., 26 Med. L. Rptr. 1599, 1601 (D.D.C. 1998).

89. Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1056 (Colo. 2002) (en banc) ("[W]e find the protections afforded to fundamental expressive rights by federal law, under the above interpretation of *Zurcher*, to be inadequate. We turn to our Colorado Constitution, which we now hold requires a more substantial justification from the government than is required by the Fourth Amendment of the United States Constitution when law enforcement officials attempt to use a search warrant to obtain an innocent, third-party bookstore's customer purchase records.").

90. *Id.* at 1059 ("[W]e hold that our state constitution requires that the government, when it seeks to use a search warrant to discover customer book purchase records from an innocent, third-party bookstore, must demonstrate that it has a compelling need for the information sought. In determining whether law enforcement officials have met this standard, the court may consider various factors including whether there are reasonable alternative means of satisfying the asserted need and whether the search warrant is overly broad. The court must then balance the law enforcement officials' need for the bookstore record against the harm caused to constitutional interests by execution of the search warrant. This harm likely will be minimal if the law enforcement officials' reasons for wanting the book purchase record are entirely unrelated to the contents of the books.").

91. Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant, *supra* note 17, at Ex. 2 (Search Warrant: State of Florida, County of Pinellas, dated March 7, 2013).

92. Dwyer, *supra* note 15.

93. Steer, *supra* note 12; *see also Law Enforcement Information Requests*, *supra* note 64 ("Amazon does not disclose customer information in response to government demands unless we're required to do so to comply with a legally valid and binding order.").

94. AR 27-10, *supra* note 64, paras. 5-15–5-19.

95. Emerson, *supra* note 20 (noting that descriptions of available data and capabilities within the cloud or on a device often vary significantly depending on which programmers or system designers are consulted, and they typically lack overarching knowledge of system capabilities or even specific capabilities that are not interrelated to their specialties).

96. *See Office of Justice Programs—Bureau of Justice Assistance (BJA)*, U.S. Dep't of Just., https://www.ojp.gov/about/offices/bureau-justice-assistance-bja (last visited May 26, 2021) (the "Bureau of Justice Assistance . . . provides leadership and assistance to local

criminal justice programs that improve and reinforce the nation's criminal justice system"); *Office of Justice Programs—National Institute of Justice (NIJ)*, U.S. Dep't of Just., https://www.ojp.gov/about/offices/national-institute-justice-nij (last visited May 26, 2021) (the "National Institute of Justice . . . provides objective, independent, evidence-based knowledge and tools to meet the challenge of criminal justice, particularly at local and state levels . . . [and] funds research, development, and technology assistance."); *Collaborative Reform Initiative for Technical Assistance Center*, U.S. Dep't of Just. Cmty. Oriented Policing Servs., https://cops.usdoj.gov/collaborativereform (last visited May 26, 2021) ("Technical assistance encompasses a host of methods including training, peer-to-peer consultation, analysis, coaching, and strategic planning.").

97. *See National White Collar Crime Center*, NW3C, https://www.nw3c.org/investigative-resources (last visited May 26, 2021) ("The National White Collar Crime Center provides technical assistance to law enforcement and regulatory agencies in the areas of Cybercrime, Financial Crime, Intelligence Analysis, and Intellectual Property Theft."); *Multi-State Information Sharing & Analysis Center*, Ctr. for Internet Sec., https://www.cisecurity.org/ms-isac/ (last visited May 26, 2021); Techno Sec. & Digit. Forensics Conf., https://www.technosecurity.us/ (last visited May 26, 2021) ("[O]ne of the most important resources for corporate network security professionals, federal, state and local law enforcement digital forensic specialists, and cybersecurity industry leaders from around the world. The purpose is to raise international awareness of developments, teaching, training, responsibilities, and ethics in the field of IT security and digital forensics.").

98. *See* Fingas, *supra* note 12 ("Unlike a pioneering murder case in Arkansas, Hallandale police weren't expecting a complete audio capture. The search warrant indicated that cops obtained 'Amazon Echo Recordings w/ Alexa Voice Command,' suggesting that they were only hoping that one or both of the Crespos may have inadvertently set off the Echo Dots during the incident. Outside of security exploits, there's no substantial evidence that Echo speakers record continuously—they're only supposed to capture audio in a brief window of time after someone says Alexa's wake word.").

99. *See* Steer, *supra* note 12.

100. AR 27-10, *supra* note 64, para. 5-16(f).

101. *Id.* para. 5-17(d).

102. U.S. Dep't of Def., Form 3057, Application for Search and Seizure Warrant Pursuant to 18 U.S.C. § 2703 (Mar. 2019).

103. *See* Zurcher v. Standard Daily, 436 U.S. 547, 564–65 (1970); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1059 (Colo. 2002) (en banc).

104. *See Zurcher*, 436 U.S. at 564–65.

105. There may be instances where the content of expressive material is relevant. For example, if there is a question about the presence of a child in the home, it may be relevant that Alexa is accepting voice commands to play lullabies or ABC videos on the bedroom television.

106. *See* MCM, *supra* note 18, R.C.M. 309(a)(1) ("A military judge detailed under regulations of the Secretary concerned may conduct proceedings under Article 30a before referral of charges and specifications to court-martial for trial, and may issue such rulings and orders as necessary to further the purpose of the proceedings.").

107. Interestingly, the *MCM* references delayed notice in regard to court orders, but not specifically to warrants. *But see* 18 U.S.C. § 2703(b) ("A governmental entity may require a provider . . . to disclose the contents of any wire or electronic communication . . . without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in . . . (. . . chapter 47 of title 10 (the Uniform Code of Military Justice), issued under section 846 of that title, in accordance with regulations prescribed by the President) by a court of competent jurisdiction . . . .").

108. MCM, *supra* note 18, R.C.M. 703A(d)(4) ("An adverse result . . . is—(A) endangering the life or physical safety of an individual; (B) flight from prosecution; (C) destruction of or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously jeopardizing an investigation or unduly delaying a trial.").

109. *See* MCM, *supra* note 18, R.C.M. 309(f) (prohibiting military magistrates from exercising warrant authority under R.C.M. 309(b)(2)).

110. AR 27-10, *supra* note 64, para. 5-17(e) ("Submission may be made personally or electronically to the military judge with docketing responsibility over the unit to which the trial counsel is assigned.").

111. *Id.* para. 5-17(d) ("The trial counsel will provide the military judge such information regarding the nature of the investigation as the military judge may require, including a written affidavit and/or presentation of additional evidence supporting the requested process.").

112. *Supra* notes 27–29 (outlining the service of legal process for Amazon and Google); *see also* MCM, *supra* note 18, R.C.M. 703A(g) ("As used in this rule, the term 'federal law enforcement officer' includes an employee of the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, or the Coast Guard Investigative Service, who has authority to request a search warrant.").

113. AR 27-10, *supra* note 64, para. 5-17(g) ("After receipt of relevant information based on service of the warrant the trial counsel will provide the military judge an inventory of items received without describing specific content.").

114. *See* Zurcher v. Standard Daily, 436 U.S. 547, 564–65 (1970); Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1059 (Colo. 2002) (en banc); Memorandum of Law in Support of Amazon's Motion to Quash Search Warrant, *supra* note 17, at Ex. 1 (Kramerbooks & Afterwards Inc., 26 Med. L. Rptr. 1599, 1601 (D.D.C. 1998)).)

115. AR 27-10, *supra* note 64, para. 5-18(b)(2) (noting that, apart from court proceedings under Article 30a, "[t]he trial counsel will maintain a copy of the record of a pre-referral proceeding, if any, as part of the case file for eventual filing in the [record of trial].").

116. MCM, *supra* note 18, R.C.M. 309(e) ("A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority or commander with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.").

117. *Id.*

118. United States v. Lubich, 72 M.J. 170, 175 (C.A.A.F. 2013).

119. *Id.* at 172 (quoting the trial judge: "I believe that argument goes more to the weight of the evidence, and you certainly can explore that in cross-examination. The objection is overruled. I find that both Prosecution Exhibits 19 and 23 for identification have been sufficiently authenticated and that the Confrontation Clause is not implicated because we're dealing with an automated process, no conclusions in these documents themselves and, again, it's an automated process with very little discretion involved on the part of the person that was obtaining the data." (citation omitted)).

120. *Id.* at 175; *see also* United States v. Jungklaus Dadona, 2018 WL 3241488, at *3 (A.F. Ct Crim. App. Jul. 2, 2018) (citing *Lubich*, 72 M.J. at 173, and noting that screenshots of Kik messages were properly authenticated on the testimony of the investigative agents who operated the Kik account and captured the screenshots).

121. *Lubich,* 72 M.J. at 174–75 (quoting Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 900.06[3], at 900-68 (Joseph M. McLaughlin ed., 2d ed. 2003)); *see also* Weinstein § 900.06[3] (providing further helpful discussion on authentication and foundation requirements for computer data).

122. *In re* Vee Vinhnee, 336 B.R. 437, 451 (B.A.P. 9th Cir. 2005).

123. *Id.* at 446 (stating the steps as follows: "1. The business uses a computer. 2. The computer is reliable. 3. The business has developed a procedure for inserting data into the computer. 4. The procedure has built-in safeguards to ensure accuracy and identify errors. 5. The business keeps the computer in a good state of repair. 6. The witness had the computer readout certain data. 7. The witness used the proper procedures to obtain the readout. 8. The computer was in working order at the time the witness obtained the readout. 9. The witness recognizes the exhibit as the readout. 10. The witness explains how he or she recognizes the readout. 11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact." (citing Edward J. Imwinkelried, Evidentiary Foundations § 4.03[2] (5th ed. 2002)).

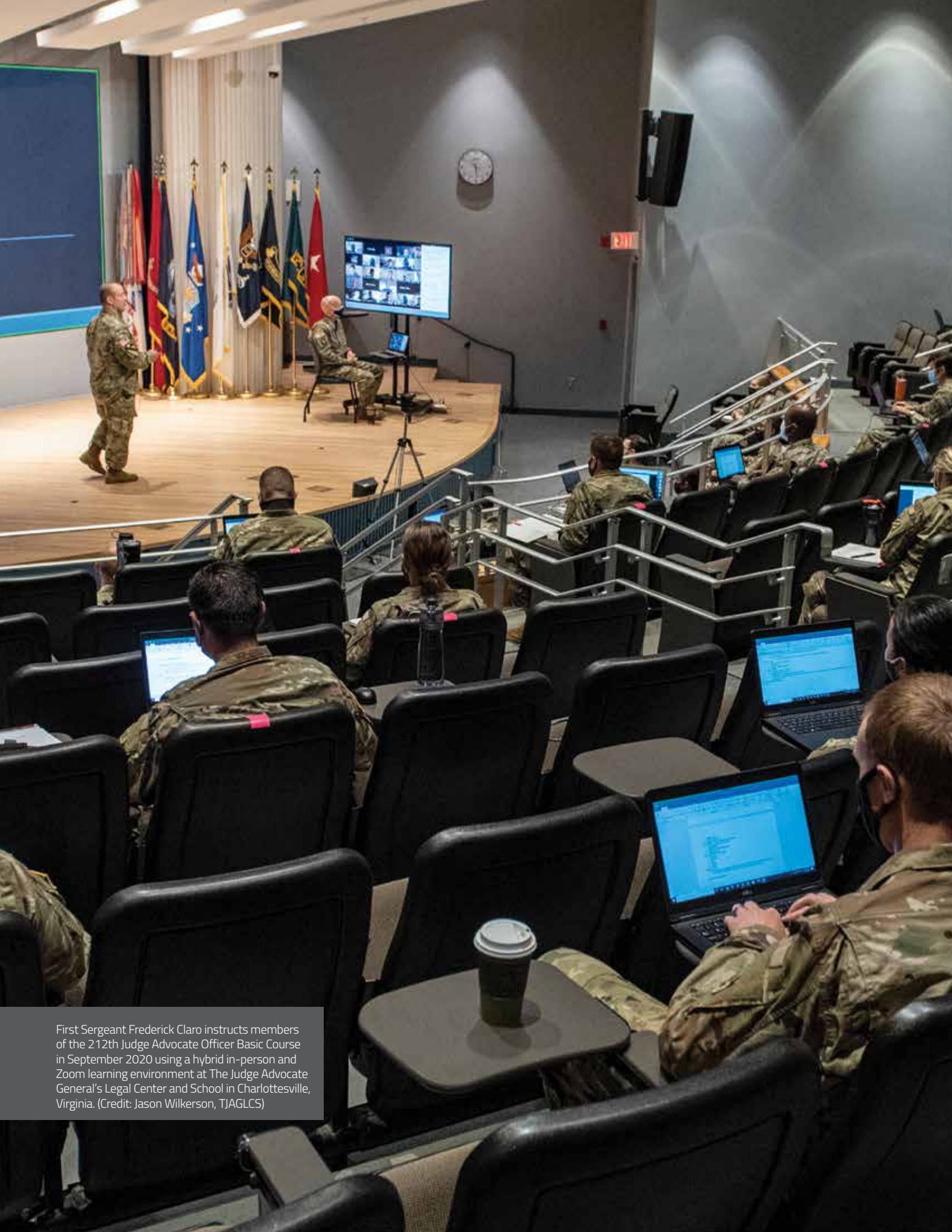
124. *Id.* at 446–47.

125. Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, n.27 (D. Md. 2007).

126. *Id.* at 538

127. *Id.* at 585.

128. *Id.* at 546–47 (discussing methods of self-authentication, and a practice of adding "hash values" and using "metadata" to authenticate electronic records).



First Sergeant Frederick Claro instructs members of the 212th Judge Advocate Officer Basic Course in September 2020 using a hybrid in-person and Zoom learning environment at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

No. 2

A Hybrid Learning Model

Best Legal Learning Practices from TJAGLCS to the Field

By Captain Evan M. FitzGerald, Lieutenant Colonel Temidayo L. Anderson, & First Lieutenant James A. D'Cruz

The Army intends to focus on the learner to strengthen and develop competencies that enable leaders to build trusted, cohesive teams capable of winning in all environments and across all domains.[1]

Education is the keystone upon which modern societies are built. With the Coronavirus Disease (COVID-19) pandemic limiting access to educational resources, developing the right educational strategy has become more important. Distance learning has become an accepted reality, one that requires the use of best practices that ensure students across the Army are able to meet their educational objectives.

The Judge Advocate General's Legal Center and School (TJAGLCS) has continued to educate leaders across the world despite the pandemic, making it an ideal proving ground for developing best practices for the U.S. military's legal community. This article discusses how TJAGLCS has continued to develop its distance-learning methodologies, the differences between passive and active learning, and the best practices derived from the experiences of the students of the 212th Judge Advocate Officer Basic Course (JAOBC) and TJAGLCS faculty. The intent of this article is to provide insight from the perspectives of the legal learner and legal faculty so that this knowledge can be applied in the field.

This article is divided into four parts. "The Army Learning Model and Active Learning" introduces the Army Learning Model and active learning. "Technology and Experiencing the TJAGLCS Hybrid Legal Learning Model" expands upon this foundation by explaining how TJAGLCS developed and applied a hybrid blended learning approach. This part concludes with two 212th JAOBC students' perspectives on this method of instruction. "A Way Ahead for Legal Learning" provides the authors' recommendations on a way ahead for legal learning. This article concludes with two appendices that provide consolidated lists of legal learning best practices for students and instructors.

The Army Learning Model and Active Learning

The goal of education in the Army is to develop both technical (job-specific) and non-technical (soft skills) competencies necessary to maintain a multifunctional force.[2] Learning is a continual process and an ongoing effort to develop skills and knowledge through experience, instruction, study, or a combination of the three.[3] Learning often takes two forms: cognitive learning (the understanding of content and development of intellect) and affective learning (understanding the emotional components of knowledge).[4] The Army applies these two learning theories through a learner-centric model, one that emphasizes context and problem-solving exercises through teacher-to student and peer-to-peer

Brigadier General Joseph Berger addresses the 69th Graduate Course about the State of the Corps in April 2021 in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

learning.[5] An analogous term for these two theories is known as active learning.

At its core, active learning seeks to engage the learner and encourage greater use of the mind.[6] This learning methodology focuses on developing critical thinking skills, teamwork, notetaking, and listening that are vital to success both in and out of an educational environment.[7] Active learning requires that learners do more than simply sit and listen, it requires that they engage with the material and demonstrate experiential learning or "learn by doing."[8]

However, legal education has not traditionally adhered to active learning tenets. Traditional legal education focuses on teaching students how to engage in "rational, logical, dispassionate analysis."[9] This learning often comes in the form of case reading, lecture, and the Socratic method.[10] Lecture, a passive learning methodology, involves the transmission of information that results in learners anxiously taking notes rather than actively engaging with the content.[11] The Socratic method assumes that students who are not directly participating in the conversation between student and instructor are actively engaged, even though effective legal learning is not a "spectator sport."[12] These passive learning approaches limit the learner's opportunity to gain the necessary experience and problem-solving skills that are required in legal practice.[13] Because the value of active learning in the legal environment has become more prevalent, over-reliance on these methods is changing.[14]

Active learning is based on participation.[15] Human beings, and attorneys specifically, have a desire to explore, to try things out, and to observe cause and effect.[16] Active learning seeks to harness this desire through the use of real-life examples and problem analysis.[17] Effective active learning seeks to encourage the learner to apply newly-gained knowledge shortly after its receipt to facilitate the learning process.[18] There are numerous active learning methods that encourage the application of knowledge. These include client interviewing, negotiation exercises, problem-based learning, and other activities where the learner models the work of a practitioner.[19] The positive effects of active classroom engagement have been well documented.[20] Amongst more than 800 first-year law students at St. Thomas University, students that attended all active learning legal course sessions had an average 0.47 grade point average higher than peers who attended no active learning sessions.[21]

Technology and the TJAGLCS Hybrid Legal Learning Model

The Army recognizes that technology in learning environments is an effective way to maximize learning potential.[22] This

is especially relevant at TJAGLCS as the educational process has not ceased since the onset of COVID-19. A concept known as "blended learning" has supported this operational continuity. Unlike traditional education, courses are delivered both in-person and online in a blended learning system.[23] The goal of blended learning is to encourage learning by using tools that encourage active learning.[24] The Judge Advocate General's Legal Center and School has continued to refine its use of blended learning throughout the pandemic, developing a hybrid legal learning model that is effective in the schoolhouse and in the field.

The COVID-19 pandemic served as the catalyst for a pedagogical paradigm shift at TJAGLCS. Like many educational institutions across the state, on Thursday, 12 March 2020, TJAGLCS learned that the governor of Virginia planned to institute a stay-at-home order[25] on Monday, 15 March, to decrease the spread of COVID-19. The initial order closed all non-essential businesses for fourteen days. The Associate Dean of Academics, Mr. Maurice Lescault, had experience using a then-unsung meeting platform called Zoom. Recognizing the value of continuing education, Mr. Lescault led an unprecedented effort to quickly transition TJAGLCS from in-person instruction to a synchronous distance learning platform with limited interruption to professional military education.[26] The Dean, Colonel Jerrett Dunlap, and TJAGLCS Commander, Brigadier General Joseph Berger, supported and authorized the change. By Friday, 13 March, every TJAGLCS instructor received training on the platform. The Judge Advocate General's Legal Center and School developed a plan to begin synchronous education using Zoom by the following Monday. The faculty training event on Friday consisted of more than Zoom familiarization.

Developing a Blended Learning Environment

Together, TJAGLCS professors developed a student engagement plan—which is critical in a distance learning environment.[27] Professors shared innovative polling software like Kahoot and Turning Point to assess student comprehension and engagement. At the same time, two professors[28] developed Zoom instructional guides for students and faculty members. These user-friendly Zoom guides decreased the learning curve and accelerated the transition. The schoolhouse prioritized providing stable internet connections for resident students and faculty.

The Associate Dean for Students and course manager, Lieutenant Colonel (LTC) Temi Anderson worked with Mr. Lescault and the Dean to develop a hybrid learning model that encouraged active learning through class participation. The Dean's office created a clear communication plan early. Using an existing online communication platform familiar to TJAGLCS students (JAG University) as a backbone, the Dean's office published critical information to students to help them navigate the class format change. The Dean's Office asked academic departments to prioritize student engagement, recognizing that passive learning in a virtual environment impacts long-term knowledge retention. The school quickly adapted experiential learning events to the virtual environment. For our recommendations on developing hybrid learning plans, see Appendix A.

The Hybrid Learning Environment

For example, for the JAOBC, the Criminal Law Department transitioned trial practice from the courtroom to Zoom by carefully scripting Zoom mock trials. Students engaged in direct and cross-examinations of witnesses via Zoom. The school maintained a small group seminar format, using over a dozen Zoom rooms to meet with groups of ten or fewer students. Seminars and trials were effective "doing devices" that allow students to interact and apply what they have learned, and they aid in retaining student focus on subject material. Some topics lacked clear "doing devices" and lend themselves to a lecture format. For these passive learning topics, professors improvised by using game-based learning platforms like Kahoot and Turning Point for periodic checks on learning. Including a measure of interactivity helped to refocus the students and allowed them to provide input into their learning experience.

Regular student touch points are a cornerstone of the TJAGLCS hybrid learning model. Recognizing that the virtual environment can be overwhelming to some students, LTC Anderson created multiple opportunities for students to engage with professors inside and outside the classroom. She added weekly office hours and dedicated question-and-answer periods to the course schedule. This provided an additional opportunity for students to engage with professors and maintain valuable human connections.

The school applied this model during the 212th JAOBC in October 2020. The 128 Army and international partner attorneys were welcomed to Charlottesville to a markedly different legal learning environment than most had previously experienced. From the onset of their studies, they were subject to COVID-19 mitigation procedures, quarantines, and new classroom procedures that would have been unrecognizable a year earlier. Learning in this environment required a blended learning approach focused on active learning.

Lieutenant Colonel Anderson separated the 212th JAOBC into two sections (*A* and *B*) from the outset in an effort to protect students and faculty. When section *A* attended lectures in a socially-distanced auditorium,[29] section *B* participated remotely in the same instruction using Zoom for Government. The two sections alternated between face-to-face learning with Zoom participation each day. To ensure and encourage participation from both sections, instructors applied different teaching methods with varying degrees of success.

Challenges with Blended Learning

The use of Zoom and similar technology has expanded the educational potential in traditional learning environments, though these platforms are not without shortcomings. Screen sharing provides learners with both an audio and visual guide similar to face-to-face lectures. The blended learning experienced by the 212th JAOBC would have been difficult without this technology, but the technology is far from perfect.

The use of Zoom and similar software requires a stable and relatively high-speed internet connection. While the internet speed and availability is adequate for most online requirements at many Army installations, the online demands at TJAGLCS often crippled its network due to upwards

of sixty students streaming lessons simultaneously. This resulted in many learners attempting to work through login issues, screen freezes, audio degradation, and being kicked out of Zoom lectures.

Addressing this issue requires either spatially distanced online learners to reduce busy networks, or dedicated networks with sufficient speed and accessibility for online learning. In an effort to combat this challenge, TJAGLCS added ten new access points on the third and fourth floors of TJAGLCS lodging[30] and is currently contracting to hardwire all rooms to increase bandwidth.

Active and Passive Learning

Another challenge posed by online learning is the overemphasis on passive-learning methodologies. This is especially true when a pure-lecture methodology is used by instructors because online learners can easily become distracted by their phone, internet browser, or television. These distractions were difficult to overcome given the passive nature of some legal lectures. Legal lectures require learners to pay close attention to receive the maximum benefit. The amount of attention paid to pure-lectures often decreased through the day as screen-fatigue and a lack of interaction affected the ability of learners to effectively receive information.[31] The 212th JAOBC experienced few of these pure-lectures, and, despite their popularity in legal learning, it is advisable to avoid using them too often in a blended legal learning environment.

The combination of pure-lecture and PowerPoint presentations (PPP) avoids some of the pitfalls of stand-alone lectures. The benefits of incorporating PPPs through screen sharing include providing visual learners with the relevant information on screen. However, PPPs have drawbacks in blended learning environments. While the information tends to be easy to read in PPPs, these presentations often fall into three categories: 1) providing too much information per slide; 2) not providing enough information; or 3) having an excessive number of slides. Having too much information on a slide is distracting to the learner because it is difficult to determine what is important. Having too little information can result in essential information not being included. Having too many slides can easily overwhelm the learner and result in a lack of attention because of the breadth of the material.

Students in the 212th JAOBC faced all three of these challenges, with varying levels of success. One of the deciding factors with these three challenges came down to the extent that instructors read off their slides. The quality of instruction decreased when instructors read from slides and learners lost interest because they had access to the same information. However, the quality of the teaching improved when teachers used their slides as a support rather than a verbatim script because of the personality and experience of the instructor. A blended learning environment should discourage reading directly from PPP slides and ensure that the slides do not overwhelm the learner in both content and scope.

Adopting Active Learning Methodologies

Legal learning should involve active learning, not a devout reliance on passive learning present in traditional law school environments. While PPPs and lectures are important for conveying the basics, the 212th JAOBC had a more rewarding experience when they were able to have their voices heard. This often came in the form of small group seminars of no more than fifteen students and one instructor. These smaller, more focused groups allowed for every legal learner to ask questions and refine their knowledge. Instructors in these smaller sessions were able to explain the material so that it was easy to understand in context and applicability. These sessions could then be further broken down into groups of three to four learners who were expected to actively apply what they had learned to a hypothetical situation. On Zoom, this was conducted by creating break-out rooms with the instructor going from room to room to check on learning. This application of problem-based learning helped to cement knowledge through an active learning process. Reinforcing what has been learned through small group activities and discussion is a productive method of learning in a blended environment.

Active learning methods aided 212th JAOBC students in learning their craft. To check how well students learned information, different active learning exercises were incorporated in the eleven weeks of JAOBC. These exercises were designed to simulate the activities of a practitioner in the field and required that learners "learn by doing." These activities included mock trials, will drafting exercises, evidence-based seminars, and a means and methods of warfare capstone. The effectiveness of these active learning exercises was evident for the face-to-face activities (mock trial), and during online activities (will drafting and the means and methods of warfare capstone). All of these active learning exercises required that learners prepare before the instruction, rather than trying to learn the material in the moment. As a result, attorneys learned the skills needed in the field while simultaneously engaging in an interactive and enjoyable learning environment. Active learning exercises were arguably the most beneficial of all the learning experiences for the 212th JAOBC students. Incorporating problem-based learning and analysis, or "learn by doing," as a check on learning is a great method of encouraging knowledge development.

Effective legal learning requires background knowledge. Learning in the classroom is not the same as learning in the field, but one requirement of both is to provide background materials ahead of instruction. Access to these materials allows legal learners to quickly develop a background in the material and allows them to apply their knowledge with greater understanding. These materials should ideally come from a range of unique voices, rather than a one-size-fits all approach. Legal learners will be set up for success when information is made available before the respective period of instruction and incorporates diverse voices where possible.

These best practices, which are listed in Appendix B, are especially important in a time when learners are balancing professional and personal challenges. Instructors in the field should take these concerns into account and accept a blended learning environment as the new "norm" of legal learning. This requires flexibility in both teaching and learning, and the ability to effectively use software such as Zoom. Learning should be active and engage legal

learners through a variety of games, mock exercises, videos, and other forms of knowledge dissemination outside of pure-lecture and PPP. Embracing these sometimes labor- and time-intensive approaches can pay great educational dividends. The 212th JAOBC benefited from the hybrid legal learning model applied by TJAGLCS, and have begun their path of the constant practice and continued education required to provide principled counsel.

A Way Ahead for Legal Learning

A blended learning environment should remain a viable alternative during and after the COVID-19 pandemic and our return to a "new normal." We recommend that academic institutions consider adding a few completely virtual courses to expand access to legal education. In this article we demonstrated the value of active legal learning, how distance learning can be effective, and that a hybrid learning model can be successful. These provide a way ahead for blended learning to become an accepted part of not only the TJAGLCS learning model, but also that of the U.S. Army. However, it will be difficult for a blended learning environment to adequately replace the value of face-to-face learning in certain situations. We recommend two ways ahead in consideration of our findings.

Retain a Blended Learning Environment for TJAGLCS Courses During High-Risk Periods

The experiences of the 212th JAOBC demonstrate that the TJAGLCS hybrid legal learning model is an effective means of providing legal learning to new attorneys. This model works well when medical guidance indicates that in-person attendance involves higher risk. The 212th JAOBC was one of several where TJAGLCS implemented a blended learning environment to reduce the risk to the student population. The school benefitted from lessons learned during the previous two JAOBCs and was able to improve the 212th as a result. This blended learning environment has also been applied to the 69th Graduate Course, as well as other resident courses offered by TJAGLCS.

Once the pandemic ends, we recommend retaining this capability to prepare for future events and maintain the skill set required for hybrid learning by creating a few fully virtual courses (hereinafter "distance learning courses") based on lessons learned. This expansion will serve two primary purposes: 1) it will account for the potential for future pandemic situations, and 2) it will reduce the costs of providing instruction for some resident courses.

It is uncertain whether COVID-19 will completely dissipate, and this is an important consideration for the future of the Corps. Additional challenges, including future conflicts that prevent traditional face-to-face learning, may also arise. Retaining the ability to provide both hybrid and distance instruction is required to ensure that both cognitive and affective learning practices are maintained, and that we continue professional military education (PME) for attorneys so that they are prepared to provide principled counsel. Providing legal learning via a distance learning model may also reduce unit travel costs. Because students lose the opportunity to engage in continuous course dialogue with peers and professors during distance learning events, we recommend that TJAGLCS assess the best future courses for this practice.

Select Short and Organizational Courses Should Continue to Adopt a Hybrid Learning Model

Hybrid learning should remain a new "norm" of legal learning for select short courses lasting one week or less. The short courses offered by TJAGLCS are presently almost, if not entirely, offered via distance learning. This has allowed personnel in the field to attend courses, such as the Domestic Operations course, that they otherwise would not be able to due to a prior need to be physically present at TJAGLCS. Though this distance learning model has its benefits, it alone may not be ideal for some learners.

The school should maintain its hybrid learning model for select short courses because it accounts for different types of learners and those in distant locations. This will provide attorneys who want to attend short courses with the option of attending via distance learning or receiving face-to-face instruction. This model allows attorneys who do not learn well online to obtain face-to-face instruction at TJAGLCS. Adopting a hybrid model would also benefit those who are geographically distant from TJAGLCS. This has been especially true during the COVID-19 pandemic as many attorneys that are stationed outside the continental United States face restriction of movement and other travel-related challenges. These and similar issues may remain once the pandemic has subsided, reaffirming the benefit of the permanent adoption of a hybrid learning model.

The permanent adoption of such a hybrid learning model for select courses also sets the stage for greater access to PME for those in the field. This article, and other lessons learned, can empower legal offices, centers of excellence, and other entities to provide their own PME separate from that offered by TJAGLCS. Organizations are already beginning to adopt this approach, such as the Defense Intelligence Agency, which offers its Intelligence Oversight Officers course via an online platform. Offices of the Staff Judge Advocate (OSJA) could similarly sponsor such hybrid training; for example, the U.S. Army Pacific OSJA could hold face-to-face legal training for attorneys stationed in Hawaii, while simultaneously providing the same training to attorneys in subordinate units stationed throughout the U.S. Indo-Pacific Command area of responsibility.

Conclusion

The COVID-19 pandemic has inexorably changed how military lawyers learn. It is important to take these lessons and create best practices that can be applied by the legal profession for years to come. The best practices contained in this article were experienced by judge advocates in the 212th JAOBC and are intended for both field and schoolhouse use. They reflect the use of a blended learning model, and how both passive and active learning methodologies play an important role in how attorneys learn their craft. It is the hope of the authors that the incorporation of these best practices and recommendations bolsters the effectiveness of legal education and continues to reinforce the importance of education throughout the legal profession. Continued refinement will only enhance learning outcomes and ensure that TJAGLCS moves onward with alacrity. **TAL**

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Appendix A
Helpful Tips for Developing a Hybrid Learning Plan

1. Communication is critical in a virtual environment. Creating a recognizable communication format that students can rely on and won't tune out is important.

Less is more. Avoid sending more than one comprehensive message a day in the days leading up to a course or elective. Sending messages too frequently will result in student overload. Students will begin to ignore the messages. On day one, explain when you will provide class updates and stick with that plan.

2. How-to Guides. We recommend that course managers create short how-to guides with screen shots to explain how the learning platform works.

Sending a comprehensive how-to guide up-front is okay, but we recommend that you follow-up with shorter, targeted guides that are five slides or fewer at the time you ask students to perform a task like register for the class, join a virtual room, or ask questions. A strong guide should answer students' questions in less than two minutes.

3. Create a plan for questions in advance.

Before the Course. The Judge Advocate General's Legal Center and School used a blog feature in Blackboard for questions before and during the course. This allowed students to ask questions during asynchronous periods. Professors from each department monitored the site for questions. Using the blog site allowed other students to benefit from a professor's response. Professors normally responded to questions within twenty-four hours.

During the Course. The school used chat windows and appointed a second professor to answer questions while the instruction was ongoing. This helped the primary professor remain on track while simultaneously answering students' questions. We recommend having the professor monitoring the chat room try to answer as many questions as they can. This allows the primary professor to focus on briefing the class content. Students were also free to ask questions by raising their hand during class. The primary professor stopped to answer verbal questions during class.

Controlled Unclassified Information (CUI) (formerly For Official Use Only (FOUO)) questions. The course manager created a centralized CUI inbox for CUI questions. We appointed a central person to manage that inbox and seek answers from each subject matter expert.

Office Hours. The course manager created weekly office hours for graduate course students and created dedicated question and answer sessions prior to officer basic course exams. This gave students dedicated time to meet with professors.

4. Flatten communication with all professors in advance.

We recommend that course managers and department leads meet with faculty in advance after establishing the course schedule. This meeting is important. During the meeting, we trained professors on the technology, our primary, alternate, contingency, and emergency communication (PACE) plan, how questions should come in, and how to introduce the chat room professor as soon as the lecture begins so that students saw them and knew to whom they were writing in the chat room.

We also created a phone directory with professor phone numbers so that professors could quickly contact the Dean's office or each other if they had a question.

5. Monitoring the Session and Flexible Options

If you implement a security procedure like a waiting room, we recommend that you open the room at least thirty minutes before class and have someone responsible for verifying the identity of all users before granting them access.

Creating a profile naming convention is important for recognizing students. TJAGLCS students rename their Zoom profile so that it displays their rank and first and last name. This allows professors to quickly identify them on the student roster.

We recommend that professors record their sessions. We placed recorded session on our student class site on JAGU. This helped students who missed class for any reason. This also helped students who encountered technological issues during class. They were able to review key information they missed during the live session.

Appendix B
Best General Practices for Maximizing the Utility of a Hybrid Legal Learning Model

1. Create blended learning environments that maximize the combination of distance and face-to-face learning similar to the hybrid legal learning model applied at TJAGLCS.
2. Use online learning paired with face-to-face instruction.
3. Internet connectivity and speed should be addressed prior to the start of online-based instruction.
4. Avoid pure lecture.
5. Slides should not contain too much or too little information—provide only the information that is needed.
6. Try not to read from slides.
7. Engage learners using active-learning based small group activities and exercises.
8. Maximize the use of "learning by doing" exercises that require the learner to apply their knowledge.
9. Provide background information prior to the instruction.
10. Obtain a diversity of speakers and viewpoints to provide depth to the information presented.

Notes

1. U.S. Dep't of Army, Training and Doctrine Command Pam. 525-8-2, The U.S. Army Learning Concept for Training and Education 2020-2040, at iii (Apr. 2017) [hereinafter TRADOC Pam. 525-8-2].

2. *Id.* at 9.

3. *Id.*

4. *Id.* at 10.

5. *Id.* at iii, 23, 28.

6. Harvey M. Shrage, *Using an Arbitration Simulation to Teach Critical Skills*, 13 Atl. L.J. 191, 192 (2011).

7. *Id.* at 193.

8. Rohan Havelock, *Law Studies and Active Learning: Friends Not Foes?*, 47 Law Tchr. 382, 385 (2013).

9. June Cicero, *Piercing the Socratic Veil: Adding an Active Learning Alternative in Legal Education*, 15 Wm. Mitchell L. Rev. 1011, 1012 (1989).

10. *See id.*; Havelock, *supra* note 8, at 386.

11. Havelock, *supra* note 8, at 387.

12. Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. Det. Mercy L. Rev. 1, 3 (2003); Havelock, *supra* note 8, at 385.

13. Havelock, *supra* note 8, at 388.

14. The prevalence of passive teaching techniques is often related to the difficulty educators face in finding effective "doing devices." Roger C. Schank, What We Learn When We Learn by Doing, Nw. Univ., Inst. for Learning Scis. (1995), http://cogprints.org/637/1/LearnbyDoing_Schank.html. Doing devices allow students to put academic concepts into practice. For example, after studying the Rules of Evidence, we use a mock trial as a "doing device" to put the Rules of Evidence into practice in admitting evidence, objecting to evidence, and developing an appropriate rebuttal. Trial practice provides numerous opportunities for criminal law application but it is often more difficult to find an appropriate "doing device" for more abstract concepts like command authority or medical disability in a classroom environment. How can we teach a commander's authority to govern personal conduct by doing? John Dewey remarked in 1916, in his book, *Democracy and Education*:

> Why is it that, in spite of the fact that teaching by pouring in, learning by passive absorption, are universally condemned, that they are still so entrenched in practice? That education is not an affair of "telling" and being told, but an active constructive process, is a principle almost as generally violated in practice as conceded in theory. Is not this deplorable situation due to the fact that the doctrine is itself merely told? But its enactment in practice requires that the school environment be equipped with agencies for doing . . . to an extent rarely attained.

John Dewey, Democracy and Education: An Introduction to the Philosophy of Education 38 (1916).

15. Cicero, *supra* note 9, at 1018. *But see* Michael L. Richmond, *Teaching Law to Passive Learners: The Contemporary Dilemma of Legal Education*, 26 Cumb. L. Rev. 943, 954-55 (1996) (stating that students have not yet learned how to receive information from being actively involved in learning).

16. *See* Cicero, *supra* note 9, at 1018.

17. Havelock, *supra* note 8, at 385.

18. Cicero, *supra* note 9, at 1019.

19. Havelock, *supra* note 8, at 388-89.

20. *See* Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. Eng'g Educ. 223 (2004).

21. Patricia W. Hatamyar Moore & Todd P. Sullivan, *The Impact of Active Learning Sessions on Law School Performance: An Empirical Study*, SSRN (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688311. *See also* Richard R. Hake. *Interactive-Engagement Versus Traditional Methods: A Six-Thousand-Student Survey of Mechanics Test Data for Introductory Physics Courses*, 66 Am. J. Physics 64 (1998) (in a survey of more than 6,000 physics students, the researchers found that there was a significant performance improvement amongst students that applied interactive learning methods rather than traditional learning methods).

22. TRADOC Pam. 528-8-2, *supra* note 1, at 19.

23. Kylie Burns et al., *Active Learning in Law by Flipping the Classroom: An Enquiry into Effectiveness and Engagement*, 27 Legal Educ. Rev. 163, 163 (2017).

24. *Id.* at 164.

25. On 12 March 2020, Governor Ralph Northam declared a state of emergency in the Commonwealth of Virginia due to the spread of the novel coronavirus (COVID-19), a communicable disease of public health threat. Executive Order 61 banned out-of-state travel for state employees, with some limited exceptions. The next day, Governor Northam closed all K-12 schools for two weeks. Two days later, he ordered a statewide ban on public events of more than 100 people based on guidance from the Center on Disease Control and Prevention. On 17 March 2020, the State Health Commissioner and governor issued Order of Public Health Emergency One (Health Order No. 1), later amended, which limited restaurants, fitness centers, and theaters to ten or fewer patrons. M. Norman Oliver, State Health Comm'r, & Ralph S. Northam, Governor, Commonwealth of Va., Executive Order Number Sixty-One (2020) and Order of Public Health Emergency Three: Phase One Easing of Certain Temporary Restrictions Due to Novel Coronavirus (COVID-19), May 8, 2010, https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-61-and-Order-of-Public-Health-Emergency-Three—-Phase-One-Easing-Of-Certain-Temporary-Restrictions-Due-To-Novel-Coronavirus-(COVID-19).pdf.

26. Within hours, TJAGLCS contacted Zoom and purchased the requisite commercial software necessary for this transition. The school currently uses Zoom for Government.

27. The Judge Advocate General's Legal Center and School is fortunate to have an innovative team of adaptive professors and information technology experts. For over a decade, TJAGLCS invested in distance learning education. The Educational Technology and Distributed Learning Division (ETDL), led by Mr. Jeff Sexton, manages both the Judge Advocate General's University (JAGU) and TJAGLCS's public website.

> JAGU is the Judge Advocate General's Corps' (JAGC) hub for educational outreach and digital learning. JAGU houses the second largest online program in the Army's Enterprise Lifelong Learning Center (ELLC), with over 40,000 course enrollments and thousands of instructional hours in resident and nonresident courses serving military and civilian attorneys, legal administrators, paralegals, and support personnel throughout the JAGC. Resident short courses offered at TJAGLCS make use of online class schedules, assignments, tests, and learning events and materials, accessible by the learner wherever they are, in the building, at home, local or overseas. This blended model is now the standard for all courses taught at the LCS.

Education Technology and Distributed Learning, TJAGLCS, https://tjaglcspublic.army.mil/etdl (last visited May 25, 2021).

28. Major Annie Vazquez and Major Clay Cox, TJAGLCS Contract and Fiscal Law professors, created video Zoom tutorials for professors and students. The guides served as a great training refresher for professors and students. The guide explained basic functions like logging in and how to ask questions in a digital environment.

29. Students were separated by six feet in accordance with Centers for Disease Control and Prevention guidelines. Students also wore masks in the classroom.

30. Telephone interview with Mr. Barry Bragg, The Judge Advocate Gen.'s Legal Ctr. & Sch. G-6 (Dec. 2, 2020) (on file with author). The school also modified its software to increase the power generated by each internet access point. The issue is the distribution of the internet inside the doors and walls of the rooms. The rooms are framed with old construction steel that degrades the strength of the internet signal. The wiring will be complete in fiscal year 2022. The school will run new television cables and two ethernet lines in each room so that students can plug directly into the local area net. *Id.*

31. These issues were often combatted during in-person classes by the opportunities for limited social interaction and a sense of community involvement in the learning experience.

The U.S. Supreme Court building in Washington, D.C. (Credit: chasingmoments – stock.adobe.com)

No. 3

A Separate Society

The Supreme Court's Jurisprudential Approach to the Review of Military Law and Policy

By Lieutenant Colonel Brian D. Lohnes & Major Nicholas D. Morjal

By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status.[1]

On 26 July 2017, then-President Donald Trump announced via Twitter his decision to ban transgender individuals from serving in the United States military.[2] One month later, President Trump formally directed the Department of Defense (DoD) to prohibit openly transgender individuals from serving in the military.[3] Offering insight on the rationale for his policy, President Trump noted that openly transgender Service members would "hinder military effectiveness and lethality, disrupt unit cohesion, [and] tax military resources."[4]

On 9 August 2017, the National Center for Lesbian Rights and GLBTQ Legal Advocates & Defenders[5] filed a lawsuit on behalf of five transgender Service members, challenging the constitutionality of President Trump's transgender ban.[6] The lawsuit (and a handful of other similar lawsuits)[7] garnered many supporters[8] and succeeded with early rulings for preliminary injunctions, suspending enforcement of the military policies on transgender individuals—including those with a history or diagnosis of gender dysphoria.[9]

During that time, then-Secretary of Defense James Mattis appointed a panel of military leaders to study the issue of transgender individuals serving in the military and develop policy proposals supported by findings from those studies.[10] Secretary Mattis, using the written report produced by this panel,[11] made a recommendation to the President to adopt a new policy (one consistent with the panel's report) concerning military service by transgender individuals; and he asked that the 2017 memorandum be revoked to allow implementation of the new policy.[12] The President accepted the recommendations and revoked the 2017 memorandum, as well as authorized the implementation of "any appropriate policies concerning military service by transgender individuals."[13] Secretary Mattis's new policy was then used as a basis to successfully challenge the initial preliminary injunctions—waking the Supreme Court in the process.[14]

Military policies under President Trump's administration concerning military service by transgender individuals (including those with a history or diagnosis of gender dysphoria) have since been revoked by President Joe Biden's executive order, signed 25 January 2021.[15] Although judicial intervention may be avoided by this executive order, because the plaintiffs will drop their lawsuits or the court will find them moot, lawsuits challenging military policy are still ripe for legal analysis and discussion. Specifically, these lawsuits are likely to lose if the Supreme Court grants review and follows its precedent when considering military-related cases. To succeed, plaintiffs must overcome the longstanding doctrine of

judicial deference to the military. Under this doctrine, the Court nearly always defers to the judgments of the legislative and executive branches on military-related matters.

Historically, the doctrine of judicial deference toward the military has afforded the military the flexibility necessary to effectively and efficiently defend the nation. This article argues that the Supreme Court's application of the doctrine of judicial deference to the military will continue to be the Court's jurisprudential approach when reviewing military-related cases, but cautions that an overly aggressive application of the doctrine may not be in the best interest of national defense.

This article begins by detailing the importance of regulating the military through law and policy and highlights constitutional underpinnings of military regulations. As a matter of historical background, the article describes the evolution of the Supreme Court's jurisprudential approach to reviewing military-related cases—from nonintervention to judicial deference—and examines the three major cases that developed the Court's modern doctrine of judicial deference to the military. The article also compares this doctrine to other jurisprudential approaches the Court employs when reviewing non-military policies, putting in context the Court's deference toward the defense department. In considering the future application of the doctrine of judicial deference to the military, the article identifies several reasons why the Court will most likely continue to employ the doctrine in the future. Following the analysis of the Court's treatment of cases related to military authority, the conclusion cautions that an aggressive application of the doctrine may increase the civil-military divide and compromise the military's ability to effectively defend the nation.

Origins of Military Law and Policy

The U.S. armed forces are the most effective military forces in the world today.[16] As the Supreme Court has recognized, the armed forces are charged with fighting and winning the nation's wars.[17] Given this existential nature of the armed forces' mission, the effectiveness of the armed forces should be considered a matter of national importance—not a matter of happenstance. To achieve and maintain the effectiveness that makes the U.S. military the world's premier fighting force, the military places a premium on good order, discipline, and cohesion.[18]

To those in uniform, these elements of military effectiveness are not advisory; they are imperative. Military service is more than a mere vocation; it is a unique calling. Service members are called to make extraordinary sacrifices—and all too often, the ultimate sacrifice—on behalf of the nation.

To those in uniform, these elements of military effectiveness are not advisory; they are imperative. Military service is more than a mere vocation; it is a unique calling. Service members are called to make extraordinary sacrifices—and all too often, the ultimate sacrifice—on behalf of the nation.[19] Because the stakes are so high, military leaders demand that Service members act as members of a team, not as individuals.[20] This, however, can be challenging because Service members come from diverse walks of life.[21] Upon joining the military, Service members must learn to overcome their differences to form cohesive units, be ready to deploy to austere locations with minimal notice, and be prepared to make the ultimate sacrifice for the nation.

To achieve good order, discipline, and unit cohesion, the military employs a number of policies and regulations that govern the standards of conduct for Service members.[22] Upon joining the military, a citizen's status changes, and military necessity governs all aspects of the now-Service member's life. The constitutional basis for enacting these polices and regulations is vested in the legislative[23] and executive branches.[24] Through law and policy delegated by Congress and the President, military commanders possess command authority to dictate where Service members live and work, and with whom they work. These limitations on Service members stand in stark contrast to the constitutionally-guaranteed freedoms of association and travel enjoyed by civilians. Further, commanders may criminally punish Service members who fail to obey their orders.[25]

The Supreme Court has issued decisions in the civilian context that, at first blush, would make military policies restricting Service members' civil liberties unconstitutional; however, the Court applies a separate jurisprudential approach when reviewing military policies.[26] The Court's modern approach, known as the military deference doctrine, often leads to results that are contrary to cases decided in the civilian context, causing a great degree of criticism by legal scholars.[27] Before rendering judgment on the doctrine, it is necessary to understand both the history of the Court's jurisprudential approach to military-related cases and the development of the modern doctrine of judicial deference to the military.

Supreme Court Review of Military-Related Law and Policy

During the first 150 years of its existence, the Supreme Court generally only considered military-related cases that arose from the specter of a military court-martial.[28] Comporting with the framers' intent for the Court's ability to review military matters, the Court limited its review to the jurisdictional reach of the court-martial.[29] The Court generally upheld court-martial jurisdiction and refused to conduct any substantive review of a petitioner's claim, finding that such analysis was beyond the scope of judicial review. This left petitioners little chance of success when challenging military law or policy.[30] This seminal jurisprudential approach to military-related matters is referred to as the doctrine of noninterference.[31]

The Warren Court[32] broke from this trend of noninterference in the 1950s and

1960s and began reviewing the manner in which Congress protected—or failed to protect—the constitutional rights of individuals subject to court-martial proceedings.[33] Applying precedent from civilian cases, the Warren Court struck down court-martial jurisdiction over multiple classes of civilians and ultimately determined that court-martial jurisdiction is constitutionally limited to Service members for service-connected offenses.[34] While the Warren Court was willing to consider the jurisdictional reach of courts-martial, it did not engage in a substantive review of military policies. Chief Justice Earl Warren noted that courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[35] In sum, the Warren Court established a jurisprudential approach of reviewing military-related matters, which could best be defined as a rigorous jurisdictional review.

The Berger Court, thanks in large part to the efforts of World War II veteran Justice William Rehnquist,[36] employed a new jurisprudential approach to review military-related cases. Borrowing from both prior approaches, Justice Rehnquist developed the Court's modern (and current) doctrine known as judicial deference to the military.[37] Under this doctrine, the Court does not limit its review to jurisdictional matters, but considers constitutional interests governed by military legislation and policy—distinguishing the deference doctrine from the noninterference doctrine. By recognizing that the military is a unique institution in American society due to its need for obedience and discipline,[38] the Court does not allow precedent from non-military cases to *per se* apply to the review of military legislation and policy—distinguishing the deference doctrine from the Warren Court's analysis. The Court's doctrine of judicial deference to the military is most obvious in three cases where military law and policy were in direct conflict with civil liberties. Notably, Justice Rehnquist drafted all three opinions.

Parker v. Levy[39]

In 1974, the Court introduced the jurisprudential approach of deference to the military in deciding a habeas corpus challenge to the court-martial of an Army captain convicted of multiple offenses relating to his opposition to the Vietnam War. Captain Howard Levy, an Army physician assigned to Fort Jackson, South Carolina, was ordered to oversee medical training for special forces medics.[40] Despite a written order to provide the training, Captain Levy refused to train Soldiers who were going to fight in Vietnam.[41] Captain Levy eventually made the following remarks to a group of enlisted Soldiers at Fort Jackson:

> The United States is wrong in being involved in the Viet Nam War [sic]. I would refuse to go to Viet Nam [sic] if ordered to do so. I don't see why any colored soldier would go to Viet Nam [sic]: they should refuse to fight because they are discriminated against and denied their freedom in the United States . . . are sacrificed and discriminated against in Viet Nam [sic] by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam [sic], and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars, and thieves, and killers of peasants, and murderers of women and children.[42]

Charges were preferred against Captain Levy for willfully disobeying a lawful command of a superior commissioned officer, conduct unbecoming an officer and a gentleman, and disorderly and neglectful conduct to the prejudice of good order and discipline in the armed forces, in accordance with the Uniform Code of Military Justice (UCMJ).[43] Captain Levy was convicted at a general court-martial; and, after exhausting his appellate rights under the UCMJ, he filed a petition for a writ of habeas corpus.[44] Reversing a district court's ruling on the habeas petition, the Third Circuit dismissed Captain Levy's convictions for violations of Articles 133 and 134 and held that Congress's criminalization of "conduct unbecoming an officer and a gentlemen" and "all disorders and neglects to the prejudice of good order and discipline in the armed forces" through the UCMJ was unconstitutionally vague.[45]

The Supreme Court granted certiorari, reversed the Third Circuit ruling, and reinstated Captain Levy's convictions for violating Articles 133 and 134.[46] In his second term on the Court, Justice Rehnquist began his analysis by recalling the separate society notion of the doctrine of noninterference. He noted, "The military is, by necessity, a specialized society separate from civilian society. . . . [T]he military has . . . developed laws and traditions of its own during its long history."[47] Because the military must be considered separately, Justice Rehnquist found that the Third Circuit had erred in its conclusion because it applied "contemporary standards of vagueness applicable to statutes and ordinances governing civilians."[48]

In a non-military case earlier in its term, the Court decided that "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression."[49] Rejecting the Warren Court's application of civilian jurisprudence to military-related cases, Justice Rehnquist noted that such civilian jurisprudence was inapplicable to the military: "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."[50]

Highlighting this civil-military divide, Justice Rehnquist issued the now-classic statement that justifies the Court's jurisprudential deference to the military: "While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian society."[51] In sum, *Levy* stands for the proposition that law or policy that is unconstitutional when applied to civilians may pass constitutional scrutiny when the law or policy regulates the conduct of Service members.

Levy is remarkable not only because of the degree of judicial deference afforded to the regulation of the military, but also because it is a departure from the Court's prior refusal to entertain non-jurisdictional

challenges involving the military. Following *Levy*, the Court applied its new judicial deference doctrine to other cases involving Service members.[52]

Rostker v. Goldberg[53]

Seven years after *Parker v. Levy*, the Court expanded the scope of its judicial deference doctrine to the military when considering a gender-based equal protection challenge to the Military Selective Service Act.[54] During the Vietnam War, the highly unpopular draft system required all American males to register for the draft upon their eighteenth birthday.[55] After the end of the war in Vietnam, President Gerald Ford signed Proclamation 4360, terminating the draft registration process.[56] Following the Soviet Union's 1979 invasion of Afghanistan, President Jimmy Carter reactivated the draft registration process,[57] intending to expand the scope of the Vietnam era draft to include women.[58] Following extensive hearings that highlighted the need for combat troops, the prohibition on women serving in combat roles, and thus the need to draft men to fill combat roles, Congress thwarted President Carter's efforts and passed the Military Selective Service Act, which prohibited the President from requiring females to register for the draft.[59]

As a result, in 1971, Robert Goldberg filed a lawsuit on behalf of several male plaintiffs claiming that the Act's gender-based discrimination violated the equal protection principles of the Fifth Amendment.[60] A three-judge panel in the Eastern District of Pennsylvania agreed with Goldberg and invalidated the Act.[61] Seizing the opportunity to further enshrine the doctrine of judicial deference to the military, the Supreme Court granted certiorari and reversed the district court's holding.[62]

Writing for the majority, Justice Rehnquist criticized the district court for failing to perform its "delicate duty"[63] when reviewing congressional legislation and noting that the Court must accord "great weight"[64] to Congress's view of the constitutionality of its actions. Justice Rehnquist then highlighted that courts must afford even greater deference when reviewing legislation regarding the military: "This is not, however, merely a case involving the customary deference accorded congressional decisions. This case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."[65]

In *Rostker*, the Court went one step further than *Levy* and expanded the scope of judicial deference to the military. The district court attempted to avoid the doctrine by suggesting that the Military Selective Service Act regulates civilians, not the military.[66] Justice Rehnquist outright rejected this position:

> Although the District Court stressed that it was not intruding on military questions, its opinion was based on assessments of military need and flexibility in a time of mobilization. It would be blinking reality to say that our precedents requiring deference to Congress in military affairs are not implicated by the present case.[67]

As such, through *Rostker*, Justice Rehnquist opened the aperture of the doctrine of military deference to include any law or policy involving judgments as to the needs of the military, even if the law or policy principally applies to civilians, not the military.

Goldman v. Weinberger[68]

The third installment of Justice Rehnquist's solidification of the doctrine of judicial deference considered the limits of religious expression for Service members. Captain Simcha Goldman, an Orthodox Jew, regularly wore a yarmulke while in uniform.[69] Captain Goldman served as an Air Force clinical psychologist and was also an ordained rabbi.[70] In April 1981, he testified as a defense witness at a court-martial while wearing his yarmulke.[71] After Captain Goldman's testimony, Captain Goldman's commander notified him that he was in violation of an Air Force regulation prohibiting the wear of headgear while indoors.[72]

The commanding officer ordered Captain Goldman not to violate the regulation.[73] Captain Goldman also received a formal letter of reprimand warning him that failure to obey the regulation and direct order could subject him to court-martial.[74] Upset that the government was restricting his free exercise of religion,[75] Captain Goldman obtained an injunction to prevent the Air Force from enforcing the regulation from the U.S. District Court for the District of Columbia.[76] The DoD appealed the injunction, which reversed the lower court's injunction.[77] Captain Goldman then appealed to the Supreme Court and argued that because the Air Force regulation prohibits religiously-motivated conduct, it must satisfy more than rational basis scrutiny.[78]

Justice Rehnquist rejected Captain Goldman's argument and invoked the doctrine of judicial deference to the military:

> Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.[79]

Justice Rehnquist then applied the doctrine to Captain Goldman's challenge of the Air Force regulation:

> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.[80]

Despite Captain Goldman's argument that wearing an unobtrusive yarmulke would not threaten military discipline

and that the Air Force's position was not supported by any scientific study or expert opinion, Justice Rehnquist again deferred to the military's "perceived" need for uniformity.[81]

Reiterating the Court's stance in *Levy* and *Rostker*, Justice Rehnquist went on to note that courts in general are "ill equipped" to second-guess military command judgments with regard to "the impact on discipline that any particular intrusion upon military authority might have."[82] In a slight acknowledgement of the civil-military divide, Justice Rehnquist noted that this result may make military life more objectionable for some. However, he emphasized that the "essence of military service is the subordination of the desires and interests of the individual to the needs of the service."[83] By the time of *Goldman*, the Court's doctrine of judicial deference to the military was comfortably enshrined in the Court's jurisprudence.

The Supreme Court's Review of Non-Military Policies

As *Levy*, *Rostker*, and *Goldman* illustrate, once the military informs the Court what is appropriate in a military context, the Court grants great deference to the legislative and executive branches and the military's expertise in regulating the armed forces. Unlike this doctrine of military deference, nonmilitary regulatory bodies are not granted such deference. Rather, these regulatory bodies are required to persuade the Court that their evaluation of what is appropriate in their particular field is consistent with constitutional strictures. While all regulatory litigants are granted the general presumption of subject-matter expertise, only the military's subject-matter expertise is habitually shielded from rigorous constitutional evaluation.[84] Moreover, when the Court considers the professional expertise of nonmilitary sources engaged in self-regulation, it has exhibited a remarkable unwillingness to concede that experts in a particular field actually know better about their field.[85]

Accounting Profession Regulations

Edenfield v. Fane presents a glaring example of the Court's treatment of non-military professional expertise.[86] In *Edenfield*, the Court reviewed the accounting profession's rules banning its members from engaging in face-to-face uninvited solicitation of business.[87] Unlike the Court's deference to military expertise when regulating speech in *Levy*,[88] the Court determined the accounting regulations prohibiting face-to-face solicitation to be in violation of the free speech rights of accountants who wished to solicit business in that fashion.[89] Further, unlike its doctrine of blind deference to military judgement, the Court demanded actual evidentiary proof supporting the accounting profession's judgment:

> The Board has not demonstrated that, as applied in the business context, the ban on CPA [Certified Public Accountant] solicitation advances its asserted interests in any direct and material way. It presents no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear.[90]

The Court's lack of deference to the accounting profession to self-regulate stands in stark contrast to the doctrine of judicial deference to the military. Notably, however, accountants are not alone.

Pharmacy Profession Regulations

In *Thompson v. Western States Medical Center*,[91] the Court invalidated a restriction on pharmacists advertising their drug compounding services. Pharmacists "compound" by customizing prescriptions for patients for allergy-related purposes, by substituting ingredients in a drug.[92] As the regulatory body for pharmacists, the Food and Drug Administration (FDA) allowed pharmacists to engage in compounding—even though compounded prescriptions are often not tested or approved by the FDA—so long as pharmacists did not advertise their compounding services.[93] The Court outright rejected the FDA's considered expertise in managing the practice of pharmacists, and went so far as to offer up a series of alternative solutions to the advertising ban.[94] It is important to note that none of the justices had any pharmaceutical experience. Yet, the Court had little trouble substituting their judgment for that of highly trained medical experts.

Legal Profession Regulations

Unlike the strict level of review afforded to regulations governing accountants and pharmacists, the Court has extended an almost military-like deference to the self-regulating judgment of the legal profession. Most notably, the Court has aggressively defended bar association rules prohibiting solicitation by lawyers.[95] Similar to its approach to the military profession, the Court has not required bar associations to offer evidence supporting regulations and policies governing the legal profession. This deference to the legal profession, however, should come as no surprise. Lawyers, as members of the Court, carry their own legal experiences with them to the bench. As such, the members have a vested personal interest in the ability of the legal profession to regulate the conduct of unsavory attorneys who sully the noble calling.

Future Viability of the Doctrine of Judicial Deference to the Military

Since Justice Rehnquist solidified the Court's doctrine of judicial deference to the military in *Levy*, *Rostker*, and *Goldman*, the Court has heard few constitutional challenges to military-related law and policy.[96] Aside from cases involving detainees from the War on Terror,[97] the Court has employed the doctrine in every military-related case that it has considered since *Levy*.[98] Given this track record, it is hard to imagine the Court abandoning the doctrine of deference in the near future. Several other factors will likely contribute to the Court's continued use of the doctrine: universal application of the doctrine, efforts by political branches to reduce the civil-military divide, and a lack of military experience on the Court.

Universal Application in the Circuits

The federal judiciary's universal acceptance of the military deference doctrine can be attributed to the clear and unambiguous language in Justice Rehnquist's opinions. As such, there have been few instances where the Court needed to intervene to correct circuit court decisions striking down

When considering military-related cases, the Supreme Court grants extreme deference to the legislative and executive branches to balance the rights of Service members against the interests of national security. This limited judicial review, however, does not mean that the legislative and executive branches can turn a blind eye to the rights of military personnel.

military policies. This is not to suggest that the military deference doctrine is a settled issue and will not be addressed in the future by the Court. Like any other doctrine, lower courts have reached conclusions overcoming military deference based on case-specific facts.[99] But, because circuit courts have universally applied the doctrine itself over the past thirty years, the Court has found limited reasons to grant certiorari to clarify the doctrine.[100]

Reducing the Civil-Military Divide

Another explanation for the continued application of the doctrine of deference is that the legislative and executive branches actively reduced the civil-military divide by amending military law and policy.[101] By bringing military law and policy closer to civilian standards, the political branches reduced the need for the Court to develop an alternative jurisprudential approach to address military law and policy that is too far afield of national values. The political branches' response following *Goldman* provides an excellent example of congressional action to reduce the civil-military divide.[102]

Two years after the Court's decision in *Goldman*, Congress took heed of the Court's deference and amended Title 10 of the United States Code. In section 774, Congress directed that uniformed members of the military be allowed to wear "neat and conservative" items of "religious apparel."[103] At first blush, this response to *Goldman* seems to suggest congressional disapproval for the Court's doctrine of deference to the military. There is, however, a difference between dissatisfaction with the result and dissatisfaction with the Court's jurisprudential approach.

The cornerstone of the judicial deference doctrine is that the appropriate venue for redressing inequitable regulations is through legislative and executive branch action—not judicial second guessing. As the political branches of government, the legislative and executive branches are in the best position to ensure that military policies match the will of the nation, thus reducing the civil-military divide. By using the doctrine of deference in *Goldman*, the Court simply told Captain Goldman there was no constitutional bar to the Air Force's policy and that his arguments were best left to the political branches of government. While Captain Goldman may have lost his battle at the Court, he won the war by highlighting an area of civil-military divide ripe for congressional action.[104] The response of the political branches to the Court's decision in *Goldman* highlights the efficacy of the doctrine of deference to the military and shows that, as long as the legislative and executive branches are reasonably responsive to the national will, the Court will continue to defer judgment on military matters.

Lack of Military Experience on the Court

A further explanation for the Court's deference to the military is the lack of justices who have served in the military. Two current justices served in the military prior to ascending to the Court—Justices Stephen Breyer and Samuel Alito.[105] Justice Breyer served as an enlisted Soldier in the Army Reserve,[106] while Justice Alito commissioned as a second lieutenant in the Army upon his graduation from Princeton University in 1972. After law school, Justice Alito served on active duty for three months.[107] Aside from Justices Breyer, Alito, and Anthony Kennedy, no post-World War II Service member has gone on to serve on the Supreme Court, and none of the current justices have served in combat.[108] Justice John Paul Stevens—a naval intelligence officer during World War II—is the most recent justice to have served during combat. When Justice Stevens retired, he remarked that it is important to have "at least one person on the Court who had military experience."[109]

As previously discussed, the Court is deferential to the regulation of the practice of law because as lawyers, justices personally understand the need to regulate their own profession.[110] Following this logic, veteran justices should also be deferential to the military because, through their time in the military, they would have observed the need to regulate Service member conduct to foster cohesion, engrain adherence to orders, and enforce discipline. In addition, a veteran justice would presumably be deferential to the military because their ideological beliefs and values could have been influenced by their time in service.

Recent statistical analysis, however, shows that veteran justices are actually less deferential in military-related cases.[111] The study reports that "[j]ustices with prior military service who served on the Supreme Court between 1942 and 2008 tended to be less deferential in military deference cases than those without."[112] As Justice Frank Murphy, a veteran of World Wars I and II,[113] once wrote, "A soldier is trained for action and for him action never ceases. In a sense, we have never put our uniforms away."[114] The study suggests this sense of duty and willingness to take action fostered during military service results in a more liberal judicial ideology among veteran justices.[115] The study finds that a liberal judicial ideology is a statistically significant predictor of deferential voting behavior, particularly when considering the deprivation of civil liberties for all Americans—military and civilian alike.[116] Ultimately, with a modern bench devoid of veterans, the Court is likely to continue to employ the doctrine of military deference. The appointment of veteran justices in the future, however, could decrease the ardor of its application.

Cautious Optimism for the Future

When considering military-related cases, the Supreme Court grants extreme deference to the legislative and executive branches to balance the rights of Service members against the interests of national security. This limited judicial review, however, does not mean that the legislative and executive branches can turn a blind eye to the rights of military personnel. As Justice Rehnquist noted in *Rostker*:

> None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause . . . but the tests and limitations to be applied may differ because of the military context.[117]

While granting the deference necessary to ensure the effectiveness of the armed forces, the doctrine of judicial deference also provides the judicial check necessary to ensure that the political branches adhere to the Constitution. The doctrine provides aggrieved Service members with a day in court that, when challenging the constitutionality of military policies and regulations, was foreclosed under the Court's previous jurisprudential approaches.[118] The Court must cautiously apply its deference to military policies, particularly when individual liberties are at stake. Because the Court explicitly treats civilians and Service members differently under the doctrine of judicial deference to the military, over-reliance on the doctrine can lead to dissonance between the military and the civilian society it defends. If this dissonance becomes too great, it may impact the military's ability to "fight and win" the nations wars,[119] as Service members may begin to question the military's institutional values embodied in policies treating Service members differently from their civilian brethren. These policies, designed to bolster unit cohesion, morale, and good order and discipline, may fail in their purpose if Service members feel that the military's values are intolerably unjust.

While continued application of the doctrine of judicial deference to the military is almost certain, the vigor with which the current Supreme Court will apply the doctrine remains to be seen.[120] Even if plaintiffs present strong evidence demonstrating that a particular policy is not aligned with the national will, courts must abandon the doctrine of judicial deference to the military to find the policy unconstitutional, or distinguish it from prior cases.[121] Abandonment of the well-established doctrine of judicial deference toward the military is unlikely, but blind application of the doctrine may be dangerous.

Due to the inherent danger of increasing the civil-military divide through the overly-aggressive application of the doctrine of judicial deference to the military, the Court should conservatively apply the doctrine. To avoid the risk of erosion, the military should only employ the doctrine in cases of true necessity. The legislative and executive branches must be responsive to national will and avoid making military law and policy that drives an unnecessary wedge between Service members and civilian society. Finally, because the modern Court lacks justices with substantial military experience, it is incumbent upon the military—when challenged in the courts—to plainly state the operational necessity of policies that place limitations on the civil liberties of Service members. **TAL**

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Notes

1. *In re* Grimley, 137 U.S. 147, 152 (1890).

2. Donald J. Trump, @realDonaldTrump, Twitter (July 26, 2017), https://twitter.com/realDonaldTrump/status/890193981585444864 ("After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender [sic] in the military would entail.").

3. Memorandum on Military Service by Transgender Individuals, Daily Comp. Pres. Doc. 201700587 (Aug. 25, 2017) [hereinafter President Trump Memorandum]. *See also* Memorandum from the President to the Sec'y of Def. and the Sec'y of Homeland Sec., subject: Military Service by Transgender Individuals (Mar. 23, 2018). This memorandum was revoked by President Joe Biden on 25 January 2021. Exec. Order No. 14004, 86 Fed. Reg. 7471 (Jan. 25, 2021) (enabling all qualified Americans to serve in the military, including transgender individuals and revoking President Trump's 2018 memorandum, while noting President Trump's 2017 memorandum "remains revoked"). *See also* Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (preventing and combating discrimination on the basis of gender identity or sexual orientation). Lolita C. Baldor and Zeke Miller, *Biden Reverses Trump Ban on Transgender People in Military,* AP News (Jan. 25, 2021), https://apnews.com/article/biden-reverse-ban-transgender-military-f0ace4f9866e0ca0df021eba75b3af20.

4. President Trump Memorandum, *supra* note 3.

5. The name of this organization includes the acronym "GLBTQ," which stands for "Gay, Lesbian, Bisexual, Transgender, and Queer." The organization is commonly referred to as "GLAD." *GLAD Now Stands for GLBTQ Legal Advocates & Defenders*, GLAD LEGAL ADVOCS. & DEFS. (Feb. 23, 2016), https://www.glad.org/post/glad-now-stands-glbtq-legal-advocates-defenders/.

6. Complaint for Declaratory and Injunctive Relief, Doe 1 v. Trump, No. 1:17-cv-1597 (D.D.C. Aug. 9, 2017).

7. *See* Complaint for Declaratory and Injunctive Relief, Stone v. Trump, No. 1:17-cv-02459-MJG (D. Md. Aug. 28, 2017); Complaint for Declaratory and Injunctive Relief, Karnoski v. Trump, No. 2:17-cv-01297 (W.D. Wash. Aug. 28, 2017); Complaint for Declaratory and Injunctive Relief, Stockman v. Trump, No. 17-CV-6516 (C.D. Cal. Sept. 5, 2017).

8. *See Fifty-Six Retired Generals and Admirals Warn that President Trump's Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness*, Palm Ctr. (Aug 1, 2017), http://www.palmcenter.org/fifty-six-retired-generals-admirals-warn-president-trumps-anti-transgender-tweets-implemented-degrade-military-readiness/.

> This proposed ban, if implemented, would cause significant disruptions, deprive the military of mission-critical talent, and compromise the integrity of transgender troops who would be forced to live a lie. . . . 'The military conducted a thorough research process on this issue and concluded that inclusive policy for transgender troops promotes readiness.' . . . We could not agree more.

Id. (quoting Admiral Mike Mullen). *See also* Noa Yadidi and Grace Hauck, *McCain Criticizes "Unclear" Trump Policy on Transgender Military Ban*, CNN, https://www.cnn.com/2017/07/26/politics/congress-reaction-transgender-military-policy/index.html (July 26, 2017, 4:03 PM):

> Any American who meets current medical and readiness standards should be allowed to continue serving. . . . There is no reason to force service members who are able to fight, train, and deploy to leave the military—regardless of their gender identity. We should all be guided by the principle that any American who wants to serve our country and is able to meet the standards should have the opportunity to do so—and should be treated as the patriots they are.

Id. (quoting Sen. John McCain). Press Release, Tammy Duckworth, Senator, U.S. Senate, *Duckworth Statement on Reports Trump Administration Directing DOD to Discriminate Against Transgender Servicemembers* (Aug.

24, 2017), https://www.duckworth.senate.gov/news/press-releases/duckworth-statement-on-reports-trump-administration-directing-dod-to-discriminate-against-transgender-servicemembers.

> When I was bleeding to death in my Black Hawk helicopter after I was shot down, I didn't care if the American troops risking their lives to help save me were gay, straight, transgender, black, white or brown. All that mattered was they didn't leave me behind. If you are willing to risk your life for our country and you can do the job, you should be able to serve—no matter your gender identity or sexual orientation.

Id.

9. *See* Doe 1 v. Trump, 275 F.Supp. 3d 167, 177 (D.D.C. 2017), *vacated*, Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019) (preliminarily enjoining enforcement of the Accession and Retention Directives); Stone v. Trump, 280 F.Supp. 3d 747, 769 (D. Md. 2017) (enjoining "the enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives pending the final resolution of this lawsuit"); Karnoski v. Trump, 2017 WL 6311305, at *10 (W.D. Wash. Dec. 11, 2017) (enjoining enforcement of the transgender policy "that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement"); Stockman v. Trump, 2017 WL 9732572, at *16 (C.D. Cal. Dec. 22, 2017) (enjoining the Accession, Retention, and Sex Reassignment Surgery Directives until the litigation is resolved).

10. Memorandum from Sec'y of Def. to Sec'y of the Mil. Depts. et al., subject: Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals (14 Sept. 2017).

11. U.S. Dep't of Def., Report and Recommendations on Military Service by Transgender Persons (Feb. 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF.

12. Memorandum from Sec'y of Def. to the President, subject: Military Service by Transgender Individuals (22 Feb. 2018). Specifically, Secretary Mattis recommended that the Department of Defense (DoD) should adopt the following policy:

> [1] Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.
>
> [2] Transgender persons who require or have undergone gender transition are disqualified from military service.
>
> [3] Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

Id. at 2–3. This policy was later implemented as a Directive-type Memorandum. *See* U.S. Dep't of Def., DTM 19-004, Military Service by Transgender Persons and Persons with Gender Dysphoria 1 (USD(P&R), 12 Mar. 2019) (C1, 17 Mar. 2020). *See also supra* note 3.

13. Memorandum on Military Service by Transgender Individuals, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

14. The preliminary injunction in *Doe 1* was vacated on January 4, 2019. Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019). In *Karnoski*, defendants filed a motion in the Ninth Circuit to stay the preliminary injunction pending appeal. This motion was denied because "a stay of the preliminary injunction would upend, rather than preserve, the status quo." Karnoski v. Trump, 826 F.3d 1180, 1193 n.11 (9th Cir. 2019). On 22 January 2019, the Supreme Court granted a stay of the district courts' preliminary injunctions issued in *Karnoski* and *Stockman* "pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought." Trump v. Karnoski, 139 S. Ct. 950, 203 L. Ed. 2d 128 (2019) (No. 18A625); Trump v. Stockman, 139 S. Ct. 950, 203 L.Ed.2d 129 (2019) (No. 18A627). On March 7, 2019, the court in *Stone* granted the Defendant's motion to stay the preliminary injunction based on the Supreme Court's rulings in *Karnoski* and *Stockman.* Stone v. Trump, 2019 WL 5697228, at *3 (D. Md. Mar. 7, 2019).

15. *See supra* note 3.

16. *2021 Military Strength Ranking*, Global Fire Power, https://www.globalfirepower.com/countries-listing.php (last visited Apr. 29, 2021) (ranking the United States as the highest in total available active military manpower, followed by Russia, China, India, and Japan).

17. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("It is the primary business of armies and navies to fight or be ready to fight should the occasion arise.").

18. *See generally* U.S. Dep't of Army, Doctrine Pub. 1, The Army para. 1-1 (31 July 2019) [hereinafter ADP 1] ("Our Army achieves readiness through sound doctrine, capable organizations, realistic training and education, modernized equipment, inspired leadership, and disciplined Soldiers. Readiness is what makes our Army credible."); U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession tbl.2-1 (31 July 2019) (C1, 25 Nov. 2019) (defining discipline as "decisions and actions consistent with the Army Values; [a] willing obedience to orders," and ranking it among factors internal and central to Soldiers serving in leader or follower roles—that constitute an individual's character). On 11 May 1993, General H. Norman Schwarzkopf (Retired) stated before the Senate Armed Services Committee:

> What keeps Soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the Marines attacking up the hill under withering machine gun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver bombs on targets is the simple fact that they do not want to let down their buddies on the right or on the left. They do not want to betray their unit and their comrades with whom they have established a special bond through shared hardship and sacrifice not only the war but also in the training and preparation for the war. It is called unit cohesion, and in my [forty] years of Army service in three different wars, I have become convinced that it is the single most important factor in a unit's ability to succeed on the battlefield.

Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, Army Law., Jan. 1995, at 27, 29 (quoting General H. Norman Schwarzkopf).

19. On 20 July, 1993, then-Chief of Staff of the Army General Gordon R. Sullivan stated before the Senate Armed Services Committee:

> What separates us from civilian society is ultimate sacrifice, the sacrifice of our lives for our country. We have to sublimate everything that we do to selfless service to our Nation. Duty, honor, country . . . is, in fact, that mission, the protection of the Nation, which must govern everything we do.

Id. at 28 (quoting General Gordon R. Sullivan).

20. *See* ADP 1, *supra* note 18, para. 3-13 ("The Army is at its best when the total force works and fights as one team.").

21. *Army Advocates: Diversity in Our Nation's Armed Forces,* U.S. Army (13 Nov. 2018), https://www.goarmy.com/advocates/advocates-news-and-events/diversity-army-life.html (recognizing that the United States has become increasingly diverse, with "racial and ethnic minority groups ma[king] up 40 percent of Defense Department active-duty military in 2015, up from 25 percent in 1990.").

22. An attempt to list all regulations governing the military is futile. For example, as of 15 April 2020, the Army Publishing Directorate lists 500 Army Regulations, 158 Army Directives, 12 active Department of the Army Memorandums, 139 Department of the Army Pamphlets, and 2,850 Department of the Army General Orders. *See generally* Army Publishing Directorate, https://armypubs.army.mil/ (last visited Apr. 29, 2021). The Naval Department and the Department of the Air Force have similar numbers of administrative regulations. Further, all Service members are subject to regulations promulgated by the Joint Staff. *See generally Joint Doctrine Publications*, Joint Chiefs of Staff, https://www.jcs.mil/Doctrine/Joint-Doctine-Pubs/ (last visited April 29, 2021).

23. U.S. Const. art. I, § 8, cls. 1, 12–15 ("The Congress shall have the power . . . [t]o raise and support Armies . . . ; [t]o provide and maintain a Navy; . . . [t]o make Rules for the Government and Regulation of the land and naval Forces; . . . [a]nd [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers.").

24. U.S. Const. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

25. *See* UCMJ art. 90 (2016) (Willfully disobeying superior commissioned officer); UCMJ art. 92 (1950) (Failure to obey order or regulation).

26. *See infra* notes 27–81 and accompanying text.

27. *See, e.g.*, Diane H. Mazur, A More Perfect Military: How the Constitution Can Make Our

Military Stronger (2010) (arguing that the doctrine of judicial deference to the military has created a civil-military divide where the military has fallen from the nation's common national experience); Gustavo Oliveira, Cook v. Gates *and* Witt v. Department of the Air Force*: Judicial Deference and the Future Of Don't Ask Don't Tell*, 64 U. Miami L. Rev. 397 (2009) (arguing that the doctrine of judicial deference to the military would create an illogical result of upholding the policy of Don't Ask Don't Tell, despite the Court's holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 Hastings L.J. 441, 444 (2004) ("The judiciary's silent march away from meaningful judicial review of those determinations threatens to transform the overarching legal questions into little more than a series of foregone conclusions."); L.M. Campanella, *The Regulation of "Body Art" in the Military: Piercing the Veil of Service Members' Constitutional Rights,* 161 Mil. L. Rev. 56, 85–91 (1999) (arguing that the Army's ban on certain "body art" and "piercings" would not withstand First Amendment scrutiny, despite the military deference doctrine); Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 Chi.-Kent L. Rev. 265, 265 (1994) (arguing that military deference doctrine is outdated because "the military functions much like a large civilian corporation, with officers playing the role of managers and enlisted personnel playing the role of employees," and "military justice is to justice what military music is to music"); Gail B. Goldman & Berylin Tancer, *The Military's Exclusion of Homosexuals: An* Indefensible *Policy*, 1 J.L. & Pol'y 71, 89 (1993) ("A court's talismanic invocation of military [deference] doctrine results in a body of case law which provides little thoughtful criticism as to whether and how military regulations comport with constitutional principles."); John N. Ohlweiler, *The Principle of Deference—Facial Constitutional Challenges to Military Regulations*, 10 J.L. & Pol. 147, 175–80 (1993) (arguing that military deference doctrine should not apply to facial constitutional challenges); Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 Yale J.L. & Feminism 1, 44 (1992) (arguing that judicial deference doctrine contributes to the decay of democracy in a pluralistic society by not allowing military members to develop skills required for democratic participation and promoting a patriotism of blind obedience); Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 Harv. BlackLetter L.J. 221, 222 (1991) (calling the Supreme Court's military jurisprudence "a judicial myopia which threatens the very form of government conceived by the framers of the Constitution"); Linda Sugin, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. Rev. 855, 876 (1987) ("The development of first amendment law for the military shows how the civil courts' standard of review has degenerated into blind acceptance of the military's position.").

28. *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 Ga. L. Rev. 161, pt. II(a) (2000).

29. The doctrine of judicial non-interference in military matters traces its roots to the founding of the Republic. Alexander Hamilton noted that the Constitution granted the judiciary "no influence over either the sword or the purse." Alexander Hamilton, *Federalist No. 78, in* The Federalist Papers 465 (Clinton Rossiter ed., 1961) (c. 1788). Hamilton also noted that Congress's power to regulate the armed forces "ought to exist without limitation because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." *See* Alexander Hamilton, *Federalist No. 23, in* The Federalist Papers 152 (Clinton Rossiter ed., 1961) (1787).

30. *See, e.g.*, Martin v. Mott, 25 U.S. 19, 30 (1827) (affirming the president's right as commander-in-chief to call out the state militia). "The authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." *Id. See also* Wilkes v. Dinsman, 48 U.S. 89 (1849) (upholding the conviction for a Sailor who refused to perform duties after his term of enlistment expired during a mission in the South Atlantic, and limiting review to jurisdiction); Dynes v. Hoover, 61 U.S. 65 (1857) (upholding the conviction of attempted desertion for a Sailor by refusing to review substantive issue of whether attempted desertion is a lesser included offense of desertion and instead, reviewing whether the court-martial had jurisdiction over the Sailor and the charged offense); *In re* Grimley, 137 U.S. 147, 147 (1890) ("It is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction."); Kahn v. Anderson, 255 U.S. 1 (1921) (finding that the court-martial had jurisdiction over the accused and offense, and refusing to review the military convening authority's decision to convene a capital court-martial with fewer panel members than required by the Army Articles of War); *Ex parte* Quirin, 317 U.S. 1 (1942) (finding jurisdiction to try saboteurs—including a U.S. citizen—before a military commission and holding that because military tribunals are not courts in the sense of Article III of the Constitution, the Sixth Amendment does not apply); Hiatt v. Brown, 339 U.S. 103 (1950) (finding that the convening authority is not required to detail a defense counsel when one is not available because the convening authority's exercise of this discretion delegated by Congress is conclusive, and explicitly reaffirming the Court's doctrine of noninterference with respect to Service members' non-jurisdictional assertions of court-martial error); Burns v. Wilson, 246 U.S. 137 (1953) (finding jurisdiction over the accused and the offense and, because of the doctrine of noninterference, refusing to consider any evidence regarding the accused's claims of illegal detention, coerced confessions, denial of counsel, and illegal suppression of evidence); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953).

> The military constitutes a specialized community governed by a separate discipline from that of the civilian . . . . Judges are not given the task of running the Army . . . and [o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Id.

31. O'Connor, *supra* note 28, pt. II(A).

32. The Warren Court—deriving its name from Chief Justice Earl Warren—lasted from 1953 to 1969. Bernard Schwartz, The Warren Court: A Retrospective (1996). In general, the Warren Court was less concerned with doctrine than it was with reaching what it considered to be an appropriate or just result, particularly when civil liberties were at stake. *Id.* Notably, of the seventeen justices who served during the Warren Court years, six had served in the military prior to their appointment to the Court: Chief Justice Earl Warren, Justice Hugo Black, Justice Tom Clark, Justice Sherman Minton, Justice William Brennan, and Justice Barron White. Lee Epstein et al., The Supreme Court Compendium 347 (2012). *See infra* notes 103–14 and accompanying text (discussing how prior military service may influence a justice's jurisprudential approach to the review of military-related cases).

33. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (finding Article 3(a), Uniform Code of Military Justice (UCMJ), which extended court-martial jurisdiction over former Service members for any offense, was unconstitutional); Reid v. Covert, 354 U.S. 1 (1957) (invalidating the exercise of court-martial jurisdiction over military dependents for capital offenses); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (invalidating the exercise of court-martial jurisdiction over military dependents for all offenses).

34. O'Callahan v. Parker, 295 U.S. 258 (1969) (finding that Congress lacks the power to compel trial by court-martial for Service members for non-service-connected offenses). By the end of the Warren Court in 1969, the Court called into doubt the legitimacy of the military justice process in its entirety. *Id.* at 265–66 (questioning the efficacy of courts-martial).

35. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962). The Supreme Court later incorporated this quotation from Chief Justice Warren in the opinion in *Chappel v. Wallace*, 462 U.S. 296, 305 (1983).

36. *See infra* notes 103–14 and accompanying text (discussing how prior military service may influence a justice's jurisprudential approach to the review of military-related cases).

37. O'Connor, *supra* note 28, at 161–62.

38. *See* Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) ("T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life.").

39. Parker v. Levy, 417 U.S. 733 (1974).

40. *Id.* at 736.

41. *Id.*

42. *Id.* at 736–37.

43. *Id.* at 733. Levy was convicted at a general court-martial for disobeying the hospital commandant's order to establish a training program for Special Forces aide men and for making certain public statements. *Id.*

44. Parker v. Levy, 417 U.S. 733, 740–41 (1974).

45. Levy v. Parker, 478 F.2d 772 (3d Cir. 1973).

46. *Parker,* 417 U.S. at 743.

47. *Id.*

48. *Id.* at 741 (citing *Levy,* 478 F.2d at 793).

49. Smith v. Goguen, 415 U.S. 566, 573 (1974) (finding that a conviction, based on the provision of a Massachusetts flag-misuse statute that criminalizes the public contemptuous treatment of the flag of the United States, is void for vagueness under the Due Process Clause of the Fourteenth Amendment).

50. *Parker,* 417 U.S. at 739.

51. *Id.* at 751.

52. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 838 (1976) (upholding an Army policy preventing political

candidates and others from holding political rallies on Fort Dix, an Army installation in New Jersey). The Court allowed this restriction on the freedom of expression based on the following reasoning:

> [A] necessary concomitant of the basic function of a military installation has been the historically unquestioned power of its commanding officer summarily to exclude civilians from the area of his command. The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.

Id. *See also* Middendorf v. Henry, 425 U.S. 25, 43 (1976) (rejecting a challenge to the imposition of summary courts-martial—the lowest level of court-martial, where confinement is limited to thirty days, and a punitive discharge may not be adjudged)—without the appointment of a defense counsel to represent the accused). Although he was able to draw parallels to low-level civilian proceedings that did not require the appointment of a defense counsel, Justice Rehnquist, instead, noted that "we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, that counsel should not be provided in summary courts-martial." *Middendorf*, 425 U.S. at 43. *See also* Brown v. Glines, 444 U.S. 348, 354 (1980) (upholding an Air Force regulation barring on-post circulation of petitions). Employing the deference doctrine, Justice Powell noted:

> These regulations . . . protect a substantial Government interest unrelated to the suppression of free expression. The military is, by necessity, a specialized society separate from civilian society . . . [and] must insist upon respect for duty and a discipline without counterpart in civilian life. Speech that is protected in the civil population may . . . undermine the effectiveness of response to command . . . [so] the rights of military men [sic] must yield somewhat to meet certain overriding demands of discipline and duty.

Brown, 444 U.S. at 354. *See also* Chappell v. Wallace, 462 U.S. 296, 300 (1983) (demonstrating a willingness to vigorously search its prior cases to find a precedent that allowed it to employ the doctrine of deference to the military). *Chappell* involved multiple enlisted Sailors who claimed their commanding officer had taken their race into account when meting out discipline, assigning shipboard duties, and compiling performance evaluations. The Sailors brought their lawsuit as a *Bivens* action, which allows a plaintiff to sue federal officials for a violation of their civil rights, even if Congress has not specifically authorized such a lawsuit. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). The Court rejected the applicability of a *Bivens* action in a military context, and instead relied on the *Feres* doctrine—barring tort actions by Service members who were injured during their military service. *See* Feres v. United States, 340 U.S. 135 (1950). In *Chappell,* the Court noted:

> [C]onduct in combat inevitably reflects the training that proceeds combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the Court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell, 462 U.S. at 300.

53. Rostker v. Goldberg, 453 U.S. 57 (1981).

54. 50 U.S.C. § 451 et seq. (1976 ed. and Supp. III).

55. *Id.* at 57.

56. Proclamation No. 4360, 40 Fed. Reg. 14,567 (Mar. 29, 1975), *reprinted in* 89 Stat. 1255 (1975).

57. Proclamation No. 4771, 45 Fed. Register 45,247 (July 2, 1980).

58. *Rostker*, 453 U.S. at 57.

59. *Id.*

60. Goldberg v. Tarr, 510 F. Supp. 292, 292 (E.D. Pa. 1980). Mr. Curtis Tarr was the Director of the Selective Service System at the time Goldberg filed his suit in 1971. *Id.* Bernard Rostker, the new Director, was substituted as a defendant. Goldberg v. Rostker, 509 F. Supp. 586, 606 n.1 (E.D. Pa. 1980).

61. *Goldberg*, 509 F. Supp. at 605.

62. *Rostker*, 453 U.S. at 83.

63. *Id.* at 64 (quoting Blodgett v. Holder, 275 U.S. 142, 148 (1927)).

64. *Id* (quoting Columbia Broadcast. System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).

65. *Id.* at 64–65. In fact, later in the opinion Justice Rehnquist noted that "[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id.* at 70.

66. *Goldberg*, 509 F. Supp. at 596 ("We are not here concerned with military operations or day to day conduct of the military into which we have no desire to intrude.").

67. *Rostker*, 453 U.S. at 68–69.

68. Goldman v. Weinberger, 475 U.S. 503 (1986).

69. *Id.* at 504.

70. *Id.*

71. *Id.* at 505.

72. *Id.* The regulation at issue was U.S. Air Force Regulation 35-10, which stated that "[h]eadgear will not be worn . . . while indoors except by armed security police in the performance of their duties." U.S. Dep't of Air Force, Reg. 35-10, para. 1-6h(2)(f) (18 July 1980).

73. *Goldman*, 475 U.S. at 505.

74. *Id.*

75. At the time of Goldman's injunction and appeal, the Supreme Court had developed a sizable record of knocking down non-military regulations that placed an undue burden on the free exercise of religion. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). *See generally* Cong. Rsch. Serv., *Facially Neutral Laws that Interfere with Religious Practice: Doctrine During 1960s through 1980s*, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-1-4-2-1-2/ALDE_00001017/ (last visited Apr. 29, 2021).

76. Goldman v. Sec'y of Def., 530 F. Supp. 12 (D.D.C. 1981).

77. Goldman v. Sec'y of Def., 734 F.2d 1531 (D.C. Cir. 1984).

78. Goldman v. Weinberger, 475 U.S. 503, 503 (1986).

79. *Id.* at 507.

80. *Id.* at 508.

81. *Id.* at 509–10.

82. *Id.* at 507.

83. *Id.*

84. Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918–2004*, 65 Md. L. Rev. 907, 907–08 (2006).

85. It is important to note that the deference the Court grants to the military is distinguishable from the judicial deference granted under the *Chevron* doctrine. The *Chevron* doctrine was established in the 1984 case of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). In *Chevron*, the Court upheld the Reagan Administration Natural Resources Defense Council's (NRDC) decision to enforce the Clean Air Act (CAA) with less vigor than had been done by the Carter Administration's NRDC, because the CAA's statutory language was ambiguous and both administration's interpretations were reasonable. Generally, military-related law and policy have not been challenged on the basis of ambiguity (i.e., Air Force Regulation 35-10 clearly prohibited Captain Goldman from wearing his yarmulke; the Military Selective Service Act at issue in *Rostker* explicitly prohibited the president from requiring females to register for the draft). Thus, unlike the *Chevron* doctrine, under the doctrine of judicial deference to the military, the military is not required to demonstrate that it is acting reasonably in the face of a vague or ambiguous regulation—it is simply granted deference (i.e., in *Levy*, the Court did not need to consider the ambiguity of Article 134, UCMJ, and granted deference to the military because of the differences between the military and civilian society).

86. Edenfield v. Fane, 507 U.S. 761 (1993).

87. *Id.* at 770.

88. *See supra* notes 39–51 and accompanying text.

89. *Edenfield,* 507 U.S. at 771.

90. *Id.*

91. Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002).

92. *Id.* at 360–61.

93. *Id.* at 368–70.

94. *Id.* at 372. Justice O'Connor proposed that the FDA could better regulate the practice of compounding by banning the use of certain equipment for compounding purposes, limiting the number of compounding prescriptions a pharmacist could dispense, and prohibiting intrastate compounding transactions. *Id.*

95. In *Oralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court upheld sanctions issued to an Ohio attorney who, quite literally, chased ambulances. More recently, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Court upheld a Florida Bar rule prohibiting direct mail solicitations to accident victims within thirty days of the accident.

96. Lichtman, *supra* note 84, app. A; Shannon M. Grammel, *Old Soldiers Never Die: Prior Military Service and the Doctrine of Military Deference on the*

Supreme Court, 223 Mil. L. Rev. 988, app. A (updating Lichtman's survey of cases to include those decided by the Court between 2004 and 2015, showing that the Court has considered twenty-nine military-related cases in the forty-three years since the doctrine of deference was introduced in *Levy*.)

97. *See* Hamdi *v.* Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 524 U.S. 446 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008). Detailed analysis determining the distinction between these cases and other military-related cases is beyond the scope of this article. However, these cases are generally jurisdictional in nature and allow the Court to employ the Warren Court's approach of rigorous jurisdictional review.

98. Grammel, *supra* note 96, at 1026–29.

99. *See, e.g.*, Roe v. Dep't of Def., 947 F.3d 207, 218–28 (4th Cir. 2020). The court analyzed the nature and strength of the plaintiff's challenge to a military determination while "giv[ing] great deference to the professional judgment of military authorities concerning the relative importance of a particular interest." *Id.* The court found that Air Force Service members diagnosed with human immunodeficiency virus (HIV), who faced imminent separation from service, demonstrated a likelihood of success on the merits of their claim that a DoD policy categorically precluding HIV-positive Service members from deploying to theater-level U.S. Central Command (USCENTCOM) was arbitrary and capricious, in violation of the Administrative Procedure Act (APA). The DoD offered no rationale for the policy, nor did it identify evidence it considered in formulating it; and each explanation offered by the government for its policy was unsupported by the record, or contradicted by scientific evidence, including current medical literature and expert opinions about HIV treatment and transmission risks. *Id.*

100. *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1202 (9th Cir. 2020) (in vacating the district court's order striking President Trump's motion to dissolve the 2017 preliminary injunction based on Secretary Mattis's new 2018 policy, the court concluded that on the current record, a presumption of deference was owed to the decision-making because the 2018 policy appeared to have been the product of independent military judgment, and therefore, the district court "may not substitute its own evaluation of evidence for a reasonable evaluation by the military") (citations omitted); Doe 2 v. Shanahan, 755 F. App'x 19, at *25 (D.C. Cir. 2019) (reversing the district court's denial of the government's motion to dissolve the 2017 preliminary injunction and vacating the preliminary injunction, the court held that "any review must be 'appropriately deferential' in recognition of the fact that the Mattis Plan concerned the composition and internal administration of the military," and "must recognize that the Mattis Plan plausibly relies on the 'considered professional judgment' of 'appropriate military officials'").

101. *See* Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 Wake Forest L. Rev. 557, 566 (1994). Former Chairman of the Senate Armed Services Committee, Senator Sam Nunn, argues that the legislative and executive branches have developed an appropriate system of military criminal and administrative law that carefully balances the rights of individual Service members and the needs of the armed forces. Trumpeting Congress's responsiveness to the national will, Senator Nunn notes:

> The system has demonstrated considerable flexibility to meet the changing needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognize the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel. These principles have continuing validity as a guide for judicial review of military cases.

Id.

102. The same could be said about President Biden's executive actions on 25 January 2021. *See supra* note 3.

103. 10 U.S.C. § 774(a)–(b) (2014). In response to the congressional amendment to Title 10, the DoD issued a DoD instruction (DoDI). U.S. Dep't of Def., Instr. 1300.17, Religious Liberty in the Military Services (1 Sept. 2020). Taken as a whole, this DoDI directs military commanders to grant requests for religious accommodation, unless the religious apparel item interferes with the Service member's ability to perform his military duty or is not neat and conservative. This instruction also notes that military commanders "should" approve requests for accommodation to wear religious apparel when such accommodation will not have an adverse impact on mission accomplishment, military readiness, standards, or discipline.

104. The practical impact of 10 U.S.C. § 774, DoDI 1300.17, and the regulations from military departments implementing the statute and instruction, is that the wear of the yarmulke by Service members has been nearly universally accepted. Camouflage yarmulkes may be even by ordered through the DoD's official supply system (the Woodland BDU Camouflage yarmulke is NSN 9925-01-465-9326, and the Day Desert Camouflage yarmulke is NSN 9925-01-490-5181), and commanders may use appropriated funds to order these items for their Service members. *See* DLA Religious Supply Catalog by NSN (2016). *See also* Daniel Eric Minkow, *Kippah the Jewish Uniform,* Jews in Green (June 5, 2005), http://jewsingreen.org/2005/06/kippah-the-jewish-uniform/ (comments to the article made by Soldiers, Sailors, Airmen, and Marines who have worn their yarmulkes in uniform, both in garrison and in deployed environments such as Iraq and Afghanistan).

105. Epstein et al., *supra* note 32, at 347.

106. *Id.*

107. Neil A. Lewis & Scott Shane, *Alito Is Seen as a Methodical Jurist with a Clear Record*, N.Y. Times (Nov. 1, 2005), https://www.nytimes.com/2005/11/01/politics/politicsspecial1/alito-is-seen-as-a-methodical-jurist-with-a-clear.html.

108. Epstein et al., *supra* note 32, at 347. Justices Breyer, Kennedy, and Alito are the only Supreme Court justices who served in the military, but not during a time of war. *Id.* During the Rehnquist Court, three members of the Court served in the military—Chief Justice Rehnquist, Justice Stevens, and Justice Kennedy. Chief Justice Rehnquist and Justice Stevens both served on active duty during World War II. *Id* at 348.

109. Jeffrey Toobin, *After Stevens: What Will the Supreme Court Be Like Without Its Liberal Leader?*, New Yorker (Mar. 15, 2010), http://www.newyorker.com/magazine/2010/03/22/after-stevens.

110. *See* discussion *supra* Review of Legal Profession Regulations.

111. *See* Grammel, *supra* note 96, at 988.

112. *Id.* at 990.

113. Notably, during World War II, Justice Murphy served as both a justice on the Supreme Court and a lieutenant colonel in the Army during the Court's summer recess. While serving with the Army in the summer of 1942, Justice Murphy was recalled to Washington to rule on *Ex parte Quirin*, 317 U.S. 1 (1942). When he reported to the Court, he arrived in his Army uniform, alarming his fellow justices about his ability to rule on the validity of a military tribunal. Ultimately, Justice Murphy recused himself from the case. *See* Sidney Fine, *Mr. Justice Murphy in World War II*, 53 Am. J. Legal Hist. 90, 98–99 (1966).

114. J. Woodford Howard, Mr. Justice Murphy: A Political Biography 272 (1968) (quoting a letter from Frank Murphy to Harry Levinson (Dec. 25, 1941)).

115. Grammel, *supra* note 96, at 1022.

116. *Id.*

117. Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

118. Through the end of the Warren Court, the Court refused to review the constitutionality of military regulations and policies. *See* discussion *supra* Supreme Court Review of Military-Related Law and Policy. Since *Levy*, the Court has considered twenty-three cases involving military regulations or policies. *See* Lichtman, *supra* note 82, app. A; Grammel, *supra* note 96, app. A.

119. ADP 1, *supra* note 18, ch. 3 ("The future Army will be ready and able to fight and win in our Nation's most lethal wars.").

120. Since the last application of the doctrine in *Boumediene v. Bush*, 553 U.S. 723 (2008), the Court has welcomed five new members—Justices Sonia Sotomayor, Elena Kagan, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett. *Current Members,* Sup. Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Apr. 29, 2021). As noted above in discussing lack of military experience on the court, none of these justices are veterans or have prior military experience. *Id.*

121. A court's most likely approach would be to avoid the doctrine of judicial deference to the military by attempting to distinguish contested policy from the long line of Supreme Court cases establishing the doctrine. *See* discussion *supra* Supreme Court Review of Military-Related Law and Policy. For example, a court could have distinguished the military transgender policy by finding that the true rationale for the policy was not to further readiness, good order, or discipline, but was some other invidious purpose (such as an attack on transgender persons in general). By distinguishing the military transgender policy, a court could have reviewed the constitutionality of the policy under a much less deferential analysis. *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1200–02 (9th Cir. 2020) (concluding that the Mattis policy on its face treated transgender persons differently than other persons, and consequently, something more than rational basis, but less than strict scrutiny applied to the military's decision-making); Stone v. Trump, 400 F. Supp.3d 317, 353–55 (D. Md. 2019) (concluding that heightened scrutiny applies to the Mattis policy because it discriminates on the basis of transgender status and the level of deference given to the military depends upon what evidence it gathered and how it evaluated that evidence, which "remains to be seen").

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No. 4

Juvenile Misconduct Overseas

By R. Peter Masterton

In 2015, a six-year-old girl told her mother that she was sexually assaulted by a boy in her American military elementary school in Grafenwoehr, Germany. The girl said that the boy forced kisses on her, penetrated her with his finger, and coaxed her into touching him. The next day, the girl's father—an Army Soldier—and mother reported the sexual assault. However, they were told that the offices set up to investigate sexual assaults and assist victims could not do anything because the victim and the offender were both minors. The parents were shocked when they later learned that the military elementary school principal had received several other reports of sexual assaults by the same juvenile offender six months previously. Ultimately, the offender was removed from school, but no criminal investigation or prosecution was initiated. The girl's mother later told a reporter, "We expected some kind of justice. It was really discouraging and kind of disheartening to know the military kids, especially overseas, have no protection."[1]

Juvenile misconduct is a significant problem on many military bases.[2] Such misconduct ranges from the sexual assault case described above to shoplifting, illegal drug and alcohol use, and vandalism.[3] These cases are rarely prosecuted. The *Associated Press* documented nearly 600 sexual assaults committed by military children between 2007 and 2018; its analysis of these cases at Navy and Marine Corps bases showed that federal prosecutors pursued only one in seven.[4] These reports led to a Department of Defense (DoD) Inspector General (IG) investigation[5] and legislation designed to address the problem.[6]

Juvenile misconduct in American military communities overseas poses an even greater problem. In the United States, local American civilian authorities can investigate and prosecute misconduct by children of American military personnel. However, American authorities have limited power over such children overseas, and host nation prosecutors may be unwilling or unable to investigate their misconduct.[7]

This article examines how the American military deals with misconduct by juveniles that accompany its forces overseas. It first looks at how juvenile misconduct is investigated, both by American and host nation agencies. It then looks at the disciplinary options for resolving such misconduct, both under American and host nation law. Finally, it discusses some of the unique challenges posed by juvenile misconduct overseas and provides tips for attorneys who deal with these cases.

Investigative Options

A number of American and host nation organizations investigate misconduct by juveniles accompanying the U.S. Forces overseas. In foreign countries where large numbers of American troops and family members are stationed, a status of forces agreement (SOFA) normally defines the investigative purview of the United States and the host nation. These treaties generally provide the U.S. military the authority to investigate crimes occurring on American installations—including those involving juveniles—and require coordination with and assistance from the host nation to investigate crimes that occur off American installations. In Europe,

American criminal investigative organizations face special challenges when investigating juveniles. Juveniles have many of the same constitutional rights as adults, even though juvenile delinquency proceedings are fundamentally different from adult criminal trials. The Supreme Court has extended the search and seizure protections of the Fourth Amendment to juveniles.

for example, the North Atlantic Treaty Organization (NATO) SOFA states that:

a. Regularly constituted military units or formations of a force shall have the right to police any camps, establishment or other premises which they occupy as the result of an agreement with the receiving State [host nation]. The military police of the force may take all appropriate measures to ensure the maintenance of order and security on such premises.
b. Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State [host nation] and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.[8]

In addition, the NATO SOFA requires the United States and the host nation to assist each other in investigating offenses.[9] In Korea, the SOFA with the United States has nearly identical provisions.[10]

In many foreign countries, supplemental agreements provide more detail on this investigative authority. For example, in Germany a supplement to the NATO SOFA provides American authorities slightly greater investigative powers. Among other things, it provides the right to patrol public areas that are not located on American installations. Specifically, it allows American military police the right to:

> Patrol on public roads, on public transport, in restaurants (Gastätten) and in all other places to which the public has access and to take such measures with respect to the members of a force, of a civilian component or dependents as are necessary to maintain order and discipline. Insofar as it is necessary or expedient the details of this right shall be agreed upon between the German authorities and the authorities of the force who shall maintain close mutual liaison.[11]

Investigations by American Military Criminal Investigative Organizations

American military criminal investigative organizations generally investigate crimes committed by American juveniles overseas. Each service has its own regulations covering these investigations, and, depending on the seriousness of the offense, different organizations may be involved. In the Army, the military police investigate minor offenses committed by juveniles[12] while the Army Criminal Investigation Command investigates serious incidents.[13] Air Force policy creates a similar division of responsibilities between the security police (which investigate minor offenses) and the Air Force Office of Special Investigations (which investigates serious offenses).[14] Navy policy also divides investigative responsibility between the Navy and Marine Corps commands' organic investigators (which investigate minor offenses) and the Naval Criminal Investigative Service (which investigates serious offenses).[15]

As mentioned, the applicable SOFA and supplemental agreements with the host nation may limit the ability of military criminal investigative organizations to investigate, especially off the installation.[16] Each of the Services requires their criminal investigative organizations to maintain liaison with host nation law enforcement agencies to facilitate investigations requiring help from the host nation.[17]

American criminal investigative organizations face special challenges when investigating juveniles. Juveniles have many of the same constitutional rights as adults, even though juvenile delinquency proceedings are fundamentally different from adult criminal trials. The Supreme Court has extended the search and seizure protections of the Fourth Amendment to juveniles.[18] The Court has also held that police must read juveniles their *Miranda* rights[19] before interrogating them while in custody.[20] If police know or reasonably should know a juvenile's age, they must take that age into account in deciding whether the juvenile is in "custody" and, therefore, must receive *Miranda* warnings.[21] The American Academy of Child and Adolescent Psychiatry goes further by recommending that juveniles always have an attorney present before they are interrogated.[22] The Air Force requires its Security Forces to allow a parent or guardian to be present at such interrogations.[23]

Investigations by Other Military Agencies

A number of other American military agencies also investigate juvenile misconduct. Most of these investigations focus on treatment, although some can lead to disciplinary actions as well.

Family Advocacy Program

The military Family Advocacy Program mandates identification of child abuse and neglect.[24] The 2019 National Defense Authorization Act (NDAA) required this program to also consider juvenile-on-juvenile "problematic sexual behavior" committed on U.S. military installations.[25] As a result, the directive establishing the program now mandates investigation of "problematic sexual behavior in children and youth."[26] In addition, the Family Advocacy Program investigates other forms of juvenile misconduct, since their acts may be evidence of parental neglect. While such investigations focus on the parents, they must also deal with the underlying juvenile misconduct.[27]

The program requires creation of a multidisciplinary "incident determination committee" to "assess incidents of alleged abuse and make incident status determinations."[28] The Army, Navy, and Air Force each have regulations implementing the Family Advocacy Program, although the details vary.[29] The Army multidisciplinary committees include representatives from the military treatment facility, the legal office, the social work services office, installation law enforcement agencies, the Army substance abuse program office, the child and youth services office, the installation chaplain, and the public affairs office. The committee's "purpose is to coordinate medical, legal, law enforcement, and social work assessment, identification, command intervention, and investigation and treatment functions from the initial report of . . . child abuse to case closure."[30] The Navy and Marine Corps committees are tasked to "review all available case material and make a case status determination."[31] The Air Force created a "central registry board" at each installation which includes representatives from the command, the legal office, installation law enforcement agencies, and the military medical treatment facility.[32] The board "makes administrative determinations for suspected . . . child maltreatment" that require entry into an Air Force central registry.[33]

The Family Advocacy Program committees do not conduct criminal investigations; their focus is on identification, treatment, counseling, and rehabilitation.[34] However, the committees must also protect victims and report juvenile misconduct to other agencies. Problematic sexual behavior by children requires the team to monitor "the risk to and safety of all children and youth involved" and make "recommendations for treatment, supportive services, and case management."[35] Other misconduct demonstrating child abuse or neglect requires the team to "assess incidents" and "make incident status determinations."[36] Installation Family Advocacy Programs are required to "immediately report . . . any criminal allegations" to the appropriate law enforcement authority.[37]

While they are not criminal investigators, Family Advocacy Program committees gather evidence and identify misconduct.[38] As a result, committee members who gather evidence, including health care providers, arguably should be required to provide *Miranda* warnings in appropriate circumstances.[39] The team's focus on treatment makes it difficult for them to effectively investigate misconduct with a view toward discipline of juvenile offenders.[40]

DoDEA Schools

At schools run by the DoD Education Activity (DoDEA), special reporting requirements apply to juvenile misconduct. A 2016 directive requires DoDEA personnel, including teachers and support staff, to report and document serious incidents related to the school and its activities—including student violations of the law.[41] The 2019 NDAA requires DoDEA schools to report juvenile-on-juvenile problematic sexual behavior.[42] As a result, new DoDEA regulations specifically require reporting sexual misconduct to the Family Advocacy Program and other outside agencies.[43] In addition, the DoDEA must report any "potential criminal activity . . . to law enforcement . . . such as military police . . . host nation law enforcement, other local child protective services . . . installation command, or any other outside enforcement agency with jurisdiction over the type and nature of incident reported."[44]

Recent legislation also addressed the tracking of juvenile misconduct in military schools. The 2019 NDAA requires DoDEA to develop a comprehensive database of all juvenile misconduct within DoDEA schools.[45] One of the new DoDEA regulations mentioned above requires child abuse reports to be submitted electronically through a case management system within twenty-four hours.[46] Department of Defense Education Activity teachers and principals who interrogate student offenders may be required to read them their *Miranda* rights, especially if U.S. law enforcement agents are present during the interrogation.[47] School officials must also respect students' Fourth Amendment rights to privacy when conducting searches.[48] If the school official has reasonable grounds to believe the student has evidence of a violation of the law or school rules, and if the search is not excessively intrusive, searches of students will normally comply with Fourth Amendment requirements.[49]

Other Officials and Agencies

Other American military officials and agencies may also investigate juvenile misconduct overseas. For example, the commander of the juvenile's sponsoring parent may decide to conduct a preliminary inquiry under the Uniform Code of Military Justice if the misconduct involved child endangerment.[50] While such inquiries focus on the Service member (the juvenile's sponsor), they should also deal with the underlying juvenile misconduct. Commanders may also conduct administrative investigations if juvenile misconduct affects their unit. The Army, Air Force, and Navy all provide commanders broad authority to inspect their units. Army commanders can order administrative investigations into matters within their "area of responsibility."[51] Air Force commanders can conduct investigations to "improve and evaluate the state of conformance, discipline, economy, efficiency, readiness, and resource management" in the unit.[52] Navy commanders can initiate administrative inquiries into "incidents occurring within, or involving personnel of, the command."[53] These broad mandates would, for example, authorize investigation of juvenile vandalism in the unit area or a juvenile assault occurring during a unit function.

If a juvenile commits a sex crime, the military's Sexual Assault Prevention and Response Program can become involved. This program is designed to support the victim and only applies when the victim is a Service member, a DoD civilian employee, or a dependent of a Service member or Civilian employee over the age of eighteen.[54] The program does not apply when the victim is a dependent under the age of eighteen; these victims are covered by the Family Advocacy Program, discussed above.[55] Each of the Services has regulations implementing the Sexual Assault Prevention and Response Program.[56] Because of its focus on the victim, this program is ill-suited to gathering evidence against an offender.[57] The victim has a right to make a "restricted report," which will preclude commanders or police from initiating a criminal investigation.[58]

As mentioned at the beginning of this article, a military IG may also investigate juvenile misconduct.[59] The Inspector General

Act established offices of the IG to "conduct and supervise audits and investigations relating to the programs and operations" of the federal government.[60] The DoD has its own IG,[61] as does each of the military services.[62] The DoD IG is "an independent and objective unit within DoD to conduct and supervise audits, investigations, evaluations, and inspections relating to the programs and operations of the DoD."[63] It can investigate juvenile misconduct within schools run by the DoD and on installations under the control of its services.[64] The Army, Navy, and Air Force IG offices work in a similar fashion.[65]

While IGs can investigate specific cases, they also provide policy guidance.[66] As a result, IG investigations will usually focus on trends in juvenile misconduct rather than individual juvenile offenders. For example, the DoD IG investigation mentioned in the introduction of this article examined juvenile misconduct in DoDEA schools world-wide.[67] In addition, restrictions on the use of evidence from IG reports can limit their usefulness in subsequent disciplinary action.[68]

Host Nation Investigations

The host nation where the juvenile's offense occurs normally has the greatest power to investigate. This authority comes from the host nation's authority to prosecute the case. Under most SOFAs, the host nation retains the authority to prosecute offenses occurring within its territory, even if the offender is a juvenile accompanying visiting forces. For example, the NATO SOFA provides that:

> the authorities of the receiving State [host nation] shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offences committed within the territory of the receiving State [host nation] and punishable by the law of that State.[69]

The United States–Korea SOFA has a similar provision.[70]

The host nation will frequently need assistance from American forces to complete the investigation, especially when American witnesses are involved or the offense occurred on an American installation. Most SOFAs require U.S. forces to provide this assistance. As mentioned at the beginning of this section, the NATO SOFA provides that the host nation and the American forces "shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence."[71] The United States–Korea SOFA contains nearly identical language.[72]

Supplemental agreements can clarify the power of host nation authorities to investigate on American installations. For example, the German supplement to the NATO SOFA provides that the German police may "exercise their authority" within American installations "to the extent that the public order and safety of the Federal Republic [of Germany] are jeopardized or violated."[73] German police may enter American installations only after full consultation with American forces.[74]

American Disciplinary Options

The ability of the U.S. military to discipline juvenile offenders overseas is limited. Most American criminal laws do not apply outside the United States.[75] While the Military Extraterritorial Jurisdiction Act (MEJA) may be used to prosecute felonies committed by juveniles "accompanying the Army Force overseas,"[76] prosecutions under this Act are rare.[77] As a result, military commanders often only take administrative action against juvenile offenders in their communities.[78] If the misconduct occurred in a DoDEA school, that agency may be able to take disciplinary action as well.[79]

Military Extraterritorial Jurisdiction Act

Most SOFAs allow visiting forces to conduct their own prosecutions in the territory of the host nation. This principle allows the American forces to prosecute its personnel for crimes committed overseas.[80] However, the American military has limited jurisdiction over civilians.

The Uniform Code of Military Justice has long allowed military courts to try civilians "accompanying the armed forces" overseas.[81] In 1953, a military court used this authority to convict Clarice Covert of murdering her husband, an American Air Force sergeant, at a U.S. air base in England. In the same year, another military court relied on the same authority to convict Dorothy Smith of murdering her husband, an Army officer, at an American post in Japan. In its 1957 decision in *Reid v. Covert*, the Supreme Court overturned both convictions, ruling that the Uniform Code of Military Justice could not be constitutionally applied to the capital trial of American civilian dependents overseas in peacetime. As a result, no court had jurisdiction to try Mrs. Covert and Mrs. Smith for their crimes.[82]

The Military Extraterritorial Jurisdiction Act was passed in 2000 to address this jurisdictional gap.[83] It enables the Federal Government to prosecute persons "accompanying" the American armed forces overseas when they engage in conduct "outside the United States that would constitute an offense punishable by imprisonment for more than [one] year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States."[84] Those accompanying the armed forces include dependents of American Service members and dependents of DoD Civilian employees and contractors. For MEJA to apply, the dependent must reside with the member, employee, or contractor. Dependents who are ordinarily resident in the host nation are excluded from this definition.[85] There is no age limitation,[86] so juveniles who commit offenses punishable by more than one-year imprisonment (felonies) can be tried under this statute.

Military Extraterritorial Jurisdiction Act prosecutions are limited to federal offenses that specifically state that they apply to the special maritime and territorial jurisdiction of the United States.[87] There are a number of offenses that include such language including assault,[88] maiming,[89] theft,[90] homicide,[91] kidnapping,[92] damage to property,[93] and sexual abuse.[94] The Assimilative Crimes Act, which is often used to prosecute cases on exclusive federal jurisdiction military installations in the United States, does not apply because there is no U.S. state law to assimilate overseas.[95]

Most SOFAs divide offenses committed by visiting forces personnel into three categories: 1) those where the host nation has exclusive jurisdiction, 2) those where the visiting forces have exclusive

(Credit: Romolo Tavani – stock.adobe.com)

jurisdiction, and 3) those where the host nation and the visiting forces have concurrent jurisdiction.[96] In the first category (host nation exclusive jurisdiction), an individual violates a host nation criminal law—but there is no corresponding provision under visiting forces' criminal law.[97] For example, an American Service member stationed in Germany who commits the German crime of "public insult" by using his middle finger to disparage another person[98] is subject to exclusive host nation jurisdiction because there is no corresponding American criminal law prohibiting this act. In the second category (visiting forces exclusive jurisdiction), an individual violates the law of the visiting forces—but not the law of the host nation.[99] For example, an American Service member stationed in Korea who is absent without leave[100] is subject to the exclusive jurisdiction of the American forces because there is no corresponding Korean offense. The last category (concurrent jurisdiction) encompasses cases where an individual violates both host nation and visiting forces' criminal laws.[101] The vast majority of crimes—including larceny, sexual assault, and murder—fall into this category.

American juveniles who commit offenses that can be prosecuted by the host nation and under MEJA are subject to concurrent jurisdiction.[102] Since MEJA is limited to felonies,[103] this means that only serious juvenile offenses are subject to concurrent jurisdiction. Less serious offenses by American juveniles are subject to exclusive host nation jurisdiction.

For concurrent jurisdiction cases, most SOFAs define which country has the primary right to exercise jurisdiction. For example, the NATO SOFA provides that:

> a. The military authorities of the sending State [visiting forces] shall have the primary right to exercise jurisdiction over a member of a force [Service member] or of a civilian component [Civilian employee] in relation to (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent [and] (ii) offences arising out of any act or omission done in the performance of official duty.
> b. In the case of any other offence, the authorities of the receiving State [host nation] shall have the primary right to exercise jurisdiction."[104]

The United States–Korea SOFA has nearly identical language.[105] Because the visiting forces' primary jurisdiction extends only to Service members and Civilian employees, and not to dependents, the United States does not have primary jurisdiction over American juveniles accompanying the American forces overseas. Therefore, if an American juvenile accompanying the force in Korea commits a felony (such as sexual assault) against another member of the American forces, Korea would have primary jurisdiction. An American prosecution of such a juvenile could proceed only if Korea waived its primary right to jurisdiction.[106] Similarly, MEJA provides that an

American prosecution may not commence if the host nation has prosecuted or is prosecuting the case.[107] This underscores the importance of close cooperation with host nation prosecutors.

Under MEJA and American federal law, those under the age of eighteen can be tried as an adult for certain violent crimes and drug offenses.[108] Other federal crimes committed by juveniles are tried as acts of juvenile delinquency.[109] However, there are limitations on federal delinquency proceedings in addition to the general limitations contained in MEJA.[110] For example, under the Federal Juvenile Delinquency Act, a U.S. Attorney must certify to the appropriate federal district court that 1) the state juvenile court does not have jurisdiction or refuses to exercise jurisdiction; 2) the state does not have available "programs and services adequate for the needs of juveniles;" or 3) the juvenile committed a "crime of violence" or a drug offense and that there is a "substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction."[111] Unfortunately, this certification is seldom sought.[112]

Although the Federal Juvenile Delinquency Act establishes procedures for federal prosecutions of juveniles, there is officially no federal juvenile justice system; instead, the Act envisions federal prosecutions of juveniles as a last option when states are unable to prosecute.[113] In addition, there are no federal institutions for juvenile prisoners; rather, the Bureau of Prisons rents beds for such prisoners in public and private juvenile facilities.[114] As a result, MEJA prosecutions of juveniles are rare.

Military Extraterritorial Jurisdiction Act prosecutions are conducted in the United States, so the juvenile offender must be returned to an appropriate federal district court before the prosecution can proceed.[115] Commanders and their legal advisors who wish to initiate a MEJA prosecution must coordinate with both the Department of Justice (DoJ) and the Department of State.[116] The Human Rights and Special Prosecutions Section of the U.S. DoJ Criminal Division is responsible for these prosecutions.[117]

Discipline by American Military Commanders

Many overseas American military commands have developed specific procedures for dealing with civilian misconduct. These procedures differ from country to country and may be Service-specific or apply to all civilians accompanying the Army, Air Force, Navy, and Marines in a particular overseas area.

Overseas military commanders' ultimate disciplinary option is barring civilians from the installation and withholding logistic support. A commander's ability to bar civilians from an installation is based both on the commander's inherent authority[118] and the military's authority to regulate the security of its property.[119] In some overseas areas, commanders have the authority to bar individuals from all American military installations.[120] The authority to grant and deny logistic support comes from a number of sources,[121] some of which are unique to each country where U.S. troops are stationed.[122]

A number of overseas commands have created administrative agencies responsible for taking action in response to civilian misconduct. These agencies are similar to the juvenile review boards set up on some exclusive federal jurisdiction installations in the United States.[123] The U.S. Forces in Korea are covered by a single regulation establishing procedures for dealing with misconduct by all civilians and family members accompanying the American armed forces in that country.[124] Under this regulation, the Area Commander is designated as the Civilian Misconduct Action Authority and is responsible for imposing administrative discipline for civilian misconduct.[125] The Area Commander is assisted by a Civilian Misconduct Officer (who tracks civilian misconduct) and a Civilian Misconduct Board (which provides nonbinding recommendations on discipline).[126] In Europe, the Army has established a similar regulation to deal with civilian personnel under its control.[127] Army garrison commanders in Europe are designated as Civilian Misconduct Action Authorities with the authority to discipline civilians and family members who engage in misconduct.[128] These officials are assisted in their duties by an Assistant Civilian Misconduct Action Authority.[129]

These civilian misconduct agencies have a number of disciplinary options that depend on the consent of the offender. These options include requiring the offender to pay the victim damages, perform community service, attend counseling, remain confined at home, or periodically report to a community supervision officer.[130] If the offender refuses or fails to complete the requirement, more severe discipline can be imposed.[131] Civilian misconduct agencies can only enforce these voluntary options based on the threat to impose the ultimate discipline of an installation bar or withdrawal of logistic support, as previously discussed.

Tables of suggested penalties provide uniformity in punishment.[132] For example, in Korea the suggested penalty for a juvenile's first offense of assault is fifty hours of community service, referral to counseling, and two 1000-word essays.[133]

Discipline by American Military Schools

In addition to those mentioned above, special disciplinary options exist for juvenile misconduct occurring in DoDEA schools. The ultimate punishment is suspension or expulsion from school.[134] However, schools must apply discipline progressively. Before resorting to suspension or expulsion, school administrators must consider "verbal reprimands, conferences, detention, time-out, alternative in-school placements, school service programs, community service and counseling programs, and other behavior management techniques."[135] Corporal punishment is prohibited.[136]

Grounds for suspension and expulsion from school include: assault; possession of dangerous weapons; possession of alcohol, tobacco, and drugs; robbery; vandalism; theft; lewd acts; gambling; fighting; bullying; cheating; and truancy.[137] A school principal may remove a student for up to ten consecutive school days only after conducting an informal conference with the student.[138] Removal for more than ten days requires a formal hearing before a school disciplinary committee.[139] The student has a right to be represented at the hearing, present a defense,[140] and to appeal the final decision.[141] Expelled students must still

be provided an opportunity to obtain an education, either through correspondence courses or other educational programs.[142]

Trial in Host Nation Courts

Host nation courts are often in the best position to prosecute juvenile misconduct. As mentioned above, under most SOFAs, the host nation retains authority to prosecute offenses that occur within its territory.[143] In many cases, the host nation will have exclusive jurisdiction because prosecution under MEJA is not authorized.[144] In other cases, the host nation and the United States may both have jurisdiction (concurrent jurisdiction), but the host nation will have the primary right to try the case (primary jurisdiction).[145] Even if a prosecution under MEJA is authorized and the host nation is willing to waive its primary jurisdiction,[146] the Americans may be unable to prosecute because the DoJ declines to take the case.[147]

Many host nations do not permit criminal prosecutions of children under a certain age. In Germany, for example, children under the age of fourteen are considered to lack criminal capacity.[148] As a result, when children under fourteen commit crimes, the German government is unable to prosecute.[149] The age of criminal responsibility around the world varies from seven to eighteen.[150] The host nation laws establishing these ages are often criticized, especially when juveniles commit serious crimes. In 1993, a court in England convicted two eleven-year-old boys of the murder of a two-year-old toddler, causing some to argue that the age of criminal responsibility in that country (ten years) is too low.[151] A recent gang-rape in Germany involving two twelve-year-old offenders who were immune from criminal prosecution under German law caused many to question whether the German age of criminal liability (fourteen) is too high.[152] But there are a number of other challenges involved in host nation trials.

The American forces are required to "assist" the host nation with the collection and production of evidence.[153] This includes the production of American witnesses at host nation trials.[154] The local American military legal office should coordinate this production and ensure that the witnesses understand the limitations on their testimony. Service regulations require coordination of these requests at various levels. The Army requires the appropriate Staff Judge Advocate to review and approve the production of American military personnel to appear as witnesses at foreign tribunals.[155] The Air Force requires coordination with the Staff Judge Advocate and the DoJ.[156] The Navy requires the relevant General Court-Martial Convening Authority to approve such requests for witnesses.[157]

Juveniles accompanying U.S. forces tried by host nation courts receive significant support. For juveniles accompanying the American armed forces overseas, U.S. law authorizes the military to "employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation."[158] The Government can also pay charges for copies of records, printing and filing fees, interpreter and witness fees, and similar expenses.[159] These fees can be paid for pretrial, trial, appellate, and post-trial criminal proceedings in host nation courts. However, payment is only authorized when the sentence normally imposed includes confinement (whether or not suspended), there appears to have been a "denial of the substantial rights of the accused," or the case "is considered to have a significant impact on the relations of U.S. forces with the host country, or involve[s] any other particular U.S. interest."[160]

Status of forces agreements usually stipulate that Americans pending criminal trial in foreign courts be granted certain basic rights. For example, the NATO SOFA provides:

> Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State [host nation] he shall be entitled:
>
> a. to a prompt and speedy trial;
> b. to be informed, in advance of trial, of the specific charge or charges made against him;
> c. to be confronted with the witnesses against him;
> d. to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;
> e. to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;
> f. if he considers it necessary, to have the services of a competent interpreter . . . ."[161]

In Korea, the SOFA with the United States has nearly identical provisions.[162]

Status of Forces Agreements also normally authorize the United States to send an observer to the criminal trials of American personnel in host nation courts. For example, the NATO SOFA provides that the accused in a foreign criminal trial will have the right "to communicate with a representative of the Government of the sending State and when the rules of the court permit, to have such a representative present at his trial."[163] The SOFA in Korea has similar language.[164]

Other Issues

Whether a juvenile is being investigated or disciplined by U.S. or host nation officials, a number of collateral issues may arise. In addition to the underlying misconduct, attorneys dealing with these cases must be prepared to deal with these issues.

Custody

Most SOFAs have provisions dealing with pre-trial custody. For example, the NATO SOFA provides that the "authorities of the [host nation] and the [visiting forces] shall assist each other in the arrest of . . . dependents in the territory of the [host nation] and in handing them over to the authority which is to exercise jurisdiction."[165] The United States–Korea SOFA has nearly identical language.[166] This means that when juveniles accompanying U.S. forces are pending trial in host nation courts, the host nation will decide whether to confine them prior to trial. In some countries, supplemental agreements allow the U.S. forces to take custody of civilians, including juveniles, prior to trial when they are being

prosecuted by the host nation.[167] However, even where supplemental agreements allow it, American correctional facilities are generally not authorized to hold such civilians.[168] Therefore, such juveniles serving pretrial confinement will likely be housed in a host nation jail or similar facility.

American military personnel will normally visit Americans confined in host nation jails on a monthly basis.[169] The visits are designed to ensure the American prisoner receives "the same or similar treatment, rights, privileges, and protections of personnel confined in U.S. military facilities. Such rights, privileges, and protections . . . include (but are not limited to) legal assistance, visitation, medical attention, food, bedding, clothing, and other health and comfort supplies."[170]

American juveniles sentenced to post-trial confinement by a foreign court may be eligible for the federal prison transfer program. Authorized by federal statute[171] and a number of bilateral and multilateral treaties,[172] this program allows certain Americans imprisoned in foreign jails to be transferred to an appropriate correctional facility in the United States. The DoJ Office of International Affairs is responsible for this program.[173]

Special problems arise when juveniles pending American prosecution under MEJA must be placed in pretrial confinement. As mentioned above, American military confinement facilities are not authorized to hold them,[174] so commands have to contract with host nation facilities. Under federal law, such juveniles must be confined separately from adults, preferably in a foster home or community-based facility.[175]

Foster and In-Patient Psychiatric Care

When juveniles accompanying the U.S. force misbehave, American military or host nation authorities may decide that the offender should be placed in foster care because the parent or guardian is unable to provide adequate supervision. The Army has an emergency placement care program where volunteer families provide such children with short-term care, normally not exceeding ninety days.[176] The Air Force has a similar program, but the focus is on returning the offender and their family to the United States.[177] The Navy program requires return of children needing foster care to the United States.[178] If American foster care is unavailable, such children may be placed in host nation foster care. Unfortunately, this may lead to language and cultural barriers. Only a host nation court can normally order involuntary placement in foster care, since no American courts exist overseas that can make involuntary placements.[179]

In extreme cases, American children may need in-patient treatment at a psychiatric facility. American military treatment facilities may be unable to provide this care.[180] Host nation medical treatment may not be appropriate for American juveniles because they do not understand the language. In addition, the cost of medical treatment may not be fully covered by American health insurance such as TRICARE, the health care available to dependents of Service members.[181] Host nation medical facilities may be concerned that they will not receive compensation from the juvenile's family.

The United States is generally unable to directly compensate host nations for medical treatment or foster care they provide to juveniles accompanying the U.S. force. At least one host nation argued that the United States is liable for such treatment and foster care under a mistaken view of its supplementary SOFA.[182] Such misunderstandings can result in disputes and a loss of host nation cooperation in cases involving juveniles accompanying the U.S. force.

Returning Juveniles to the United States

As mentioned above, prosecution under MEJA requires return of the juvenile offender to the United States.[183] There may be other circumstances where return to the United States for treatment is in the best interest of the command and the juvenile. Arranging this return may be a complex process.

The American military has a process to return dependents to the United States before their sponsor's overseas tour expires. This "early return of dependents" can be used to return juvenile offenders to the United States where they can receive care at American treatment facilities or from relatives.[184] Unfortunately, unless a juvenile is being returned for prosecution under MEJA,[185] American officials have no authority to force a juvenile to board an aircraft for the return to the United States—even if an early return of dependents is approved. However, it may be possible to encourage juvenile offenders to leave the country by barring them from American installations or denying them logistical support.[186]

Tips for Attorneys

If you have been assigned to provide legal advice in an overseas juvenile misconduct case, there are a myriad of issues to consider. There are limited investigative and disciplinary options, and the rules are bewilderingly complex. However, there are a few tips that can assist you in navigating these difficult cases.

Command legal advisors should coordinate closely with law enforcement agencies investigating the case. Host nation law enforcement agencies may be reluctant to investigate, believing that the Americans will handle the case. American military criminal investigation organizations may also be reluctant to investigate because they are confused as to their investigative jurisdiction[187] or they do not believe an American prosecution under MEJA is possible.[188] Legal advisors can help sort out this confusion and ensure that the investigation is done properly. An effective investigation is critical to a successful prosecution.[189]

Command legal advisors should maintain liaison with host nation prosecutors, since the host nation is often in the best position to prosecute these cases. This liaison is required by regulation[190] and assists in developing effective solutions for juvenile misconduct. Most overseas American military legal offices maintain regular contact with host nation prosecutors, youth welfare workers, and similar officials by conducting joint legal conferences and events. Many commands are able to obtain official representation funds for these events.[191] If a command legal advisor's first interaction with host nation prosecutors is after they contact that advisor about an American juvenile in their custody, it may be difficult to gain their trust. It is easier to develop

(Credit: Feng Yu – stock.adobe.com)

relations with foreign officials before problems arise.

Command legal advisors should engage with the DoJ as early as possible on serious juvenile misconduct when a prosecution under MEJA may be appropriate. This coordination should be made through command legal channels and include appropriate Department of State officials.[192] Include sufficient facts and the offender's last known address in the United States so the DoJ can determine where the MEJA prosecution should be pursued.[193] Convincing the DoJ to take a MEJA case can be difficult,[194] so be prepared to explain the importance of prosecution, the adverse effects of failure to pursue the case, and the lack of other options. Early coordination with the DoJ can help keep all options open, including an American prosecution.

Coordination with American agencies involved in juvenile misconduct is also critical. Command attorneys assigned to the Family Advocacy Program multi-disciplinary team should take an active role to ensure that juvenile misconduct is investigated and handled appropriately. Attorneys who advise civilian misconduct boards should ensure such cases receive appropriate resolution.

Legal assistance attorneys and others who represent victims of serious juvenile misconduct should aggressively assert their clients' rights under federal and host nation law. Under the Victims' Rights and Restitution Act, victims of federal crimes are entitled to know the status of the investigation and to receive protection from the offender.[195] The Crime Victims' Rights Act provides a number of additional rights, including the right to confer with the prosecuting attorney; the right to notice of and to be heard at court hearings involving the case; the right to full and timely restitution; and the right to proceedings free from unreasonable delay.[196] If the DoJ declines to pursue prosecution under MEJA, victims may want to pursue injunctive or similar relief.[197] Many host nations also provide victims with a number of rights. For example, Germany has a crime victims' compensation law that allows foreign national victims to receive compensation for damages and injuries.[198]

Draw on the institutional knowledge of the installation. Cases similar to the one you are dealing with have probably occurred before. Most American legal offices overseas have host nation attorneys, who can often provide invaluable advice based on their recollection of these prior cases.

Expect the unexpected. It is not unusual for juveniles who engage in misconduct to have a number of legal problems unrelated to the original misconduct. For example, in a recent case involving an American child offender in Germany, a number of collateral issues complicated resolution. The juvenile initially ran away

from the home of his mother, an American Civilian employee, alleging that his mother abused him. Because American foster care was not available, German officials placed the child in German foster care. The child assaulted others in foster care and was eventually placed in an expensive German in-patient facility where he did not understand the language. The child's military sponsor, who had divorced the child's mother several years earlier, failed to enroll the child in the military health-care system—the Defense Enrollment Eligibility Reporting System (DEERS); as a result, there was no insurance to pay for the child's treatment.[199] In addition, the child could not be returned to the United States because his passport expired. The attorneys working on this case found these collateral issues more difficult to resolve than the child's misconduct.[200]

Be creative. In the scenario described above, the attorneys and social workers found innovative ways to obtain the appropriate documentation to enroll the child in DEERS so his treatment in Germany could be paid for. This required extensive coordination with the commander of the child's military sponsor and the employer of the child's mother. They also were able to renew the child's passport on an expedited basis so the child could be removed to an in-patient facility in the United States that was better equipped to handle him. This required extensive coordination with the child's sponsor, the child's mother, and the U.S. Consulate in Frankfurt.[201] The best solution for juvenile misconduct will usually involve a combination of treatment and discipline, and it will often involve a number of members of the multi-disciplinary juvenile misconduct team.

Be persistent. A proper solution to juvenile misconduct may take a great deal of time and work. Investigation of juvenile misconduct may take more time than a normal criminal investigation and involve a number of parties, to include parents, guardians, teachers and school administrators. Resolution may also take a long time and involve many agencies. It is important to track each stage of the investigation and disciplinary proceedings to obtain the best result for the juvenile and the community.

Keep abreast of changes in the law. While this advice applies to all legal issues, it is particularly important here. Recent media attention, to include the story mentioned at the beginning of this article, have led to many changes in the regulations and statutes related to juvenile misconduct.[202] Media attention is also creating pressure to change host nation laws related to juveniles, especially those involving the age of criminal responsibility.[203]

Conclusion

Dealing with juvenile misconduct on military installations is difficult. However, the problems are exacerbated overseas because of the limited authority of American officials and the inability or unwillingness of host nation officials to resolve such misconduct.

Many agencies are responsible for investigating juvenile misconduct overseas, including American and host nation law enforcement, Family Advocacy Program teams, and DoDEA schools. Ensuring that the investigation is conducted properly can be difficult. One agency may fail to investigate because it assumes another is handling the case. Attorneys advising and liaising with these agencies must ensure the investigation is completed appropriately and promptly.

Attorneys working on juvenile misconduct cases overseas must know all of the disciplinary options available, both under U.S. and host nation law. The host nation is normally in the best position to prosecute the offender, although a U.S. prosecution under MEJA may be appropriate in serious cases. A number of U.S. administrative disciplinary options, to include bars from the installation and expulsion from military schools, may also be available. The attorneys handling these cases can assist in pursing the options that are most appropriate for the military community and the juvenile offender.

A number of collateral issues may arise when dealing with juvenile misconduct. If a juvenile must be placed in custody prior to trial, coordination with host nation officials is critical since the juvenile will probably be housed in one of their jails. Similarly, involuntary placement of such children in foster care will require coordination with host nation officials. While U.S. officials can order an "early return" of juvenile offenders to the United States, they may have little authority to force the offenders to get on the airplane.

Effectively handling misconduct by juveniles accompanying U.S. forces overseas requires a great deal of work. Coordination with U.S. and host nation investigators, prosecutors, and others involved in juvenile misconduct is critical. If handled poorly, these cases may irreparably harm morale within the military community and damage relations with the host nation. Careful research, flexibility, creativity, and persistence will help ensure these cases are properly resolved. **TAL**

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Notes

1. Reese Dunklin & Justin Pritchard, *Military Families Feel Deserted After Sex Assaults at Base School*, Mil. Times (Mar. 14, 2018), https://www.militarytimes.com/news/your-military/2018/03/15/military-families-feel-deserted-after-sex-assaults-at-base-school/.

2. *Id.*; Justin Pritchard & Reese Dunklin, *US Military Overlooks Sex Abuse Among Service Members' Kids,* Army Times (Mar. 13, 2018), https://www.armytimes.com/news/pentagon-congress/2018/03/13/ap-investigation-us-military-overlooks-sex-abuse-among-kids/.

3. Vince Little, *Yokota Commander Lays Out Expectations for Teenagers,* Stars & Stripes (Sept. 3, 2005), https://www.stripes.com/news/yokota-commander-lays-out-expectations-for-teenagers-1.37814.

4. Pritchard & Dunklin, *supra* note 2. *See also* Major Emily M. Roman, *Where There's a Will, There's a Way: Command Authority over Juvenile Misconduct on Areas of Exclusive Federal Jurisdiction, and the Utilization of Juvenile Review Boards,* Army Law., May 2015, at 35.

5. Memorandum from Principal Deputy Inspector Gen. Performing Duties of the Inspector Gen. to Sec'ys of Mil. Dep'ts et al., subject: Evaluation of the Department of Defense and DoD Education Activity Response to Incidents of Serious Student Misconduct on Military Installations (Project No. 2018C011) (July 12, 2018) [hereinafter DoD Inspector General Memorandum].

6. *See infra* notes 25, 42, and accompanying text.

7. John Vandiver, *DODEA Must Do More to Protect Students from Sexual Assaults, Lawmakers Say*, Stars & Stripes (July 25, 2018), https://www.stripes.com/news/dodea-must-do-more-to-protect-students-from-sexual-assaults-lawmakers-say-1.539353.

8. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces art. VII, para. 10, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846 [hereinafter NATO SOFA].

9. *Id.* art. VII, para. 6(a).

10. Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea art. XXII, paras. 6(a), 10, July 9, 1966, 17 U.S.T. 1677, T.I.A.S. 6127, 674 U.N.T.S. 163 [hereinafter United States–Republic of Korea SOFA].

11. Agreement to Supplement the Agreement between the Parties to the North Atlantic Treaty regarding the Status of Their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany (Revised Supplementary Agreement), Aug. 3, 1959, amended Oct. 21, 1971, amended May 18, 1981, amended Mar. 18, 1993, art. 28, para. 1, 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30, [hereinafter German Supplementary Agreement].

12. U.S. Dep't of Army, Reg. 190-30, Military Police Investigations para. 4-2a (1 Nov. 2005) [hereinafter AR 190-30].

13. *Id.* para. 4-2f. The U.S. Army Criminal Investigation Command is generally responsible for investigating felonies. U.S. Dep't of Army, Reg. 195-2, Criminal Investigation Activities paras. 1-8a, 3-2b (21 July 2020) [hereinafter AR 195-2].

14. U.S. Dep't of Air Force, Instr. 71-101V1, Criminal Investigations Program para. 2.1.2 (1 July 2019) [hereinafter AFI 71-101].

15. U.S. Dep't of Navy, Sec'y of Navy Instr. 5430.107A, Mission and Functions of the Naval Criminal Investigative Service encl. 4, para. 2d (19 June 2019) [hereinafter SECNAVINST 5430.107A].

16. NATO SOFA, *supra* note 8, art VII, para. 10; United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 10. *See also* AR 190-30, *supra* note 12, para. 4-5b (off-post incidents can only be investigated in accordance with an appropriate status of forces agreements (SOFA) or similar agreement).

17. AR 195-2, *supra* note 13, paras. 1-7c, 3-2b; AFI 71-101, *supra* note 14, para. 1.4.1; SECNAVINST 5430.107A, *supra* note 15, encl. 4, para. 19.

18. New Jersey v. T.L.O., 469 U.S. 325, 333 (1985).

19. Miranda v. Arizona, 384 U.S. 436 (1966).

20. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

21. *Id.* at 275.

22. *Interviewing and Interrogating Juvenile Suspects*, Am. Acad. of Child & Adolescent Psychiatry (Mar. 7, 2013), https://www.aacap.org/AACAP/Policy_Statements/2013/Interviewing_and_Interrogating_Juvenile_Suspects.aspx.

23. U.S. Dep't of Air Force, Instr. 31-115, Law and Order Operations para. 6.4.4 (18 Aug. 2020).

24. U.S. Dep't of Def., Instr. 6400.01, Family Advocacy Program (FAP) para. 1-2e (1 May 2019) [hereinafter DoDI 6400.01].

25. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 1089, 132 Stat. 1635, 1996 (2018) [hereinafter 2019 NDAA].

26. DoDI 6400.01, *supra* note 24, para. 3.1c.

27. The Department of Defense Instruction defines child abuse to include "neglect of a child by a parent, guardian, foster parent, or by a caregiver, whether the caregiver is intrafamilial or extrafamilial, under circumstances indicating the child's welfare is harmed or threatened." *Id.* Glossary. The Army's regulation implementing this Family Advocacy Program is slightly broader; it defines child abuse to include "injury or serious threat of injury to another person because the child's behavior was not properly monitored." U.S. Dep't of Army, Reg. 608-18, The Army Family Advocacy Program Glossary (30 Oct. 2007) (RAR 13 Sept. 2011) [hereinafter AR 608-18]. The federal statute requiring child abuse to be reported defines child abuse as "physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." 34 U.S.C. § 20341(c)(1) (2019). This definition does not limit abuse to parents and caregivers; it is broad enough to include juvenile on juvenile abuse. *Id.*

28. DoDI 6400.01, *supra* note 24, para. 3.1b(1).

29. *See* AR 608-18, *supra* note 27; U.S. Dep't of Air Force, Instr. 40-301, Family Advocacy (5 July 2018) [hereinafter AFI 40-301]; U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.3B, Family Advocacy Program (FAP) (10 Nov. 2005) [hereinafter SECNAVINST 1752.3B].

30. AR 608-18, *supra* note 27, para. 2-3b(1).

31. SECNAVINST 1752.3B, *supra* note 29, para. 8h(2).

32. AFI 40-301, *supra* note 29, para. 2.2.4.5.1.2.

33. *Id.* para. 2.2.4.5.1.1.

34. DoDI 6400.01, *supra* note 24, para. 3.1.

35. *Id.* para. 3.1c(2).

36. *Id.* para. 3.1b(1).

37. *Id.* para. 2.4f(3).

38. Major Toby N. Curto, *The Case Review Committee: Purpose, Players, and Pitfalls,* Army Law., Sept. 2010, at 45.

39. Captain Joseph L. Falvey, Jr., *Health Care Professionals and Rights Warning Requirements,* Army Law., Oct. 1991, at 21, 28.

40. The teams also have difficulty recommending discipline of parents responsible for child neglect. Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?,* 148 Mil. L. Rev. 1, 12–15 (1995).

41. U.S. Dep't of Def. Educ. Activity, Reg. 4700.04, Serious Incident Reporting para. 1.2a (20 June 2016). This reporting requirement is largely internal. *Id.* paras. 3.1–3.2.

42. 2019 NDAA, *supra* note 25, § 1089(b)(1).

43. U.S. Dep't of Def. Educ. Activity, Reg. 3030.01, DoDEA Incident Reporting Program para. 3.5b (21 May 2019) [hereinafter DoDEA Reg. 3030.01]; U.S. Dep't of Def. Educ. Activity, Admin. Instr. 1443.02, Prohibited Sexual, Sex-Based, and Other Related Abusive Misconduct Reporting and Response para. 6.1 (21 Feb. 2019).

44. *Id.* para 6.1b.

45. 2019 NDAA, *supra* note 25, § 563.

46. DoDEA Reg. 3030.01, *supra* note 43, para. 3.2a.

47. J.D.B. v. North Carolina, 564 U.S. 261 (2011).

48. New Jersey v. T.L.O., 469 U.S. 325 (1985).

49. *Id.* at 337.

50. Commanders may conduct preliminary inquiries to investigate potential violations of the Uniform Code of Military Justice (UCMJ). Manual for Courts-Martial, United States, R.C.M. 303 (2019). Child endangerment is an offense under Article 119b, UCMJ. UCMJ art. 119b (2019). *See also* United States v. Vaughan, 58 M.J. 29 (C.A.A.F. 2003).

51. U.S. Dep't of Army, Reg. 15-6, Procedures for Administrative Investigations and Boards of Officers para. 2-1b (1 Apr. 2016).

52. U.S. Dep't of Air Force, Instr. 90-201, The Air Force Inspection System para. 1.1.6 (20 Nov. 2018) (C1, 29 Jan. 2021) [hereinafter AFI 90-201].

53. U.S. Dep't of Navy, JAG Instr. 5800.7F, Manual of the Judge Advocate General (JAGMAN) sec. 0205 (26 June 2012).

54. I U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures para. 2a (28 Mar. 2013) (C5, 9 Apr. 2021) [hereinafter DoDI 6495.02]. Limited services are available to DoD civilian employees and their dependents overseas. *Id.* para. 2a(4). In addition, many such victims are entitled to representation by a Special Victims' Counsel. Special Victims' Counsel for Victims of Sex-Related Offenses, 10 U.S.C. § 1044e. There are special services in addition to the Special Victims' Counsel available for juvenile victims who are dependents—including services available from legal assistance attorneys, medical personnel, chaplains, and a number of other organizations.; however, the topic is outside the scope of this article.

55. DODI 6495.02, *supra* note 54, para. 2b.

56. U.S. Dep't of Army, Reg. 600-20, Army Command Policy ch. 7 (24 July 2020); U.S. Dep't of Navy, Sec'y of Navy Instr. 1752.4C, Sexual Assault Prevention and Response Program Procedures (10 Aug. 2018); U.S. Dep't of Air Force, Instr. 90-6001, Sexual Assault Prevention and Response (SAPR) Program (15 July 2020).

57. *See* Major Katherine A. Krul, *The Sexual Assault Prevention and Response (SAPR) Program—in Need of More Prevention,* Army Law., Nov. 2008, at 41.

58. *Id.* at 45.

59. *See supra* note 5 and accompanying text.

60. Inspector General Act of 1978, 5 U.S.C. app. § 2(1).

61. 10 U.S.C. § 141.

62. 10 U.S.C. §§ 7020, 8020, 9020 (Section 7020 pertains to the Army, section 8020 to the Navy, and section 9020 to the Air Force.).

63. U.S. Dep't of Def., Dir. 5106.01, Inspector General of the Department of Defense (IG DoD) para. 3 (20 Apr. 2012) (C2, 29 May 2020) [hereinafter DoDD 5106.01].

64. *Id.* para. 5b; Inspector General Act, 5 U.S.C. app. § 8(c)(2).

65. U.S. Dep't of Army, Reg. 20-1, Inspector General Activities and Procedures (23 Mar. 2020); U.S. Dep't of Navy, Sec'y of Navy Instr. 5430.57H, Mission and Functions of the Naval Inspector General (17 Dec. 2019); AFI 90-201, *supra* note 52. Note that Army IG are prohibited from investigating complaints when a command elects to resolve them using a commander's investigation or inquiry. AR 20-1, *supra,* para. 7-1i(3).

66. *See, e.g.,* DoDD 5106.01, *supra* note 63, paras. 5c, 5h; 5 U.S.C. app. § 8(c)(3), (5).

67. DoD Inspector General Memorandum, *supra* note 5.

68. Protected Communications, Prohibition of Retaliatory Personnel Actions, 10 U.S.C. § 1034.

69. NATO SOFA, *supra* note 8, art. VII, para. 1(b).

70. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 1(b).

71. NATO SOFA, *supra* note 8, art. VII, para. 6(a).

72. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 6(a).

73. German Supplementary Agreement, *supra* note 11, art. 28.

74. *Id.*

75. U.S. Dep't of Def., Instr. 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members para. 2.4 (3 Mar. 2005) [hereinafter DoDI 5525.11]. *See* Julie R. O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction,* 106 Geo. L.J. 1021, 1048–56 (2018).

76. 18 U.S.C. §§ 3261–3267.

77. Andrew D. Fallon & Captain Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000,* 51 A.F. L. Rev. 271, 271 (2001).

78. *See, e.g.*, U.S. Army in Europe, Reg. 27-9, Misconduct by Civilians (22 Nov. 2011) [hereinafter AER 27-9].

79. U.S. Dep't of Def., Education Activity Reg. 2051.1, Disciplinary Rules and Procedures (4 Apr. 2008) (C2, 23 Mar. 2012) [hereinafter DoDEA Reg. 2015.1].

80. Serge Lazareff, Status of Military Forces Under Current International Law 128 (1971); NATO SOFA, *supra* note 8, art. VII, para. 1(a); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 1(a).

81. The initial version of the UCMJ provided that the following persons fell under military jurisdiction: "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States." UCMJ art. 2(11) (1950). The current version of the UCMJ has a nearly identical provision. UCMJ art. 2(a)(11) (2016).

82. Reid v. Covert, 354 U.S. 1 (1957). At the time of Ms. Covert's offense, an executive agreement granted American military courts exclusive jurisdiction over offenses committed in Great Britain by American Service members and their dependents. The same situation applied to Ms. Smith's offense in Japan. *Id.* at 15–16. *See generally* Captain Brittany Warren, *The Case of the Murdering Wives:* Reid v. Covert *and the Complicated Question of Civilians and Courts-Martial*, 212 Mil. L. Rev. 133, 182–184 (2012).

83. DoDI 5525.11, *supra* note 75, para. 2.5; Fallon & Keene, *supra,* note 77, at 271.

84. 18 U.S.C. § 3261(a).

85. 18 U.S.C. § 3267(2).

86. *Id.*

87. 18 U.S.C. § 3261(a).

88. 18 U.S.C. § 113.

89. 18 U.S.C. § 114.

90. 18 U.S.C. § 661.

91. 18 U.S.C. §§ 1111–1113.

92. 18 U.S.C. § 1202.

93. 18 U.S.C. § 1362.

94. 18 U.S.C. §§ 2241–2244, 2252.

95. 18 U.S.C. § 13.

96. *See, e.g.*, NATO SOFA, *supra* note 8, art. VII, paras. 2–3; United States–Republic of Korea SOFA, *supra* note 10, art. XXII, paras. 2–3.

97. *See, e.g.*, NATO SOFA, *supra* note 8, art. VII, para. 2(b); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 2(b).

98. Strafgesetzbuch [StGB] [German Penal Code], §185, https://www.gesetze-im-internet.de/englisch_stgb/index.html. Many Americans and other foreigners are not aware that using profanity or the middle finger to disparage another person in public is a crime under German law. Erik Kirschbaum, *In Germany, It Can Be a Crime to Insult Someone in Public*, L.A. Times (Sept. 6, 2016, 6:37 AM), https://www.latimes.com/world/europe/la-fg-germany-insult-law-snap-story.html.

99. *See, e.g.*, NATO SOFA, *supra* note 8, art. VII, para. 2(a); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 2(a).

100. 10 U.S.C. § 886.

101. *See, e.g.*, NATO SOFA, *supra* note 8, art. VII, para. 3; United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 3.

102. *See* Fallon & Keene, *supra* note 77, at 285; The Handbook of the Law of Visiting Forces 225 (Dieter Fleck ed., 2d ed. 2018). The application of a SOFA to prosecutions under the Military Extraterritorial Jurisdiction Act (MEJA) depends on the language of the SOFA. For example, both the NATO SOFA and the United States–Republic of Korea SOFA permit the visiting forces to exercise criminal jurisdiction over persons "subject to military law." *See* NATO SOFA, *supra* note 8, art. VII, para. 1a; United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 1a. The Military Extraterritorial Jurisdiction Act can be described as a "military law" under these SOFA provisions because it is limited to prosecutions of military personnel, including civilians "accompanying the armed forces overseas." 18 U.S.C. § 3261(a). Furthermore, MEJA was designed to fill the jurisdictional gap left after the UCMJ section that permitted prosecution of civilians overseas was ruled unconstitutional. Fallon & Keene, *supra* note 77, at 271–72. Therefore, these SOFAs permit American prosecutions under MEJA.

103. 18 U.S.C. § 3261(a).

104. NATO SOFA, *supra* note 8, art. VII, para. 3.

105. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 3.

106. NATO SOFA, *supra* note 8, art. VII, para. 3(c); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 3(c).

107. 18 U.S.C. § 3261(b).

108. 18 U.S.C. § 13; United States v. Welch, 15 F.3d 1202, 1207 (1st Cir. 1993).

109. 18 U.S.C. § 5031.

110. DoDI 5525.11, *supra* note 75, para. 6.1.6.4.

111. 18 U.S.C. § 5032. Arguably, the first two prongs are irrelevant overseas since there is no American "state" available to exercise jurisdiction or administer programs. The statute requires certification by the U.S. Attorney General, but this authority has been delegated to U.S. Attorneys. U.S. Dep't of Just., Justice Manual § 9-8.110 (2020).

112. Major George R. Lavine III, *Protect Our Military Children: Congress Must Rectify Jurisdiction on Military Installations to Address Juvenile-on-Juvenile Sexual Assault,* 18 Wyo. L. Rev. 116, 125 (2018).

113. Addie C. Rolnick, *Untangling the Web: Juvenile Justice in Indian Country,* 19 N.Y.U. J. Legis. & Pub. Pol'y 49, 122 (2016).

114. *Id.* at 123.

115. 18 U.S.C. § 3262(b).

116. DoDI 5525.11, *supra* note 75, para. 5.5.

117. The section's website is available online. *See Human Rights and Special Prosecutions Section (HRSP)*, U.S. Dep't of Just., https://www.justice.gov/criminal-hrsp (last visited May 4, 2021).

118. Cafeteria and Rest. Workers Union v. McElroy, 367 U.S. 886 (1961).

119. 50 U.S.C. § 797; 32 C.F.R. § 809a.5 (2020).

120. In Europe, an inter-service agreement requires all services to recognize theater-wide bar orders issued by other Services. Memorandum of Agreement Between the Commanding General, United States Army, Europe and Seventh Army (USAREUR/7A), Commander, United States Air Forces in Europe, Commander in Chief, United States Naval Forces, Europe, & Commander, United States Marine Corps Forces, Europe, subject: Interservice Memorandum of Agreement for a Theater-Wide Bar (26 Apr. 2002); AER 27-9, *supra* note 78, app. C.

121. *See, e.g.*, U.S. Dep't of Army, Reg. 215-8/U.S. Dep't of Air Force, Instr. 34-211(I), Army and Air Force Exchange Service Operations (5 Oct. 2012); U.S. Dep't of Def., Instr. 1330.17, DoD Commissary Program (18 June 2014) (C2, 14 Sept. 2018).

122. *See, e.g.*, U.S. Army in Europe, Reg. 600-700, Identification Cards and Individual Logistic Support (19 Dec. 2018).

123. *See* Roman, *supra* note 4, at 35.

124. U.S. Forces Korea, Reg. 600-52, Civilian/Family Member Overseas Misconduct (17 Feb. 2014) [hereinafter USFK Reg. 600-52].

125. *Id.* para. 1-4c.

126. *Id.* paras. 1-4c, 2-5.

127. AER 27-9, *supra* note 78.

128. *Id.* para. 4.

129. *Id.* para. 4c.

130. *Id.* para. 11a; USFK Reg. 600-52, *supra* note 124, para. 3-3a.

131. AER 27-9, *supra* note 78, para 11a; USFK Reg. 600-52, *supra* note 124, para. 3-3b.

132. AER 27-9, *supra* note 78, app. D; USFK Reg. 600-52, *supra* note 124, app. C.

133. *Id.*

134. DoDEA Reg. 2051.1, *supra* note 79, para. 4.3.

135. *Id.* para. 4.2.

136. *Id.* para. 4.4.

137. *Id.* encl. 3, para. E3.5.

138. *Id.* encl. 4, para. E4.5.

139. *Id.* encl. 5, para. E5.1.

140. *Id.* paras. E5.2.2.6 to –.7.

141. *Id.* paras. E5.6 to –.7.

142. *Id.* para. E5.8.4.

143. *See supra* notes 69–70 and accompanying text.

144. *See* NATO SOFA, *supra* note 8, art. VII, para. 2(b); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 2(b).

145. *See* NATO SOFA, *supra* note 8, art. VII, para. 3(b); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 3(b).

146. *See* NATO SOFA, *supra* note 8, art. VII, para. 3(c); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 3(c).

147. *See supra* notes 109–114 and accompanying text.

148. Strafgesetzbuch [StGB] [German Penal Code], §19, https://www.gesetze-im-internet.de/englisch_stgb/index.html.

149. *Id.*

150. Cecilia Polizzi, *The Crime of Terrorism: An Analysis of Criminal Justice Processes and Accountability of Minors Recruited by the Islamic State of Iraq and Al-Sham*, 24 U.C. Davis J. Int'l L. & Pol'y 1, 6 (2018). The Child Rights International Network publishes an online interactive map showing the minimum ages of criminal responsibility around the world. *See The Minimum Age of Criminal Responsibility,* Child Rts. Int'l Network, https://home.crin.org/issues/deprivation-of-liberty/minimum-age-of-criminal-responsibility (last visited May 4, 2021).

151. *See* Stephanie J. Millet, *The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?*, 28 Vand. J. Transnat'l L. 295, 304 (1995).

152. *See Germany: Rape Case Sparks Debate on Age of Criminal Liability*, Deutche Welle (July 9, 2019), https://www.dw.com/en/germany-rape-case-sparks-debate-on-age-of-criminal-liability/a-49517917.

153. NATO SOFA, *supra* note 8, art. VII, para. 6(a); United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 6(a).

154. Lazareff, *supra* note 80, at 236 n.188.

155. U.S. Dep't of Army, Reg. 27-40, Litigation para. 7-17 (19 Sept. 1994).

156. U.S. Dep't of Air Force, Instr. 51-301, Civil Litigation (2 Oct. 2018).

157. U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.8A, Release of Official Information for Litigation Purposes and Testimony by Department of Navy (DON) Personnel encl. 3, para. 4 (27 Aug. 1991) (C1, 10 Jan. 2005).

158. 10 U.S.C. § 1037(a).

159. U.S. Dep't of Army, Reg. 27-50/U.S. Dep't of Navy, Sec'y of Navy Instr. 5820.4G/U.S. Dep't of Air Force, Instr. 51-706, Status of Forces Policies, Procedures and Information para. 2-7 (15 Dec. 1989) [hereinafter Joint SOFA Reg.].

160. *Id.* para. 2-4.

161. NATO SOFA, *supra* note 8, art. VII, para. 9.

162. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 9.

163. NATO SOFA, *supra* note 8, art. VII, para. 9(g).

164. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 9(g). *See also* Joint SOFA Reg., *supra* note 159, para. 1-8.

165. NATO SOFA, *supra* note 8, art. VII, para. 5(a).

166. United States–Republic of Korea SOFA, *supra* note 10, art. XXII, para. 5(a).

167. *See, e.g.*, German Supplementary Agreement, *supra* note 11, art. 22, paras. 1(b), 2.

168. Except in time of war and contingency operations, Army, Air Force, and Navy correctional facilities are only authorized to hold civilians briefly. U.S. Dep't of Army, Reg. 190-47, The Army Corrections System para. 16-3b (15 June 2006); I U.S. Dep't of Air Force, Manual 31-115, Air Force Corrections System para. 5.1.2 (28 Aug. 2019); U.S. Dep't of Navy, Sec'y Navy Manual 1640.1, Department of the Navy Corrections Manual sec. 7103(2)(e) (15 May 2019).

169. Joint SOFA Reg., *supra* note 159, para. 3-4b.

170. *Id.* para. 3-1.

171. 18 U.S.C. §§ 4100–4155.

172. *See, e.g.*, Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2847, T.I.A.S. No. 10823, E.T.S. 112.

173. *See International Prisoner Transfer Program*, U.S. Dep't of Just., https://www.justice.gov/criminal-oia/iptu (Nov. 24, 2020).

174. *Supra* note 168.

175. 18 U.S.C. §5035; DoDI 5525.11, *supra* note 75, para. 5.5.

176. AR 608-18, *supra* note 27, ch. 9.

177. AFI 40-301, *supra* note 29, attach. 5.

178. U.S. Dep't of Navy, Chief, Naval Operations Instr. 1752.2C, Family Advocacy Program, ch. 16, para. 4 (20 May 2020) [hereinafter OPNAVINST 1752.2C].

179. AR 608-18, *supra* note 27, para. 9-1a; AFI 40-301, *supra* note 29, attach. 5, para. A5.2.1; OPNAVINST 1752.2C, *supra* note 178, ch. 16, para. 2c(3).

180. *See* 10 U.S.C. § 1073d. Active duty Service members have priority for care over dependents. 32 C.F.R. § 199.17(d)(1)(i) (2020).

181. *See* 10 U.S.C. § 1079; 32 C.F.R. pt. 199 (2020); U.S. Dep't of Def., Dir. 6010.04, Healthcare for Unformed Services Members and Beneficiaries (17 Aug. 2015) (C1, 1 June 2018).

182. The German government argued that Article 13 of the German Supplementary Agreement, *supra* note 11, which excludes visiting forces from the obligation to pay into German social welfare programs, obligates visiting forces to pay for the benefits they receive from such programs. Letter from Michael Ohliger, Chief of the Child and Social Division of the Administrative Office of Kaiserslautern, Zusatzabkommen zum NATO-Truppenstatut und dessen Auswirkungen auf die Bestimmungen des SGB VIII (Supplementary Agreement to NATO SOFA and Its Effect on the Provisions of the Code of Social Laws VIII) (Jan. 11, 2019) (on file with author).

183. 18 U.S.C. § 3262(b).

184. U.S. Dep't of Def., The Joint Travel Regulations (JTR) paras. 050804 (Dependents of Service Members), 053805 (Dependents of Civilian Employees) (1 May 2021).

185. The procedures for removal to the United States for prosecution under MEJA are described in 18 U.S.C. §§ 3262(b) and 3264(b). *See also* DoDI 5525.11, *supra* note 75, para. 6.5.

186. *Supra* notes 118–122 and accompanying text.

187. *See* Dunklin & Pritchard, *supra* note 1.

188. *See* Lavine, *supra* note 112, at 126.

189. *See* DoDI 5525.11, *supra* note 75, para. 5.3.1.

190. Joint SOFA Reg., *supra* note 159, para. 1-7.

191. U.S. Dep't of Def., Instr. 7250.13, Use of Appropriated Funds for Official Representation Purposes (30 June 2009) (C1, 27 Sept. 2017).

192. DoDI 5525.11, *supra* note 75, para. 6.2.2.1.

193. *Id.* para. 6.2.2.3.

194. *See* Lavine, *supra* note 112, at 124.

195. 34 U.S.C. § 20141.

196. 18 U.S.C. § 3771.

197. *See* Lavine, *supra* note 112, at 136.

198. 18 U.S.C. § 3771; Gesetz über die Entschädigung für Opfer von Gewalttaten [Crime Victims Compensation Act], Jan. 7, 1985, BGBl I at 1, last amended by Gesetz [G], Apr. 15, 2020, BGBl I at 811 (Ger.), https://www.gesetze-im-internet.de/englisch_oeg/index.html.

199. 32 C.F.R. § 199.1(c)(2)(v) (2020.

200. E-mail from Molly R. Stoner, Social Worker, Landstuhl Reg'l Med. Ctr., to Joerg C. Moddelmog, Att'y, 21st Theater Sustainment Command (June 16, 2019, 15:39 CET) (on file with author).

201. E-mail from Lieutenant Colonel Christina M. Buchner, Troop Commander, Landstuhl Reg'l Med. Ctr., to Charlene Hoobler, Chief Operations Officer, Barry Robinson Ctr. (Aug. 21, 2019, 08:43 CET) (on file with author).

202. *See supra* notes 1, 25, 42, and accompanying text.

203. *See supra* notes 151–52 and accompanying text.

CPT Grace Smitham takes command of the Judge Advocate Officer Basic Course Student Detachment in July 2019 at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. (Credit: Jason Wilkerson, TJAGLCS)

Closing Argument

Stewarding the Profession– A Command Perspective

By Captain Grace Smitham & Captain Justin Kman

All judge advocates (JAs) are charged with stewarding our dual profession of legal professionals and Soldiers. Two captains in the Judge Advocate General's (JAG) Corps are uniquely situated to instill the JAG Corps's four constants—Principled Counsel, Stewardship, Mastery of the Law, and Servant Leadership—in hundreds of JAs and paralegals as they begin their careers in the Corps. Captain Grace Smitham is the recently departed commander of the JA Officer Basic Course (OBC) Student Detachment and was charged with leading new JAs into their roles as leaders and Army lawyers. Captain Justin Kman is the recently departed commander of the Paralegal Advanced Initial Training (AIT) (J Company) and was charged with ensuring the Army's newest paralegals are equipped to execute the mission and develop into tomorrow's leaders. Captains Smitham and Kman share their experiences and thoughts on how their missions steward the profession and develop the Corps's newest leaders.

"Drive It Like You Stole It": Commanding the JAOBC

As I took command of the Student Detachment at The Judge Advocate General's Legal Center and School (TJAGLCS), my predecessor's parting encouragement to me was "Just drive it like you stole it!" I knew what he meant—I trend toward being a risk-averse rule follower, so this new role brought me well outside my comfort zone. I evaluated the incredible team and organization I had inherited, knowing it would take some time to identify areas where I wanted our team to leave its mark on the organization. Visions arose of exciting new Army Combat Fitness Test workouts under Charlottesville sunrises; building coaching and mentoring relationships through quintessential OBC social events; and finding ways to share all the lessons that I had learned (and things I wished somebody had told me) when I was brand new to the Corps.

Two weeks into our second cycle, that car I had stolen hit a brick wall and—as TJAGLCS transitioned to COVID-19-response mode—organized physical training shut down, the health of our teammates became the top priority, and all classes and communications went virtual. A year later,

we're emerging into a new normal. What never faltered was the agility of our staff and faculty who 1) ensured that no obstacles would stand in the way of delivering the quality instruction we all know from TJAGLCS and 2) prepared our newest JAs to enter the field. But what continues to stand out in my mind is the way these events have positively shaped the newest stewards of our Corps. What was lost has been replaced with experiences that have significantly marked the transition of new JAs into our Corps, and the impact of the lessons they have learned along the way are tangible.

Lesson 1: Take Care of Yourself So That You Can Care for Those Around You

Recent OBC graduates have received an introduction to the Army that may feel more abrupt than advertised, entering a quarantine bubble at the Direct Commission Course that did not truly end until OBC graduation. Many of our new leaders have been separated from family and loved ones during significant and trying life events—something that we get used to as our years of service go on but is often a substantial and emotional change for those who were civilians only a few weeks before. Through the ups and downs, it has been incredible to see these students build resilience, find outlets to manage stress and promote wellness, and strengthen themselves so that they can reach out and provide support to each other on the hard days. They have come together to share their talents and ensure the continued health of their peers—leading yoga classes, planning outdoor adventures, and finding ways to virtually connect quarantined students with what is happening in off-duty hours. The collective empathy and concern they have shown for their teammates in times of isolation, quarantine, sickness, and loss should fill our Corps with excitement and confidence; knowing these JAs understand they have joined a team sport and will bring these traits to bear to the benefit of their current and future organizations is inspiring.

Lesson 2: Embrace and Leverage the Diversity of Your Team

At the start of each course, the cadre collect biographical sheets for each student and compile a student directory. The results are humbling, highlighting the incredible diversity of backgrounds and experiences our new JAs bring to our Corps. We see some new lawyers with years of prior military service, others who have worked as attorneys or judges for decades and are seeking new ways to serve, and some who are brand new law school graduates embarking on their first career. Some have medical degrees, others speak multiple languages, but all have something to contribute for the improvement of our organization. The fantastic student detachment team injects another layer into training, providing the perspectives on what to expect in the first years of their career as a paralegal noncommissioned officer and a legal administrator warrant officer. And then we leverage the students—frequently switching up class leadership roles to share leadership opportunities with as many as possible and demonstrating that there is no one-size-fits-all approach to leadership. Through this exercise, we are all continually reminded that each individual can leverage their strengths and experiences to successfully influence others.

Lesson 3: Flexibility, Creativity, and Evolution

Our newest JAs have been forged in what has felt like an ever-shifting landscape of COVID-19 restrictions, but they have never failed to make the most of their experiences. From the initial switch to complete online learning from individual hotel rooms (which felt like solitary confinement to many), to where we sit now with a hybrid of online and in-person instruction (and the occasional step back into quarantine as conditions warrant), the OBC classes have learned first-hand that rapidly-changing operational environments require quick assessments and decisions (which are often based on limited facts available but always with some impact). They have also seen that successful organizations are not static, but must remain in a state of constant evolution to meet the mission, overcome challenges, and continue to operate in the near term to ensure future successes. And, they have already contributed to the development of those who will soon follow in joining our ranks, sharing frequent and honest feedback with cadre and faculty alike that helps us to improve upon each iteration. These JAs will continue to choose to do hard things while 1) knowing that it builds character, 2) understanding that the Army often puts us in situations we would not have chosen for ourselves, and 3) seeing that the reward is often achieved in retrospection—especially when we recall and internalize the lessons learned for future application.

As our team trains new officers, there are many questions that have only one right answer—they are the kind of issues that will get you an on-the-spot correction. Then there are those questions, the core of our profession, where we advise and counsel what's legal, what's appropriate, and what's wise. And then, there's the space in between: finding new ways to build the team and take care of each other; adapting to circumstances that aren't ideal; and getting creative with ways to accomplish the mission. That said, we are confident that these are the lessons our newest JAs will continue to share as they join your teams.

Instilling Moral Courage from the Start: Commanding AIT Soldiers

Days before taking command of the Army's sole Paralegal Advanced Individual Training (AIT) Company in July 2019, I heard a phrase that would be repeated to me dozens of times throughout my tenure at Juliet Company: "Don't be afraid to take off your JAG hat, and put on your commander hat." I quickly realized this was code for, "don't be indecisive, don't be afraid to take calculated risk, and don't follow the letter of the law to the detriment of the mission." While prudence and caution are hallmarks of some of the best JAs, I hope that I also imparted on my fellow logistics commander colleagues the many reasons why one should *not* take off their "JAG hat," even while in command. While I prepared to relinquish command this summer, I hope now that the "JAG hat" is synonymous with moral courage, ardent professionalism, and unpretentious—but necessary—organizational criticism. I hope further that these virtues are reflected in both the 40 cadre and the over 1200 AIT students that have passed through Juliet Company over the last two years. Quite simply, I hope that the "JAG hat" is a symbol for what is right in our Army and that the Soldiers arriving to Offices of the Staff Judge Advocate will wear it with pride.

CPT Justin Kman addresses students in the MOS 27D Advanced Individual Training at Fort Lee, Virginia. (Credit: SSG Kathryn Altier)

Moral Courage: "We Are the Standard!"

The young paralegals that pass through Juliet Company will display an unwavering sense of moral courage. At 0530 every morning, around 120 students stand at parade rest on Stillions Field on Fort Lee, Virginia, unflinching as they await the call to "attention." At this command, a resounding, "We Are the Standard" erupts from the sole JAG Corps formation in a sea of quartermasters. The company motto is cliché for some, cheesy for others, but ultimately serves as the guide for all legal professionals. Each of those soon-to-be-certified paralegals is asked a question from day one: if we are not the standard, who is? If we do not hold ourselves beyond reproach, both morally and ethically, what right do we have to assist or advise our commanders on actions that will take away rank, pay, or quite literally someone's liberty? On week one this motto is, at best, a throwaway line vigorously bellowed in an effort to avoid the watchful eye of a drill sergeant. By week ten, however, that motto becomes something more: a purpose and a foundation for the future career of each and every 27D that passes through Fort Lee.

Professionalism: Emotions and Sound Judgment

The cadre that pass through Juliet Company will display ardent professionalism even in the most trying moments. Our cadre form the lifeblood that pulses through Juliet Company—dedicated, nominated, and hand-selected drill sergeants and instructors that give their dusks, dawns, and everything in between to our AIT Soldiers. Our cadre are the epitome of professionalism, but they often learn the hard way how to balance raw emotion and professional judgment. It is the latter that differentiates our NCO leaders from our junior enlisted Soldiers. Each and every cadre member has a moment in their Juliet Company career where an emotional response to an AIT antic starts to boil beneath their steely exteriors. For some, it arrives on their first "pick-up" day; and for others, it happens on a random weekend at 2300, minutes before lights out. In these moments, cadre learn that only if we provide the utmost respect and professionalism to our most junior Soldiers, *only then* can we demand from them a constant pursuit of perfection as a person, a Soldier, and a future paralegal. In this manner, nothing an AIT student does or says should ever be taken personally. Instead, emotions drive our cadre and serve as the engine for their successes in life; however, sound professional judgment must guide them and serve as their rudder. The senior NCOs that pass through Juliet Company, and on to their subsequent paralegal roles, will display sound judgment at every opportunity.

Organizational Criticism: "A Storm Is a Brewin'"

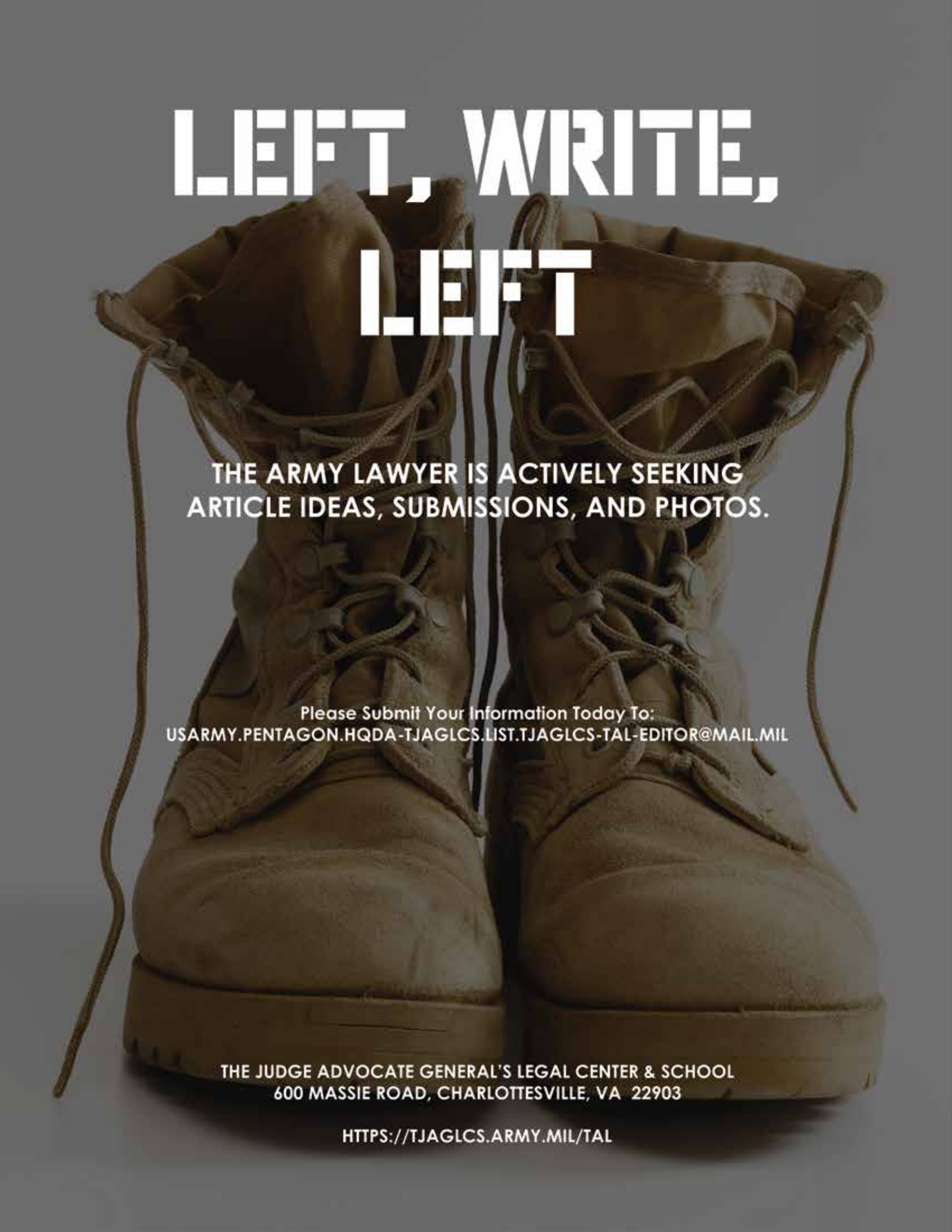
Ten weeks after arrival, graduation day comes for the vast majority of our 27D hopefuls. There, they will hear words of wisdom from a guest speaker on what to expect when they leave the friendly confines of Hotel Juliet. When they hear me speak on graduation day, they often hear some rendition of an anecdote known warmly as, "A Storm Is a Brewin'." The title happened to be a former junior paralegal's catchphrase for rapidly expanding legal action trackers in the brigade legal office. In this quick but true story, as those actions piled up, and as a storm was most certainly a brewin', I tell our graduates about a newly-minted 27D that found herself in the center of a battalion command and staff meeting. It was at this meeting that a battalion commander wanted to take an action that would fly in the face of ethical regulations. After a chorus of "yes, Sirs" echoed around the large conference table, a small but mighty, "I don't think that'd be a good idea, Sir," was the only voice willing to disagree with the table full of officers and senior enlisted Soldiers. The voice? A private first class, less than one year out of AIT. Often, these new paralegals may be the only voice of reason, the only voice of respectful criticism, in an otherwise staunchly loyal unit. Trust that the Soldiers that will join your offices will be ready and willing to have the hard conversation when the time comes.

Conclusion

Moral courage, professionalism, and a willingness to respectfully criticize: While we cannot promise that these three tenets will be perfected in each and every Soldier that passes through Juliet Company, we can ensure that the foundation for all three has been formed on solid ground. That sturdy foundation is a testament that the leaders who develop and teach your future Soldiers are a product of decades worth of proudly wearing the "JAG hat." **TAL**

CPT Smitham was the commander of the Student Detachment at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. In summer 2021, she will be a student in the 70th Graduate Course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

CPT Kman was the commander of J Company, 262d Quartermaster Battalion, 23d Quartermaster Brigade, at Fort Lee, Virginia. In summer 2021, he will be a Future Concepts Officer at the Future Concepts Directorate, The Judge Advocate General's Legal Center and School, in Charlottesville, Virginia.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