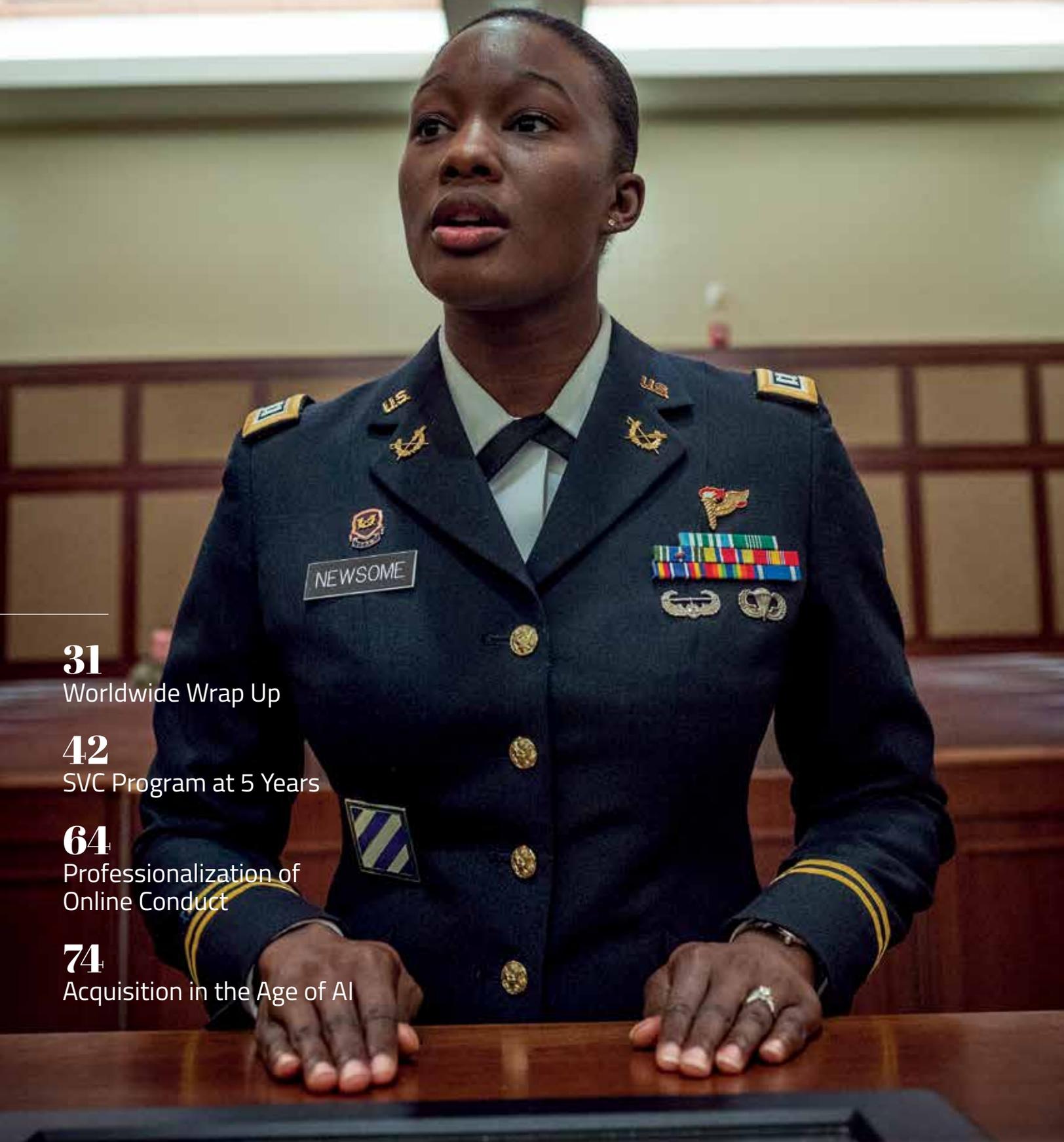


# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 1 2019



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## **AROUND THE CORPS**

Lieutenant Colonel Carol Brewer, a special victim prosecutor, speaks during a class she led last fall at Fort Belvoir. (Credit: Chris Tyree)

# Army Lawyer

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Issue 1 2019

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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published six times a year by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities.

The opinions expressed by the authors in the articles do not necessarily reflect the view of the Department of Defense, the Department of the Army, The Judge Advocate General's Corps (JAGC), The Judge Advocate General's Legal Center and School, or any other governmental or non-governmental agency. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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

Articles may be cited as: [author's name], [article title in italics], *ARMY LAW.*, [date], at [first page of article], [pincite].

On the cover: CPT Jessika Newsome serves as a Government Appellate Attorney at the U.S. Army Legal Services Agency at Fort Belvoir, Virginia.

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BG R. Patrick Huston

# Court is Assembled

## The Future JAG Corps

By Brigadier General R. Patrick Huston

**This issue of *The Army Lawyer* recalls a few important lessons learned at the September 2018 Worldwide Continuing**

**Legal Education (WWCLE) event at our regimental home in Charlottesville. This year's event brought together senior JAG**

Corps leaders from around the globe, representing all Army components.

For the past year, The Judge Advocate General has challenged all of us to “Be Ready.” At the 2018 Worldwide CLE, we unpacked that challenge and took a deep look at what attorneys and the JAG Corps may face in the future. The discussions ranged from the new Army Futures Command to future weapons—including autonomous weapons—to the practice of law in the future. The doctrinal framework of AirLand Battle is being replaced by Multi-Domain Operations, and while counter terrorism operations will continue in the near future, we must prepare for direct conflict with peer and near-peer adversaries. As our Army moves into this new era, commanders will rely upon judge advocates not only for their advice and counsel, but for help defining and setting the parameters for this transition.

WWCLE speakers challenged us to think deeply about the application of the law to an entirely new set of challenges such as multi-domain operations, autonomous weapons, and artificial intelligence. The Undersecretary of the Army, Honorable Ryan D. McCarthy, discussed the new Army Futures Command and the need to modernize our Army, enhance the lethality and effectiveness of our Soldiers, and rapidly provide capabilities to the force when needed. Lieutenant General Eric Wesley, Director, Army Capabilities Integration Center, cautioned that in future combat with a peer competitor we will likely face degraded communications, making our ability to advise the warfighter uniquely challenging. Further, the advent of increasingly long-range weapon systems and significant “standoff,” or enemy controlled space, will prevent us from staging for conflict in the manner we’ve been accustomed to for years. This standoff will limit our ability to stage out of large forward operating bases, challenging the supply chain from the moment we enter the conflict.

In addition, Mr. Richard Kidd, Deputy Assistant Secretary of the Army for Strategic Integration, pushed us to consider the implications of the persistent information confrontation and cyberattacks on our installations. He also challenged us to be ready to provide advice on the legal and policy



decisions required to respond to these threats. Mr. Paul Scharre, an author and expert in autonomous weapons, delivered an insightful presentation on artificial intelligence and posed the following questions we all must consider as artificial intelligence becomes weaponized: Are autonomous weapons illegal? Are they immoral? How does the law of armed conflict (LOAC) apply to their implementation?

Finally, many speakers stressed the increased importance of joint and multi-national operations to effectively combat the wide array of cyber operations, information confrontations, and other acts that may fall short of traditional armed conflict. As our potential adversaries continue to push international legal boundaries, we must analyze LOAC principles to determine when and how LOAC should be applied to both defensive and offensive measures in cyberspace.

Ultimately, the message from the 2018 Worldwide CLE was clear: the

Multi-Domain Operations of the future require us to assess our capabilities, adapt to new technologies, and apply the law to a rapidly changing problem set. We will need to review our legal framework to prepare for conflict in urban areas with millions of civilians. As enhancements in artificial intelligence make the use of autonomous weapons on the battlefield commonplace, judge advocates must be positioned to advise coders and developers to ensure LOAC principles are built into emerging technology. Finally, as we modernize and revamp our contracting principles, judge advocates must adapt the legal framework to support rapid procurement in the information age.

To you, the legal professionals of the Army's law firm, the challenges of our future are yours. As Abraham Lincoln said, "The best way to predict your future is to create it." Today we are in a unique position to create our future by preparing for rapid advances in technology, conflict, and warfare, so that our Corps can help

lead the Army's response to these unique and nuanced issues. It is incumbent upon us as legal professionals to apply the law to these new challenges in innovative and principled ways, ensuring our commanders have the right counsel to make informed decisions about our evolving threat environment. **TAL**

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*BG R. Patrick Huston is the Commanding General of The Judge Advocate General's Legal Center and School.*

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Paralegals conduct physical readiness training during Advanced Individual Training at Fort Lee in Petersburg, Virginia. (Credit: SFC Bryan Ortiz)

On 18 September 2018, a group of JAG Corps noncommissioned officers (NCOs) executed a demonstration of the ACFT for over 250 senior judge advocates attending the Worldwide CLE at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. When it comes to the difficulty of the events, "you are absolutely going to feel it," LTG Charles N. Pede explained to the audience prior to the demonstration. "Most individuals will be using muscle groups that they don't use that often." The ACFT measures much more than the current Army Physical Fitness Test (APFT). The APFT assesses only muscular and aerobic endurance, whereas the ACFT is believed to assess strength, power, speed, aerobic endurance, and agility. Furthermore, the ACFT is believed to considerably enhance combat readiness while decreasing injury, and have more predictive power for combat performance.

The ACFT demonstration covered five of the six events, leaving out the familiar two-mile run. The NCOs ran two lanes, with a station for each of the five events in each lane, rotating groups of approximately twenty-five participants through the five stations. At each station, the NCOs would demonstrate the event by talking through the motions, followed by execution of the event. The participants were given time to ask questions and attempt the event; many accepted the challenge and provided valuable feedback. Command Sergeant Major (CSM) Osvaldo Martinez Jr. closed the ACFT demonstration by informing the participants that "the ACFT has been linked to the readiness of our Army." Command Sergeant Major Martinez reminds us all that "as senior leaders in the Army, we must all embrace this change and prepare ourselves for the change, while also preparing our Soldiers. Soldiers will do what leaders do."

The first draft of the U.S. Army ACFT Field Testing Manual was published by HQDA on 6 September 2018, which promises the ACFT to be the physical fitness test of record beginning in FY21. Within the manual, each of the six events are thoroughly explained, an appropriate testing

## News & Notes

### JAG NCOs Tryout New ACFT

By now you've probably heard about the Army's new physical fitness test: the Army Combat Fitness Test (ACFT). The ACFT is currently being fielded as a gender and age neutral test promised to better measure the

overall fitness of each Soldier. The ACFT isn't an idea merely being thrown out for feedback; it will be the tool that the Army will use to assess the physical readiness of Soldiers. The JAG Corps needs to be ready for the ACFT.



Regimental Command Sergeant Major Osvaldo Martinez Jr. visited the legal office from 1st Brigade, 1st Armored Division during their training rotation to the National Training Center at Fort Irwin, California. (Photo provided by Strategic Initiatives Office)

site is defined, and specific test equipment requirements are clearly listed. The manual also includes the proposed instructions and a sample of the proposed ACFT scorecard. The Headquarters for the Department of the Army also published the Army Combat Fitness Test Training Guide, in an effort to “provide exercises that will help Soldiers successfully prepare to take the ACFT.”

Unsurprisingly, the guide lists many familiar exercises from Physical Readiness Training (PRT), which the Army has been conducting for nearly a decade. The guide provides visual references, equipment lists, step by step instructions for execution of the exercises, as well as recommendations for the number of sets and repetitions for the exercises.

The best way to prepare for the new test is by physically attempting all of the ACFT events and incorporating the Army’s recommended preparation exercises into our current fitness regimen. Share your

new-found knowledge with the Soldiers to your left and right. Proactively incorporate exercises into your current PRT sessions that will prepare your Soldiers for this test. Don’t complain about the changes, embrace them—enthusiastically.

### **U.S. Army South OSJA Hosts Inter-American Forum**

From 11-13 December 2018, U.S. Army South OSJA hosted the 6th annual Inter-American Forum on Military Justice & Operational Law. The Inter-American Forum is a regional security cooperation legal engagement among partner nation senior legal advisors in the Army South AOR. The purpose of the Inter-American Forum is to facilitate exchange of information between these senior legal advisors and their U.S. counterparts, facilitate interoperability, become a “think tank” in which to discuss common challenges facing

military justice systems in the region, and share legal “lessons learned” in all areas of military law, including operational law. Senior legal advisors from eight countries in South & Central America and the Caribbean attended the event: Peru, Brazil, Dominican Republic, Colombia, Argentina, Chile, Honduras, and Guatemala. The topic for this year’s forum was “Rule of Law & Operational Efficiency: Necessary Legal Innovations to Combat Illegal Transnational Armed Organizations.” Presentations were given from various delegations, including BG Susan Escallier. This is the first time the Forum has been hosted in the United States.

### **Continuing to Bridge the Divide in National Security Law**

On 27 and 28 September 2018, over fifty individuals from the Services, federal and state government offices, non-governmental organizations (NGOs), and more than



Brigadier General Patrick Huston with Captain Amanda Williams at the ABA conference in Chicago, Illinois. CPT Williams is the recipient of this year's Outstanding Young Military Lawyer Service Award for the Army. (Photo provided by Strategic Initiatives Office)



Professor Bobby Chesney—at the time a professor at Wake Forest University School of Law, and currently the Charles I. Francis Professor in Law and Associate Dean for Academic Affairs at the University of Texas School of Law—and Professor Geoff Corn, Presidential Research Professor at the South Texas College of Law, recognized the need for a forum that would bridge the divide between national security law academics and military and government national security law practitioners. The first workshop was held at Wake Forest University School of Law in coordination with TJAGLCS. This first workshop, in which ten law professors and ten JAG Corps officers participated, lasted a day and a half. It included eleven paper presentations and four hours of judge advocate-led law of armed conflict instruction. Subsequent workshops were held at the University of Texas, South Texas College of Law, and TJAGLCS, and transitioned to a format of presentation and discussion of papers on various national security law issues with the last workshop being held in 2015 at the South Texas College of Law.

After a hiatus of three years, the workshop next took place in 2018, consisting of

a series of panels discussing today's most challenging national security law issues. These panels, which were moderated by academics, included a diverse mix of judge advocates and government and NGO attorneys. Topics of discussion included the domestic and international legal bases for the use of force in operations and use of force in a transnational armed conflict; countering cyber and information warfare; law of the sea issues in the Arctic and South China Sea; the next frontier in space warfare, artificial intelligence, and the future of unmanned vehicles; and the use of economic tools to address national security threats. Additionally, TJAGLCS's Commanding General, Brigadier General R. Patrick Huston, gave opening remarks as well as a keynote address on Future War and Future Law.

The workshop was a huge success, particularly because there was nearly equal participation from military and government practitioners and academia. In addition to Professors Chesney and Corn, organizers included Mark Nevitt, Sharswood Fellow at the University of Pennsylvania Law School, and CAPT Todd Huntley, Professor in the National Security Law Department at TJAGLCS. Co-hosts and participants agreed that the workshop should continue annually at TJAGLCS in order to allow for maximum participation by both academics and military practitioners.

### Visiting Professor Examines Free Speech in a Digital World

On Friday, 21 September 2018, Dr. Colette Langos, a visiting professor at TJAGLCS from the University of Adelaide Law School in Australia, gave a plenary presentation to the American Bar Association in Chicago, along with her co-presenter, Wanda Cassidy, an associate professor at Simon Fraser University in Canada. Their presentation was entitled "Freedom of Speech in a Digital World: What are the Challenges, Education Opportunities, and the Role of Government?" Themes discussed included research into harmful online behaviors, justifications for encroaching upon the right to free speech, and the important role that law-related education can and should play in addressing how young people interact in our digital world.

TJAGLCS Visiting Professor Colette Langos from the University of Adelaide. (Credit: Jason Wilkerson, TJAGLCS)

ten U.S. and international law schools, gathered at The Judge Advocate General's Legal Center and School (TJAGLCS) to discuss various national security law-related issues at the 9th National Security Law Workshop. The first National Security Law Workshop occurred in 2008 when



COL Jack Durant, center, with his wife, CPT Katherine Burke Nash, right, arrives in Frankfurt, Germany, to face charges related to the theft of jewels belonging to the House of Hesse. (Credit: U.S. Army/National Archives)

# Lore of the Corps

## The German Job

### Theft of Hesse Jewels in WWII Led to High-Profile Courts-Martial

*By Fred L. Borch III, Regimental Historian & Archivist*

In the aftermath of World War II, the theft of gold, silver, and jewels belonging to the German aristocratic House of Hesse triggered an intensive criminal investigation and resulted in three high-profile courts-martial. When it was all over, Colonel (COL) Jack W. Durant, Major (MAJ) David Watson, and Captain (CPT) Kathleen Burke Nash were all in jail.<sup>1</sup>

In February 1946, less than a year after war had ended in Germany, Princess Sophie of Greece was preparing to marry Prince George Wilhelm of Hanover. The bride

was to wear the Hesse family jewels during the ceremony, but when a servant was sent to retrieve the jewels from their hiding place in the Hesse family castle, Schloss Friedrichshof at Kronberg, they were gone—and presumed stolen.

Countess Margaretha, the reigning matriarch of the Hesse family, knew that all property in Kronberg castle was personal family property and so could not be seized like the assets of defeated Nazi Germany. Consequently, she went to the provost marshal in Frankfurt, and shortly thereafter

the Army's Criminal Investigation Division launched an investigation. It soon discovered that a year before, when General George S. Patton's 3rd Army had been in the area, a Women's Army Corps officer, CPT Kathleen Burke "Katie" Nash, had been assigned to manage the castle as an officers' club. In November 1945, while exploring the massive structure, Nash saw a fresh patch of concrete on the floor of the wine cellar. Apparently, she also had heard a rumor that jewels, gold and silver were buried in a secret place in the castle. In any event, when Nash and two members of her staff chipped through the concrete, Nash discovered a zinc-lined box filled with small, neatly wrapped packets containing gold, silver, and jewels. It was literally a discovery of buried treasure—worth more than \$2.5 million.

Nash retrieved some of the loot. She also shared her secret with "J.W." Durant and Watson. Together the three officers then conspired to steal the remainder of the tiaras, bracelets, and other valuables. Realizing that they would likely be caught if they tried to smuggle the treasure back to the United States in its present form, the three conspirators removed the precious stones from their settings and set them aside to be sold later; they sold or pawned the gold and silver mountings. Watson travelled to Northern Ireland in November and December 1945, where he "pawned a large quantity of gold; he also gave a few baubles to a former girlfriend in Belfast."<sup>2</sup> Durant and Nash did their part in January 1946 by journeying to Switzerland and selling gold and jewels in Bern, Basel, and Zurich.

As for what they had decided to keep for themselves, the trio used the Army post office system. Watson mailed a sterling silver pitcher home to his parents in California. Nash sent a thirty-six-piece solid-gold table service—as well as a large number of jewels—to her sister in Wisconsin. Durant sent jewels and other valuables using envelopes stamped "Official" and by diplomatic pouch; most went to his brother in Falls Church, Virginia. All in all, some thirty boxes of treasure were sent to the United States.<sup>3</sup>



Some of the recovered items from the House of Hesse shown during court martial proceedings. (Credit: U.S. Army/National Archives)



COL Durant, center, with his two defense attorneys. (Credit: U.S. Army/National Archives)

By May 1946, the Criminal Investigation Division agents had caught up with the three culprits. Watson was apprehended in Germany. Durant and Nash, who had married on 28 May, were arrested at the luxury La Salle hotel in Chicago on 2 June. The timing of their marriage was not a coincidence: both Durant and Nash understood that a husband and wife could refuse to testify against each other in court-martial proceedings. But Nash

also hoped to escape trial because she was expecting to be honorably discharged. Unbeknownst to Nash, however, the Army had cancelled her separation orders and so she remained on active duty and subject to court-martial jurisdiction.

A few days later, nearly a million dollars in recovered Hesse family treasure—which the Army insisted was “a mere pittance” compared to the total value of the missing property—was displayed at the Pentagon.

Shortly thereafter, the Durants were flown to Frankfurt, Germany, where they both faced trial by general court-martial.

Katie Nash Durant was the first to stand trial. Charged with being absent without leave, larceny, fraud against the government, conduct unbecoming an officer and gentleman, and bringing discredit upon the military service, she appeared before the court panel in a uniform without any insignia, and refused to enter a plea. Her defense counsel, CPT Glenn Brumbaugh, insisted that the court lacked *in personam* jurisdiction because the Army had rescinded her separation orders solely to maintain jurisdiction over her. He also argued that, even if the court-martial had jurisdiction over her person, Nash was not guilty of any offenses involving the Hesse jewels because the Hesse family had abandoned the treasures or, alternatively, that the jewels were legitimate spoils of war. Major Joseph S. Robinson, the trial counsel, countered:

It is our obligation to see to it that private property in enemy territory we occupy be respected, and that any interference with such private property for personal gains be justly punished.<sup>4</sup>

The court agreed. It found Nash guilty and sentenced her to five years in jail and a dismissal.

Watson was next. His defense was that looting was common in Germany and that, as the treasure belonged either to dead Nazis or S.S. members, the property could not be returned to them. In any event, argued Watson, he lacked the criminal intent to steal anything. In his summary to the panel, CPT Abraham Hyman, the trial counsel, reminded the court that it could not blind itself to the fact there were people who took advantage of abnormal conditions in occupied Germany. However, there is also the precedent of millions of Soldiers who went through the war without yielding to the temptation to take things which did not belong to them.<sup>5</sup>

The court of ten colonels agreed with Watson, at least in part. But, while they found him not guilty of larceny, the panel members convicted him of the remaining offenses, including receiving stolen property. He was sentenced to three years in jail and a dismissal.

“J.W.” Durant was the last to go to trial. In a court-martial convened in Frankfurt, but concluded in Washington, D.C., COL Durant was found guilty of all charges. He was sentenced to fifteen years confinement at hard labor and a dismissal.

On 1 August 1951, Headquarters, European Command Army, announced that:

The Department of the Army, in cooperation with the Department of the Treasury, today returned to their owners the Hesse jewels, which have been in the custody of the United States since 1946 . . . Involved in the turnover were jewels filling 22 cubic foot Army safes and consisting of more than 270 items. Among the jewels were: a platinum bracelet encrusted with 405 diamonds, a platinum watch and bracelet with 606 diamonds, a sapphire weighing 116.20 carats, a group of diamonds weighing 282.77 carats, a gold bracelet with 27 diamonds, 54 rubies and 67 emeralds. . . .<sup>6</sup>

Despite this press release, more than half the Hesse jewels, and most of the gold and silver that had been hidden in the wine

## War Crimes Archive Initiative at William Winthrop Memorial Library

By Fred L. Borch

When LTG Pede officially dedicated the “William Winthrop Memorial Library” at the Legal Center and School in September 2018, he emphasized that the newly named library would be “the destination library for war crimes research.”

The library is off to a good start in achieving this goal, as it already has an extensive collection of war crimes related documents. These include: the record of trial in the military commission proceedings against the German U-boat saboteurs (better known as *Ex Parte Quirin*); records from the trials of major war criminals at Nuremberg; the Report of the Deputy Judge Advocate for War Crimes, European Command (June 1944-July 1948); the Malmedy Massacre Investigation Subcommittee Hearings; the record of trial in the case of General Yamashita; and the Judgment of the International Military Tribunal for the Far East (Toyko).

As for more recent war crimes materials, practitioners and scholars will be interested to know that the library has the record of trial in *United States v. Calley*, along with memorabilia from Judge Reid Kennedy, who presided over the trial, and Aubrey Daniel, the lead trial counsel in *Calley*. A copy of the official inquiry into the killings at My Lai, which was conducted by a team headed by LTG William R. “Ray” Peers also is available.

While ‘hard-copies’ of these documents are housed in our Regimental Archives, much of this material has been digitized and is available on line at the Library of Congress at [https://www.loc.gov/rr/frd/Military\\_Law/military-legal-resources-home.html](https://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html).

In the near future, the Winthrop Memorial Library will be obtaining documents and related materials from David M. Crane, who served as the Chief Prosecutor for the Special Court for Sierra Leone. Crane, who served as a judge advocate and retired as a lieutenant colonel, was appointed as Chief Prosecutor and Undersecretary General of the United Nations by Secretary General Kofi Annan in 2002. Our acquisition of LTC Crane’s war crimes materials is extremely important, as his experiences as the founding prosecutor for this United Nations tribunal are unique in military legal history.



(Credit: U.S. Army/National Archives)

cellar, were never recovered. To this day, no one knows what happened to this missing treasure.

As for Nash, Watson, and Durant, they served their sentences at the Disciplinary Barracks, Fort Leavenworth, Kansas, and were then released. Watson was the first to be freed; he was paroled in 1947. When he died in 1984, he was “still petitioning for a presidential pardon.”<sup>7</sup> Nash and Durant were both released in 1952; they spent their remaining days together before dying in the mid-1980s. **TAL**

*Fred Borch is the Regimental Historian and Archivist for the JAGC.*

## Notes

1. *United States v. Kathleen Nash Durant*, CM 317327; *United States v. David F. Watson*, CM 319747; *United States v. Jack W. Durant*, CM 324235 (on file with Records of the Office of the Judge Advocate General, Record Group (RG) 153, M1899).
2. Stephen Harding, *Soldiers of Fortune: The Hesse Jewel Heist, WORLD WAR II* (March 2009), <http://www.historynet.com/soldiers-of-fortune.htm> (last visited July 19, 2011).
3. JUDGE ADVOCATE GENERAL’S CORPS, *THE ARMY LAWYER* 172 (1975).
4. *Id.* at 173.
5. *Id.*
6. Court-Martial Case Files Relating to the “Hesse Crown Jewels Case,” 1944–1952 (on file with Records of the Office of the Judge Advocate General (Army), Record Group 153, Pub. No. M1899, Nat’l Archives, Washington, DC).
7. Harding, *supra* note 2.



J. Clay Smith Jr., pictured left. (Photo courtesy of Fred Borch)

# In Memoriam

## Remembering Recently Departed Judge Advocates

By Fred L. Borch, Regimental Historian & Archivist

### J. Clay Smith Jr. and Togo West Jr.

Two prominent African-American attorneys, both of whom who served in our Corps in the late 1960s and 1970s, recently passed away. By a strange coincidence, they were both born in the same year, only months apart, and died within days of each other. Both attended the same Judge Advocate Officer Basic Class in 1969, and both went on to have extraordinarily successful careers in law and in government.

John Clay Smith Jr. was born in Omaha, Nebraska, in April 1942. He attended Creighton University, where he participated in the Reserve Officer Training Corps program and was commissioned as a second lieutenant in the Adjutant General's Corps after graduating in 1964. He then entered Howard University's law school, where he was class president and graduated in 1967.

Then Captain Smith entered our Corps in 1969, and served four years of active duty

as a judge advocate before leaving active duty in 1973. The following year, he joined the Federal Communications Commission, where he later served as associate general counsel. In 1978, President Jimmy Carter named him to the Equal Employment Opportunity Commission (EEOC), where he made a name for himself supporting guidelines that protected underrepresented populations in the workplace. Dr. Smith (in addition to his law degree, he had a doctorate from George Washington University) was particularly concerned about sexual harassment in the workplace, which he insisted was "not a figment of the imagination" but a "real problem." In 1980, Dr. Smith made history when he was elected national president of the 15,000 member Federal Bar Association, the first African-American to hold the office.

After leaving the EEOC, Smith joined Howard University's law faculty and served as law school dean from 1986 to 1988. He worked tirelessly to enhance Howard's reputation in the legal community and brought in much needed financial support for the law school. Smith also wrote a book about early black lawyers titled *Emancipation: The Making of the Black Lawyer, 1844-1944*. Dr. Smith retired from Howard in 2004. He died in Washington, D.C., on 15 February 2018 from complications of Alzheimer's disease. He was seventy-five years old.

Born in Winston-Salem, North Carolina, in June 1942, Togo Dennis West Jr. graduated from Howard University in 1965 and then went on to receive his law degree from that same institution in 1968. West entered the Corps in 1969, in the same Judge Advocate Officer Basic Class as Smith. But while Dr. Smith served his tour in our Corps in uniform, Captain West entered the Honors Program in the Department of the Army Office of the General Counsel. Consequently, he spent the next four years in the Pentagon in a coat-and-tie, and dealt with a multitude of complex legal issues of importance to the highest levels of the Army.

When he finished his active duty obligation in 1973, West entered the civilian world. He returned to government service under President Jimmy Carter, when he was the top lawyer in the Department of the Navy and the Defense Department.



Togo West Jr.

In 1993, President Bill Clinton chose Togo West to be the Secretary of the Army. It was a turbulent period in Army history, as the Army was reducing from eighteen to ten active divisions, reorganizing the Army Reserve, and implementing the Clinton administration's "Don't Ask, Don't Tell" policy.

Secretary West received much praise for his work as the top Army official and this played a part in his selection to be the Secretary of Veterans Affairs (VA) in 1998. His tenure at the VA, however, was controversial. While he was credited with pushing more than \$3 billion into the agency's budget, an inspector general's report found he rented limousines and chartered military airplanes against government rules. He resigned in 2000.

In 2007, following a series of articles published in the *Washington Post* about the care of Soldiers at Walter Reed Army Medical Center, Mr. West returned to government service as part of an investigation into the facility. He died on 8 March 2018 while on a cruise in the Caribbean. He was seventy-five years old.

**Colonel (Retired) John Jay Douglass**  
Colonel (COL) (Ret.) John Jay Douglass, a larger-than-life personality in the history of our Corps, died on 22 December 2018 at his home in Charlottesville, Virginia. He was ninety-six years old.

Born in Lincoln, Nebraska, John Jay (he insisted that he be called "John Jay")

and would not answer to "John" or "Jay") graduated from the University of Nebraska and entered the Army in 1943. Second Lieutenant Douglass taught for a year at The Infantry School at Fort Benning before being transferred to the Caribbean Defense Command, where he served first as an infantry company commander and later as the command's public relations officer.

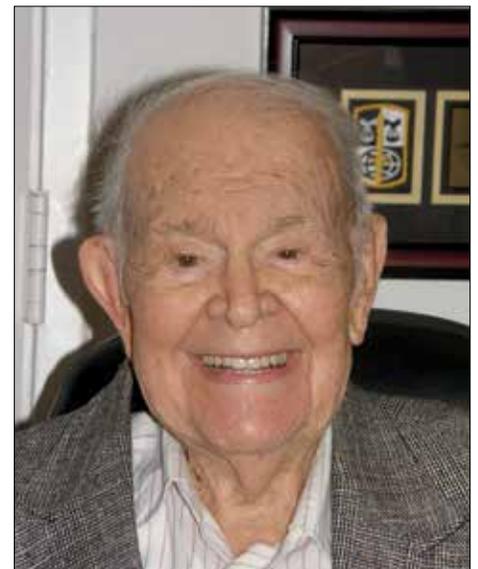
In 1947, John Jay obtained a Regular Army commission and then attended law school at the Army's expense. He graduated from the University of Michigan in 1952 and transferred to our Corps.

Then Captain Douglass's first assignment as an Army lawyer was in Korea. At the end of hostilities, he transferred to Japan, where he served until returning to the United States in 1953. Colonel Douglass subsequently served in Heidelberg at the Office of the Judge Advocate, U.S. Army, Europe (1963–1966) and was the Staff Judge Advocate, Fort Riley, Kansas (1966–1968) before deploying to Vietnam in 1968 to assume duties as the Staff Judge Advocate, U.S. Army, Vietnam (USARV). His time in Southeast Asia was challenging because, after the passage of the Military Justice Act of 1968, COL Douglass was responsible for re-organizing the delivery of legal services for more than 300,000 Soldiers serving as part of USARV. When the many changes in the Military Justice Act were effective on 1 August 1969 (e.g., creation of the position of military judge, and the appearance of trial and defense counsel at special courts-martial), USARV was ready because of COL Douglass's preparations.

After returning to the United States, COL Douglass spent a year as a trial judge before assuming duties as the Commandant, The Judge Advocate General's School (TJAGSA). During his long tenure (he served from June 1970 to January 1974), Douglass began a number of far-reaching and long-lasting initiatives. It was his idea to create a new monthly publication, which he named *The Army Lawyer*; it continues today, albeit in a bi-monthly format. John Jay also began the Senior Officers Legal Orientation and started the General Officers Legal Orientation (known colloquially as "SOLO" and "GOLO"), both of which are still with us. Finally, when the University of Virginia

decided to move its law school to the North Grounds, and offered to build a separate building for TJAGSA, COL Douglass spent hours with the architects on the project designing the new school. He insisted that the new building have a club on the fifth floor, a Post Exchange, and a two-floor Bachelor Officers Quarters. Douglass also made certain that the windows in the Commandant's office had a clear view of Jefferson's Monticello.

After retiring with thirty-one years of service in 1974, COL Douglass was named Dean of the National College of District Attorneys at the University of Houston, which was a joint project of the American Bar Association, the National District Attorneys Association, and the Association of American Trial Lawyers. He retired from that position in 1994.



John Jay Douglass

Among his many honors and awards were: Eagle Scout (1937); Order of the Coif (1952); Army Distinguished Service Medal (1971); and Nebraska Alumni Association Achievement Award (2002).

He was a member of the Texas and Nebraska State Bars and was very active in the American Bar Association. Colonel Douglass was particularly proud of his role in founding the Retired Association of Judge Advocates (RAJA), a social organization consisting of retired Active, Reserve, and Guard judge advocates. He served as its first president for many years.

Colonel Douglass was preceded in death by his wife of sixty-eight years, Margaret “Papoose” Pickering. He is survived by children, grandchildren, and great grandchildren.

John Jay Douglass is the last of the generation of judge advocates who served in World War II, Korea, and Vietnam, and he will be missed by all who knew him.

### **Colonel (Retired) William V. Adams**

Colonel (COL) (Ret.) William “Bill” V. Adams died on 15 July 2018. He was sixty-nine years old. Bill was born 6 November 1948. He is survived by his wife, Nancy; and other family members.

### **Lieutenant Colonel (Retired) Robert Byers**

Lieutenant Colonel (LTC) (Ret.) Robert “Bob” Byers died 3 July 2018 in San Antonio, Texas. He was eighty-five years old.

Born in Marshalltown, Iowa, on 29 August 1932, he earned his J.D. from the University of Iowa in 1959. He then accepted a commission in the JAG Corps in February 1960. Lieutenant Colonel Byers subsequently served a twenty-year career as an Army lawyer. His assignments included Charlottesville, Virginia; Fort Lewis, Washington; and Fort Sam Houston, Texas. Lieutenant Colonel Byers also served overseas in Heidelberg and Munich, Germany. After retiring from the JAG Corps, he went into private practice, representing abused and neglected children.

Bob is survived by his wife, Nancy; his four grandchildren, Chase & Natalie Dickinson and Taylor & Jamie Byers; granddaughters-in-law, Sarah Dickinson and Kayla Byers; daughters-in-law, Cindy Byers & Kathy Byers; and his beloved dogs Dudley, Willie, and Annie.

### **Colonel (Retired) Harry St. George Tucker Carmichael III**

Colonel (COL) (Ret.) “Mike” Carmichael died in Lexington, Virginia, on 30 November 2018. He was seventy-nine years old and had been suffering from Parkinson’s Disease for years.

Born on 26 August 1939 in Atlanta, Georgia, Mike had a varied and adventurous childhood, having lived in Charleston, West Virginia, where his maternal

great-grandfather had been governor; in Greece, where his father was a civil engineer helping with reconstruction after World War II; and in Kentucky, where his family had homes in Versailles and Lexington.

Mike graduated from Virginia Military Institute in 1961, and from the University of Kentucky’s College of Law. He then entered our Corps, serving first in Vietnam. Remaining on active duty, COL Carmichael had a varied career, including tours at Fort Campbell, and the Pentagon. He also served as the Deputy Staff Judge Advocate for the XVIII Airborne Corps in Fort Bragg, and as the Staff Judge Advocate for the 172nd Infantry in Fort Richardson, Alaska. He completed his career as an Army lawyer as an Associate Judge for the U.S. Army Court of Criminal Appeals in Falls Church, Virginia.

Mike retired in 1989 and assumed duties as the Senior Staff Attorney—and later Counsel—for the newly created Court of Veterans Appeals, which provided judicial review for veterans whose disability claims had been denied by the Department of Veterans Affairs. Upon retiring from the court, he was the first recipient of its Outstanding Achievement Award.

Colonel Carmichael is survived by Suzanne, his wife of fifty-one years; daughter, Anne Lovelace; son, Tucker; and four grandchildren.

### **Brigadier General (Retired) James P. Cullen**

Brigadier General (BG) (Ret.) James P. Cullen died on 8 December 2017. He was seventy-two years old. Born on 27 January 1945 in Queens, New York, he graduated from Iona College and St. John’s University School of Law.

Brigadier General Cullen served in the Army Reserve for more than twenty-five years. He had served as commander of the 4th Legal Support Operation and was a founding board member of the 4th JAG Officers Association. Prior to retirement in 1996, he was the Chief Judge of the Army Court of Criminal Appeals.

After retirement, BG Cullen devoted himself to human rights issues. He was co-founder and the first president of the Brehon Law Society, served on the Advisory Board of Human Rights First, and was the treasurer of the Construction Industry



BG (Ret.) James P. Cullen

World Trade Center Disaster Relief Fund. Additionally, BG Cullen was instrumental in assembling a group of retired military officers to speak out against the use of torture and call for the closure of the Guantanamo prison. President Barack Obama called this group “outstanding Americans.” Brigadier General Cullen played an active role in the negotiation of the Good Friday Agreement in an effort to bring peace to Ireland. He acted as an international civil rights monitor in Northern Ireland, and testified before Congress in the case of murdered human rights lawyer, Patrick Finucane.

Brigadier General Cullen is survived by his partner, Catherine Kelly; his children, Tara Carbonaro (husband Salvatore), Kerry Bartelemucci (husband Lawrence), Erin Stilp (husband Erik), Sean Cullen (wife Lindsey); their mother, Traudy Cullen; and eight grandchildren.

### **Lieutenant Colonel (Retired) Christina Ekman**

Lieutenant Colonel (LTC) (Ret.) Christina “Chrissy” Ekman died on 7 March 2018. She was fifty-two years old and had battled cancer for some years. After graduating from James Madison University in 1987, LTC Ekman was commissioned as a second lieutenant in the Transportation Corps. She began her Army career as a Logistics and Motor Pool officer at SHAPE in Belgium before serving as an Installation Transportation Officer, Adjutant, and Battalion S-1.

Lieutenant Colonel Ekman entered the JAG Corps after obtaining her J.D. at Seattle University School of Law. Her first assignment as an Army lawyer was as trial counsel at Camp Stanley, Korea. She subsequently served as the Chief of Criminal Law and Chief of Claims at Fort Lee, Virginia. After completing the Graduate Course, LTC Ekman remained in Charlottesville, where she taught criminal law. Lieutenant Colonel Ekman completed resident Command and General Staff College before serving as the Deputy Staff Judge Advocate, U.S. Armor Center and Fort Knox. Her final assignment was as the Chief, Judge Advocate Recruiting Office. Lieutenant Colonel Ekman retired in 2008.

Lieutenant Colonel Ekman is survived by her husband of eighteen years, Colonel Andrew J. Glass; her son, William Michael Ekman Glass; her parents, Colonel (Retired) Michael E. Ekman and Katherine "Ann" H. Ekman; sisters, Patricia "Patty" E. Dokken (husband Tim), Katherine "Katie" E. Hines (husband Matt); and brother, Thomas "Tom" M.W. Ekman (wife Kristin).

### **Major Christopher Roan Evans**

Major (MAJ) Christopher R. Evans died on 14 February 2017. He was thirty-nine years old. Born on 3 April 1977 in Iberia, Louisiana, he received his B.A. from Millsaps College and his J.D. from the Mississippi College of Law in 2002. Major Evans served as a judge advocate in the Army National Guard and deployed to Iraq in 2010. His last assignment was with the 399th JAG, Trial Defense Team, New Orleans, Louisiana.

### **Colonel (Retired) Vincent James Faggioli**

Colonel (COL) (Ret.) Vincent J. "Vince" Faggioli died on 2 October 2018 at his home in Hawaii. He was seventy-one years old.

Born in Salt Lake City on 12 November 1946, he earned a B.S. in Political Science from the University of Utah. He subsequently earned an M.A. in Public Administration, along with a J.D. He also had an LL.M. in Tax and Government Contracts and an LL.M. in International Law.

Colonel Faggioli served thirty years in our Corps and, after retiring from active duty, continued his service as a civilian

attorney. Colonel Faggioli retired a second time after fourteen years of civilian service. He was a member of the Senior Executive Service at the time of his second retirement.

He is survived by his wife, Karen Anne; son, Vincent James II (wife Amanda); brothers, David Lamar and Douglas; and granddaughters, Amelia Anne and Evangeline Lee.

### **Brigadier General (Retired) Patrick Finnegan**

Brigadier General (BG) (Ret.) Patrick "Pat" Finnegan died on 2 July 2018. He was sixty-eight years old. Born on 20 September 1949 in Fukuoka, Japan, he was the son of Colonel (Ret.) John B. Finnegan.

Pat spent his childhood traveling the globe. He then entered the United States Military Academy at West Point, from which he graduated in 1971. Due to his high class standing, then Second Lieutenant Finnegan went immediately to graduate school. In 1973, he received an M.A. in Public Administration from Harvard University's John F. Kennedy School for Government.

After a three year tour as an Infantry officer, BG Finnegan began law school as a FLEP at the University of Virginia, from which he earned his J.D. in 1979. His first assignment as a judge advocate was in Germany with the 8th Infantry Division. Pat then served in assignments of increasing importance and responsibility, including: Deputy Staff Judge Advocate, XVIII Airborne Corps; Legal Advisor, Joint Special Operations Command, Fort Bragg; Staff Judge Advocate, U.S. Special Operations Command, MacDill Air Force Base; and Legal Advisor, U.S. European Command. BG Finnegan served in Operations *Desert Storm*, *Desert Shield*, and *Hawkeye*.

Brigadier General Finnegan's distinguished Army career culminated with his return to West Point in 1998. He served as professor and head of the Department of Law until leaving that position to accept an appointment as the 12th Dean of the Academic Board in 2005. He retired five years later in 2010.

Brigadier General Finnegan then became the President of Longwood University, located in Farmville, Virginia. At Longwood, BG Finnegan championed efforts to expand



BG (Ret.) Patrick Finnegan

international educational opportunities for students and led the university's transition from Division I independent status into the Big South Conference. He retired from that position in 2012.

Brigadier General Finnegan is survived by his wife, Joan; daughters, Jenna and Katie; and several grandchildren.

Pat was greatly admired by all who knew him. He influenced generations of judge advocates and will be greatly missed.

### **Major (Retired) Russell James Fontenot**

Major (MAJ) (Ret.) Russell James Fontenot died on 21 March 2018 after a two-year battle with cancer. He was born in Jennings, Louisiana. He earned both his B.A. and J.D. from Louisiana State University, and served as an officer in various assignments, including the Infantry and the Judge Advocate General's Corps. He also deployed to Vietnam from 1971–1972.

Major Fontenot retired in 1989 after twenty-three years of active duty service. He returned to work for the Army as a civilian attorney at William Beaumont Army Medical Center, Fort Bliss, Texas. He retired in 2006 to Cedar Park, Texas, and enjoyed traveling and camping with his family, reading, and researching family history.

Major Fontenot is survived by his wife of fifty-two years, Martha; daughters, Tracey and Jolie; sons, David and Corey; and grandchildren, Katrina, Isaac, and Cora.

### **Lieutenant Colonel Gerald R. Fox**

Lieutenant Colonel (LTC) Gerald R. Fox died on 4 September 2017. He was fifty-six years old. Born on 20 April 1961, in Baltimore, Maryland, he grew up in Orlando, Florida. In 1981, he enlisted in the Army. He was a staff sergeant when he left active duty to study law. Lieutenant Colonel Fox received his J.D. from the University of Wisconsin Law School in 1995.

In 1999, LTC Fox accepted a position as Assistant State Public Defender. He was elected to the office of District Attorney in 2006 and was re-elected in 2008, 2012, and again in 2016.

Lieutenant Colonel Fox joined the Wisconsin Army National Guard in 2003 as a first lieutenant. In 2005, he deployed to Iraq in support of *Operation Iraqi Freedom*. He subsequently served as the Pre-Trial Agreement Attorney in the Central Criminal Court of the Iraq Liaison Office as part of Task Force 134 (Detainee Operations). Lieutenant Colonel Fox later graduated from the Military Judges Course. His legal excellence was recognized with the Army National Guard Trial Defense Service Excellence Award, and the Colonel Barnett Leadership Award.

Lieutenant Colonel Fox is survived by his wife of twenty-eight years, Susan; mother, Joyce "Liz" Bailey; and brother, Doug Fox (wife Sidney).

### **Captain Charles "Chip" Ladd**

Captain (CPT) Charles "Chip" Ladd, died on 1 May 2018. He was thirty-five years old. The son of Colonel Edward T. Ladd (U.S. Air Force, Retired) of Union City, California, and Dr. Elizabeth (King) Ladd of Fremont, California, Chip Ladd grew up in Union City, Tennessee.

Captain Ladd graduated with a B.A. in Aeronautical Studies from Embry-Riddle Aeronautical University in 2005. He received his J.D. from the University of Tennessee at Knoxville in 2009.

Captain Ladd began his military career in 2002, when he joined the Air Force as a Predator UAV Systems Technician at Nellis Air Force Base, Nevada. He deployed in 2003 to Pakistan to launch and recover UAVs, and deployed again in 2004 to Iraq. Captain Ladd joined the Tennessee National Guard in 2007 as an Intelligence



CPT Charles Ladd

Officer, and deployed to Iraq again in 2009. He transferred to the Army JAG Corps in 2011. Chip was Air Assault and Airborne qualified. He was also fluent in Spanish. At the time of his death, he was serving as a trial defense counsel at Fort Bliss, Texas.

Captain Ladd is survived by his daughter, Katherine Ladd, of Texas; siblings, Major Teddy Ladd (Air Force) (wife Emily), John Ladd, James Ladd, and Melena (Ladd) Meese; and parents, Dr. Elizabeth Ladd and Colonel (Ret.) Edward Ladd.

### **Major (Retired) Carla T. Johnson**

Major (MAJ) (Ret.) Carla T. Johnson died on 9 January 2017 in Richmond, Virginia. She was fifty years old. Born in Harrisburg, Pennsylvania, she was an officer in the Signal Corps prior to entering the JAG Corps. Major Johnson earned a B.A. from Indiana University of Pennsylvania and a J.D. from Texas Southern University.

Major Johnson served in our Corps in a variety of assignments, including: Legal Assistance Attorney, Camp Casey, Korea; Trial Counsel, Eighth U.S. Army, Yongsan, Korea; Recruiting Officer, Judge Advocate Recruiting Office, Fort Belvoir, Virginia; Administrative Law Attorney, Fort Lee, Virginia; Trial Counsel and Senior Defense Counsel, 3d Infantry Division, Fort Stewart, Georgia; and Deputy Staff Judge Advocate, U.S. Army Aviation and Missile Command, Redstone Arsenal, Alabama.

After retiring from the Army in 2014, Carla worked as a civilian attorney with the Defense Contract Audit Agency, Office of the General Counsel, Fort Belvoir, Virginia.

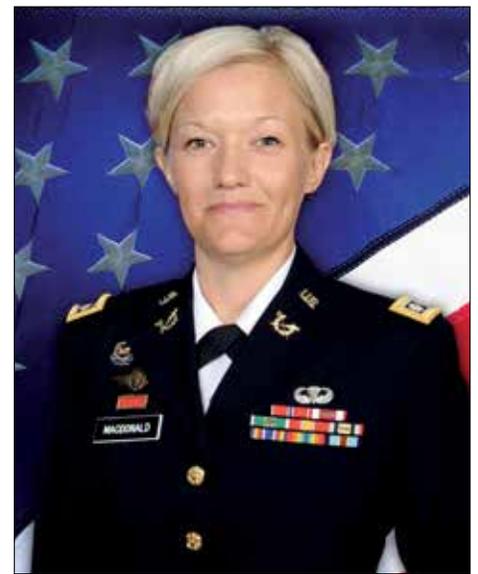
Carla is survived by her husband, Cornell; daughters, Cayla and Camryn Peters; and sons, Brendan, Kristopher, and Kyle Johnson.

### **Lieutenant Colonel Sally MacDonald**

Lieutenant Colonel (LTC) Sally MacDonald died on 11 September 2017. She was forty-two years old. Born on 9 August 1975 in Phoenixville, Pennsylvania, she received her B.S. in Social Science from Towson University in 1998, and her J.D. from the University of Maryland in 2002. Lieutenant Colonel MacDonald received her LL.M. from The Judge Advocate General's Legal Center and School (TJAGLCS) in 2011.

At the time of her death, LTC MacDonald was the Associate Dean of Students at TJAGLCS. Prior to this assignment, she served as the Chief of Military Justice, XVIII Airborne Corps at Fort Bragg, North Carolina. Other assignments included Fort Hood, Texas; Iraq; Fort Sam Houston; and Wiesbaden, Germany. Her military awards included the Legion of Merit and Bronze Star Medal.

Sally MacDonald was a running enthusiast, and had completed the Marine Corps Marathon and the Baltimore Marathon. She



LTC Sally MacDonald

also regularly participated in the Army Ten Miler. Lieutenant Colonel MacDonald is survived by her son, Ian Nixon; brother, Ian MacDonald; mother, Mary MacDonald; and father, Bruce MacDonald.

Lieutenant Colonel MacDonald was an extraordinarily popular officer who was admired by her superiors, peers, and subordinates alike. Her untimely death was the result of a brain aneurism suffered while on active duty. Her death was a shock to all who knew her.

### **Lieutenant Colonel (Retired) Michael McWright**

Lieutenant Colonel (LTC) (Ret.) Michael McWright died on 3 September 2017. He was fifty-three years old. Born on 14 November 1963, he received his B.A. from James Madison University in 1985 and his J.D. from Ohio Northern University in 1988. He also earned an LL.M. from TJAGSA in 1998. Prior to his untimely death, LTC McWright served as an administrative law attorney at U.S. Army Cadet Command, Fort Knox, Kentucky.

### **Colonel (Retired) Robert Mitchell Nutt**

Colonel (Ret.) Robert Mitchell Nutt died on 22 July 2018. He was eighty-one years old. Born on 5 July 1937 in Hot Springs, Arkansas, he attended the University of Arkansas, from which he earned both his B.A. and J.D. degrees. Colonel Nutt served twenty-two years in the JAG Corps. He is survived by his wife, Carol.

### **Captain John Darby O'Brien**

Captain (CPT) John Darby O'Brien died on 30 March 2018. He was seventy-seven years old. Born 10 July 1940, in Hannibal, Missouri, his parents were James F. O'Brien and Helen Elizabeth Wear.

Following his graduation from Creighton University School of Law, CPT O'Brien entered the JAG Corps. He deployed to Vietnam, where he joined the 173rd Airborne Brigade. He was awarded the Bronze Star Medal for his exemplary service in Vietnam. Upon his return to the U.S., O'Brien left active duty and settled in Las Vegas, Nevada.

He took and passed the Nevada Bar in 1969 and became a Deputy District Attorney

in the Clark County District Attorney's Office. Mr. O'Brien was later named United States Magistrate in 1978, and in 1985, entered private practice. During his legal career, Mr. O'Brien was President of the Nevada State Bar, Nevada State Chair for the American College of Trial Lawyers, and served on numerous Bar and Bench committees for the Nevada Supreme Court.

Mr. O'Brien was one of the founding trustees of The Alexander Dawson School at Rainbow Mountain in Las Vegas and The Dawson School in Lafayette, Colorado. Both schools are dedicated to providing their students with a learning environment that promotes academic excellence as well as honesty and integrity in all aspects of their personal lives.

Mr. O'Brien is survived by his brothers, James, Matt, Louie, and Charlie O'Brien; nephews, James and Sammy; nieces, Nan and Meghan; and his devoted friend of over fifty years, Lynn Cibel of Washington, D.C.

### **Sergeant First Class Zerion Dexter Simpson Jr.**

Sergeant First Class (SFC) Simpson died on 7 September 2018. He was fifty-three years old. Born in Groveland, Florida, he enlisted in the Army Reserve in 1991, and later transferred to the Active Guard Reserve (AGR). He subsequently served in a variety of assignments throughout his career, including: 174th Legal Operations Detachment, Miami, Florida; 3d Infantry Division (Mechanized), Fort Stewart, Georgia; U.S. Army Reserve Command, Fort Bragg, North Carolina; and 139th Legal Operations Detachment, Nashville, Tennessee. He also served as the AGR Training and Operations Noncommissioned Officer, 128th Legal Operations Detachment, Mustang, Oklahoma.

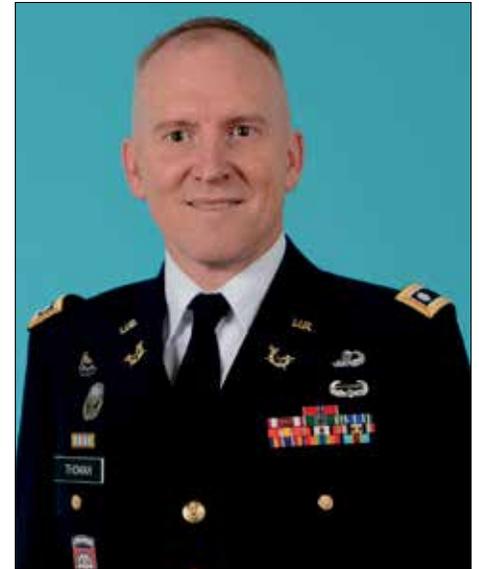
Sergeant First Class Simpson is survived by his daughter, Blair N. Simpson; his son, Zerion Dexter Simpson III; his mother, Ethel Lee Reed; his father, Zerion Dexter Simpson; his sisters, Dr. Cynthia Reese, Gwendolyn Jones (husband Joseph), Susie Reed, Pamela Drummond, and Rosa Winston (husband Phillip); his brothers, Gregory Simpson (wife Alice) and Clifford Simpson; as well as uncles, aunts, nephews, nieces, and cousins.

### **Lieutenant Colonel Jay Thoman**

Lieutenant Colonel (LTC) Jay Thoman passed away on 30 April 2018. He was running near the Pentagon when he was struck and killed by an automobile. Jay was forty-four years old. Born in California on 24 April 1974, LTC Thoman graduated from Gonzaga University in 1996 with a B.A. in Political Science. He subsequently earned his J.D. from Willamette University in 2000, and his LL.M. from TJAGLCS in 2009.

Lieutenant Colonel Thoman began his active duty career in 2000. At the time of his death, he was serving as the Chief of the Policy Division within the Criminal Law Division of the Office of The Judge Advocate General. His prior assignments included Fort Benning, Fort Bragg, Fort Leonard Wood, and TJAGLCS (where he taught criminal law). Lieutenant Colonel Thoman also served in Hawaii, Germany, and Iraq.

Lieutenant Colonel Thoman is survived by his wife, Jennifer; daughters, Julie and Josephine; son, Joshua; and his parents, Jay and Cynthia.



LTC Jay Thoman



## **AROUND THE CORPS**

Judge robes hang inside a chamber within the United States Army Court of Criminal Appeals at Fort Belvoir, Virginia.





# WRITECOM

## #thinkbeforeyoupost

By Major Laura O'Donnell

*There are many things of which a wise man might wish to be ignorant.<sup>1</sup>*

**In the age of Twitter, Facebook, and Snapchat, it is essential for us to focus on both how we communicate and what we communicate.** So, what does that mean? Since the advent of social media, people firmly believe others want or need to see their every move; but not everything is best shared. People forget that sometimes it's better to communicate face-to-face, like the good ol' days. Additionally, we are

so quick to get information out there that we fail to think through or proofread the potential post—and we should proofread everything. Remember that what you post on social media might be someone's first impression of you; you want to make sure it is a positive impression. Below are ten things to think about before you post on social media. The bottom line is this: think before you post.

### 1. It really does last forever.

The minute you post something, it is out there. You may go back to delete it, but it was out there long enough for individuals to see it, share it, or capture it via a screen grab. A screenshot can get as much traction as an original post. I don't watch much reality television,<sup>2</sup> but there was recently a controversy surrounding one of the contestants on the *Bachelorette*. He routinely liked posts that were discriminatory and inappropriate.<sup>3</sup> This came to light after individuals started sharing screen captures identifying him as an individual who had liked the posts. Facebook even states on its site: "When you choose to delete something you shared on Facebook, we remove it from the site. Some of this information is permanently deleted from our servers; however, some things can only be deleted when you permanently delete your account."<sup>4</sup>

### 2. Do people care what you are eating for dinner?

I am more of a silent stalker than a poster. It is amazing how much I know about some people I have not talked to in years. Now, I am not stalking in a creepy way, I am just watching what comes up in my news feed. People post everything from what they are eating for dinner to vague posts about having a terrible day. Some people post their every move. This might not be wise in some situations, and it may actually be dangerous. Social media platforms like Facebook and Instagram have geotags that allow people to see your exact location. This is even more of a concern for military members. The Department of Defense has banned geolocation features in designated operational areas.<sup>5</sup>

### 3. Why does social media so frequently equal poor grammar?

Many people seem to totally forget grammar when they are posting something online. When your future staff judge advocates (SJAs) go to search for your online presence, which they will—or someone in the office reports back to the SJA—they might decide you don't know the difference between *your* and *you're*.<sup>6</sup> There are, in fact, some SJAs out there with poor grammar from subordinates as their number one pet peeve, and you don't want that to be the



first impression they have of you. We are told over and over by superiors and peers to proofread our own work, so why don't we carry that advice with us when it comes to posts on social media? Some people will not be able to see past grammatical errors to read the amazing information you just posted about your cat.

**4. If you would not say it in a group of people, do not say it on social media.**

People feel brave sitting behind a keyboard, so they have a tendency to type things they would not actually say aloud. Before you post something, think to yourself, "Would I be okay saying this in front of my SJA?" Additionally, ask yourself if what you are going to post comports with the Army Values. We are all a part of the Department of Defense, and when we post something, our followers may attribute it to our positions

in the military. Many of our feeds contain pictures of us in uniform; this should be an even greater reminder to mind your Ps and Qs.<sup>7</sup> Moreover, the Army website states we need to "type messages that are consistent with our U.S. Army values."<sup>8</sup>

**5. You are being judged by your social media presence.**

Refer to tip number three, above, about the poor grammar. When you report for duty at your next assignment, is the leadership going to think you are unaware there's no such thing as an espresso? Your pictures matter, your comments matter, and your posts matter. You may think something is harmless fun, but the person seeing the photo may make a totally different judgment. Almost 70% of employers look for the internet<sup>9</sup> presence of individuals applying for jobs.<sup>10</sup> That may be a statistic from the civilian workforce, but SJAs are

doing the same thing or asking someone else in the office to see what is out there. Do you want your new office to think of you as a professional individual, or do you want your new office to think of you as someone who hasn't realized she graduated from college years ago? It can sometimes be hard to overcome the judgments that are made based on what you have sent out into the digital world—fix that by thinking before you post.

**6. You were taught to share as a child, and the sharing of ideas is good—sharing posts, maybe not.**

This goes for liking posts, too. People reading the post you shared may not grasp the reason you are sharing it and attribute the thoughts and ideas to you. In some cases, that may be a good thing, but in others, it may not be the message you want to convey. Again, this also goes for liking a

post (see the *Bachelor*<sup>11</sup> contestant, above). You may have a variety of reasons you like a post, but others may think you support that idea or concept fully, and it can cause issues. The U.S. Army’s “tweeters” recently found out how this can happen. The twitter account for the Army liked a post from Mindy Kaling in January, and it was immediately interpreted that the U.S. Army was criticizing the administration. It may have been just a bad decision, but as soon as the tweet was “liked,” it was seen and the end result was an article in the *Washington Post*.<sup>12</sup> Your liking a post may not get that level of attention, but all it takes is getting the attention of one person and an inaccurate interpretation to cause an issue.

### 7. Just because it is on social media does not mean it is true.

If you have not heard the term “fake news”<sup>13</sup> you may not have to worry about this tip because you must not be on social media. Not everything you read on social media is true. I was recently scrolling through social media and saw that someone shared a post about sharks in North Carolina. On the surface nothing unusual, until I read the post closer and read that the sharks were swimming in the streets of North Carolina after Hurricane Florence. It was a totally false story, but it was floating around enough that there was then an article debunking the information.<sup>14</sup> Before you state something as fact, take the time to ensure it is correct.

### 8. Do you really want your boss (or future boss) to see that photo?

When people hear a name for the first time, they immediately turn to the internet to search for information. If the first picture that pops up is a picture of you at a college party in a toga, that might not be the main message you want to convey about yourself. Additionally, know that when you post pictures out there, others can capture them, save them, and use them later. Information and pictures posted on the internet are fair game for people to review when deciding whether or not to give you a job. Make sure the pictures you are using for your profile are something you want everyone to see and judge you on.

### 9. Private in the realm of social media does not actually mean private.

Don’t fool yourself by thinking your Facebook is private. Your SJA may be sitting next to someone who went to school with you, and as soon as they hear your name, they’ll pull up your page and . . . Whoa, there is that picture of you in a toga with a caption that reads “I know your jelous over their!” Now the SJA thinks you have poor grammar, but you never even intended for him or her to see that. It is a much safer practice to treat everything like everyone can see it.

### 10. Try to stick to pictures of children, food, and animals.

This tip doesn’t need much explanation; it’s more of a summary. Plus, what know-it-all article only has nine tips? All kidding aside, you already know about these tips. The important part is to put them into practice with every post, every share, every like. You can always count on this: children, food, and animals are generally safe to post and they tend to make people happy.

The Army Command team released a memo in regard to social media, and they want all of us to “Think, Type, Post.”<sup>15</sup> What does that mean? They helpfully explain the tagline: “‘Think’ about the message being communicated and who could potentially view it now and for years to come; ‘Type’ a communication that is consistent with Army Values; and ‘Post’ only those messages that demonstrate dignity and respect for self and others.”<sup>16</sup> Bottom line—think before you post. **TAL**

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### Notes

1. Ralph Waldo Emerson.
2. Okay, that’s a lie. But the rest of this article is true.
3. [https://www.huffingtonpost.com/entry/bachelorette-premiere-garrett-yrigoyen\\_us\\_5b0837d9e4b0fdb2aa5342b6](https://www.huffingtonpost.com/entry/bachelorette-premiere-garrett-yrigoyen_us_5b0837d9e4b0fdb2aa5342b6).
4. <https://www.facebook.com/help/1701730696756992>.

5. Memorandum from Deputy Sec’y of Def. to Chief Management Officer of the Dep’t of Def., et al., subject: Use of Geolocation-Capable Devices, Applications, and Services (Aug. 3, 2018). Combatant Commanders or their designees can make exceptions.

6. Or, even worse, they find out that you—gasp—don’t care about the difference.

7. Interestingly, nobody is sure where “Mind your Ps and Qs” comes from, though all theories agree: it means pay attention to what you’re doing. <https://www.snopes.com/fact-check/ps-and-qs/>.

8. <https://www.army.mil/socialmedia/soldiers/>.

9. Yes, we’re no longer capitalizing “Internet” in the *Bluebook* and *Chicago Manual of Style*. <https://www.quickanddirtytips.com/education/grammar/chicago-updates-stop-capitalizing-internet-and-hyphenating-email> (also no more hyphenating “email”). The *AP Style Manual*—always fashion-forward—decided to stop capitalizing “internet” in 2016. <https://blog.oxforddictionaries.com/2016/04/05/should-you-capitalize-internet/>. In case you already know everything there is to know about thinking before you post on social media, this footnote is for you: so you don’t feel you’ve wasted your time reading this article. You’re welcome.

10. <https://www.businessnewsdaily.com/2377-social-media-hiring.html>.

11. Just kidding. I know it was the *Bachelorette*. Stop judging me.

12. [https://www.washingtonpost.com/news/checkpoint/wp/2018/01/08/the-military-cant-stop-accidentally-undermining-trump-on-twitter/?noredirect=on&utm\\_term=.5f82c403775e](https://www.washingtonpost.com/news/checkpoint/wp/2018/01/08/the-military-cant-stop-accidentally-undermining-trump-on-twitter/?noredirect=on&utm_term=.5f82c403775e).

13. [https://en.wikipedia.org/wiki/Fake\\_news](https://en.wikipedia.org/wiki/Fake_news).

14. <https://www.newsobserver.com/news/state/north-carolina/article218265210.html>.

15. [https://www.army.mil/e2/downloads/rv7/social-media/sa\\_csa\\_and\\_sma\\_tri-signed\\_letter\\_online\\_conduct\\_of\\_members\\_of\\_the\\_army\\_team.pdf](https://www.army.mil/e2/downloads/rv7/social-media/sa_csa_and_sma_tri-signed_letter_online_conduct_of_members_of_the_army_team.pdf).

16. [https://www.army.mil/e2/downloads/rv7/social-media/sa\\_csa\\_and\\_sma\\_tri-signed\\_letter\\_online\\_conduct\\_of\\_members\\_of\\_the\\_army\\_team.pdf](https://www.army.mil/e2/downloads/rv7/social-media/sa_csa_and_sma_tri-signed_letter_online_conduct_of_members_of_the_army_team.pdf).



(Credit: iStock.com/jdwfoto)

# Practice Notes

## Handling FOIA Requests Related to Courts-Martial

By Major Collin P. Evans

*A democracy requires accountability and accountability requires transparency.<sup>1</sup>*

**Over the past five years the military has seen a significant increase in both the media's and general public's interest in criminal prosecutions taking place within the military.** In the Army alone, the prosecutions of Brigadier General Jeffrey Sinclair, Private First Class Bradley Manning, and Sergeant Bowe Bergdahl are just three examples of courts-martial

generating such interest. While Rule for Courts-Martial (R.C.M.) 806 gives members of the military and the civilian public the ability to access courts-martial proceedings, it also gives military judges wide latitude to control who is present in the courtroom and to decide whether the proceedings will be open or closed.<sup>2</sup> This has resulted in significant frustration on

the part of the media who feel the military is frequently impeding their ability to report on the judicial proceedings.<sup>3</sup> At times, such frustration has resulted in the media resorting to litigation in an attempt to open up courts-martial proceedings.<sup>4</sup> It has also led to an increase in the media's use of the procedures available to them under the Freedom of Information Act (FOIA) to gain access to relevant information when the court does not make such records or proceedings public.<sup>5</sup> Examples of this can be seen in reporter David Phillips's use of the FOIA to gather information for his Pulitzer Prize winning piece *Other Than Honorable*,<sup>6</sup> multiple FOIA requests by media outlets for information relevant to the Staff Sergeant Robert Bales case,<sup>7</sup> and Judicial Watch's litigation against the Obama administration regarding access to documents relevant to the Sergeant Bowe Bergdahl case.<sup>8</sup>

This increased reliance on the FOIA by the media and the public means that a greater number of Army practitioners are going to find themselves involved in responding to such requests. However, unlike many federal agencies where FOIA requests are handled by individuals in full-time positions dedicated to FOIA practice, Army practitioners reviewing such requests will often have little experience dealing with this complex area of law.<sup>9</sup> When this lack of experience is combined with significant media interest and the short deadlines set by the FOIA, the risk of mistakes is high. This article will provide practitioners with the information necessary to quickly develop an understanding of the FOIA, the FOIA's exemptions, and best practices for handling FOIA requests related to criminal proceedings.

### FOIA Overview

The purpose of the FOIA is to allow any person to request and obtain, without explanation or justification, existing, identifiable, and unpublished agency records on any topic.<sup>10</sup> Once such a request is made, an agency has twenty days to determine if the information requested is exempt from disclosure by one of the nine exemptions, and, if it isn't, release the requested information to the requestor.<sup>11</sup> In short, the act is meant to encourage accountability in government by allowing the citizenry to

access information held by the government that serves it.<sup>12</sup>

In the spirit of encouraging accountability, executive departments have been directed to approach the handling of FOIA requests with a presumption in favor of disclosure.<sup>13</sup> This sentiment is echoed in the Department of Defense Freedom of Information Act Manual (DoDM 5400.07) which states that “[i]nformation responsive to a FOIA request will be withheld only if the DoD Component reasonably foresees that disclosure would harm an interest protected by one or more of the FOIA exemptions or disclosure is prohibited by law.”<sup>14</sup> Likewise, Army Regulation (AR) 25–55 states that “records not specifically exempt from disclosure under the Act shall, upon request, be made readily available to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked.”<sup>15</sup> It is extremely important for judge advocates practicing in this area to not only understand this presumption, but also keep it at the forefront of their analysis of FOIA related issues.

## The Exemptions

The FOIA exempts nine categories of records from disclosure.<sup>16</sup> This article focuses on six of these nine exemptions—Exemptions 1 through 3 and 5 through 7. Exemptions 4, 8, and 9 will not be discussed as their relevance to courts-martial is limited.<sup>17</sup>

As an initial matter, it is important for readers to understand that even if an exemption applies to requested information, it does not necessarily mean the information must be withheld.<sup>18</sup> This is because the FOIA provides agencies “discretionary release authority” for information protected by Exemptions 2, 5, and 7—except 7(c). Discretionary release authority means that agencies can release information even if an exemption applies so long as there is no foreseeable harm from such a release.<sup>19</sup> This standard came into existence on 19 March 2009, when then Attorney General Eric Holder issued a memorandum stating that “an agency should not withhold information simply because it may do so legally,” but rather must apply the “foreseeable harm standard” for denials.<sup>20</sup> Therefore, judge advocates handling FOIA requests

must understand that it is often not enough to merely determine whether an exemption applies to the requested information. Rather, once they determine that an exemption applies, they must consider the “foreseeable harm” of such a release. If there is no foreseeable harm and the applicable exemption is 2, 4, or 7—except 7(c)—the information should be released regardless of the exemption.<sup>21</sup> It is important to note, however, that information protected from disclosure under Exemptions 1, 3, 4, 6, and 7(c) are *not* subject to discretionary release.<sup>22</sup> Practitioners need only consider discretionary release when dealing with Exemptions 2, 5, or 7, except 7(c).<sup>23</sup>

### Exemption 1

Exemption 1 excludes from release “records properly classified in the interest of national defense or foreign policy purposes as secret under criteria established by an executive order.”<sup>24</sup> The current executive order in effect is Executive Order 13526.<sup>25</sup> Only documents properly classified as Confidential, Secret, or Top Secret qualify for Exemption 1.<sup>26</sup> Documents marked For Official Use Only, Limited Distribution, or Controlled Unclassified Information do not qualify under exemption 1.<sup>27</sup>

Before relying on this exemption “it must be determined whether the information is *properly classified* in accordance with the Executive Order at the time the FOIA request is made.”<sup>28</sup> Therefore, judge advocates who are considering using Exemption 1 as the basis for redacting information must coordinate with the appropriate officials on their staff to determine if the document was properly classified or if it should be declassified.<sup>29</sup>

### Exemption 2

Exemption 2 excludes from release records that are “related solely to the internal personnel rules and practices of an agency.”<sup>30</sup> It is important to note here that AR 25–55 has not been updated since 1 November 1997. This is significant because AR 25–55 states that “[t]his exemption has two profiles, high b2 and low b2.”<sup>31</sup> In 2011, the Supreme Court of the United States overturned thirty years of case law when it issued its opinion in *Milner v. Department of the Navy*,<sup>32</sup> and removed “high b2” from the

interpretation of this exemption, holding that in order for records to qualify for Exemption 2 they must relate solely to the agency’s internal personnel rules and practices.<sup>33</sup> This ruling created a new three part test which must be satisfied for information to fit within Exemption 2. The three parts of the test are: (1) the information must be related to personnel rules and practices, (2) the information must relate solely to those personnel rules and practices, and (3) the information must be internal.<sup>34</sup> This is a significant narrowing of Exemption 2<sup>35</sup> and it is extremely important for judge advocates handling these issues to understand this and disregard the guidance provided by AR 25–55 as it is no longer in line with the law.

### Exemption 3

Exemption 3 “incorporates into FOIA certain nondisclosure provisions that are contained in other federal statutes.”<sup>36</sup> This information is allowed to be withheld provided the statute either “(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”<sup>37</sup> Additionally, “for any statute enacted after October 28, 2009, in order to qualify as an Exemption 3 statute under this paragraph, it must cite to section (b)(3) of the FOIA.”<sup>38</sup> One example of this is “10 U.S.C. § 130b, which allows withholding of information on personnel of overseas, sensitive, or routinely deployable units.”<sup>39</sup> Additionally, DODM 5400.07 also provides a list of statutes which meet the requirements of Open FOIA Act of 2009.<sup>40</sup>

### Exemption 5

This exemption applies to “inter-agency and intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency.”<sup>41</sup> This statute has been construed by the courts to “exempt those documents and only those documents normally privileged in the civil discovery context.”<sup>42</sup> As such, this exemption is extremely broad, “encompassing both statutory privileges and those commonly recognized by case law.”<sup>43</sup> As a practical



matter though, this exemption typically encompasses three types of privileges, which are: (1) the deliberative process privilege, (2) the attorney work-product privilege, and (3) the attorney-client privilege.<sup>44</sup>

The deliberative process privilege has its basis in the desire to “prevent injury to the quality of agency decisions.”<sup>45</sup> “In concept, this privilege protects not merely documents, but also the integrity of the deliberative process itself where the exposure of that process would result in harm.”<sup>46</sup> There are two requirements that must be met for the deliberative process privilege to apply. First, “the communication must be predecisional, i.e. ‘antecedent to the adoption of an agency policy.’”<sup>47</sup> Second, “the communication must be deliberative, i.e. ‘a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.’”<sup>48</sup> “A document is ‘predecisional’ if it is generated before the adoption of an agency policy.”<sup>49</sup> To be deliberative, the document must “reflect the give-and-take of the consultative process.”<sup>50</sup> When considering

this, judge advocates must analyze closely the honest nature of the documents and the role they played in the agency’s deliberations.<sup>51</sup> Examples of documents considered to fall under this exemption are listed in AR 25–55.<sup>52</sup> They include nonfactual portions of staff papers, after action reports, situation reports containing staff evaluations, advice, opinions, or suggestions, Inspector General reports, and planning, programming, and budgetary information involved in defense planning and the resource allocation process.<sup>53</sup>

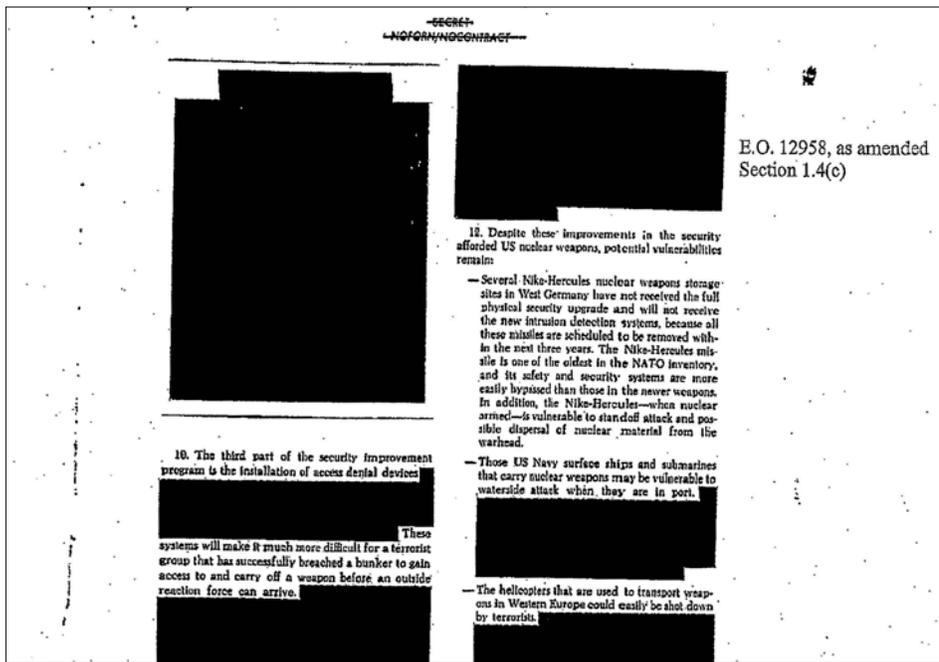
The exemption also traditionally covers the attorney-work product privilege.<sup>54</sup> Under the attorney work-product privilege, the exemption is not limited to civil proceedings, but also extends to administrative proceedings and to criminal matters.<sup>55</sup> While this only applies when the attorney is working on products in cases where litigation is probable, it is not necessary that the litigation has actually begun.<sup>56</sup> The test for this is whether litigation is reasonably regarded as inevitable under the circumstances, as such it is not sufficient that

litigation is merely conceivable.<sup>57</sup> The key for this exemption to apply is that the document was created at least in part because of the prospect of litigation.<sup>58</sup>

The Attorney-Client Privilege is the third privilege traditionally incorporated into Exemption 5.<sup>59</sup> This privilege is not limited to litigation, but “it fundamentally applies to facts divulged by a client to his attorney” and the opinions given by an attorney to his client based upon those facts.<sup>60</sup> This privilege would apply to judge advocates and their commanders in accordance with AR 27–26, Rule 1.13, because judge advocates represent the Army “through its officers, employees or members in their official capacity.”<sup>61</sup>

#### **Exemption 6**

Exemption 6 applies to “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>62</sup> There is a two-prong test to decide whether information possessed by the government falls under this exemption. First, and



often the most difficult, is a determination whether the records meet the definition of personnel, medical, or similar files.<sup>63</sup> Second, if this definition is met, the “agency must engage in a balancing test to consider the intrusion into personal privacy that would occur from release of the records, weighed against the interest of the public in disclosure of the requested materials.”<sup>64</sup>

The key to understanding this exemption is understanding the definition of the term “similar files.” In *U.S. Department of State v. Washington Post Co.*, the Supreme Court found that Congress intended similar files to include any information that “applies to a particular individual.”<sup>65</sup> As a result, similar files constitute any record that “contains personal information about an identified individual.”<sup>66</sup> Based on this definition the courts have ruled items such as personnel files, emails, and performance appraisals exempt under Exemption 6.<sup>67</sup> However, this exemption cannot be claimed if federal law requires disclosure, nor can it be claimed if the individual whose information is contained in the records consents to the disclosure.<sup>68</sup>

If there is a privacy interest identified, the next step in the analysis is to balance the privacy interest against the public’s interest in the information. When making this determination practitioners should keep in mind that a particular requestor’s intent is

irrelevant. Rather, the “only relevant public interest under FOIA is the extent to which disclosure of the information sought would shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.”<sup>69</sup> In practice, this often means low level employee information is protected from disclosure, while disclosure of information pertaining to more senior personnel is fairly common.<sup>70</sup> Therefore, when handling these situations practitioners must closely consider who the information pertains to before making a determination regarding disclosure.

#### **Exemption 7**

Exemption 7 applies to law enforcement investigations.<sup>71</sup> While the term “law enforcement” may sound straight forward, case law shows that applying the law enforcement exemption can be extremely complex, particularly in a military context. This is because the definition of what constitutes a law enforcement investigation is broad and often includes items one would not typically consider part of a law enforcement investigation. In applying this exemption, practitioners must always consider the purpose behind it—to protect documents from disclosure where such disclosure “would jeopardize criminal or civil investigations and cause harm to

persons involved in matters concerning law enforcement.”<sup>72</sup> Keeping that purpose in mind is critical when balancing FOIA’s presumption in favor of disclosure against the organization’s need for effective law enforcement investigations.

The harms that may be considered in a disclosure analysis under Exemption 7 are enumerated as six sub-exemptions.<sup>73</sup> To withhold the information “a federal government agency must usually now establish that one of the enumerated harms ‘could reasonably be expected’ to occur if the information is disclosed.”<sup>74</sup>

In practice, there is a two part analysis to determine if Exemption 7 applies. First, a practitioner will need to consider whether the information requested falls within the definition of a law enforcement investigation. Under AR 25–55, paragraph 1–409, a law enforcement investigation is defined as “an investigation conducted by a command or agency for law enforcement purposes relating to crime, waste, or fraud, or for national security reasons. Such investigations may include gathering evidence for criminal prosecutions and for civil or regulatory proceedings”<sup>75</sup> Whether or not a requested item meets the definition of a law enforcement investigation often turns on why the information was gathered.<sup>76</sup> From the perspective of a judge advocate, this definition can apply to multiple types of requested information. For example, courts have held that AR 15–6 Investigations,<sup>77</sup> Judge Advocate Professional Responsibility Branch Investigations,<sup>78</sup> Security Clearance Investigations,<sup>79</sup> and Serious Incident Reports submitted to the Army by private security contractors in Iraq<sup>80</sup> can all be considered law enforcement investigations. In contrast, “[r]ecords created to conduct ‘general monitoring,’ and similar employee files, are not considered law enforcement records.”<sup>81</sup> In making these decisions, courts focused on whether the purpose of the investigation was to “focus directly on specifically alleged illegal acts, illegal actions of particular identified officials, acts which could, if proved, result in civil or criminal sanctions.”<sup>82</sup>

If it is determined the documents meet the definition of law enforcement records, the second step is to determine whether any of the six sub-exemptions apply. As stated

above, these sub-exemptions were created in order to prevent the harmful disclosure of law enforcement information.<sup>83</sup> While most of the exemptions are straight forward, two in particular—exemptions 7(c) and 7(f)—have generated a significant volume of case law and require detailed analysis before they can be claimed.

Exemption 7(c) prevents the disclosure of information that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>84</sup> While similar to Exemption 6, Exemption 7(c) protects the privacy interest of an individual and affords an even greater privacy protection.<sup>85</sup> When considering whether to apply this exemption, the courts have adopted a two-part balancing test. First, it must be determined whether there is a privacy interest in the information.<sup>86</sup> If there is, the second part of the analysis is to balance that privacy interest against the public interest favoring disclosure.<sup>87</sup>

The definition of a privacy interest has been interpreted broadly and encompasses an individual’s control of information concerning his person.<sup>88</sup> As a result, information such as names, addresses, and other personally identifying information has been held to fall under the purview of this exemption.<sup>89</sup> The rationale behind this is the fact that the “mere mention of an individual’s name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.”<sup>90</sup> In fact, this exemption is so broad that it can even be claimed by the next of kin of a deceased individual.<sup>91</sup>

Once a privacy interest has been identified, the second part of the analysis is to balance that interest against the public interest favoring disclosure.<sup>92</sup> However, in analyzing this, the Supreme Court has held the public interest is limited to FOIA’s basic purpose, shedding “light on an agency’s performance of its statutory duties.”<sup>93</sup> In these situations, courts have been fairly consistent in holding that investigations into wrongdoing can trump the employee’s privacy interest, stating “[d]isclosure of the information related to ‘an agency investigation serves the public interest to the extent that it sheds light on the agency’s performance of its official duties.’”<sup>94</sup> Courts have held that the higher the rank or the more

prominent position an individual holds in a department, the greater the public interest in disclosure.<sup>95</sup> In contrast, lower-level employees typically have a greater privacy interest absent significant public interest in the case.<sup>96</sup> Because of this, it is important for judge advocates to consider both the level of interest in the requested information and the relative seniority of the individual involved in the investigation when considering whether to apply Exemption 7(c).

Exemption 7(f) prohibits the disclosure of information that could “reasonably be expected to endanger the life or physical safety of any individual.”<sup>97</sup> To qualify under Exemption 7(f), the agency must show that the release of this information would cause “specific threats to particular individuals arising out of law enforcement investigations.”<sup>98</sup> The key to understanding this, however, is to understand that the term “any individual” as used in the statute is not unlimited, and agencies that seek to claim this exemption cannot claim it based solely on speculative risk to a broad group of individuals.<sup>99</sup> Rather, the agency needs to state clearly how the disclosure could “reasonably be expected to endanger the life or physical safety” of the individuals it claims to be protecting.<sup>100</sup> Likewise, it is extremely important to understand that when considering this exemption, courts have deferred to agency judgment about the likelihood of harm, so long as the agency’s evaluation is reasonable.<sup>101</sup> Judge advocates considering making use of Exemption 7(f) should make sure they are able to succinctly articulate both the group that is likely to be harmed by the release of the information, and how likely the harm is to occur.<sup>102</sup>

### Best Practices

Along with the increase in media attention to matters within the military has come an increase in the use of the FOIA by the media. As a result, many chiefs of administrative law and brigade judge advocates will find themselves dealing with an increasing number of FOIA requests during their time in those roles. In many cases, the material requested will deal with highly sensitive cases which means scrutiny not just from division and corps level staff judge advocates, but also from the Office of the Judge

Advocate General (OTJAG). What follows is a list of best practices to ensure the success of practitioners who find themselves in such a position.

### *The Role of the Initial Denial Authority*

First, it is important to remember that while a commanding general is typically the approval authority for the majority of the actions coming out of a unit, that general does not have the authority to decide what is, and is not, releasable under the FOIA for criminal cases. This is because OTJAG Administrative Law Division and Criminal Law Division are the Initial Denial Authorities (IDAs) for the release of administrative and criminal legal records.<sup>103</sup> Likewise, the Commander, U.S. Army Criminal Investigation Command (CID), is the IDA for both CID and military police reports.<sup>104</sup> Therefore, the practitioner’s role when dealing with such high-visibility requests is to coordinate with the local FOIA Officer for the collection of the requested records and to conduct a legal review of the records proposed for release to ensure the legal sufficiency of any release or redaction.<sup>105</sup> The legal review, along with “the original FOIA request, two copies of the requested information (with one copy clearly indicating which portions are recommended for withholding, and which portions, if any, have already been released), a copy of the interim response acknowledging receipt and notifying the requestor of the referral to the IDA, and a cover letter containing a telephone point of contact will be forwarded to the IDA.”<sup>106</sup>

In practice, this means that the practitioner will likely be the main point of contact for multiple higher headquarters as they begin to process such FOIA requests. If the case arose out of an AR 15–6 investigation, the practitioner will likely deal primarily with OTJAG Administrative Law and, once the criminal process commences, OTJAG Criminal Law. If, on the other hand, the case arose out of a criminal investigation the practitioner will deal with CID and OTJAG. Given the amount of file sharing that will need to occur for this process, ensuring proper organization and naming conventions for electronic files on the share drive is essential. Likewise, maintaining separate file folders for redacted and

un-redacted documents will help prevent accidental disclosure. Perhaps the best analogy for how to organize this process is to treat the documents like a discovery file. Taking such an approach will minimize the risk of mistakes as well as ensure proper organization.

### ***Prep the Battlefield***

Perhaps one of the most difficult parts of dealing with FOIA requests related to courts-martial garnering significant media interest will be avoiding development of an “us versus them” mentality on the part of the chain of command. In these situations, stress and scrutiny can be high. The temptation to delay or deny disclosure of documents will exist. It is incumbent on the attorney to remind those in the chain of command that FOIA has a presumption in favor of disclosure.<sup>107</sup> As stated by the DoD, “[i]nformation responsive to a FOIA request will be withheld only if the DoD Component reasonably foresees that disclosure would harm an interest protected by one or more of the FOIA exemptions or disclosure is prohibited by law.”<sup>108</sup> This is an important point that practitioners must make clear to their commanders in order to avoid the litigation that may be sparked by the unnecessary denial of a high visibility request. Therefore, it is important for practitioners to sit down with commanders early and explain the FOIA to them, as well as the consequences of withholding information.<sup>109</sup>

### ***Be Proactive in the Process***

Those who have served as brigade judge advocates know that the best way to ensure you are kept in the loop on issues is to build strong relationships with the primary players in the brigade prior to issues arising. This means getting out of your office on a regular basis to visit the commanders and staff section leaders to “kick over stones” and stay informed. The same holds true for FOIA practice. Having strong relationships with commanders and brigade staff will ensure that you get the assistance and information needed when FOIA requests arrive.

Additionally, practitioners must also build strong working relationships with their command’s FOIA Office. On installations where there are multiple general

courts-martial convening authorities (GCMCAs) there will likely be multiple FOIA offices,<sup>110</sup> while smaller installations may only have a single point of contact.<sup>111</sup> As a result, practitioners need to determine early on who handles their FOIA requests and introduce themselves. A prior relationship will help facilitate the flow of information once a request comes in, and will minimize the likelihood of miscommunication during the stress of processing a request.

### ***Ensure the Scope of the Request Is Understood***

This may sound simple, but as attorneys we understand clarity is often lost as soon as someone tries to describe the scope of a search in writing. Under AR 25–55, paragraph 1–507, a proper request is defined as one in which the requestor provides “a description of the desired records, that enables the government to locate the records with a reasonable amount of effort.”<sup>112</sup> While this definition is somewhat vague, it nonetheless requires the agency to offer assistance to the requestor “in identifying the records sought and in reformulating the request.”<sup>113</sup> Therefore, it is extremely important that practitioners review the request to ensure they understand its scope. They must keep in mind that it is not their interpretation of the scope of the request that controls, but rather the intent of the requestor. As a result, if there is any uncertainty regarding what the requestor is asking for, they should work with the FOIA Office to contact the requestor for clarity. For example, a requestor may fail to use proper court-martial terminology, substituting jury for panel members or grand jury for Article 32. In such cases, practitioners should contact the requestor to determine the actual scope of the request. Taking such action will help to avoid conflict with the requestor and unnecessary duplication of work.<sup>114</sup>

### ***Is It Really Classified?***

As discussed earlier, documents “properly classified as Confidential, Secret, or Top Secret qualify for Exemption 1 protection.”<sup>115</sup> However, before “relying upon Exemption 1 . . . it must be determined whether the information is properly classified in accordance with the Executive Order at the time the FOIA request is made.”<sup>116</sup>

Therefore, when dealing with classified information it is extremely important that practitioners have the appropriate officials review the materials prior to invoking this exemption in order to determine whether the information is still properly classified or whether it can be declassified and released.<sup>117</sup> Additionally, when dealing with requests related to courts-martial, practitioners must consider the regularly changing classification levels of items that are typically requested, such as rules of engagement, battlefield video footage, and other internal documents. Therefore, it is important that practitioners give themselves adequate time to both identify these documents and determine their classification level, as well as determine if documents that aren’t suitable for a total release can be redacted sufficiently for a partial release.

### **Conclusion**

After reading this, some practitioners may bristle at the thought of individual citizens and the media having the right to access records concerning the activities of the military. Some may argue that distributing this information has the potential to harm military interests or prosecutions. However, as the FOIA makes clear, a civilian’s right to this information does exist and it is important for ensuring government transparency and accountability.<sup>118</sup> Failure to appreciate this concept can lead to conflict, litigation, and a perception on the part of the public that the military has something to hide. For this reason, practitioners handling FOIA requests for criminal cases must approach their role in the process with a mindset that favors disclosure over the instinctive desire to “protect” a particular prosecution.

While handling FOIA requests can be nerve-racking and time consuming, it doesn’t have to be. By establishing a basic understanding of the requirements of the FOIA before the requests are received, the practitioner can be confident they understand the general rules under which they will be operating. Additionally, establishing relationships early with the individuals involved in processing these requests will go a long way towards reducing processing times and stress. Finally, building systems that organize the information into coherent, searchable formats will help to

eliminate confusion and prevent accidental disclosure or non-disclosure. In the end, if these recommendations are followed, the practitioner can be confident in their ability to handle a FOIA request at any level. **TAL**

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## Notes

1. Memorandum on the Freedom of Information Act, PUB. PAPERS (Jan. 21, 2009), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf> [hereinafter Presidential Memo].
2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 803 (2016).
3. Aaron Mackey, *Military Courts Continue to Stymie Public Access*, 37 THE NEWS MEDIA AND THE LAW 13 (2013), <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2013/military-courts-continue-st>.
4. An example of this can be seen in *The Center for Constitutional Rights v. United States* where the C.A.A.F. held it lacks jurisdiction over challenges brought by journalists or the public seeking to open Court-Martial records or proceedings. *Center for Constitutional Rights v. United States*, 72 M.J. 126 (C.A.A.F. 2013).
5. Mackey, *supra* note 3. One of the chief complaints of media have regarding having to use of the FOIA to access information related to courts-martial is that the 20 day response period allowed to the government for responding to requests results in lag, making any information they receive untimely.
6. David Philipps, *Other Than Honorable*, The Colorado Springs Gazette (May 19, 2013), <http://cdn.csgazette.biz/soldiers/day1.html>. Philipps made extensive use of the FOIA to gather information regarding Soldiers who had previously deployed to combat, were suffering from PTSD, and accepted Chapter 10 discharges in lieu of facing Courts-Martial for post-deployment misconduct.
7. Project on Government Oversight, *Application of FOIA in Army Case Leaves Much to be Desired* (July 1, 2015), <http://www.pogo.org/blog/2015/07/foia-army-robert-bales.html>.
8. *Judicial Watch Sues Department of Defense to Obtain "Initial Report" of U.S. Army Review of Sgt. Bowe Bergdahl's Disappearance* (March 25, 2015), <https://www.judicialwatch.org/press-room/press-releases/judicial-watch-sues-department-of-defense-to-obtain-initial-report-of-u-s-armys-review-of-sgt-bowe-bergdahls-disappearance/>.
9. Lieutenant Colonel Craig E. Merutka, *Street FOIA: Nuts, Bolts, and Loose Change*, ARMY LAW., Dec. 2008, 49.
10. WENDY GINSBERG, CONG. RESEARCH SERV., R41933, THE FREEDOM OF INFORMATION ACT (FOIA), BACKGROUND, LEGISLATION, AND POLICY ISSUES (2014).
11. Bradley Pack, Note: *FOIA Frustration: Access to Government Records Under the Bush Administration*, 46 Ariz L. Rev. 815, 817 (Winter 2004)..
12. Presidential Memo, *supra* note 1.
13. *Id.* This fact was made clear in then President Obama's Freedom of Information Act Memorandum in which he stated that "[a]ll Agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA.
14. U.S. DEP'T OF DEF., MEM. 5400.07, DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (Jan. 1997), 17 [hereinafter DoDM 5400.07].
15. U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM para 1-501 (1 Nov. 1997) [hereinafter AR 25-55].
16. 5 U.S.C. § 552(b).
17. *Id.* Exemption (b)(4) covers trade secrets, Exemption (b)(8) governs records related to the regulation or supervision of financial institutions, and Exemption (b)(9) governs geological and geophysical information and data.
18. Merutka, *supra* note 9, at 53.
19. U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE (Dec. 8, 2014), DISCRETIONARY DISCLOSURE, [hereinafter DoJ FOIA GUIDE, DISCRETIONARY DISCLOSURE].
20. Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Exec. Dep'ts and Agencies, subject: Concerning the Freedom of Information Act (March 19, 2009), available at <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf> [hereinafter Holder Memo]. This memo stated that the DOJ would defend an agency's denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interested protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.
21. The foreseeable harm standard was codified in the FOIA Improvement Act of 2016. Foreseeable Harm exists only if the "agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b)" or "disclosure is prohibited by law." The FOIA Improvement Act of 2016, Public Law 114-185 (2016).
22. DoJ FOIA GUIDE, DISCRETIONARY DISCLOSURE, *supra* note 19.
23. DoJ FOIA GUIDE, DISCRETIONARY DISCLOSURE, *supra* note 19.
24. 5 USC § 552(b)(1).
25. U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE (Aug. 7, 2013), EXEMPTION 1, [hereinafter DoJ FOIA GUIDE, EXEMPTION 1].
26. Merutka, *supra* note 9, at 54.
27. DoDM 5400.07, *supra* note 14, at 32.
28. *Id.*
29. In many cases the unit possessing the information will not be the original classification authority. In such cases it is extremely important that the individuals handling the FOIA request reach out to the original classification authority to ensure proper action is taken to either keep the information classified or declassify it. *Id.*
30. 5 USC § 552(b)(2).
31. AR 25-55, *supra* note 15, para 3-200. AR 25-55 defines high b2 as those records containing or constituting statutes, release, regulation orders, manuals, directives, and instructions the release of which would allow circumvention of these records thereby substantially hindering the effective performance of a significant function of the DOD. Low b2 is defined as those that are trivial and housekeeping in nature for which there is no legitimate public interest of benefit to be gained by release and it would constitute an administrative burden to process the request.
32. *Milner v. Department of the Navy*, 562 U.S. 562 (2011).
33. U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE (Mar. 5, 2013), EXEMPTION 2, 11 [hereinafter DoJ FOIA GUIDE, EXEMPTION 2].
34. *Id.* at 12-13.
35. *Id.* at 13.
36. U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE (Aug. 13, 2015), EXEMPTION 3, 1 [hereinafter DoJ FOIA GUIDE, EXEMPTION 3].
37. *Id.*
38. DoDM 5400.07, *supra* note 15, at 18.
39. Merutka, *supra* note 9, at 55.
40. DoDM 5400.07, *supra* note 14, at 18.
41. 5 USC § 552(b)(5).
42. U.S. DEP'T OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY, FREEDOM OF INFORMATION ACT GUIDE (May 7, 2014), EXEMPTION 5, 1 [hereinafter DoJ FOIA GUIDE, EXEMPTION 5]. (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)).
43. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 2.
44. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 3.
45. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 13. Specifically, three policy purposes constitute the basis for this privilege (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are actually adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency action.
46. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 14 (quoting *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1119 (9th Cir. 1988)).
47. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 15 (quoting *Ancient Coin Collectors Guild v. U.S. Dep't of State*, 641 F.3d 504, 513 (D.C. Cir. 2011)).
48. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 15 (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975)).
49. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 16 (quoting *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006)).
50. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 26 (quoting *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 867 (D.C. Cir. 1980)).
51. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42.
52. AR 25-55, *supra* note 15.
53. *Id.*
54. *Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947). See also DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 46.

55. *Schoeman v. FBI*, 573 F.Supp. 2d 119, 143 (D.D.C. 2009). See also DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 46.

56. *Margolin v. Nasa*, No. 09-00421, 2011 U.S. Dist. Lexis 40882, 24-25). See also DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 47.

57. *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331 (D.C. Cir. 2011). See also DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 49.

58. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 50 (quoting *Maine v. U.S. Dep't of the Interior*, 298 F.3d 60, 67 (1st Cir. 2002)).

59. DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42.

60. *Vento v. IRS*, 714 F.Supp. 2d 137, 151 (D.D.C. 2010). See also DoJ FOIA GUIDE, EXEMPTION 5, *supra* note 42, at 58.

61. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, Rule 1.13, (1 May 1992) [hereinafter AR 27-26].

62. 5 USC 552(b)(6).

63. 110 Am. Jur. Trials 367 §23 (2008).

64. *Id.*

65. COL(R) Richard R. Huff & Lieutenant Colonel Craig E. Merutka, *Freedom of Information Act Access to Personal Information Contained In Government Records: Public Property or Protected Information?*, ARMY LAW., January 2010, at 3, (quoting U.S. Department of State v. *Washington Post Co.*, 456 U.S. 595 (1982)).

66. *Id.* at 3. An identified individual can also include someone not named in the information, but easily identifiable from the context of the information contained in the record. See also *Judicial Watch v. U.S. DOJ*, 41 F Supp. 3d 39 (D.D.C. 2014).

67. *Id.* at 6. This article presents an in depth analysis of the information exempt from release under Exemption 6.

68. 110 Am. Jur. Trials, *supra* note 63.

69. *United American Financial, Incorporated v. Potter*, 531 F Supp. 2d 29, 43 (D.D.C. 2008).

70. Huff & Merutka, *supra* note 65, at 7-8.

71. 5 USC 552(b)(7).

72. 110 Am. Jur. Trials, *supra* note 63.

73. 5 U.S.C. 552(b)(7).

The following are the sub-exemptions listed under the FOIA: records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if

such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual.

74. 110 Am. Jur. Trials, *supra* note 63.

75. AR 25-55, *supra* note 15, para 1-409. Curiously the DOD FOIA Guide does not provide a definition for what constitutes a law enforcement investigation.

76. 110 Am. Jur. Trials, *supra* note 63. The Agency requesting this exemption "is required to establish that the information was compiled for criminal, civil, or other law enforcement purposes." *Id.*

77. *Lurie v. Department of the Army*, 970 F. Supp. 19 (D.D.C. 1997).

78. *Wonder v. McHugh*, 2012 WL 3962750 (D.D.C. 2012).

79. *Henderson v. Officer of the Director of National Intelligence & Office of Personnel Management*, 151 F. Supp. 3d 170 (D.D.C. 2016).

80. *L.A. Times v. Department of Defense*, 442 F. Supp. 2d 880 (C.D.Ca. 2006).

81. Huff & Merutka, *supra* note 65, at 4.

82. *Lurie*, *supra* note 77, at 2 (quoting *Rural Housing Alliance v. U.S. Department of Agriculture*, 498 F 2d 73, 81 (D.C.Cir. 1973)).

83. 110 Am. Jur. Trials, *supra* note 63.

84. 5 U.S.C. 552(b)(7)(c).

85. Huff & Merutka, *supra* note 65, at 4.

86. *Roth v. U.S. Department of Justice*, 642 F 3d 1174 (D.D.C. 2011).

87. *Id.*

88. *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 763 (1989).

89. *Department of the Air Force v. Rose*, 425 U.S. 352 (1975). For a detailed list of cases where this exemption has been applied. See Huff, *supra* note 65.

90. *Lurie*, *supra* note 77, at 37, (Quoting *Fitzgibbon v CIA*, 911 F.2d 755, 767 (D.C.C. 1990)).

91. *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2003). The Court held that FOIA recognizes surviving family member's right to personal privacy with respect to their close relative's death-scene images.

92. *Roth v. U.S. Department of Justice*, 642 F 3d 1174 (D.D.C. 2011).

93. *Lurie*, *supra* note 77, at 37, (quoting U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749,773 (1989)).

94. *Lurie*, *supra* note 77, at 37 (quoting *Providence Journal v. DOA*, 981 F 2d. 552, 568 (1992)).

95. *Id.* at 37.

96. *Trentadue v. Integrity Committee*, 501 F 3d. 1215 (10th Cir 2007).

97. 5 USC 552(b)(7)(f).

98. *American Civil Liberties Union v. Department of Defense*, 543 F3d 59, 74 (2d. Cir. 2008).

99. *Id.*

100. *Los Angeles Times Communication v. Department of the Army*, 442 F Supp. 2d 880 (C.D. Ca. 2006). In a contrasting ruling the court held agency has met its burden as it had laid out how the information

related to SIRs involving contractors, if released, could improve insurgents' ability to target contractors and US Personnel. This differed with the ruling in *ACLU v. DOD* as there the DOA claimed too broad of a group to fall under the any individual terms where the Army attempted to withhold photographs of prisoner abuse by government forces in Iraq and Afghanistan.

101. "The test is not whether the court personally agrees in full with the agency's evaluation of the danger, rather, the issue is whether on the whole record the Agency's judgment objectively survives the test of reasonableness, good faith, specificity, and plausibility in this field of foreign intelligence in which the Agency is expert given by Congress a special role." *Gardels v. CIA*, 689 F2d. 1100, 1105 (D.D.Cir. 1982).

102. The driving purpose behind this exemption was the protect government agents, witnesses, informants, and others who have participated in law enforcement investigations and proceedings, as well as prevent criminals from being able to use the FOIA to deter or hinder law enforcement investigations "by identifying those involved in such investigations and targeting the involved parties or associates or relatives of those parties." *ACLU*, *supra* note 98, at 80.

103. TJAG Regulation # 25-55, The Office of the Judge Advocate General, U.S. Army, Subject: Office Management Release of Information, (Nov. 30, 2007).

104. 32 CFR 518.16(e)(21).

105. AR 25-55, *supra* note 15, para 5-104.

106. *Id.*

107. Presidential Memo, *supra* note 1.

108. DoD MEM. 5400.07, *supra* note 14.

109. Informing commanders that attorney's fees for litigation resulting from improper denials are paid from their Operations and Maintenance Budget will likely be helpful in persuading them to release required information. U.S. DEP'T OF DEF., 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 10, ch. 12, sec. 120201 (Jul. 2017).

110. Fort Bragg for instance, has separate FOIA Offices for FORSCOM Headquarters, 18th Airborne Corps, and USASOC, however, if an individual navigated to the Fort Bragg FOIA Page this is not readily apparent. See <https://www.bragg.army.mil/index.php/my-fort-bragg/all-services/office-freedom-information-act>

111. In contrast, Fort Lee has only one FOIA Office for the entire installation.

112. AR 25-55, *supra* note 15, para 1-507.

113. *Id.*

114. Gavin Baker, *Best Practices for Agency Freedom of Information Act Regulations*, Center for Effective Government (December 2013), <https://www.foreffectivegov.org/sites/default/files/info/foia-best-practices-guide.pdf>.

115. Merutka, *supra* note 9, at 54.

116. Merutka, *supra* note 9, at 54.

117. U.S DEP'T OF DEF., REG. 5200.1-R, INFORMATION SECURITY PROGRAM para. C4.1.3.1 (Jan. 1997).

118. Presidential Memo, *supra* note 1.

# U.S. Tax Reform

## Considerations for Service Members

By Adam G. Province & Samuel Kan, CFP®

### Introduction

On 22 December 2017, the president signed into law P.L. 115-97 (the “Act”).<sup>1</sup> The Act represents the largest overhaul of the U.S. Internal Revenue Code since the Tax Reform Act of 1986.<sup>2</sup> Specifically, the Act lowers individual tax rates and increases the standard deductions, while modifying or repealing a number of other previously available deductions, generally effective 1 January 2018. Absent further Congressional action, since the Act was passed under the Senate “budget reconciliation” rules, most of the individual provisions are scheduled to sunset after 2025. This article summarizes the most important changes affecting service members.

### Reduction in Individual Tax Rates

The Act retains the current seven-bracket individual tax rate structure but temporarily lowers tax rates and modifies income levels for some brackets.<sup>3</sup> Over time, however, taxpayers will gradually find themselves in higher tax brackets due to a newly adopted “chained” Consumer Price Index (CPI) approach, which will not sunset after 2025.<sup>4</sup> The Act also modifies the individual Alternative Minimum Tax.<sup>5</sup>

### Exclusions from Gross

#### *Income Alimony Payments*

Prior to the Act, alimony payments and certain separate maintenance payments were available for an above-the-line deduction by a payor spouse, while receipt of such payments was includable as gross income by a payee spouse.<sup>6</sup> For divorces effective after 31 December 2018, however, the Act provides that alimony payments will neither be deductible by a payor spouse,<sup>7</sup> nor includable by a payee spouse. This provision will not sunset after 2025.

#### *Exclusion for Employer Moving Expense Reimbursement*

Prior to the Act, qualified moving expense reimbursements provided by an employer to an employee were excluded from the employee’s gross income.<sup>8</sup> For service members, moving and storage reimbursements and allowances were similarly excluded.<sup>9</sup> While the Act suspends the exclusion of such moving expense reimbursements for civilians until after 31 December 2025, the exclusion is preserved for reimbursements and allowances received by service members.<sup>10</sup>

#### *Out-of-Pocket Moving Expenses*

Prior to the Act, qualified moving expenses not covered by an employer’s reimbursement generally were allowed as an above-the-line deduction from an employee’s gross income if certain distance and employment status requirements were met.<sup>11</sup> The Act suspends the deduction for moving expenses for civilian employees until after 31 December 2025. However, the suspension does not apply to service members.<sup>12</sup> Consequently, service members may be able to deduct out-of-pocket expenses related to a permanent change of station (PCS) if certain requirements are met.<sup>13</sup>

### Deductions

#### *Standard Deduction*

An individual who does not itemize deductions may reduce his or her adjusted gross income by taking a standard deduction.<sup>14</sup> In 2017, the amount of the standard deduction was \$12,700 for married individuals filing a joint return, \$6,350 for individual filers, and \$9,350 for single filers with at least one qualifying child.<sup>15</sup> The Act increases the standard deduction to \$24,000 for married individuals filing a joint return, \$12,000 for individual filers and married individuals

filing separately, and \$18,000 for single filers with at least one qualifying child.<sup>16</sup> Due to the increased standard deductions and the reduction of available itemized deductions discussed below, fewer taxpayers will itemize their deductions. In addition, those who itemize their deductions may find it useful to “bunch” their itemized deductions in one year, such as making two years of charitable contributions in one year, and then taking the standard deduction in the following year.

#### *Itemized Deductions*

##### *State and Local Tax Deductions*

One of the biggest changes that will affect service members concerns the itemized deduction for state and local taxes not incurred in a trade or business. Prior to the Act, the Code generally permitted taxpayers to deduct state and local income, property, and sales taxes.<sup>17</sup> The Act limits the deduction of state and local taxes to a combined total of \$10,000.<sup>18</sup> As a result, state and local taxes in excess of \$10,000 are not deductible, unless the deduction relates to a trade or business.<sup>19</sup> Service members from high income tax states such as California, Massachusetts, and New York are likely to be significantly affected by this change.

##### *Mortgage Interest Deduction*

Prior to the Act, individuals could deduct mortgage interest expenses related to a qualified residence for mortgage debt up to \$1 million for married taxpayers or \$500,000 for single taxpayers.<sup>20</sup> The Act reduced the amount of interest expense deductible under the Code.<sup>21</sup> Specifically, interest for indebtedness related to a mortgage incurred after 14 December 2017, is only deductible for mortgage debt up to \$750,000 for taxpayers who are married filing jointly and \$375,000 for those who are single.<sup>22</sup> Existing mortgages as of 14 December 2017, continue to be subject to the prior \$1 million limitation. In addition, the Act repeals the prior separate deduction for interest paid on home equity loans.<sup>23</sup>

##### *Miscellaneous Itemized Deductions*

Prior to the Act, individual taxpayers could claim an itemized deduction for certain miscellaneous expenses as long as

the total of such expenses exceeded two percent of the individual taxpayer's adjusted gross income.<sup>24</sup> One commonly used miscellaneous itemized deduction applied to National Guard and reserve component members who did not receive expense reimbursement for travel 100 miles or less to their duty station.<sup>25</sup> Common expenses included costs for traveling to and from the destination, meals and lodging while away from home, baggage charges, and laundry expenses. Travel, if unreimbursed, generally was permitted as a miscellaneous itemized deduction.<sup>26</sup> The Act repeals all the miscellaneous itemized deductions.<sup>27</sup> As a result, National Guard and reserve component members can no longer deduct these.<sup>28</sup>

### Increase of the Child Tax Credit

Prior to the Act, taxpayers generally received a \$1,000 child tax credit per qualifying child.<sup>29</sup> In general, the Act increases the child tax credit to \$2,000 per child subject to certain limitations for each qualifying child.<sup>30</sup> In addition, the Act increases the phaseout gross income level limitation for claiming the credit from \$110,000 to \$400,000 for married taxpayers filing jointly and from \$75,000 to \$200,000 for single filers.

### Individuals performing services in the Sinai Peninsula of Egypt

In general, service members receive numerous tax benefits if they serve in combat zones, qualified hazardous duty areas, or areas in direct support of military operations in combat zones or qualified hazardous duty areas. Prior to the Act, service members serving in the Sinai Peninsula of Egypt did not receive these benefits. The Act, however, designated the Sinai Peninsula as a qualified hazardous duty area retroactive to 9 June 2015.<sup>31</sup> As a result, service members serving in the Sinai now qualify for benefits such as the exclusion of certain military pay from their gross income and extensions of time for filing their tax returns.<sup>32</sup>

### Spousal Residency

In addition to the changes made by the Act, Section 302 of the Veterans Benefits and Transition Act of 2018 allows for military spouses to elect to use the same legal residence as the Servicemember during

any taxable year of the marriage beginning with the 2018 tax year. In short, it will allow a military spouse to elect the residence of the Servicemember even if the spouse might not otherwise have the requisite connections with the state where the Servicemember has legal residence or domicile. **TAL**

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### Notes

1. Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).
2. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.
3. Tax Cuts and Jobs Act § 11001.
4. Tax Cuts and Jobs Act § 11002. See generally Sho Chandra, *What You Need to Know About Chained CPI*, BLOOMBERG (Nov. 20, 2017), <https://www.bloomberg.com/news/articles/2017-11-20/why-chained-cpi-has-links-to-u-s-tax-debate-quicktake-q-a>. For example, in 2017 "the threshold at which a single filer move[d] from a 25 percent tax bracket to a 28 percent bracket [was] \$91,900. [In 2016,] it was \$91,150. It gets adjusted upward to account for inflation, to spare taxpayers from what's known as bracket creep. If chained CPI were used to calculate the next adjustment, rather than traditional CPI, the 28 percent rate might kick in just a tiny bit earlier—say, at \$92,600 of income, instead of \$92,700." *Id.*
5. Tax Cuts and Jobs Act § 12003.
6. See I.R.C. § 61(a)(8) (2012) (including alimony and separate maintenance payments as gross income of the payee spouse); I.R.C. §§ 62(a)(10), 215(a) (excluding those payments from the payor spouse's gross income in the form of an above-the-line deduction).
7. Tax Cuts and Jobs Act § 11051.
8. See I.R.C. § 132(g) (2012) (permitting an itemized deduction for moving expenses paid or incurred in connection with the commencement of work by the individual taxpayer as an employee or as a self-employed individual at a new principal place of work).
9. See generally Internal Revenue Service, ARMED FORCES' TAX GUIDE, publication 3 (Feb. 20, 2018).
10. Tax Cuts and Jobs Act § 11048.
11. I.R.C. §§ 62(a)(15), 217 (2012).
12. Tax Cuts and Jobs Act § 11049.
13. Internal Revenue Service, ARMED FORCES' TAX GUIDE, publication 3 (Feb. 20, 2018).
14. I.R.C. § 63 (2012).
15. Internal Revenue Service, *Itemize or Choose the Standard Deduction* (Feb. 21, 2017), <https://www.irs.gov/newsroom/itemize-or-choose-the-standard-deduction>.

16. Tax Cuts and Jobs Act § 11021. See also H.R. Rep. No. 115-466, at 201 (2017) (outlining the difference between the House and Senate versions of the Tax Cuts and Jobs Act, in which the House version proposed to increase the standard deduction to \$24,400 for married individuals filing a joint return, \$12,200 for individual filers, and \$18,300 for single filers with at least one qualifying child).

17. I.R.C. § 164 (2012).

18. Tax Cuts and Jobs Act § 11042.

19. See generally I.R.C. § 212 (2012) (permitting an itemized deduction for an individual if such expense relates to the production of income, or the management or maintenance of property held for the production of income).

20. I.R.C. §§ 163(h)(2)(D), (h)(3) (2012).

21. Tax Cuts and Jobs Act § 11043.

22. H.R. Rep. No. 115-466, at 258 (2017).

23. Tax Cuts and Jobs Act § 11043. See also *Interest on Home Equity Loans Often Still Deductible Under New Law*, INTERNAL REVENUE SERVICE (last visited Sept. 1, 2018), <https://www.irs.gov/newsroom/interest-on-home-equity-loans-often-still-deductible-under-new-law>.

24. I.R.C. § 67(a) (2012).

25. See generally Internal Revenue Service, Publication 529, *Miscellaneous Deductions* (Jan. 26, 2018) (noting the difference between travel expenses and travel in excess of 100 miles provided by military reserve component members, which is treated as an above-the-line deduction or adjustment under Internal Revenue Code section 62(a)(2)(E)).

26. Internal Revenue Service, Publication 529, *Miscellaneous Deductions* (Jan. 26, 2018) (noting an employee that has an ordinary and necessary business-related expense for travel away from home may be deductible as a miscellaneous itemized expense so long as the travel does not relate to an indefinite work assignment).

27. Tax Cuts and Jobs Act § 11045.

28. See *id.* For clarification, National Guard and military reserve component members who travel in excess of 100 miles to their duty station may still utilize adjustments provided under Internal Revenue Code section 62(a)(2)(E).

29. See generally I.R.C. § 24 (2012) (defining a qualifying child to meet the following requirements: (i) must be under the age of seventeen years old by the end of the tax year; (ii) must be the taxpayer's son, daughter, stepchild, foster child, brother, sister, stepbrother, stepsister, or a descendant of any of these individuals, including the taxpayer's grandchild, niece, or nephew; (iii) must have more than half of the support provided by the taxpayer; (iv) must be claimed as a dependent on the taxpayer's tax return; (v) must be a U.S. citizen, U.S. national, or U.S. resident alien; and (vi) must have lived with the taxpayer for more than half of the tax year). Other limitations apply, such as a reduction in the child tax credit by \$50 for each \$1,000 of modified adjusted gross income that exceeds \$110,000 for married taxpayers filing jointly or \$75,000 for single individual taxpayers.

30. Tax Cuts and Jobs Act § 11022.

31. *Id.* § 11026.

32. *Id.*

**No.1**

# **Worldwide Wrap Up 2018**

**This Year's WWCLE Focused on Technology  
and an Army in Transition.**



# Lethal Autonomous Weapon Systems

## An Overview

*By Major Richard J. Slesman and Captain Todd C. Huntley, USN*

At the 2018 Worldwide CLE, the National Security Law Department at TJAGLCS talked about some of the rules that apply to lethal autonomous weapon systems. We would like to share them here for everyone to think about and discuss.<sup>1</sup> Though these weapons are too new for us to provide a comprehensive discussion of each and every rule that could apply, there are three more modest goals that we can accomplish: We can identify what autonomous weapon systems are; we can describe what we already know about the rules governing autonomous weapon systems; and we can identify—cautiously—some of the future legal problems that must be solved in order to get autonomous weapon systems right.

### **Defining Autonomous Weapon Systems**

First, we want to define autonomous weapon systems. The Department of Defense (DoD) has done this in DoD Directive 3000.09, *Autonomy in Weapon Systems*. In general, DoD has defined two categories. First, there are semi-autonomous weapon systems, defined as a “weapon system that, once activated, is intended to only engage individual targets or specific target groups that have been selected by a human operator.”<sup>2</sup> In other words, a human is the one that chooses the target. Second, we have autonomous weapon systems. These are defined as weapon systems “that, once activated, can select and engage targets without further intervention by a human operator.”<sup>3</sup>

The focus of our talk during the Worldwide CLE was on these two types of weapon systems as opposed to artificial intelligence more generally. While there are many possible uses of artificial intelligence in warfare, most of them will not pose exactly the same challenges that we face with autonomous weapon systems.

### **The Current Rules for Autonomous Weapon Systems**

Because artificial intelligence is still in its early stages, the eventual capabilities and legal implications of autonomous weapon systems remain unknown. However, some very important issues have already been settled.

#### ***The Law of War Governs the Use of Autonomous Weapon Systems***

The Law of War applies to the use of autonomous weapon systems. The U.S. reiterated this basic point in its submission to the Group of Governmental Experts, which meets under the framework of the Convention on Certain Conventional Weapons (CCW).<sup>4</sup> Since the Law of War applies, basic Law of War principles and rules will govern the use of autonomous weapon systems during armed conflicts.

#### ***People—not Machines—Apply the Law of War***

The U.S. has begun to clarify how the Law of War will apply to autonomous weapon systems. In its submissions to the Group of Governmental Experts, the U.S. has stated that “[i]t is not the case that the law of war requires that a weapon, even a



SGT Samantha Merryfield launches an RQ-11 Raven as part of an unmanned aerial system operator's course at Joint Base McGuire-Dix-Lakehurst, N.J. (Credit: U.S. Army)

semi-autonomous or autonomous weapon, make legal determinations.”<sup>5</sup> Instead, “it is persons who must comply with the law of war by employing weapons in a discriminate and proportionate manner.”<sup>6</sup> This is a critical point because it means that judge advocates’ law of war analysis must remain focused on commanders and human operators.

For example, when an autonomous weapon system selects and engages a target we do not pretend that the machine applied the principle of distinction or that the machine somehow made an assessment as to whether its actions were proportional. Instead, when a human commander decides to send machines to conduct an attack, that commander must ensure that only enemy combatants and military objectives are the object of the attack.<sup>7</sup> Also, the commander must be satisfied that any harm to civilians will not be excessive in light of the concrete

and direct military advantage expected to be gained, and the commander must have taken feasible precautions to protect civilians and other protected persons and objects.<sup>8</sup> In this analysis, the machine’s code is best viewed as “an additional feature that improves the ability of human beings to implement legal requirements rather than as an effort to replace a human being’s responsibility and judgment under the law.”<sup>9</sup> To put it more simply, the machine’s algorithms and code may be viewed as some of the feasible precautions the commander uses when conducting an attack.

This does not mean that the weapon system cannot be fully autonomous. The system need not have a human selecting each target. This does mean, however, that when a commander sends that weapon system to do a job and sets the parameters for how it will operate, that commander’s choices are governed by the Law of War.

### ***The Department of Defense Has a Policy Governing Lethal Autonomous Weapon Systems***

As mentioned earlier, DoD Directive 3000.09, *Autonomy in Weapon Systems*, establishes definitions and creates a policy framework for the acquisition of weapons that have autonomous features. Without diving into all the details of that policy, it is helpful to understand its general framework.

The policy begins by requiring that “[a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”<sup>10</sup> The term “human judgment over the use of force” is an important one, because the U.S. favors it over the “human control” standard advanced by some states<sup>11</sup> and some non-governmental organizations.<sup>12</sup> As the U.S. has pointed out, “an operator might be able to exercise

meaningful control over every aspect of a weapon system, but if the operator is only reflexively pressing a button to approve strikes recommended by the weapon system, the operator would be exercising little, if any, judgment over the use of force.<sup>13</sup>

After requiring that the weapon system allow appropriate levels of human judgment, the policy establishes technical requirements for the systems and then sets approval thresholds depending on the type of system. In general, DoD will follow its standard weapons approval process for three types of weapons: semi-autonomous weapon systems; human-supervised autonomous weapon systems (which are autonomous weapon systems where a human can terminate an engagement before unacceptable damage occurs) in limited circumstances; and autonomous weapon systems applying non-lethal, non-kinetic force (“such as some forms of electronic attack”).<sup>14</sup> This means that most actual autonomous weapon systems must be approved by extremely high officials within DoD.<sup>15</sup>

### **Future Legal Issues**

Once we understand the basic Law of War framework and the basic policy framework, we can begin to cautiously sketch out some of the legal issues that will need to be addressed in the future. In our Worldwide CLE discussion, we focused on five such issues. Before discussing the specifics of those issues, it is important to recognize that because of how they operate, autonomous weapon systems will raise legal issues during their development, not merely when they are used.<sup>16</sup> This fundamental change from most of our current weapons creates most of the legal issues identified below.

#### ***Judge Advocates Involved in Development***

Since legal issues are likely to arise in development, not just during the use of the weapon system, judge advocates will need to provide legal advice during the development process. This could require a shift in judge advocate assignments.

Also, judge advocates assigned to work on autonomous weapon system development must be well-versed in the Law of War. A judge advocate’s level of knowledge and training in this area is important because the stakes are incredibly high—if

developers create unduly permissive algorithms, a Law of War violation could occur. If algorithms are unduly restrictive, the weapon system might not engage a lawful target important to mission success. This could be catastrophic because the employing commander probably cannot alter the algorithm while operating in the field.

#### ***Human-Machine Interface***

Recall that the commander, not the weapon system, makes legal determinations. This means that the human-machine interface must enable the commander to comply with the Law of War. From a legal perspective, the human-machine interface must answer at least three questions. First, what precautions can the algorithm take? Second, how good is the algorithm at taking those precautions? Finally, is command input needed to take a precaution?

As an example, suppose a commander wishes to use an autonomous anti-ship missile to attack a group of enemy warships, but a hospital ship is nearby. The first question will be critical—once the missile is in the area, can the algorithm identify the hospital ship and avoid attacking it? The second question is also important: if the algorithm can identify the hospital ship with seventy-five percent accuracy, the commander will need to weigh the risk to the hospital ship in evaluating whether the attack on the warships will comply with the Law of War. This leads to the third question, whether command input is necessary to take a precaution. Here, if the algorithm cannot recognize and respond to the presence of the hospital ship on its own, the commander may need to intervene—for example, by narrowing the area the missile is allowed to search.

While simplistic, the above example illustrates the importance of the human-machine interface. This interface must communicate how the weapon will act, and it must do so in a way that allows the commander enough judgment to satisfy Law of War obligations.

#### ***Investigations***

Things will go wrong during combat operations. When autonomous weapon systems are involved, investigations may be more complex. This can happen because many of the required resources may not be available

at the unit level. For example, details about the algorithm’s development, data about what exactly occurred, and experts who can interpret the data may not be available to the unit using the weapon. While it is too early to know for sure, there may need to be a centralized investigation process for autonomous weapon systems. Also, designers must consider future investigations while creating the weapon system, ensuring that data is appropriately preserved.

#### ***Contract Law and Contact With Industry***

Earlier we discussed the need for judge advocates to participate in the autonomous weapon system development process. While a simple concept in theory, proper procedures must be followed as many weapon systems are developed by contractors and not the government. Close involvement with contractors during autonomous weapon system development creates a risk that judge advocates (and other military personnel) could run afoul of the laws and policies governing contact with industry. However, this risk can be mitigated. Department of Defense policy actually favors “frequent, fair, even, and transparent dialogue with industry,”<sup>17</sup> and both the Office of Federal Procurement Policy and the DoD Standards of Conduct Office have embarked on a “Myth-Busting” campaign to educate government personnel on how to successfully interact with industry.<sup>18</sup> While a detailed discussion is outside the scope of this article, experts in these areas cannot be left out of the autonomous weapon system discussion. For a fuller discussion of the acquisition of disruptive technology, consult Maj. Andrew Bowne’s article also appearing in this issue of *The Army Lawyer*.

#### ***Possible External Constraints***

Law, policy, and public opinion on artificial intelligence and lethal autonomous weapon systems is developing rapidly. There are a few situations that may emerge as external constraints on the U.S.’s ability to develop autonomous weapon systems.

First, there is the possibility that States who are parties to the CCW<sup>19</sup> may agree on an additional protocol that would regulate lethal autonomous weapon systems. The CCW provides a framework for States to regulate certain types of weapons. The

U.S. is a party to the CCW and to its five<sup>20</sup> currently existing protocols. The U.S. is also participating as part of the Group of Governmental Experts working to determine the way forward for these weapons. There has been little progress, however, towards a new protocol.<sup>21</sup> Even if a new protocol were created, it would only be binding on States that consent.

Second, States could create an entirely new treaty outside the CCW framework. This would be similar to the way in which States approached cluster munitions and antipersonnel landmines.<sup>22</sup> While States seem content with the CCW process at this point, that may change in the future. Of course, such a treaty would only be binding upon States that become a party to it.

Finally, States could be limited by individuals, corporations, or other groups that voluntarily commit not to develop lethal autonomous weapon systems. Many such commitments exist and have received significant press attention. This is perhaps the most significant potential external limitation, as the competition for top talent in artificial intelligence research is fierce.<sup>23</sup> For judge advocates, the opportunities for outreach in this area are significant.<sup>24</sup> Areas of focus include the need to allow commanders to exercise appropriate human judgment, the need for accountability, and the importance of government cooperation with industry.<sup>25</sup>

## Conclusion

Hopefully this brief overview will be helpful as our Corps prepares for the many ways autonomous weapon systems will affect military operations. As discussed during the Worldwide CLE, there is a lot of work to be done to solve the many legal issues that autonomous weapon systems will create.<sup>26</sup> We are confident, however, that judge advocates, applying the fundamental principles of the Law of War, will be able to solve them. **TAL**

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*MAJ Slesman is an associate professor and CAPT Huntley is a professor in the National Security Law Department at TJAGLCS.*

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## Notes

1. Many thanks to Maj. Andrew Bowne, Contract and Fiscal Law Department, The Judge Advocate General's Legal Center and School, without whose assistance this article would not have been possible. Despite his significant assistance, any errors are our own.

2. U.S. DEP'T OF DEF, DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS (21 Nov. 2018) [hereinafter DoD DIRECTIVE 3000.09].

3. *Id.*

4. U.S. WORKING PAPER, AUTONOMY IN WEAPON SYSTEMS, para. 10 (10 Nov. 2017) [hereinafter AUTONOMY IN WEAPON SYSTEMS]. For background on the Group of Governmental experts established by the Fifth Review Conference of the High Contracting Parties to the CCW, see Hayley Evans, *Lethal Autonomous Weapons Systems at the First and Second U.N. GGE Meetings*, LAWFARE, (Apr. 9, 2018), <https://www.lawfareblog.com/lethal-autonomous-weapons-systems-first-and-second-un-gge-meetings>.

5. *Id.* para. 13.

6. *Id.*

7. U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL para. 5.5 (Dec. 2016) [hereinafter LAW OF WAR MANUAL]; see also AUTONOMY IN WEAPON SYSTEMS, *supra* note 4, para. 10.

8. LAW OF WAR MANUAL, para. 5.10; see also AUTONOMY IN WEAPON SYSTEMS, *supra* note 4, para. 13-14.

9. AUTONOMY IN WEAPON SYSTEMS, *supra* note 4, para. 15.

10. DoD DIRECTIVE 3000.09, *supra* note 2, para. 4(a).

11. See Working Paper Submitted by the Bolivarian Republic of Venezuela on behalf of the Non-Aligned Movement (NAM) and Other States Parties to the Convention on Certain Conventional Weapons (CCW), General principles on Lethal Autonomous Weapons Systems, [https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/E9BBB3F7ACBE8790C125825F004AA329/\\$file/CCW\\_GGE\\_1\\_2018\\_WP.1.pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/E9BBB3F7ACBE8790C125825F004AA329/$file/CCW_GGE_1_2018_WP.1.pdf).

12. Human Rights Watch, *Heed the Call: A Moral and Legal Imperative to Ban Killer Robots*, HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2018/08/21/heed-call/moral-and-legal-imperative-ban-killer-robots>.

13. U.S. WORKING PAPER, HUMAN-MACHINE INTERACTION IN THE DEVELOPMENT, DEPLOYMENT AND USE OF EMERGING TECHNOLOGIES IN THE AREA OF LETHAL AUTONOMOUS WEAPONS SYSTEMS, para. 11 (28 August 2018).

14. DoD DIRECTIVE 3000.09, *supra* note 2, para. 4(c).

15. *Id.*, para. 4(d). These officials are: The Under Secretary of Defense for Policy; the Under Secretary of Defense for Acquisition, Technology, and Logistics; and the Chairman of the Joint Chiefs of Staff. *Id.*

16. AUTONOMY IN WEAPON SYSTEMS, *supra* note 4, para. 29 (“[a]dvanced applications of autonomy in weapon systems can allow for issues that would normally only be presented in the context of the use of the weapon system to be presented in the context of the development of the weapon system.”).

17. Memorandum from Deputy Secretary of Defense to the Secretaries of the Military Departments, et al., subject: Engaging with Industry (Mar. 2, 2018).

18. *Id.* See also DEFENSE ACQUISITION UNIVERSITY, CONTRACTING SUBWAY MAP, [https://www.dau.mil/](https://www.dau.mil/tools/Documents/Contracting%20Subway%20Map/DAU%20Contracting%20Subway%20Map.html)

[tools/Documents/Contracting%20Subway%20Map/DAU%20Contracting%20Subway%20Map.html](https://www.dau.mil/tools/Documents/Contracting%20Subway%20Map/DAU%20Contracting%20Subway%20Map.html).

19. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 November 1980, 1342 U.N.T.S. 137, [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=xxvi-2&chapter=26&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvi-2&chapter=26&lang=en) [hereinafter CCW].

20. There are currently Protocols I-V, but Protocol II has been amended.

21. Details about the Group of Governmental Experts can be found at: [https://www.unog.ch/80256EE600585943/\(httpPages\)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument](https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument).

22. CCW, *supra* note 19; Convention On The Prohibition Of The Use, Stockpiling, Production And Transfer Of Anti-Personnel Mines And On Their Destruction, Mar. 1, 1999, 2056 U.N.T.S. 211, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVI-5&chapter=26&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVI-5&chapter=26&lang=en).

23. Cade Metz & Adam Satariano, *Silicon Valley's Giants Take their Talent Hunt to Cambridge*, N.Y. TIMES (Jul. 3, 2018), <https://www.nytimes.com/2018/07/03/technology/cambridge-artificial-intelligence.html>.

24. Memorandum from The Judge Advocate General to Judge Advocate Legal Services Personnel, subject: Guidance for Strategic Legal Engagements (8 Sep 2016).

25. Brigadier General R. Patrick Huston, *Future War and Future Law*, LAWFIRE (Dec. 3, 2018), <https://sites.duke.edu/lawfire/2018/12/03/guest-post-bg-pat-huston-on-future-war-and-future-law/>.

26. Good references already exist, including: Schmitt & Thurnher, “*Out of the Loop: Autonomous Weapon Systems and the Law of Armed Conflict*,” 4 HARV. NAT'L. SEC. J. 231; PAUL SCHARRE, ARMY OF NONE (2018).

# Judge Advocates Need to Provide Stability to Changing Army

*By Major Janae M. Lepir*

Undersecretary of the Army Hon. Ryan D. McCarthy stressed the need for judge advocates to provide stability to the Army as it begins a period of renaissance, during a speech he gave at the WWCLE in September 2018.

Undersecretary McCarthy began with a discussion of leadership, which includes giving people time with their colleagues. He noted that lawyers are important to policy makers and gave the Bin Laden raid as an example where lawyers played a role in success.

He noted that the Army is currently involved in the most fundamental restructuring of the Army since 1973 and that lawyers are part of that effort. What the Army needs from lawyers is not to say “no,” but to provide a better way to accomplish its goals. McCarthy discussed Army Futures Command in the context of the 2018 National Defense Strategy. He discussed institutionalizing capabilities and modernization programs against the backdrop of a multi-billion dollar increase (albeit temporary) in defense spending. As he said, money matters, and the Army leadership has a “laser focus” on combat readiness ratings. Even so, modernization is about more than money. The timeline for defense programs has historically been twenty years. We have a geographically disparate acquisition process. Hence, the impetus for the Cross Functional Teams (CFTs), led by post-Brigade commanders.

Transitioning to the details, McCarthy stated that Lieutenant General (LTG) Eric Wesley, the Deputy Commanding General for Future Concepts, is working with Combat Development to strengthen our formations. The primary question is what do we need? Lieutenant General Jim Richardson was recently selected to be the Deputy Commanding General for Combat Development precisely to answer this question. With the establishment of this new command, TRADOC and AMC will be “under one roof.” There will be a fusion and exchange of ideas at Futures Command. There will be opportunities for small businesses. We as an organization need to get better at contracting—we need to do things faster and more efficiently.

McCarthy also discussed how we measure success, how we “put points on the board.” According to him, if the operating concept is clear, and the warfighter wants it, any new technology or system will succeed. As such, we need to bring requirements and the acquisition process closer together. We have six priorities for investment, which translates into twenty-one systems. Fiscal years 2020 through 2024 will involve major muscle movements in the budget to fund these systems. He used the term “tough love” to describe choices the leadership will need to make. While our current budget includes a substantial funding increase, the budgets that follow will likely be flat on defense spending, with the potential for decreases.



LTG Charles Pede speaks with LTC Grace M. Gallagher, SJA MEPCOM, during the WWCLE. (Credit: Jason Wilkerson, TJAGLCS)

Finally, the undersecretary returned to the role of lawyers in the way we need to do business to win. He said in terms of contract law, there are new authorities from past NDAs that have not been “embraced” which could conceivably help us do things faster and more efficiently. He said we need an “IP strategy” for the Army. He cited the work of the Talent Management Task Force of two years ago, which gave us increased talent management authorities. Ultimately, he said the bureaucratic process is weighing us down. **TAL**

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*MAJ Lepir is an associate professor in the Criminal Law Department at TJAGLCS.*

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# Back to the Future

## Transforming the Rule of Law to Compete

*By Major Todd M. Chard*

On 19 September 2018, Lieutenant General (LTG) Eric J. Wesley—dual hatted as the Deputy Commanding General, Army Futures Command (AFC), and the Director, Army Capabilities Integration Center (ARCIC), U.S. Army Training and Doctrine Command—briefed LTG Charles N. Pede and his senior leaders on building the future Army.<sup>1</sup> Lieutenant General Wesley's message was clear—the paradigms of war are rapidly changing, now our Army must too.

### **The Thucydides Trap<sup>2</sup>**

In ancient Greece, during the late fourth century BCE, the rise of Athens threatened Sparta, the dominant super power of its time. War resulted, devastating both city-states.<sup>3</sup> Lieutenant General Wesley offered this historical backdrop to contextualize today's geopolitical landscape, warning that history does in fact repeat itself.

Lieutenant General Wesley opened his brief with a grim picture of the future of America, arguing that traditional U.S. dominance is fleeting. He acknowledged China's ambition to be the preeminent worldwide super power by 2049 as a large and looming threat, but focused on Russia's global aspirations since the Department of Defense has directed the U.S. Army to assess the threat Russia represents to the U.S. and its allies. In Russia, LTG Wesley sees a nation that has learned from its combat failures in its botched 2008 invasion of Georgia, a nation that now embraces the benefits of operating “to the left of conflict.”<sup>4</sup> Within this theoretical sphere, Russia has successfully disrupted the effectiveness of its near-peers, both individually and as blocs, by employing drivers of

instability aimed at their general populations. Examples of Russian interference include “little green men”<sup>5</sup> securing land in Crimea and Ukraine for Russia without Russia officially firing a single shot; voter interference in the Europe, in Catalonia, and in the U.S.; and infiltration of U.S. service member social media accounts in order to mine data as well as propagate divisive and often misleading information. It is this middle ground, this competition space, between peace and conflict where Russia is thriving, and we are absent.

### **“Americans operate in a cognitive paradigm. Our adversaries do not.”**

Russia understands they cannot defeat American forces in close combat. They can, however, achieve their revanchist agenda, perhaps more effectively, using nonmilitary means.<sup>6</sup> As such, they have doctrinally shifted focus to counter our combat prowess with two prongs: 1) creating standoff<sup>7</sup>; and 2) shifting their attack from traditional conflict to political subversion, deception, electronic warfare, and proxy forces.<sup>8</sup>

The Russian employment of these methods to compete for global power often comes close to, but does not cross, thresholds triggering a declaration of war or other decisive determination by its opponents. The U.S., on the other hand, culturally craves, and by law often requires, a triggering activity to act. This doctrinal gap allows Russia to compete around the clock, but stifles us from keeping pace. In order to confront adversaries in this new competition space, the U.S. must redefine cultural paradigms—shifting away from the binary conceptualization of war and peace.



However, recasting our cultural definition of conflict from an abnormality into a holistic concept of enduring competition will not be easy. Further, revising our laws and regulations to reflect that change will prove even more difficult.<sup>9</sup>

**“We have been here before.”**

Russia has firmly entrenched itself into our organizations, systems, and psyche using nonmilitary means. The U.S., however, does not possess the agility to respond.<sup>10</sup> Developing laws, doctrine, and organizations to compete during these interwar years will be paramount. Although this threat is new, the conception and successful execution of large-scale reorganization within the U.S. Army is not.

There are blueprints to successfully implement sweeping doctrinal modernization within our Army’s history. In 1973, General Creighton W. Abrams, Jr., Chief of Staff of the Army, assigned Major General Donn A. Starry to analyze lessons learned from the Yom Kippur War. The Starry report resulted in major overhauls to doctrine and training that changed the Army in significant ways.<sup>11</sup> Again in 1982, doctrinal concepts were turned on their head with the development of AirLand Battle. Now, ARCIC will assist the newly minted AFC in the development of its regulatory framework so that the Army can effectively face today’s threat.

In its current form, our rule of law—the law and polices established in order to maintain rule—constrains U.S. military intervention against Russia. It must be modernized in order to authorize military intervention prior to what we currently consider acceptable triggers for conflict. Powering down to lower-level commanders so that they can immediately deter nefarious activity will be key in a world where response time to constant threats is limited. The U.S. can no longer wait for antiquated thresholds; it should be competing right now. **TAL**

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*MAJ Chard is an associate professor in the Contracts and Fiscal Law Department at TJAGCLS.*

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**Notes**

1. This article captures some of LTG Wesley’s comments as a presenter for the 2018 Worldwide Continuing Legal Education Conference at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.
2. GRAHAM ALLISON, *DESTINED FOR WAR CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP?* (New York: Houghton Mifflin Harcourt Pub Co., 2017).
3. “When a rising power threatens to displace a ruling power ... danger ahead.” *Id.* at vi.
4. LTG Wesley anticipates doctrinal changes in multi-domain operations where “competition space prior to conflict,” and “conflict” replace phasing of operations.
5. Mark Galeotti, “Hybrid War” and “Little Green Men”: *How It Works, and How It Doesn’t*, in UKRAINE AND

RUSSIA: PEOPLE, POLITICS, PROPAGANDA AND PERSPECTIVES 156–164 (Agnieszka Pikulicka-Wilczewska & Richard Sakwa, eds., 2015).

6. Valery Gerasimov, *The Value of Science Is in the Foresight: New Challenges Demand Rethinking the Forms and Methods of Carrying out Combat Operations*, *Mil. Rev.*, Jan. 2016, Vol. 96, No. 1. (Robert Coalson trans., Prague: Radio Free Europe/Radio Liberty, 2016) (2013).

7. Standoff hampers the U.S. force’s ability to stage for combat. It consists of four tiers, as follows: 1) propagate information and social media that disrupts opponents internally, and confuses and disorganizes target populations; 2) anti-access area denial; 3) long-range precision fires; and 4) hybrid warfare.

8. “Russia’s overall aim in competition is to disorganize and confuse their opponents while making it increasingly difficult for us to make decisions, coalesce a coalition, and develop policy decisions that can be executed.” Lieutenant General Eric J. Wesley, Deputy Commanding General of Futures Command, Remarks at the 2018 Worldwide Continuing Legal Education Course at The Judge Advocate General’s Legal Center and School (Sep. 19, 2018).

9. “Title 10 speaks to duties, responsibilities and functions of the U.S. Armed Forces to sustain readiness in peacetime. We are a break glass in case of war institution, culturally. The bottom line is the Constitution reinforces a legacy notion reflecting our binary conception of war in which we are either at war or not.” *Id.*

10. “The mid-February indictment of these 12 Russians illustrated enormous stakes ... they’re embedded in our knickers, and we are reconciling it in a courtroom.” *Id.*

11. “The Starry report assessed what our peers can do for us. This drove us to build a concept, and battlefield development plan that ultimately transformed the Army in a fundamental way and resulted in the institution every one of us have grown up in ... across the DOTMLPF and a fundamental rebuild of our organization.” *Id.*

# Four Pillars of a Successful JAGC Career

*Remarks by Major General Kenneth D. Gray, U.S. Army Retired*

*At a formal reception during the September 2018 Worldwide CLE Course in Charlottesville, Virginia, Major General (Ret.) Kenneth Gray gave the following remarks:*

General Pede, General Risch, members of the Regiment, Ladies and Gentlemen, good evening! I want to thank General Pede, General Risch, and the members of the Regiment for honoring me as a Distinguished Member of the Regiment.

It is great to return to the JAG School, as all of the old timers refer to the Legal Center. Carolyn and I spent four wonderful years here. We spent our first year in the advanced class (now the Graduate Course) at the old school and moved here to the Criminal Law Division when the then new School opened in 1975. Our youngest son was born here in Charlottesville at Martha Jefferson Hospital.

Thank you, General Pede, for that great introduction. You heard some of my background in that introduction, but I want to share a little more with you. It's a long journey from McDowell County, West Virginia, to standing before you this evening.

I grew up during segregation. Although *Brown v. Board of Education* had been decided in 1954, it took ten years for the decision to be implemented in McDowell County—the southernmost county in the state. I had already graduated from high school.

I grew up in Excelsior Bottom, West Virginia, in McDowell County. How many of you have heard of Homer Hickam Jr.? Homer is one of the “Rocket Boys” and the movie “October Sky” is based on his life story. Homer grew up in Coalwood, West Virginia, seven miles from Excelsior. While there were similarities, our lives and experiences were so different that the distance

could have been 1,000 miles apart. As many of you know, Homer achieved success as a NASA Engineer—his boyhood dream. Unlike Homer, I didn't really dream of being a lawyer, or a two-star general in the Army, or a vice president at West Virginia University. I did dream about going to college, getting a good job, and being successful.

My grandfather was a Baptist minister, my father was a coal miner and veteran of World War II, and my mother was a homemaker. And when my father was laid off from the coalmines after eighteen years, she returned to college to earn her teaching degree. My family wanted me to have a life beyond the coalfields, and they made it clear that education would open doors to new worlds.

My teachers also stressed the importance of a college education. They served as role models for African American students in a segregated school system. They instilled in me that I could be or do anything if I worked hard and got an education.

I have been fortunate to achieve many of my own dreams and to go farther than I ever thought possible. It wasn't easy, and I had to overcome a lot of challenges and obstacles along the way. As Booker T. Washington once said, “Success is to be measured not so much by the position that one has reached in life, but by the obstacles which one has to overcome while trying to succeed.”

I managed to succeed by having a foundation of values that helped me through the hard times, believing in myself, never giving up, and looking back to draw strength from where I came

from. I always remember something my grandmother used to say: "Sometimes you have to climb up the rough side of the mountain to reach your goals." She knew that I would face a lot of challenges and obstacles in life and wanted to prepare me for the struggle ahead.

I knew that whatever particular hurdles I would face, I had to work hard and never give up until I reached my goals. Sir Winston Churchill was once invited to speak at Harrow School, where he had attended as a youth. When he got up to speak, he simply said, "Never, ever, ever, ever, give up. Never give up. Never give up. Never give up," and sat down. I never, ever, gave up, because I knew that the obstacles I faced would not define me—but the way I responded to them would.

As Dr. Martin Luther King, Jr. said, "The true measure of a man is not where he stands during times of comfort and convenience, but where he stands during times of challenge and controversy." During my career, I faced many barriers and challenges along the way. I drew strength from that quote, and I drew strength from looking back to where I came from.

I looked back to Excelsior Bottom, West Virginia, and what my parents and teachers taught me about the difference between right and wrong and the importance of doing what's right. I looked back to the ROTC Cadre at West Virginia State College, where they taught me the professional ethic of being a Soldier. I looked back to my law school professors at West Virginia University who taught me about the professional responsibility that's required of a lawyer.

My success is based on how I learned to cope with the many life experiences that I faced along the way.

I was asked recently what I was most proud of during my career. There have been many great jobs, successful programs, serving as a staff judge advocate of a division and a corps. I am most proud of my assignment in 1971 to recruit minority and women lawyers for the Corps. At that time, there were eight female lawyers and sixteen African American lawyers out of about 1,600 lawyers in the Corps. My assignment was to develop a program that would increase those numbers.

I developed a five part program:

1. Make recruiting visits to all of the predominantly African American law school and those with a large population of African American students.
2. Enlist the support of the JAG Corps Reserve and National Guard Components to help with recruiting.
3. Work with the American and National Bar Associations to recruit at their mid-year and annual meetings.
4. Create an advertising program and place ads in legal magazines and magazines that appealed to predominantly African American communities.
5. Create a Summer Intern Program to hire first and second year law students to work in judge advocate offices for the summer and serve as ambassadors for the Corps when they returned to their law schools in the fall.

I am most proud of the accomplishments of that program and the fact that I was given the privilege of getting the Summer Intern Program approved. I recall that the last signature I needed to get the program approved came from a civilian employee located in a small cubicle in the basement of the Pentagon.

I'm proud that the Summer Intern Program is still in operation today after forty-five years. I am also proud of the fact that Lieutenant General Darpino crashed through the glass ceiling and became our first female TJAG. I know that General Pede and General Risch are working hard to end my distinction as the only active component African American to be selected for General Officer since the inception of the Corps in 1775.

Finally, all of the people who touched my life throughout these years helped me create a foundation for success. Upon that strong foundation, I was able to build a more successful career than I ever dreamed possible.

There are also four pillars that have supported my successful career.

The first pillar: My law school experience of being the only African American student in the law school during my three years there. I was the third African American student to graduate from the

WVU College of Law in 1969. Carolyn and I have very fond memories of our time there. That experience also allowed us to assimilate very well when we were assigned to JAG Offices where we were the only African Americans in the office.

The second pillar: The mentors that I had during my career were significant in providing advice and guidance and helped me be successful.

The third pillar: The NCOs and enlisted Soldiers who helped me adapt to the Army and the JAG Corps. They are the backbone of the Army and the Regiment.

The fourth pillar: My family, especially my bride, my wife, my best friend, Carolyn, who has been there for fifty-two years of marriage. I can't thank her and our two sons enough for their support.

I know that I stand on the shoulders of so many who came before me. As the only Active Component general officer to be selected in the Judge Advocate General's Corps since its inception, I owe them a debt of gratitude for paving the way for me to be successful.

Thank you again. I am so proud to be a Distinguished Member of the Regiment.

God bless all of you for coming this evening. God bless our Regiment and God bless the United States of America. **TAL**

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*MG (Ret.) Gray was the first African-American general in the JAGC. He holds a B.A. in political science from West Virginia State College and a J.D. from West Virginia University's College of Law. Following his military career, he served as vice president for student affairs at West Virginia University.*

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## No. 2

# Find Your Yoda

## Ten Rules for Being a Rock-Star Operational Attorney

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*By Brigadier General (Retired) Rich Gross*

*On March 23, 2018, Brigadier General (Ret.) Rich Gross gave The Judge Advocate General's Legal Center and School's 11th annual Solf-Warren Lecture in National Security Law. The following is an abridged version of his comments during this chaired lecture.*

It's a tremendous honor to be here. It's a little intimidating, frankly. First of all, I worked for Mark Warren—absolutely one of the best bosses I ever had. And, in my mind, I have a very short list of the top Operational Law attorneys that I've ever worked with—Army and other services—and he is on that short list. Pat Huston is also on that short list. So, I've got those two here. To make it more intimidating, Professor Yoram Dinstein, who probably is the greatest mind on the planet when it comes to International and Humanitarian Law, is also here. Sir, you will be greatly disappointed today.

When trying to decide what to talk about today, I really thought about what I would have wanted to hear when I was in your shoes. What I'm going to give you are my top ten rules for being a rock-star operational law attorney. I've learned them from some pretty amazing people, some of whom are in this room.

### **Rule #1: Don't be a dentist.**

Now, look, I love dentists. Dentists are important. We all need to go see the dentist and get our teeth cleaned. It is important to our health. So what do I mean by, "Don't be a dentist"? Think about the business model for a dentist. He has an office. You go visit every six months. If you have a problem, your dentist fixes your problem, then you go away. That is the dentist's business model.

However, it doesn't work for an Operational Law attorney. You have to be integrated into your command's business all the time. You have to be present.

Let me give you an example. I was at a meeting at a place I can't tell you where, with a unit I'm not going to disclose. And we spent fifty-nine minutes of that meeting—time I was never going to get back in my life—immersed in the operational business of the command. No legal issues at all. And then, in the very last minute, one of the J3 guys said to the boss, "Hey, sir, I've got an idea we want to pitch to you." So, I hung around.

And he pitched this amazing capability that would have given our command some interesting things that we could do to accomplish some really important missions. There were about twenty-five people standing around. Everybody's going, "That's really cool. That's really cool." But then, just as we're getting ready to break up, I raised my hand. And I said, "I'm sorry. Excuse me, sir." And the boss said, "Hey, Judge, what's up?" This is a two-star. I said, "Sir, I'm pretty sure that would violate the Chemical Weapons Convention." And all heads swung in my direction.

I continued, "It's an international treaty; it's kind of important. I'll check." And I checked. Of course, the J3 guys were furious. But they had not run it by me, you know. They had not come by my office to ask me about this, but fortunately, I was at the meeting



where they introduced it. Sure enough, it was a violation of an international treaty, so, we shut it down. It never got to the point where it was a legal violation, fortunately.

The only way I learned about it was being at the meeting. I learned that from Mark Warren. Mark Warren used to call it “Double-billing.” He would say, “I go to all these meetings that have absolutely no legal purpose, but I’m there, I’m heard, I’m seen, they are aware I am there; and I may be working on something else, but I am listening for that legal issue.”

You will go to a lot of meetings. You will be there, like I said, fifty-nine minutes, and only in the last minute will you get a legal issue—but it will make all the difference. So, do not be a dentist. Get out of your office.

### **Rule #2: Take the long view.**

It is real easy to solve a problem right there on the spot, and not think about the long-term consequences. “Is it legal

or not?” “It’s legal; let’s move on.” You’ve got to take the long view. Sometimes, that involves using more than just your legal acumen. Sometimes, that involves looking at common sense, or what we would call “*The Washington Post* test.” That’s happened to me on more occasions than I can say, and probably happened to you all as well.

When I was on the Joint Staff, we had all the four-star COCOM commanders coming to town. Someone wanted to use helicopters to fly them out from the Pentagon to the Antietam Battlefield, a forty-five minute drive in the worst of traffic. Everybody thought that was a great idea, except me. I said, “I really think that is a bad idea.” Is it illegal? No. Is it a bad idea? Yeah. It’s what Harold Koh, the State Department legal advisor, used to call, “Lawful, but awful,” and is what I call, “Legal, but stupid.”

And so, I said, “I think this is a really bad idea. Think about the optics of this.” Sure enough, they took it to the Chairman of the Joint Chiefs, and they

said, “Everybody on the staff thinks this is a wonderful idea, except the Judge.” And General Dempsey said, “I agree with Rich. We are not going to do it.” They put the COCOM Commanders on a bus. There were probably nine very unhappy COCOM commanders on that bus. But it just didn’t make sense.

You have to take the long view.

### **Rule #3: Befriend the gatekeeper.**

Your client has somebody who guards them. They guard their schedules. They guard their office. They guard their phone calls. Everything. And if you get in good with that person, you will know exactly what’s going on, and you will get invited.

When I was at Central Command (CENTCOM), General Mattis, now the Secretary of Defense, was my client. He held a “small group” meeting with the Chief of Staff, J2, J3, and J5. The Chief of Staff wouldn’t let me go to the small group meetings. He said, “Well, Rich, we talk about

really important, sensitive things there.” I am, like, “Hello? You don’t think the lawyer should be there, sir?” He said, no. He was just adamant that I should not be there.

The J2, Bob Ashley, a wonderful Army guy and now a three-star, and the J3, who was a Navy admiral, both were concerned that the lawyer was not at the meeting. They liked the idea of the lawyer being there. And so they went to General Allen, who was the Deputy Commander, and said, “Hey, sir, we really need to get the Judge at these meetings.” I was soon added to the meetings. I became part of the small group. It became the J2, J3, J5, and me.

And so, you have got to befriend the gatekeeper. Sometimes, that is the XO; sometimes that is the aide; sometimes that is the civilian secretary. Make friends with all of them. If they need help, they get help. If the secretary to the Chairman called me with an issue, her issue now became number one. I will talk more about rank in number 10. But it didn’t matter to me that she was a GS whatever, and other people would say, “Well, I don’t have time for you; I have a two-star over here who needs help.” No, no, no. That is the gatekeeper. She moved to the front of the line.

Befriend the gatekeeper.

#### **Rule #4: Keep calm and carry on.**

Do you remember the signs? They were kind of cool for a while. It was a poster that the Brits put up during World War II, to help the population keep calm and carry on. And my British officer at International Security Assistance Force (ISAF) had one on the wall, and I thought it was really cool, so I put that on my wall from that point forward. I still have that poster because it reminds me that the one thing the JAG cannot do is get emotional, get upset, or get angry. There’s nothing you can do to change what has already happened; we all know that. All you can do is work to fix it moving forward. Nothing makes the situation worse than a boss who is angry or a JAG who is angry. If you are the JAG and the boss, you’re just compounding the problem even more.

One of the folks I worked for once told me, “There’s absolutely nothing we can do about the past. What we can control is what we do with the present and the future.”

And I thought that was amazing, wonderful advice.

When you get excited and energized and crazy, your folks are going to get that way, your commander is going to sense it, and you are not going to be helpful. So, keep calm and carry on.

#### **Rule #5: Build a network.**

I learned this from General Stan McChrystal, who wrote a book, *Team of Teams*, which is a pretty amazing book. I can endorse books, now, by the way; I am retired.

It is a great book, but he lived that. He had a network. And so, I created a network of JAGs. You need people who are experts, who can help you out in your day-to-day job, because you do not know everything. I did not know everything; in fact, sometimes I felt like I hardly knew anything. You need experts who can help you out. So, if you’re a criminal law guy, you need somebody who knows administrative law, you need somebody who knows International Law, etc.. You have to build the network.

For me, it was the “Tier One Bar Association.” Many of you in the room are members. It was a group of Special Operations JAGs who were all in the same community: the Joint Special Operations Command (JSOC) crowd and others. We would help each other, whether it was by email or by phone. We were constantly talking, because when you are the only operational law attorney in a unit, and something really weird is going on, you have got to be able to reach out and talk to somebody. But it’s not just Special Ops. It matters for conventional units; it matters for Headquarters Department of the Army; it matters here at the JAG School. So, build those network connections now, and keep them. Make sure you keep them. It’s just vital to build a network.

#### **Rule #6:**

Along the lines of number five, **Find your Yoda**. There’s somebody who can speak truth into your life and give you the kind of guidance and wisdom that you need. You need to be able to call somebody who has successfully done what you are doing. Do not pick a loser. Pick somebody who did it well, and count on that person to help

you. You know, we call them “mentors,” we call them “coaches,” we call them “trusted advisors.” It’s your Yoda.

For me, it was Dana Chipman, who is a very tall, tan, handsome individual. He would be furious that I am calling him Yoda. But Dana Chipman was a JAG in a Special Operations Command when I took over a subordinate special operations unit. And he was there to help me get through that.

At that unit, I had never been an operational law attorney. I used to make fun of operational law attorneys. Back when I was at Fort Campbell as a captain, we didn’t know what that area of law really was, so we made fun of them. And suddenly there I was, an operational law attorney for a very sophisticated Special Operations unit, and I was lost, so I would call Dana and say, “Hey, I don’t know what the deal is.” He would talk me through it. Later on, I did the same for others.

You have to find your Yoda. It must be somebody who can speak honestly, tell you what is going on, give you good advice, and keep you on the straight and narrow when you need it. Absolutely critical.

#### **Rule #7: Legal counsel is two words: “legal” and “counsel.”**

You will find, the higher up you get in your job, in rank and position, the more commanders will count on you, not only for your legal opinion, but for your “counsel”—your non-legal advice or guidance. We do that very well. There is something they do to mess up our brains in law school, so that we have a different way of looking at things. We look at it from different angles, we analyze it differently. It works—it is not always the right answer, frankly, but it is often a very good perspective.

Be careful to be crystal clear to your clients that you are giving them counsel and not a legal opinion, because you owe it to them. When you are giving a legal opinion, you are the only one on the staff qualified to do that, and you ought to make that clear to folks without being a jerk. However, when giving non-legal advice or counsel, you are one of many advisors, so keep that in mind. You are one perspective.

General Dempsey used to consult me for reviewing news articles, helping him prep for press conferences, and helping



him prep for Congressional hearings. I did that with General McChrystal and General Mattis as well. They value your counsel.

Just make it clear when you're giving a legal opinion versus merely counsel.

### **Rule #8: Take all of the blame and none of the credit.**

This is more of a leadership rule than an operational law attorney rule. You ought to be willing to give top cover to the folks who work for you. You ought to be willing to be the "buck-stops-here" guy when it comes to legal advice. That means you take all of the blame and you give them all the credit. You would be amazed what people will do for you when you do that. This works for anything, not just operational law. This works as a general counsel of a company. This works as a commander of the JAG School. It works anywhere, and it's incredible.

I learned this from a guy named Dave Carey, who retired as one of our regimental one-stars. When he was the Staff Judge Advocate at Fort Campbell, Kentucky, and my boss, he would get beat up at Division Headquarters. You would think he was the only one in the office working, because he took all the blame.

When the commander was praising what was going on in that office, you would think Dave Carey did not do a single thing. He would say because "Well, I didn't write this. He did this." Dave Carey would name people and make you feel good. The two CGs we worked for knew which lawyers in the office were doing all the good things. They must have thought Dave Carey was a complete screw-up, and all these young captains were amazing.

Take all of the blame, and none of the credit.

### **Rule #9: Make the complex simple.**

Our job is to teach. You all have busy leaders. Take General Dempsey, for example. If he got an email and he had to scroll down, he would not read it. He would not scroll. God forbid you put it in a Word document: he would not open it. That is not unusual for busy two, three, and four-stars.

You have got to make the complex simple.

There are some easy ways to do that. Your subject line is not, "Monday morning." Your subject line is not, "Legal Opinion." You need to put enough on the subject line to where they know exactly what you

are going to tell them, and then your first sentence is a bottom line up front (BLUF). I use to write, "BLUF." I still write "BLUF." I'm in the civilian world; I get asked, "What's that?" But I still do it. You tell them in that first sentence what it is you are going to tell them and what you need them to do, and then you lay it out.

I saw four-stars go into critical national security meetings, on some of the most complex issues facing our nation at the time, armed with only three bullet points in an info paper. You have got to make the complex simple.

### **Rule #10, last one: Ignore rank.**

Ignore rank, theirs and yours. When I say "theirs," that applies in three ways.

One, there are a lot of really, really smart people that can help you out who may be E-4s. They may be E-2s. Yet they have expertise and help that you need. If you think about them in terms of, "Well, that's an E-4 and I'm an O-4, I don't have time for this, you know. Talk to the sergeant." You are not going to get what you need. You need to think in terms of, "What is this person's capabilities? What do they bring to the fight?"

I learned this from General McChrystal, whom I watched demonstrate this principle all the time. For example, I once saw a young E-5 who had an intel report that he knew the boss needed to see. He walked right up to General McChrystal and said, "I need you to see this, sir." McChrystal would listen to him, and not a single person in the room tried to stop the E-5 or block his access to the boss. Ignore the rank. McChrystal did that better than anyone.

Second, it works the other way around. You cannot ignore your boss's rank in the sense that you stop calling her "ma'am," or him "sir," and be disrespectful. But you have to speak truth to power. If you are worried about their rank, and you are afraid to tell them the truth, you are not going to be effective. You have to have courage. You have to be able to tell them what is going on and why what they are getting ready to do is a really bad idea. You need to be able to ignore rank and speak truth to power.

Finally, ignoring rank goes for the way you treat people. General McChrystal used to talk about "invisible people." The folks who clean your offices, the folks who work at the gym, the gatekeepers we discussed earlier—we tend to ignore them. We do not even say "hi" to them sometimes, because we somehow have this mental class system in our minds, which is so wrong. McChrystal was great about talking to anybody. You will be amazed at what you can find out when you are nice to everybody, when you treat everybody the same, with the same kind of dignity and respect. You will get information and help on your job that will just blow your mind.

So, ignore rank, and you'll do well.

In closing, I've got two last pieces of advice that do not have anything to do with being an operational law attorney.

First, I get asked a lot for career advice. "Should I do this job?" By the way, this is not "PPT&O-approved" advice, okay. I tell people, "You ought to do what you want to do. You've got one life; have fun. Go do what you want to do." If you want to go do X, ask for X. They may not let you, but at least go after it.

Listen to good advice, find your Yoda, talk to your network. But at the end of the day, if you want to go work Claims at an Army hospital because you have a passion

for that, go do it. If you do not get promoted, then that is the consequence, but at least you do what you love, because there is nothing worse than making rank and then getting out and being miserable because you did not do anything that you liked doing.

When I went to interview with Delta Force, and this was pre-9/11, and I had a friend who said, "You will never get promoted to lieutenant colonel. If you take that job, you will never get promoted. Guarantee it." And, you know, I thought about it. I talked to my wife about it. And I said, "You know what? It is a cool job. I am never going to get a chance like this again in my life. I am going to go for it." And I said to my wife, "Honey, I may not make lieutenant colonel." And she said, "Go have fun. Go do what you want to do."

Well, it did not hurt me, obviously. I had a blast. And, as it turns out, I got the job, and three months after I showed up, 9/11 happened, and we got busy.

And so, you just do not know what is going to happen, but I cannot imagine where my life would be now if I had not done it.

Do what you want to do. That's advice number one.

Advice number two. There was a civilian attorney named Mike Lewis at Fort Campbell twenty plus years ago. What a great guy. My wife and I had babies at Fort Campbell, and Mike Lewis had a couple of kids who were maybe at the time twelve and ten.

I do not think he would mind me sharing this with you. He had shared custody, but probably not as much custody as he wanted. I had new kids. He showed me a picture of his kids his two boys. He said, "You know what? Enjoy the time you have with them. It goes fast. You're never going to get this time back."

Other people had told me that. People tell you time goes fast, but you tend not to believe them. Or, you believe them, but you do not really get it. When Mike said it, I got it. It was in his eyes, it was in his voice, and it made a difference in my life because I made sure that, if I was home, I was home; that I spent time with my kids and my family. There were a lot of deployments; I missed a lot of Christmases and a lot of birthdays. But, when I was home, I was home.

You know, there is always going to be enough work to fill the time. You are always going to have enough to do. You have got to shut it off and go home.

There was a great philosopher of our generation named Ferris Bueller. Ferris said, "Life moves pretty fast. If you don't stop every once in a while and look around, you're going to miss it." And that is some amazing, wonderful advice, because your life is going by like a rocket.

I am retired from the Army. I have been out of the Army now for two years. Where did the time go? I was sitting where you were sitting not long ago, and it is gone by so fast. My kids are in college or out of college; one is married. I mean, it goes fast.

So, enjoy them while you can. Take the time while you can. Cherish those moments. The work will be there when you get back. There are times when you have got to do the mission; there are times when you just got to be there on Sunday afternoon at the JAG office and finish up or get ready for a trial or do whatever. There are times you have to deploy. But, you know what? Sometimes, you do it to yourself. Stop! Go home. Spend the time with your kids and your family. You will never regret that.

Life moves pretty fast. You have got to stop every once in a while and look around, or you are going to miss it. So, please do that with your families. **TAL**

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*BG (Ret.) Gross is currently the general counsel for Janus Global Operations LLC, an international integrated stability operations company.*

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## No. 3

# Reforming The Army's Online Policies

## An Opportunity for Leadership

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By Colette Langos, Ph.D.

*The very foundation of what we do depends on trust, and trust depends on the treatment of all Soldiers with dignity and respect by fellow Soldiers and leaders . . . . Without this, our profession is placed in jeopardy, our readiness suffers, and our mission success is at risk.<sup>1</sup>*

The sentiment conveyed above is enduring; it epitomizes core Army values. In an age where electronic communication is commonplace, it is critical to ensure that dignity and respect is maintained offline *and online*. A harmful communication sent from behind a screen does not trivialize the behavior; the consequences of carrying out acts which flout Army values are the same regardless of the domain—cyber or face-to-face—in which those acts occur.

“It is relatively easy to hurt others when their suffering is not visible and when causal actions are physically and temporally remote from their effects.”<sup>2</sup> This is a key reason why Army leaders need to understand how to manage online misconduct. To carry out their responsibilities, leaders need unambiguous and comprehensive regulatory tools at their disposal which they can apply consistently and confidently.

On 25 July 2018, the Deputy Chief of Staff of the Army circulated an All Army Activities (ALARACT) message providing guidance on online conduct applicable to all members of the Army.<sup>3</sup> The message reiterated that:

- There is an onus on commanders and leaders to foster a climate in which members interact with one another in accordance with Army values, where online misconduct is not tolerated, and any reported instances will be addressed.
- Members of the Army are expected to engage in electronic communication in a manner consistent with values and Army social media policy. Service members should employ the “Think, Type, Post” approach when engaging in communications online.
- Any misconduct should promptly be reported to the chain of command or to services providing alternative reporting mechanisms, e.g., family support services.

Importantly, the ALARACT highlighted a need for the Army to reinforce professional online conduct through measures such as amending relevant Army regulations and any relevant clauses in Army contracts and agreements.<sup>4</sup> The Army has an opportunity to be at the forefront of reform in this area. To that end, what follows are recommendations which would serve to more comprehensively manage online misconduct, including proposed changes to

relevant Army regulations, Army contracts, and social media policies.

## I. Introduction

The accessibility and ease with which we can communicate using electronic technologies presents legislators and policy makers around the world with challenges surrounding comprehensive regulation and management of negative online behaviors. At an organizational level, workplaces ought to ensure policies prescribe expected standards of behavior, clearly stating that such standards apply equally to online conduct. The Army, as a workplace, has policies addressing the use of electronic communications in place. These policies are premised on adherence to core Army values and seek to ensure that all Army members are treated with dignity and respect. This is reflected in the wording of specific Army regulations (e.g., Army Regulation (AR) 600-20, paragraph 4-19) and broader social media policy.

Recently, the armed forces have grappled with a series of incidents calling into question the efficacy of policies and actions available under the UCMJ regarding evolving manifestations of online misconduct. For example, the high profile “Marines United” scandal of 2017 was a catalyst for the introduction of Article 117a to the UCMJ, which came into effect 1 January 2019.<sup>5</sup> It is imperative that those in leadership positions are equipped with effective tools for managing online behavior confidently and consistently. It is equally important for service members to be provided with sufficient guidance on the types of behaviors which “cross the line.” This article considers various ways in which the Army can reinforce the parameters surrounding acceptable online conduct, therein ensuring that prohibitions on the misuse of electronic communications are clear and comprehensive. Part II considers AR 600-20, paragraph 4-19, *Treatment of persons*, which is paramount to ensuring Soldiers are treated with dignity and respect. Part III refers to AR 25-13, paragraph 3-2, *Unauthorized and prohibited uses of telecommunications and computing systems*. Part IV identifies the Federal Acquisition Regulation 52.203-13, *Contractor Code of Business Ethics and Conduct*, as a valuable

contract term governing contractor behavior, including online misconduct. Part V provides guidance on how the Army’s social media policy could be strengthened by providing service members with a host of examples of behaviors which violate core Army values, AR 600-20, and social media policy.

## II. Army Regulation 600-20, Army Command Policy

Army Regulation 600-20, paragraph 4-19, *Treatment of persons*, explicitly prohibits behaviors which undermine Army values.<sup>6</sup> Soldiers are required to treat each other with dignity and respect. The regulation is punitive. The scope of the provision is broad and should be understood as encapsulating any behaviors which undermine Army values, encompassing both “offline” and “online” conduct. “Bullying” and “hazing” are identified as two specific categories of proscribed behavior. The regulation provides definitions of each to delineate the conduct.

Hazing typically involves conduct directed at new members but is not limited to superior-subordinate relationships. Hazing appears to be characterized by a ritualistic/ceremonial component. It could be one act—as opposed to repetitious acts—that is cruel, abusive, humiliating, oppressive, demeaning, or harmful, and typically has an identifiable end-point. Bullying, on the other hand, is currently defined as repeated “cruel abusive, humiliating, oppressive, demeaning, or harmful behavior, which results in diminishing the other Servicemember’s dignity, position or status.”<sup>7</sup> There is no identifiable end-point. It is often characterized as excessive corrective action and always occurs with the intention of excluding another from inclusion in a group.

Although hazing and bullying are two separate and specific categories of proscribed behavior, based on existing definitions they do share certain characteristics. For example, aggressors who engage in hazing or bullying intend to cause the target harm, either physically or psychologically. Moreover, either behavior can be carried out in physical proximity to the target (physically or verbally) or via electronic communication.

## A. Bullying

### 1. Bullying Defined

A notable feature of the definition of bullying provided in paragraph 4-19 of AR 600-20 is its narrow scope. The requirement that the conduct be carried out with the intent to exclude or reject a target from inclusion in a group limits the forms of bullying which fall within the ambit of the definition.

Outside of a military context, exclusion is regarded as one of plethora of manifestations of bullying—offline or online. For example, instances of online bullying which are not necessarily premised on excluding a target from a group, but which clearly violate Army values, include: sending offensive or intimidating messages via technology repeatedly; placing a person’s name on a rating list inviting comment (e.g., “who’s hot and who’s not”); stalking a person using technology (e.g., repeatedly sending a colleague electronic communications which make them fear for their personal safety); logging onto a person’s email account and sending offensive, humiliating, intimidating communications to others; tricking a person into disclosing personal information and then using technology to distribute that information to others; and broadcasting/distributing a private (intimate/sexually explicit) image or film without the subject’s consent.

The bullying definition detailed in paragraph 4-19 may have been drafted to reflect a characteristic unique to a military setting. As a result, however, a Soldier cannot rely on the current meaning to argue that he or she has been the target of bullying unless the goal of the victimization is exclusion or rejection from a group.

It is useful to note that there is no universal bullying definition upon which the Army ought to model a revised definition of bullying. Considering linguistic differences which exist across disciplines and cultures, semantic differences explain the varying conceptualizations of bullying that currently exist.<sup>8</sup> However, scholarship examining the nature and scope of bullying informs us of a general international consensus that bullying is a subset of aggression. It can be understood as being a “specific type of aggressive behavior that is

intended to cause harm, through repeated actions carried out over time, targeted at an individual who is not in a position to defend him/herself.<sup>9</sup> The following are broadly considered the elements that are necessary to differentiate bullying from mere aggression: *repetition* (conduct which occurs more than once, as opposed to a single incident); *power imbalance* (where the offender demonstrates power over the target); *intention* (conduct must be intended as opposed to accidental); and *aggression* (conduct involves maliciousness on the part of the aggressor).

The definition provided in paragraph 4-19 does not encompass the above elements in a comprehensive manner. The criterion of *power imbalance* is not clearly identifiable. Although the definition states that “bullying may include an abuse of authority”<sup>10</sup> (indicative of a power imbalance between the aggressor and the target), the current wording does not state that a power imbalance is a necessary element of bullying. The criterion of *repetition*, although apparent within the stated definition, is not expressed clearly, reference to bullying typically not having “an identifiable endpoint” merely suggests that bullying is repetitious. Only *intention* and *aggression* are clearly identifiable within the current definition. In regard to *intention*, the definition clearly articulates that an aggressor must intend to engage in the negative behavior; accidental conduct is not encompassed. Reference to bullying as “cruel, abusive, humiliating, oppressive, demeaning or harmful behavior” suggests the conduct involves maliciousness and reflects the criterion of *aggression*. The definition ought to include the marked elements comprehensively to delineate bullying from other types of negative behaviors. Application of a precise bullying definition, premised on elements recognized by scholars researching in the field as critical to delineating bullying from other types of behavior is strongly recommended. This will give greater legitimacy to a bullying provision since a definition that incorporates elements regarded as indicative of bullying is more likely to be regarded publicly as one that seeks to comprehensively regulate legitimate bullying behaviors.

It is also important to note that paragraph 4-19 does not list behaviors which constitute bullying. Soldiers would benefit from practical guidance on the nature and scope of provision by way of examples of both offline and online bullying. An anti-bullying provision should also clarify whether an objective or subjective standard will be applied when determining whether a violation has occurred. An objective standard (“reasonable person” standard) is preferred as this limits the scope for subjective interpretations and fosters consistent evaluations for breach.

Department of Defense Instruction 1020.03, *Harassment Prevention and Response in the Armed Forces*, effective as of 8 February 2018, includes a well-drafted bullying definition which could form the basis of the Army’s anti-bullying provision encompassed in AR 600-20, paragraph 4-19.<sup>11</sup> This definition incorporates the above noted elements critical to a well-regarded description of bullying. It does not limit bullying to conduct carried out to exclude another from a group. It stipulates that bullying is evaluated based on an objective rather than a subjective standard and provides some guidance on the nature and scope of the conduct by listing some examples of prohibited behaviors.<sup>12</sup> The DoD definition refers to the fact that bullying can be carried out using electronic communications, thereby capturing both offline and online misconduct.

## 2. Recommendations

- The bullying definition provided in DoD Instruction 1020.03 ought to be incorporated into AR 600-20, paragraph 4-19, with some amendments. Its application would demonstrate a consistent approach to bullying across DoD and the Army service branch.
- The DoD Instruction 1020.03 definition ought to be changed to make unequivocally clear that bullying involves an asymmetric power relationship between the aggressor and the victim; the word “often” should be deleted from the sentence, “It often involves an imbalance of power.”
- The language used in DoD Instruction 1020.03 should be amended to reflect the provision’s application to the Army.

## 3. Drafting Guidance

The following is recommended as an updated definition for “bullying:”

*Bullying is a form of harassment that includes acts of aggression carried out by a Soldier with the intent of harming another Soldier, either physically or psychologically, without a proper purpose. Bullying may involve the singling out of an individual from his or her co-workers, or unit, for ridicule because he or she is considered different or weak. It involves an imbalance of power between the aggressor and the victim. Bullying can be conducted through the use of electronic devices or communications, and by other means, including social media, as well as in person. Bullying does not include properly directed command and/or operationally required activities or training for those activities such as: physical or mental hardships associated with operations or operational training; lawful punishment imposed pursuant to the UCMJ; administrative corrective measures, including verbal reprimands and command-authorized physical exercises; extra military instruction or corrective training that is a valid exercise of military authority needed to correct a Soldier’s deficient performance; physical training and remedial physical training; and similar activities that are authorized by the chain of command and conducted in accordance with this or another applicable regulation.*

The military should incorporate the examples of behaviors constituting bullying (listed at DoD Instruction 1020.03, paragraph 3.4a (1-10)). Listed examples are relevant in an Army context, however, all references to “person” should be changed to “Soldier.” Further, in light of the existing wording of AR 600-20, paragraph 4-19, it would be pertinent to also include the following example as an instance of bullying: “exclusion or rejection of a Soldier from inclusion in a group.” Examples of online behaviors constituting bullying should also be included in any revised definition included in AR 600-20. Such examples should include the following language:



online bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).

- Logging onto a Soldier's email account and sending offensive, humiliating, or intimidating communications to others.
- Tricking a Soldier into disclosing personal information and then using technology to distribute that information to others.
- Using electronic communications to threaten to physically harm a Soldier.
- Sending a Soldier intimidating, demeaning, abusive, or degrading messages via electronic communication.
- Purposely and repeatedly excluding a Soldier from online discussion groups/forums.

These proposed amendments radically reform the way the Army defines and regulates bullying. The changes serve to limit misconceptions about the nature and scope of bullying, making it easier for Soldiers to understand their rights and responsibilities, and easier for those in leadership positions to identify and address misconduct. The amendments also enable arguments for breach to be made more clearly.

## B. Hazing

### 1. Hazing Defined

As is the case with bullying, there is no universal definition of hazing. A fundamental characteristic of hazing includes exploitation of an asymmetric relationship (e.g., existing members of a group or organization versus newcomers; higher status (rank, grade) members versus lower status members). It involves acts which cause or create risk of physical or psychological harm to the target for the purposes of initiation, affiliation, or admission to an organization. Hazing can be one act; it need not be repetitive. These elements are captured in the current paragraph 4-19 hazing definition.

The existing hazing definition provides guidance on the nature and scope of the conduct by describing acts which constitute hazing in a face-to-face context. However, examples of online hazing behaviors should also be provided to give further guidance as to scope. A comprehensive anti-hazing provision ought to clarify whether an objective or subjective standard will be applied when determining whether hazing has occurred.

- Non-consensual broadcasting of a private (intimate or sexually explicit) image or film depicting a Soldier if that person has a good reason to believe it would be kept private. An intimate image depicts the subject's private areas. Broadcasting means electronically transmitting. One act is sufficient to constitute online bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).
- Non-consensual broadcasting of a humiliating photo or film depicting a Soldier. Broadcasting means electronically transmitting. One act is sufficient to constitute online

bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).

- Stalking a person using technology (e.g., a Soldier repeatedly sends another Soldier electronic communications which makes the recipient fear for his or her personal safety).
- Placing a Soldier's name or photo on a rating list inviting negative comment (e.g., "who's hot and who's not") or commenting negatively about a Soldier whose name or photo appears on a rating list. Negative comment includes a demeaning, abusive, or degrading comment. One act is sufficient to constitute

Department of Defense Instruction 1020.03 sets out a clear hazing definition which encompasses well understood characteristics of hazing.<sup>13</sup> It is structured in a concise manner which limits misconceptions about the nature and scope of hazing. The definition appears to be modeled closely on the Hazing Law enacted in the State of Florida since 2005.<sup>14</sup> Specific guidance as to the nature and scope of the conduct is provided by way of examples of behaviors constituting hazing.<sup>15</sup> Importantly, the definition stipulates that hazing is evaluated based on an objective rather than a subjective standard and refers to the fact that hazing can be carried out using electronic communications, thereby capturing both offline and online misconduct. This definition could form the basis of the Army's anti-hazing provision encompassed in AR 600-20, paragraph 4-19.

## 2. Recommendations

The hazing definition provided in DoD Instruction 1020.03 ought to be incorporated into AR 600-20, paragraph 4-19, with minor amendments. Its application would demonstrate a consistent approach to hazing across DoD and the Army service branch.

Amend the language used in DoD Instruction 1020.03 to reflect the provision's application to the Army.

## 3. Drafting Guidance

The following is recommended as an updated definition for "hazing:"

*Hazing is a form of harassment carried out by a Soldier that includes conduct causing or creating a risk of physical or psychological injury to another Soldier for the purpose of: initiation, admission into, affiliation with, change in status or position within, or a condition for continued membership in any organization with a nexus to military service. Hazing can be conducted through the use of electronic communications, and by other means including social media, as well as in person. Hazing does not include properly directed command or operationally required activities or training for those activities such as physical or mental hardships associated with operations or*

*operational training; lawful punishment imposed pursuant to the UCMJ; administrative corrective measures, including verbal reprimands and command-authorized physical exercises; extra military instruction or corrective training that is a valid exercise of military authority needed to correct a Soldier's deficient performance; physical training and remedial physical training; and similar activities that are authorized by the chain of command and conducted in accordance with this or another applicable regulation.*

The revised Army regulation should incorporate the examples of behaviors constituting hazing listed in DoD Instruction 1020.03 at paragraph 3.5a (1)-(9). Listed examples appear to be relevant in an Army context, however, references to "person" should be replaced with the term "Soldier."<sup>16</sup> Examples of online behaviors constituting hazing should also be included in any revised definition included in AR 600-20. Such examples should include the following language:

- *Using electronic communications to threaten to physically harm a Soldier.*
- *Sending a Soldier demeaning, abusive, or degrading messages via electronic communication.*
- *Using electronic communications to solicit, coerce, or encourage a Soldier to engage in illegal, harmful, demeaning or dangerous acts.*

These proposed amendments make it easier for Soldiers to understand their rights and responsibilities. Further, the changes would serve to better assist those in leadership positions in identifying and addressing misconduct. The amendments also enable arguments for breach to be made more clearly.

## C. Other Behaviors

### 1. "Other Behaviors" Defined

Army Regulation 600-20, paragraph 4-19, prohibits bullying, hazing, and other behaviors that undermine dignity and respect. It is likely that drafters included the broad yet unpecific "other behaviors" category to encapsulate instances of misconduct

which undermine dignity and respect, but which cannot be labeled as bullying or hazing. The provision does not list examples of the kinds of behaviors which fall within the scope of the "other behaviors" category or specify whether an objective or subjective standard will be applied when evaluating whether or not a breach of the regulation has occurred.

Notwithstanding the fact that proposed bullying and hazing definitions would encompass a much larger array of misconduct than current definitions allow, not all behaviors will be encompassed. Thus, it is important that paragraph 4-19 continues to include an "other prohibited behaviors" category. To avoid misconceptions or confusion about scope, Soldiers ought to be provided with some guidance. Listing examples of "other" offline and online misbehaviors would provide some clarity. Further, it would be prudent to clarify whether an objective or subjective standard will be applied when determining whether particular conduct violates the provision.

## 2. Recommendations

- Amend AR 600-20, paragraph 4-19, to include further specificity surrounding the meaning of "other behaviors."
- An objective standard for determining whether a violation of the provision has occurred should be included.

## 3. Drafting guidance

The following is recommended as an updated definition for "other behaviors:"

*A Soldier violates this provision by carrying out, or soliciting or coercing another person to carry out, an act that reasonable persons would regard as undermining dignity and respect. The act can be conducted through the use of electronic devices or communications, and by other means including social media, as well as in person. It is not a violation of this provision to carry out properly directed command and/or operationally required activities or training for those activities such as: physical or mental hardships associated with operations or operational training; lawful punishment imposed pursuant to the UCMJ; administrative corrective measures, including verbal reprimands and*

*command-authorized physical exercises; extra military instruction or corrective training that is a valid exercise of military authority needed to correct a Soldier's deficient performance; physical training and remedial physical training; and similar activities that are authorized by the chain of command and conducted in accordance with this or another applicable regulation.*

The revised definition should include examples of offline and online behaviors which violate this provision. Such examples should include:

- *Playing an abusive or demeaning trick on a Soldier.*
- *Spitting on a Soldier.*
- *Making an offensive, humiliating, or degrading comment about a Soldier.*
- *Coercing a Soldier to engage in a humiliating act.*
- *Accusing a Soldier of an indiscretion without due cause.*
- *Threatening a Soldier with physical harm.*
- *Threatening to broadcast or distribute a private (intimate/sexually explicit) or humiliating image of a Soldier.*
- *Threatening to exclude a Soldier from an offline or online group.*
- *Using electronic communications to send sexually explicit material to a Soldier.*

These proposed amendments serve to limit misconceptions about the nature and scope of prohibited behaviors which fall outside the definitions of bullying and hazing, yet nevertheless undermine dignity and respect. As noted above in the discussion on bullying and hazing, this guidance aims to make it easier for Soldiers to understand their rights and responsibilities and easier for those in leadership positions to recognize and address misconduct.

A violation of AR 600-20 can lead to internal reprimand or punishment under Article 92 of the UCMJ, *Failure to Obey an Order or Regulation*. Depending on the relationship between the aggressor and the target, the nature and the severity of the particular act(s), misconduct may also amount to other military violations under the UCMJ such as Articles 89, 91, 93, 120a, 117a, 128, and 134. An act may also constitute violation of a federal criminal offense

such as electronic harassment,<sup>17</sup> electronic threats,<sup>18</sup> cyberstalking,<sup>19</sup> obscenity,<sup>20</sup> or computer misuse.<sup>21</sup>

### **III. Army Regulation 25-13, Army Telecommunications and Unified Capabilities**

Army Regulation 25-13, paragraph 3-2, *Unauthorized and prohibited uses of telecommunications and computing systems*, stipulates that Soldiers must not use DoD and Army telecommunications, unified capabilities (UC), and computing systems in an unauthorized manner.<sup>22</sup> It outlines prohibitions on the use of Army communication systems at paragraph 3-2c(1)-(7), listing examples of prohibited/unlawful use.

The existing provision requires little change. It offers guidance on scope by referencing uses which reflect adversely on DoD or the Army, detailing use of signature blocks when sending electronic messages and listing examples of unlawful activities carried out using communication systems. To reinforce professional online conduct, the following three amendments are posited:

- Include “*broadcasting of a private (intimate or sexually explicit) image or film depicting another person*” in AR 25-13, paragraph 3-2c(1), as an example of misuse of communication systems reflecting adversely on DoD or the Army. This recommended amendment is timely given the recent addition of Article 117a to the UCMJ.
- Include “*broadcasting of material reasonable persons would find offensive, harassing, or menacing*” as an example of misuse of communication systems reflecting adversely on DoD or the Army as per paragraph 3-2c(1). The wording of this example is intentionally broad to capture an array of other malicious online misconduct not specifically identified by way of the other examples listed in this paragraph. Given its breadth, it would be prudent to insert this amendment at the end of paragraph 3-2c(1).
- Amend any references to “*electronic messages*” to “*electronic communications*” to more comprehensively govern the use of signature blocks and apply language consistently. See paragraph 3-2c(2).

These proposed amendments serve to strengthen the professionalization of online conduct by clarifying the scope of misconduct encompassed by AR 25-13, paragraph 3-2, ensuring that the means of misusing communications systems are regulated more comprehensively. A violation of AR 25-13 can lead to adverse administrative action. Depending on the nature and the severity of the particular act(s), misconduct may also amount to military violations under the UCMJ, such as Articles 120a, 117a, and 134, and constitute federal criminal offenses such as computer misuse,<sup>23</sup> electronic harassment,<sup>24</sup> electronic threats,<sup>25</sup> cyberstalking,<sup>26</sup> obscenity,<sup>27</sup> or child exploitation.<sup>28</sup>

### **IV. Federal Acquisition Regulation 52.203-13, Contractor Code of Business Ethics and Conduct**

Federal Acquisition Regulation (FAR) 52.203-13, Contractor Code of Business Ethics and Conduct, must be included in contracts between the Army and a contractor where the value of the contract is expected to exceed \$5.5 million and the performance period is 120 days or more (FAR 3.1004(a)).<sup>29</sup> Where required, it applies to all contract types other than Simplified Acquisition Procedures.

Federal Acquisition Regulation 52.203-13, paragraph (b)(1)-(3), stipulates contractor requirements applicable to all contractors. This includes having a written code of business ethics and conduct; making the code available to all employees engaged in the performance of the contract; exercising due diligence to prevent and detect criminal conduct and promoting an organizational culture that encourages ethical conduct and compliance with the law; and disclosing credible evidence that a principal, employee, agent, or subcontractor has committed violations particularized in paragraph (b)(3)(A)(B). Paragraph (c) (1)-(2) of FAR 52.203-13 imposes further specific requirements on contractors other than those who qualify as a small business concern. Contractors to whom these additional obligations apply must implement an ongoing business ethics awareness and compliance program supported by appropriate training. An internal control system must be in place. This system must be supported by standards

and procedures facilitating timely discovery of improper conduct in connection with government contracts and ensure corrective measures are instituted and carried out—minimum requirements are particularized in paragraph (c)(2)(ii)(A)-(G). The substance of this clause extends to subcontractors in subcontracts that have a value in excess of \$5.5 million and a performance period of more than 120 days.

No specific guidelines on the contents of a written code of business ethics and conduct are prescribed in FAR 52.203-13. Generally, a contractor's code of professional ethics and conduct ought to articulate a set of principles and practices which guide ethical and legal decision-making and behavior within the business. As such, a code facilitates self-regulation of a broad range of improper conduct, including criminal acts.

#### **A. General Requirements Imposed on All Contractors**

Where FAR 52.203-13 applies, it places an onus on all contractors to exercise due diligence to prevent and detect fraud, conflicts of interest, bribery, gratuity violations, and other criminal conduct. The term due diligence is not defined. In exercising due diligence, a contractor would need to take reasonable steps to prevent and detect criminal conduct, including e-crimes such as electronic harassment,<sup>30</sup> electronic threats,<sup>31</sup> and obscenity.<sup>32</sup> Actions which raise awareness of improper or unlawful behaviors and communicate how improper or unlawful conduct can be reported and will be managed may support the exercise of due diligence in preventing and detecting criminal conduct.

All contractors are also required to “promote an organizational culture that encourages ethical conduct and commitment with the law.”<sup>33</sup> This requires a contractor to take proactive measures to foster ethical and lawful conduct within the organization. Communicating workplace policies and conducting training on ethical decision-making and behavioral standards, including responsible online conduct, would support this obligation. Those contractors who take a passive approach may not fulfil their obligation to promote a workplace culture aligned with the core

values underpinning the code on professional ethics and conduct.

It is important to note that non-compliance does not automatically prohibit contract payment. An express condition to that effect would need to be incorporated into the contract between the parties.<sup>34</sup> However, a contractor's performance can impact a contractor's future evaluation of a bid or proposal. Violating the contractor code of business ethics and conduct clause could impact on the contravening contractor's ability to secure future contract awards.

Contractors who qualify as a small business concern (or contractors who are a party to a contract relating to the acquisition of a commercial item as per FAR 2.101) are not required to implement an internal control system in the manner prescribed under FAR 52.203-13 (c)(2)(A)-(G).<sup>35</sup> All other contractors must implement various baseline measures. Even though these measures are not prescriptive (it is up to the contractor to decide how to operationalize requirements), the clause requires a contractor to implement key building blocks of an effective internal control mechanism such as mandating periodic evaluations of the efficacy of a business ethics awareness and compliance program; periodic assessment of the risk of criminal conduct; an internal reporting mechanism; and a system for implementing disciplinary action.

Notably, this part of the provision makes numerous references to “improper conduct” as distinct from “criminal conduct” but does not provide guidance on the meaning of the term for the purposes of the clause. Notwithstanding the lack of a definition, it is safe to assume that improper conduct relates to actions which undermine the spirit of the professional ethics and conduct code but fall short of criminal conduct. Improper conduct encompasses offline and online actions. This means that a contractor is obligated to control for improper online behavior of employees engaged in the performance of a contract.

#### **B. Importance of the clause**

Federal Acquisition Regulation 52.203-13 mandates that all contractors formalize principles which govern business practices and behavior in form of a business ethics and conduct code and that contractors

take reasonable steps to prevent and detect criminal acts and promote a workplace culture which fosters compliance with the law and the spirit of the code. Including this clause in Army contracts is a critically important control measure at the Army's disposal which goes some way towards preventing improper contractor conduct, including online misconduct. Where the Army contracts with a party not recognized as a small business concern, FAR 52.203-13 gains even greater significance given the plethora of criteria a contractor is required to implement as part of their internal control system.

The clause reflects a contractor's contractual duties surrounding contractor conduct including acts carried out via electronic communications. This fosters professional and responsible interactions between parties. Given the importance of the contract term (the value of the term for the Army as a party to a contract), FAR 52.203-13 ought to be included in contracts of any value where practicable.

#### **C. Recommendations**

- Include a definition of the term “due diligence” in FAR 52.203-13 paragraph (a), Definition, which clarifies that the contractor is responsible for doing everything reasonable to prevent and detect offline and online criminal conduct.<sup>36</sup>
- Clarify that FAR 52.203-13 should be included in all Army contracts, unless it is not practicable in the circumstances.<sup>37</sup> The requirement that the clause must be included where the value of the contract is expected to exceed \$5.5 million and where the performance period of 120 days or more remains unchanged.
- Ensure personnel engaged in the performance of a contract are aware of the implications for breach of FAR 52.203-13. Importantly, a violation of the clause will not automatically give rise to contract termination (will not prohibit contract payment). Those advising on a contract may consider incorporating the clause as an express condition of the contract. Where the clause is not incorporated as an express condition, personnel involved in overseeing contract performance ought to be

meticulous in recording the details surrounding any violations. Any violations may be taken into account should the contractor bid on future Army contracts.

Implementation of the recommendations will be most effective where those in leadership positions raise awareness about the purpose and application of the clause, as well as awareness about how the clause can protect Army personnel engaged in the performance of a contract from contractor misconduct, including improper behavior carried out using electronic communications.

## V. Army Social Media Policy

The ease with which real time global interactions occur via social media provides users with an unparalleled communication platform. Reasons for embracing institutional adoption of social media include improving institutional transparency, sharing operational lessons, recognizing achievements of members and increasing opportunities for service members to connect and interact with other military professionals. On a personal level, use of social media provides service members and their families with instantaneous connectivity. Notwithstanding these advantages, the challenges surrounding misuse and operational security are numerous and require the all branches of the armed forces to control how members communicate through electronic media. The Army has a publicized policy which regulates how Army members use social media.<sup>38</sup>

The Army's Social Media Policy is published on the Army's social media website.<sup>39</sup> Numerous useful links to relevant policy documents are easily accessible. User-friendly information provided on the Soldiers and Families webpage clearly communicates a key message to Soldiers: think about whether the contents of an electronic communication violates the UCMJ or Army values before the material enters the online domain. The maxim "Think, Type, Post" lies at the heart of the Army's Social Media Policy. Soldiers are reminded that online misconduct carried out whilst on or off duty may violate AR 600-20 and is punishable under the UCMJ. The website also provides guidance on political activity and DoD

support to political campaigns. Further, basic information addressing how social media posts could compromise operational security is presented in a clear manner by providing safety and security tips. The policy also addresses what Army members need to bear in mind in regards to social media posts containing information on the death of a Soldier or other service member.

In the pursuit of further professionalizing online conduct, Army members may benefit from an expanded discussion on "Online Conduct—Think Type Post." To this end, descriptions or examples of negative online behaviors that undermine dignity and respect and violate AR 600-20 would be useful.<sup>40</sup>

The Army's social media policy section "Online Conduct—Think, Type, Post" should be amended to provide further guidance on online behaviors which violate the policy as well as AR 600-20. Additional information may be best placed below the existing content published on the Army social media policy website. Further guidance that could be added to the social media policy includes examples of behavior that constitute online misconduct, undermines Army values, and violates AR 600-20, such as the following:

- *Non-consensual broadcasting of a private (intimate or sexually explicit) image or film depicting an Army member if that person has a good reason to believe it would be kept private. An intimate image depicts the subject's private areas. Broadcasting means electronically transmitting. One act is sufficient to constitute online bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).*
- *Non-consensual broadcasting of a humiliating photo or film depicting an Army member. Broadcasting means electronically transmitting. One act is sufficient to constitute online bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).*
- *Stalking an Army member using technology (e.g., an Army member repeatedly sends another person electronic communications which makes the recipient fear for his or her personal safety).*
- *Placing an Army member's name or photo on a rating list inviting negative comment*

(e.g., "who's hot and who's not") or commenting negatively about an Army member whose name or photo appears on a rating list. Negative comment includes a demeaning, abusive, or degrading comment. One act is sufficient to constitute online bullying given the public nature of such material (an act is repetitive by virtue of the public forum in which it occurs).

- *Logging onto an Army member's email account and sending offensive, humiliating, or intimidating communications to others.*
- *Tricking an Army member into disclosing personal information and then using technology to distribute that information to others.*
- *Using electronic communications to threaten to physically harm an Army member.*
- *Sending an Army member intimidating, demeaning, abusive, or degrading messages via electronic communication.*
- *Purposely excluding an Army member from online discussion groups/forums.*
- *Using electronic communications to threaten to physically harm an Army member.*
- *Sending an Army member demeaning, abusive, or degrading messages via electronic communication.*
- *Using electronic communications to solicit, coerce, or encourage an Army member to engage in illegal, harmful, demeaning or dangerous acts.*
- *Threatening to broadcast or distribute a private (intimate/sexually explicit) or humiliating image of another Army member.*
- *Threatening to exclude an Army member from an offline or online group.*
- *Using electronic communications to send sexually explicit material to an Army member.*
- *Liking, linking, or sharing social media posts which undermine Army values.*

These proposed amendments serve to strengthen the professionalization of online conduct by clarifying the scope of online misconduct which violates Social Media Policy.<sup>41</sup> The amendments provide Army members with pertinent examples of prohibited behaviors (which violate Army values as well as AR 600-20) to enable members to more clearly understand which behaviors cross the line. The information could be presented in form of a user-friendly chart or table for ease of reference on the website.

## VI. Conclusion

In an era where acts and transactions oft occur via electronic medium, it is critical to ensure online misconduct is minimized. The Army has identified a need to further professionalize online conduct and, to that end, implement measures which will more comprehensively regulate how Army members interact in the online environment. In line with core Army values, all Army members are to be treated with dignity and respect both offline in the physical world and online in the cyber domain.

Following a review of relevant Army regulations, clauses comprising Army contracts, and Army social media policy, a series of recommendations for reform are posited by way of this article. The proposed amendments to AR 600-20, AR 25-13, FAR 53.201-13, and the Army's social media policy include drafting guidance designed to assist Army leadership in crafting additional or revised content in a meaningful way. Noted recommendations aim to provide those in leadership positions with clear and comprehensive means to facilitate the management of online misconduct and aim to provide Soldiers (and, where relevant, contractors and Army Civilians) with concise guidance as to acceptable behaviors, mores, or norms. The Army has an opportunity to be at the forefront of reform by reinforcing professional online conduct expediently. **TAL**

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### Appendix A. Army Regulation 600-20 Paragraph 4-19

**4-19. Treatment of persons.** The Army is a values-based organization where everyone is expected to do what is right by treating all persons as they should be treated—with dignity and respect. Hazing, bullying, and other behaviors that undermine dignity and respect are fundamentally in opposition to our values and are prohibited. This paragraph is punitive. Soldiers who violate this policy may be subject to punishment under the UCMJ. Whether or not certain acts specifically violate the

provisions of this paragraph, they may be inappropriate or violate relevant civilian personnel guidance. Commanders must seek the advice and counsel of their legal advisor when taking actions pursuant to this paragraph.

#### a. Definition.

(1) Hazing. Any conduct whereby a Servicemember or members regardless of service, rank, or position, and without proper authority, recklessly or intentionally causes a Servicemember to suffer or be exposed to any activity that is cruel, abusive, humiliating, oppressive, demeaning, or harmful. Soliciting or coercing another to participate in any such activity is also considered hazing. Hazing need not involve physical contact among or between military members or employees; it can be verbal or psychological in nature. Likewise, it need not be committed in the physical presence of the victim; it may be accomplished through written or phone messages, text messages, email, social media, or any other virtual or electronic medium. Actual or implied consent to acts of hazing does not eliminate the culpability of the perpetrator. Without outside intervention, hazing conduct typically stops at an identified end-point.

(2) Bullying. Bullying is any conduct whereby a Servicemember or members, regardless of service, rank, or position, intends to exclude or reject another Servicemember through cruel, abusive, humiliating, oppressive, demeaning, or harmful behavior, which results in diminishing the other Servicemember's dignity, position, or status. Absent outside intervention, bullying will typically continue without any identifiable end-point. Bullying may include an abuse of authority. Bullying tactics include, but are not limited to, making threats, spreading rumors, social isolation, and attacking someone physically, verbally, or through the use of electronic media.

#### b. Scope.

(1) What constitutes hazing and bullying? Hazing and bullying can include both physical and nonphysical interactions. Hazing typically involves conduct directed at new members of an organization or

individuals who have recently achieved a career milestone. It may result from any form of initiation, "rite of passage," or congratulatory act that includes unauthorized conduct such as: physically striking another while intending to cause, or causing, the infliction of pain or other physical marks such as bruises, swelling, broken bones, internal injuries; piercing another's skin in any manner; forcing or requiring the consumption of excessive amounts of food, alcohol, drugs, or other substances; or encouraging another to engage in illegal, harmful, demeaning, or unauthorized dangerous acts. Unlike hazing, bullying often, but not always, takes the form of excessive corrective measures that, like hazing, involve the infliction of physical or psychological pain and go beyond what is required for authorized corrective training.

(2) Hazing and bullying are not limited to superior-subordinate relationships. They may occur between peers or, under certain circumstances, may involve actions directed towards senior personnel by those junior in rank, grade, or position to them. Hazing may occur during graduation or promotion ceremonies or similar military "rites of passage." However, it may also happen in military settings, such as in small units, to initiate or "welcome" a new member to the unit. Bullying may also occur in all settings but it most often appears as excessive correction of, or punishment for, perceived performance deficiencies. Hazing and bullying are prohibited in all cases, to include off-duty or "unofficial" celebrations or unit functions, on or off post.

(3) What does not constitute hazing or bullying?

(a) Hazing may occur when otherwise authorized or permissible conduct crosses the line into impermissible conduct. Bullying is always committed with the intent to exclude or reject another from inclusion in a group and, while the bullying conduct may appear to be corrective training, it is never authorized or permissible. The imposition of necessary or proper duties and the requirement of their performance does not violate this policy even though the duties may be arduous, hazardous, or both. When authorized by the chain of command

and/or operationally required, the following activities do not constitute hazing or bullying: (1) the physical and mental hardships associated with operations or operational training; (2) lawful punishment imposed pursuant to the UCMJ; (3) administrative corrective measures, including verbal reprimands and command-authorized physical exercises; (4) extra military instruction or corrective training that is a valid exercise of military authority needed to correct a Soldier's deficient performance in accordance with paragraph 4–6; (5) physical training and remedial physical training; and (6) other similar activities that are authorized by the chain of command and conducted in accordance with this or another applicable regulation.

(b) Many time-honored customs of the Army include traditional events that celebrate personal milestones and professional achievements. These events are part of our heritage and include hails and farewells, promotion and graduation ceremonies, and other official command functions. When properly organized and supervised, these events serve to enhance morale, esprit de corps, pride, professionalism, and unit cohesiveness. The chain of command will ensure these traditions and customs are carried out in accordance with Army values and that the dignity and respect of all participants is maintained.

(c) The willingness of any participant is irrelevant; therefore, express or implied consent to prohibited behaviors under this paragraph is not a defense to a violation of this regulation.

c. Command responsibilities.

(1) Enforcement of this policy is the responsibility of commanders and supervisors at all levels.

(2) Publish and post written command policy statements on treatment of persons. Statements will be consistent with the Army policy, include the local command's commitment to prevention of hazing and bullying, and reaffirm that these behaviors will not be tolerated. The command policy will explain how and where to file complaints and will state that all complainants will be protected from acts or threats

of reprisal. Each ACOM, ASCC, DRU, installation, unit, agency, and activity will publish a treatment of persons policy. Commanders must consult with their legal advisor prior to publishing.

(3) Conduct training. On at least an annual basis, commanders will conduct hazing and bullying training as part of the EO training requirements related to promoting a healthy unit climate.

(4) Commanders will immediately report allegations of criminal behavior in violation of this paragraph to law enforcement. All other hazing or bullying allegations that are reported to a commander will be investigated as possible violations of Article 92 of the UCMJ in accordance with the informal board procedures set forth in AR 15–6 or as a commander's inquiry. Individuals may also report incidents of hazing to the appropriate Inspector General's office and these incidents may be investigated by that office or referred to the command for investigation. Regardless of the type of investigation conducted into the hazing or bullying allegation (law enforcement, IG, or administrative), commanders are responsible for coordinating with their unit Equal Opportunity Advisor (EOA) to ensure that all hazing or bullying allegations are recorded and tracked in the Equal Opportunity Reporting System (EORS). Although administrative investigations into hazing or bullying are not EO investigations, EOAs will ensure that these incidents are recorded in EORS for tracking purposes. If a Soldier possesses a security clearance, commanders will ensure the security manager records the derogatory information as an incident report in the JPAS (or subsequent system) in accordance with AR 380–67.

d. Individual responsibilities.

Individuals are responsible for the following:

(1) Advising the command of any incidents of hazing or bullying.

(2) Conducting themselves in accordance with this paragraph and treating all persons as they should be treated – with dignity and respect.

e. Individual reporting.

Servicemembers should report hazing or bullying to their commander, law enforcement, or the Inspector General.

## **Appendix B. DoD Instruction 1020.03 Harassment Prevention and Response in the Armed Forces, Paragraph 3.4**

3.4. BULLYING. A form of harassment that includes acts of aggression by Servicemembers or DoD civilian employees, with a nexus to military service, with the intent of harming a Service member either physically or psychologically, without a proper military or other governmental purpose. Bullying may involve the singling out of an individual from his or her coworkers, or unit, for ridicule because he or she is considered different or weak. It often involves an imbalance of power between the aggressor and the victim. Bullying can be conducted through the use of electronic devices or communications, and by other means including social media, as well as in person.

a. Bullying is evaluated by a reasonable person standard and includes, but is not limited to the following when performed without a proper military or other governmental purpose:

- (1) Physically striking another person in any manner or threatening to do the same;
- (2) Intimidating, teasing, or taunting another person;
- (3) Oral or written berating of another person with the purpose of belittling or humiliating;
- (4) Encouraging another person to engage in illegal, harmful, demeaning or dangerous acts;
- (5) Playing abusive or malicious tricks;
- (6) Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person;
- (7) Subjecting another person to excessive or abusive use of water;
- (8) Forcing another person to consume food, alcohol, drugs, or any other substance;
- (9) Degrading or damaging another's property or reputation; and

(10) Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of bullying.

b. Bullying does not include properly directed command or organizational activities that serve a proper military or other governmental purpose, or the requisite training activities required to prepare for such activities (e.g., command-authorized physical training).

c. Service members may be responsible for an act of bullying even if there was actual or implied consent from the victim and regardless of the grade or rank, status, or Service of the victim.

d. Bullying is prohibited in all circumstances and environments, including off-duty or “unofficial” unit functions and settings.

### **Appendix C. DoD Instruction 1020.03 Harassment Prevention and Response in the Armed Forces, Paragraph 3.5**

3.5. HAZING. A form of harassment that includes conduct through which Service members or DoD employees, without a proper military or other governmental purpose but with a nexus to military Service, physically or psychologically injures or creates a risk of physical or psychological injury to Service members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DoD civilian organization. Hazing can be conducted through the use of electronic devices or communications, and by other means including social media, as well as in person.

a. Hazing is evaluated by a reasonable person standard and includes, but is not limited to, the following when performed without a proper military or other governmental purpose:

- (1) Any form of initiation or congratulatory act that involves physically striking another person in any manner or threatening to do the same;
- (2) Pressing any object into another person’s skin, regardless of whether it pierces the skin, such as “pinning”

or “tacking on” of rank insignia, aviator wings, jump wings, diver insignia, badges, medals, or any other object;

- (3) Oral or written berating of another person with the purpose of belittling or humiliating;
- (4) Encouraging another person to engage in illegal, harmful, demeaning or dangerous acts;
- (5) Playing abusive or malicious tricks;
- (6) Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person;
- (7) Subjecting another person to excessive or abusive use of water;
- (8) Forcing another person to consume food, alcohol, drugs, or any other substance; and
- (9) Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of hazing.

b. Hazing does not include properly directed command or organizational activities that serve a proper military or other governmental purpose, or the requisite training activities required to prepare for such activities (e.g., administrative corrective measures, extra military instruction, or command-authorized physical training).

c. Service members may be responsible for an act of hazing even if there was actual or implied consent from the victim and regardless of the grade or rank, status, or Service of the victim.

d. Hazing is prohibited in all circumstances and environments including off-duty or “unofficial” unit functions and settings.

### **Appendix D. Army Regulation 25-13, Paragraph 3-2**

#### **3-2. Unauthorized and prohibited uses of telecommunications and computing systems.**

a. Unauthorized use or abuse of DoD and Army telecommunications, UC, and computing systems (including telephone, email systems, DoD mobile devices, web services, or other systems) may subject users to administrative, criminal, or other adverse action.

b. Use of DoD-owned IT. Introducing or using software, firmware, or hardware on DoD owned/issued IT that has not been approved by the Army CIO/G-6-appointed authorizing official is prohibited.

c. Prohibitions on the use of Army communications systems include—

(1) Use of communications systems, including web services, which adversely reflect on DoD or the Army. Examples include uses involving sexually explicit email or access to sexually explicit websites, pornographic images, or computer generated or otherwise pornographic images; chain email messages; unofficial advertising, soliciting, or selling via email; and other uses that are incompatible with public service.

(2) Use of inappropriate signature blocks when sending electronic messages (emails). Army policies for records management apply to emails. Emails generated by Army personnel in their official capacity from Army communication devices (including but not limited to computers and hand held devices) will not contain slogans, quotes, or other personalized information as part of the individual sender’s signature block. Signature blocks within emails will contain only the necessary business information, such as: the name of the organization (office, activity, or unit represented); official mailing address or unit information; name of individual; telephone numbers (Defense Switched Network, commercial telephone, cell phone number, or facsimile numbers); office email addresses or government websites (unit web or social media page); government disclaimer (Privacy Act Statement, Attorney Client Notice); unit historical motto (<http://www.tioh.hqda.pentagon.mil>); or any other information approved by HQDA. Requests for exceptions will be submitted to the first O6 or equivalent in the chain of command (with possible delegation to the next O5 in the chain of command, or his/her equivalent).

(3) Use of communications systems for unlawful activities, commercial purposes, or in support of for-profit activities, personal financial gain, personal use inconsistent with DoD policy, personal use that promotes a particular religion or faith, or uses that violate other Army policies or laws. This

may include, but is not limited to, violation of intellectual property and copyright laws, gambling, support of terrorist or subversive activities, and sexual or other forms of harassment.

(4) Political transmissions, to include transmissions that advocate the election of particular candidates for public office.

(5) Actions that result in the theft of resources, personal and/or private information, or the abuse of computing facilities. Such prohibitions apply to email and content storage services and include, but are not limited to, the unauthorized entry, use, transfer, and/or tampering with the accounts and files of others; interference with the work of others; and interference with other computing facilities.

(6) Use of communications systems that could reasonably be expected to cause, directly or indirectly, the congestion, delay, or disruption of service to any computing facilities; a denial of service; or cause the unwarranted or unsolicited interference with others' use of communications. These types of interferences are described in AR 25-1.

(7) Use of communications systems to open, send, or forward items known or suspected of being malicious (for example, spam, phishing, viruses, and Trojan horses).

## Appendix E. Federal Acquisition Regulation (FAR) 52.203-13, Contractor Code of Business Ethics and Conduct

As prescribed in 3.1004(a), insert the following clause:

Contractor Code of Business Ethics and Conduct

(a) *Definition.* As used in this clause--

"Agent" means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

"Full cooperation"--

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals

responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the FAR, or the terms of the contract. It does not require--

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from--

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

"Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a division or business segment; and similar positions).

"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

"Subcontractor" means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

"United States" means the 50 States, the District of Columbia, and outlying areas.

(b) Code of business ethics and conduct.

(1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall--

(i) Have a written code of business ethics and conduct;

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall--

(i) Exercise due diligence to prevent and detect criminal conduct; and

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3)

(i) The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed--

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by the law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide

acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) *Business ethics awareness and compliance program and internal control system.*

This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

- (i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.
- (ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

- (i) The Contractor's internal control system shall—
  - (A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and special requirements of Government contracting, including—

- (1) Monitoring and auditing to detect criminal conduct;
- (2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
- (3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which

allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the

basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) Subcontracts.

(1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of \$5.5 million and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

## Notes

1. The statement was made in 2012 by way of a letter signed by then Secretary of the Army John M. McHugh, Chief of Staff of the Army, General Ray Odierno, and Sergeant Major of the Army, Raymond F. Chandler III. It has been cited in multiple publications since that time as a statement which reflects the Army's zero tolerance for bullying and hazing. See David Vergun, *Zero Tolerance in Army for Bullying, Hazing* (Aug 13, 2012), [https://www.army.mil/article/85308/zero\\_tolerance\\_in\\_army\\_for\\_bullying\\_hazing](https://www.army.mil/article/85308/zero_tolerance_in_army_for_bullying_hazing).

2. Arnold Bandura, *Social Cognitive Theory of Moral Thought and Action* in William M. Kurtines and Jacob L. Gewirtz (eds), *Handbook of Moral Behavior and Development* 86 (Vol 1, 1991).

3. All Army Activities Message, 058/2018, 251301Z Jul 18, U.S. Dep't of Army, subject: ALARACT Professionalization of Online Conduct [hereinafter ALARACT 058/2018].

4. Other measures noted in ALARACT 058/2018 include updating all Army systems which currently track misconduct related to equal opportunity, equal employment opportunity, SHARP, Inspector General investigations, UCMJ investigations, and Law enforcement investigations to reflect any amendments and ensuring that changes fulfill local labor relations obligations.

5. The scandal involved non-consensual distribution of private (intimate/sexually explicit) images of female service members and military spouses. This form of harmful online conduct is referred to as "revenge porn" (non-consensual distribution of a private still or moving image of someone in an act of revenge—e.g., posting a naked photo of a former partner online following a breakdown of the relationship without the person's consent).

6. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-19 (6 Nov. 2014) [hereinafter AR 600-20]. Paragraph 4-19 is included in this article as Appendix A.

7. AR 600-20, *supra* note 6, para. 4-19

8. Dorothy L. Espelage & Susan M. Swearer Napolitano, *Research on School Bullying and Victimization: What Have We Learned and Where Do We Go From Here?* 32, no. 3 SCH. PSYCHOL. REV. 365 (2003); Peter K. Smith et al., *Definitions of Bullying: A Comparison of Terms Used, and Age and Gender Differences, in a Fourteen-Country International Comparison*, 73 CHILD DEV. 1119 (2002).

9. Dan Olweus, *Familial and Temperamental Determinants of Aggressive Behavior in Adolescent Boys: A Causal Analysis*, 16 DEVELOPMENTAL PSYCHOLOGY 644 (1980).

10. AR 600-20, *supra* note 6, para. 4-19.

11. U.S. DEP'T OF DEF., INSTR. 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES para. 3.4 (8 Feb. 2018) [hereinafter DoDI 1020.03]. Paragraph 3.4 is included in this article as Appendix B.

12. DoDI 1020.03, *supra* note 11, para. 3.4 a (1-10).

13. DoDI 1020.03, *supra* note 11, para. 3.5. Paragraph 3.5 is included in this article as Appendix C.

14. FLA. STAT. § 1006.63 (2010).

15. DoDI 1020.03, *supra* note 11, para. 3.5a (1-9).

16. Several examples listed were included in the existing anti-hazing provision in AR 600-20, paragraph 4-19.

17. 47 U.S.C. § 223 (a)(1)(C).

18. 18 U.S.C. § 875.

19. 18 U.S.C. § 2261A.

20. 47 U.S.C. § 223(a)(1)(A).

21. 18 U.S.C. § 1030.

22. U.S. DEP'T OF ARMY, REG. 25-13, ARMY TELECOMMUNICATIONS AND UNIFIED CAPABILITIES para. 3-2 (11 May 2017) [hereinafter AR 25-13]. AR 25-13, paragraph 3-2, *Unauthorized and prohibited uses of telecommunications and computing systems*, is included in this article as Appendix D.

23. 18 U.S.C. § 1030.

24. 47 U.S.C. § 223 (a)(1)(C).

25. 18 U.S.C. § 875.

26. 18 U.S.C. § 2261A.

27. 47 U.S.C. § 223(a)(1)(A).

28. 18 U.S.C. § § 2251, 2252, 2252A.

29. Federal Acquisition Regulation (FAR) 52.203-13, *Contractor Code of Business Ethics and Conduct*, is included in this article as Appendix E.

30. 47 U.S.C. § 223 (a)(1)(c).

31. 18 U.S.C. § 875.

32. 47 U.S.C. § 223 (a)(1)(A).

33. FAR 52.203-13, *supra* note 29.

34. United States ex rel. Ortolano v. Amin Radiology, 2015 U.S. Dist. LEXIS 9724; Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001).

35. This is a sensible exclusion given the additional costs associated with the implementation and enforcement of an internal control system (which goes beyond the requirements outlined in (b) (1)-(3)). To be regarded a "small business," the business must meet the Small Business Administration's applicable size standards. The U.S. government has a goal to award twenty-three percent of U.S. government prime contracts to small business concerns.

36. "Due diligence" has been judicially construed as "doing everything reasonable, not everything possible." See, e.g., *People v. Sullivan*, 97 Mich. App. 488, 296 N.W.2d 81, 1980 Mich. App. LEXIS 2679; *Smigelski v. Dubois*, 2013 Conn. Super. LEXIS 1100, 2013 WL 2922984.

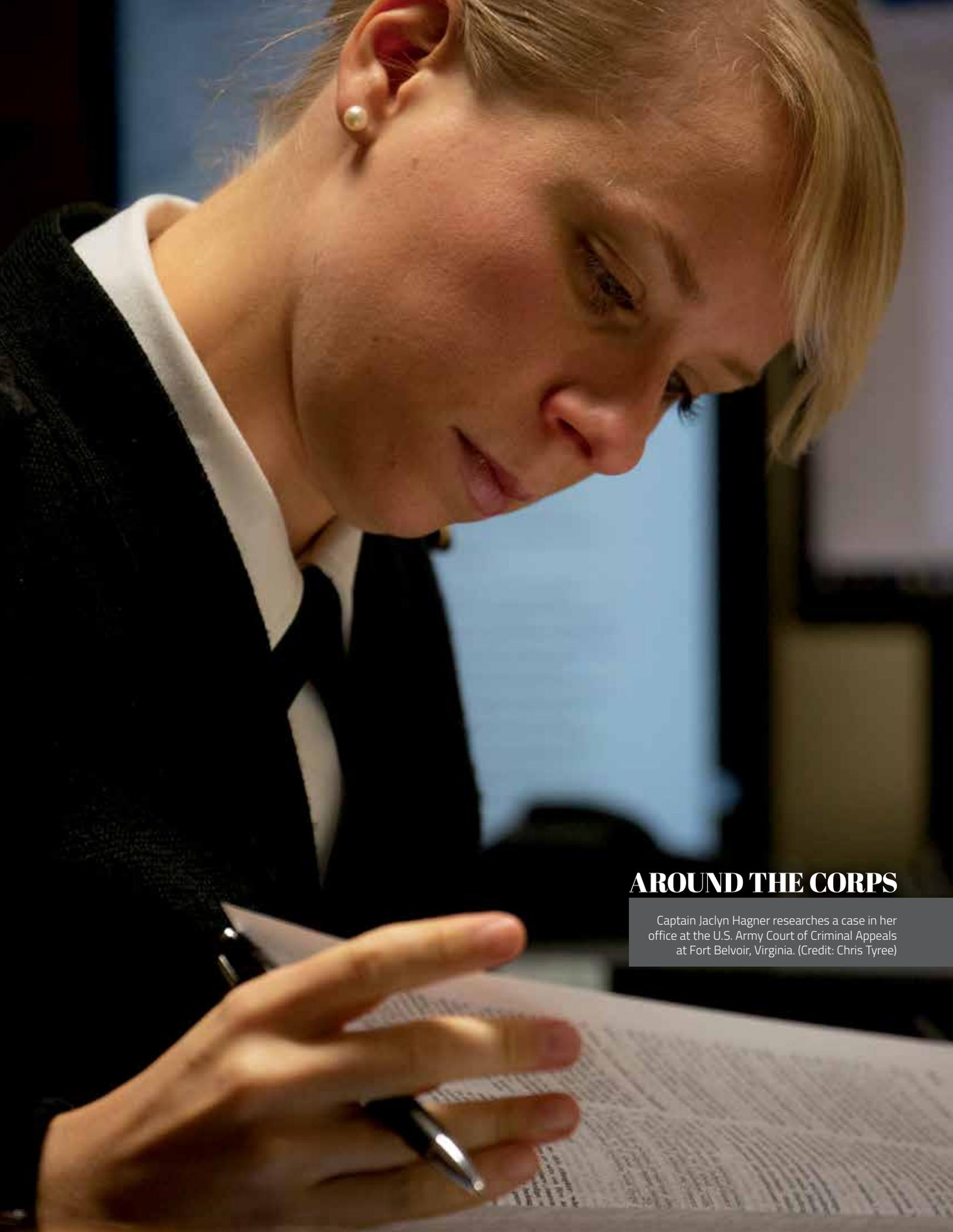
37. This would involve a discretionary judgement by the contracting officer. An instance where it may not be practicable to include the clause might involve a contract award to a sole proprietor.

38. "Army members" include all members of the Army team including members of the regular Army, the Army National Guard/Army National Guard of the United States, U.S. Army Reserve, cadets of the U.S. Military Academy, contracted cadets of the Reserve Officer Training Corps, Army Civilians, certain contractors, and contracted recruits managed by U.S. Army recruiting command.

39. Army Social Media, accessible at <https://www.army.mil/socialmedia/>.

40. Any examples referenced will need to reflect definitions and examples provided in AR 600-20.

41. Note, the examples refer to "Army members" rather than "Soldiers" reflects the application of Army social media policy to all Army members, not just active duty Soldiers.



## **AROUND THE CORPS**

Captain Jaclyn Hagner researches a case in her office at the U.S. Army Court of Criminal Appeals at Fort Belvoir, Virginia. (Credit: Chris Tyree)



## No. 4

# The Special Victim Counsel Program at Five Years

## An Overview of Its Origins and Development

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*By Colonel Louis P. Yob*

In November 2013, the Army began its Special Victim Counsel (SVC) Program with this promise to those in the Army and their family members: if they report being sexually assaulted and request an SVC, they will have a qualified, professional counsel who will help them preserve their rights and who will advocate on their behalf. This commitment was part of a new paradigm in victim advocacy that has no precedent or comparable institutional initiative anywhere in the civilian sector. The program recognized that if our system fails to treat victims with dignity, fairness, and respect, or denies them a meaningful choice about how they will participate in the military justice system, it risks re-victimizing them. Someone who feels re-victimized will struggle with resiliency and be far less likely to participate in a prosecution or disciplinary action than a victim who has an advocate to help ensure the system supports them. While important for victims, this legal representation does nothing to lessen the Army's long-standing commitment to protect the rights of the accused, which includes providing defense counsel for all military defendants.

Because of its novelty, when the SVC Program began, many were hesitant about the undefined scope of an SVC's role in sexual assault investigations and prosecutions. Some were concerned about victims' counsel usurping traditional roles of trial counsel.

Others questioned whether SVCs might cause inefficiency or confusion within the military justice system that could outweigh the benefits they provided.

We now have five years of experience and data, derived from Army SVC representation of over 5,000 victim-clients. This five-year milestone provides a prime opportunity to evaluate the challenges and successes of the program, as well as an opportunity to consider ways we can improve it in the future.

The initiation of the Army SVC Program did not occur in a vacuum. It is an extension of evolving American societal attitudes that have increasingly recognized the harmful prevalence of sexual harassment and assault. Beginning in the early 1990s, the military experienced a number of high profile sex assault incidents and negative media reports that highlighted a prevalence of sexual assault within our armed forces. In 2001, the Cox Commission, a panel reviewing the UCMJ on its 50th anniversary, raised concerns about "a near constant parade of high profile criminal investigations and courts-martial, many involving allegations of sexual misconduct, each a threat to morale and a public relations disaster."<sup>1</sup>

The Services recognized the serious threat that sexual assault posed to the safety and well-being of individuals, to the cohesion of the force, and to the public perception of the military and its

values. This spurred a series of military responses to address the prevalence of sexual assault. While the military earnestly pursued solutions to the problem of sexual assault, progress came slowly. In its FY 2012 Annual Report of Sexual Assault in the Military, the Department of Defense (DoD) noted: "Despite unprecedented attention and involvement from senior leadership, enhanced SAPR policies and training, and outreach to key stakeholders, sexual assault remains a persistent problem in the military. Current efforts to improve the Department's investigative and prosecutorial capabilities are important, but are not enough to solve the problem."<sup>2</sup> At that time, the gap between the estimated number of service members experiencing unwanted sexual contact and the number of incidents reported, appeared to have increased from prior years.<sup>3</sup> The DoD Report noted that victim confidence in the military justice process was believed to influence their decision to report a sexual assault, and ultimately, their decision to participate in the military justice process.<sup>4</sup> At the same time, a 2012 documentary film titled "The Invisible War," presented anecdotal first-hand accounts by victims of sexual assault within the military. The film noted estimates of the number of sexual assaults occurring within the military in 2010 were much higher than the number of incidents actually reported, which was in turn much higher than the number of reports that resulted in convictions.<sup>5</sup> The closing credits of the film stated that the Secretary of Defense watched the film on 14 April 2012, and two days later took the step of withholding all decisions in sexual assault cases to O-6 level commanders.

The year 2012 also saw congressional action in this area. Military lawyers had statutory authorization since 1985 to provide general legal assistance services to eligible individual clients, who included service members and their dependents, as well as DoD employees overseas.<sup>6</sup> New legislation in 2012 expanded this authority and directed the services to begin providing legal assistance services to sexual assault victims.<sup>7</sup> On 9 November 2012, shortly after the new legislation came into effect, the Office of Secretary of Defense/Office of General Counsel issued a legal

opinion concluding that this new legislation, taken in conjunction with the 1985 legal assistance legislation, authorized judge advocates to provide representational legal assistance to sexual assault victims in the criminal context.<sup>8</sup> This would include attending criminal investigative interviews and interacting with military investigators, prosecutors, and defense counsel. It was within this context that the U.S. Air Force initiated a pilot program for a dedicated contingent of legal advocates for sexual assault victims.

From November 2012 through January 2013, Air Force lawyers developed practice and procedure rules for SVCs and produced a charter document for their program. During December 2012, the Air Force trained sixty of their judge advocates to prepare them to take on the role of SVC. The Air Force drew on the expertise of the National Crime Victim Law Institute (NCVLI), a non-profit legal advocacy organization for crime victims based at Lewis & Clark Law School in Portland, Oregon. The NCVLI helped in the creation of the program and its director was a key part of the training for the first military SVCs.<sup>9</sup> The program officially began on 28 January 2013 and Air Force SVCs immediately began representing sex assault victims.

It didn't take long for these SVCs to have their first significant judicial test. In early 2013, after taking on representation of a rape victim in a case referred to court-martial, an Air Force SVC filed a formal notice of appearance with the trial court in which the SVC invoked limited standing for the victim on any issues involving Military Rule of Evidence (MRE) 412, 513, or 514.<sup>10</sup> During the case's arraignment hearing, the SVC asked the military trial judge, Lt Col Kastenber, to reserve his client's right to present argument through her SVC to the court. The trial judge ruled that the victim had a right to be heard on factual matters, but held that the victim had no standing to present legal argument to the court through her SVC on these matters.

After the trial judge denied the SVC's request for reconsideration on this ruling, the SVC filed a petition with the Air Force Court of Criminal Appeals (AFCCA) for extraordinary relief in the form of a writ

of mandamus, seeking to reverse the trial court's holding. The AFCCA denied the request, citing a lack of jurisdiction to rule on the victim's request through her SVC. The Air Force Judge Advocate General certified the matter for review by the Court of Appeals for the Armed Forces (CAAF). The CAAF's holding and opinion in this matter was a significant early step in defining the SVC role and scope in courts-martial proceedings.<sup>11</sup>

The Court of Appeals for the Armed Forces held that it did have subject matter jurisdiction to hear the matter and issue a decision. The CAAF then held that the victim was not a party to the case. Instead, the victim was characterized as a non-party with "limited participant standing."<sup>12</sup> The CAAF did not issue a writ in the case, but returned it to the trial court with direction to allow the victim to be heard through her SVC on issues involving MRE 412 or 513.<sup>13</sup> While the opinion did not go as far as the victim and her SVC requested, it was ground-breaking controlling precedent for all military courts, establishing the principle that although a victim is not a party to the case, she is a limited participant, the SVC is her legal representative, and legal arguments on behalf of the victim through her SVC must be considered by the trial court.

The *Kastenber* decision validated the need to respect and protect the rights of sexual assault victims, as well as the appropriateness of giving them a voice through an SVC to advocate for their interests to a trial court. It is important to note, too, that since the CAAF's *Kastenber* decision, significant legislation ensuring victim's rights has passed, now codified at Article 6b of the UCMJ.<sup>14</sup> Article 6b denotes many specific victim rights, and it expressly includes the right of victims to petition military appellate courts for redress.

Meanwhile, feedback on the Air Force SVC Program proved very favorable. By March 2013, there was enough client data for the Air Force to engage the Rand Corporation to conduct victim impact surveys, which showed an extremely high level of client satisfaction.<sup>15</sup>

Congressional support for continuation and expansion of the SVC Program was strong. In May 2013, senators on the Armed Services Committee (SASC)

introduced bipartisan legislation to expand SVC programs to the other services.<sup>16</sup> In June, the Air Force Chief of Staff testified before the SASC and conveyed his intent to continue the program for the Air Force.<sup>17</sup> He noted that responses from victims receiving SVC support had been “overwhelmingly positive.”<sup>18</sup>

By August 2014, the Air Force established a charter to make their SVC pilot program permanent. It provided, in part, that Air Force SVCs would enter into attorney-client relationships with victims to promote clients’ individual interests, even if they were in opposition to government interests and “without regard to how their actions might otherwise affect the Air Force as an institution.”<sup>19</sup> All Air Force SVCs would be supervised by the Air Force Legal Command, and SVCs would be independent from the command and legal offices in the field that the SVCs supported.<sup>20</sup>

On 14 August 2013, Secretary of Defense (SECDEF) Hagel directed the secretaries of the military departments to establish Special Victim Advocate Programs with an initial operating capacity by 1 November 2013, and fully established programs by 1 January 2014.<sup>21</sup> As part of his Directive, SECDEF noted that each department should establish a program best suited for their Service, indicating that Service programs need not have the same organizational structure or policies. However, he did require that each program provide legal advice and representation to victims throughout the justice process.<sup>22</sup>

### **Initiation of the Army SVC Program**

A working group made up of leaders from the Army Legal Assistance Policy and Criminal Law Divisions, as well as the Army JAG Corps’ Personnel, Plans, Training and Operations (PPTO) Division, began meeting in July 2013 to plan the Army SVC Program. The Chiefs of Legal Assistance (CLAs) from various Army installations came together in September 2013 to share information and develop a program plan. Among other products, the CLA meeting built the first training model for future SVCs.

In October 2013, The Judge Advocate General of the U.S. Army (TJAG) announced the guidelines for the Army SVC

Program.<sup>23</sup> As the largest uniformed service in terms of number of personnel, installations, and scope of operations, the Army tailored its plan to draw on its scale and established capabilities to best serve the needs of Army personnel who experienced sexual assault. While the Air Force met its needs through regional SVC offices out of which an assigned SVC would represent victims in the UCMJ process across a designated geographic area, the Army elected to disperse its SVCs to as many installations as possible, allowing SVCs to have immediate face-to-face contact with their victim-clients. The intent was to allow SVCs to advise and advocate for these clients as an integrated, knowledgeable member of the local command and community. The structure of the Army SVC Program also allowed clients to meet with their SVC face-to-face as frequently as required, since they were in the same location. In addition, within the Army, SVCs would also serve as their client’s counsel for all legal assistance issues, ensuring the victim would only have to form one attorney-client relationship with a counsel to represent all their legal interests.

Because eligibility for SVC services would be tied to the client’s ability to receive legal assistance services, it made sense to task legal assistance offices to provide SVC services at their installations. Chiefs of Legal Assistance in SJA offices would supervise SVCs, who would remain a part of their installation or unit OSJA. No new authorizations for SVC positions yet existed, so all SVCs were pulled from the installation legal assistance offices to which they already belonged. In order to mitigate the impact on legal assistance services caused by the removal of personnel for special training and assignment as SVCs, TJAG mobilized twenty reserve judge advocates to provide their services in Army legal assistance offices.<sup>24</sup> The Judge Advocate General also authorized SJAs to limit legal assistance services for retired personnel and their family members, if necessary, but directed them to consider mitigating the impact of these restrictions through creative measures such as providing weekend appointments for retirees and drawing on local reserve JAs to provide these services.<sup>25</sup> The October 2013 announcement also identified an O-6 judge

advocate to serve as the first SVC Program Manager (PM).<sup>26</sup> The SVC PM would work alongside the Office of The Judge Advocate General (OTJAG) Chief of the Legal Assistance Policy Division, who had contributed significantly to the initiation of the program up to that point.

The Army JAG Corps identified training of new SVCs as a priority, and announced an October 2013 SVC certification course for the initial forty-five Army SVCs, so they could be operational by 1 November 2013. Certification training would be required for all new SVCs. The Judge Advocate General announcement characterized the new program as “unprecedented” and noted that it reflected a dedication by the Army to victims of sexual assault, while always ensuring that Soldiers receive fair trials.<sup>27</sup>

On 1 November 2013, as the Army SVC Program came online, TJAG published an SVC Policy Memorandum that further defined the parameters of the program.<sup>28</sup> It stressed:

- The primary duty of SVCs was to zealously represent sexual assault victims within an attorney-client relationship.
- Special Victim Counsel would provide advice and representation for their clients throughout the military justice process. They would advocate for the interests and desires of their clients, even if these did not align with the interest of the government.
- The intent of the program was to build victim resiliency.
- Special Victim Counsel would conduct themselves in a professional manner at all times.

### **Special Victim Counsel Legislation**

Special Victim Counsel legislation, codified at 10 USC 1044e, was signed into law on 23 December 2013 and provided authorization for SVC services as well as mandating each military Service provide SVCs to eligible victims who requested representation.<sup>29</sup> The legislation did the following:

- Required the Services to provide SVCs for eligible victims of a sexual offense,

whether the victim made a restricted or unrestricted report of the assault.

- Described eligible victims as those who could receive legal assistance services.
- Defined a sexual offense as a violation of Articles 120, 120a, 102b, 120c, or 125 of the UCMJ, or an attempt to commit any of those offenses. The offenses defined by those UCMJ articles cover a spectrum of sexual assaults, from rape to indecent touching, indecent exposure, and forcible sodomy. Also included are any sex assaults against child victims.<sup>30</sup>
- Specified that the relationship of a victim and their SVC was an attorney/client relationship.
- Required those officials who routinely receive reports of sexual assault to inform the reporting victim of their right to request an SVC or to decline these services.
- Required the Services to provide enhanced specialized training for all prospective SVCs, and that each SVC be certified by their Judge Advocate General as competent to serve in this role.
- Authorized SVCs to provide legal consultation to their clients on a number of issues related to available services and procedures, and to accompany their clients at any proceeding in connection with the reporting, military investigation, and military prosecution of an alleged sexual offense.<sup>31</sup>

### Initial Challenges

As the first Army SVCs began representing sexual assault victims as clients, they faced a number of initial challenges. First, while published Army policy and statutory authorities for SVCs defined their role in broad terms, there was no ready resource for SVCs that defined the scope of their services or that addressed specific technical questions. In response, the SVC Program Office was tasked, in conjunction with the OTJAG Legal Assistance Policy Division, to provide technical guidance and support to SVCs in the field.

Initially, the Army appointed an active duty colonel to act as the SVC PM. Initially, the SVC Program Manager's Office (PMO) was composed of the SVC

PM, supplemented by personnel from the OTJAG Legal Assistance Policy Division. Several months later, activated reserve judge advocates helped staff the SVC PMO, and as active duty authorizations came on-line, it was staffed with a mix of active and reserve personnel.

The SVC PMO established itself as a key component in the technical chain for SVCs in the field. While SVCs would rely on their supervisory Chief of Legal Assistance for help with local issues and general guidance, they could reach out directly to the SVC PMO on systemic issues and policies that affected the whole program, as well as unique issues that perhaps no one had yet encountered or addressed. As an important part of its technical oversight, the PMO created the first SVC Handbook, providing practical information and policy guidance. Among other issues, the handbook addressed victim eligibility, program training and certification requirements, and responsibilities and roles of an SVC. It described the scope of representation memoranda SVC were to complete when establishing an attorney-client relationship with victims. These scope letters would ensure a common understanding between the client and SVC about the role of the SVC, confidentiality of communications, and the circumstances under which representation would end. SVCs needed to quickly reinforce clients' confidence that all communications were private, that SVCs were there to provide sound advice, and that SVCs were responsible for zealously representing their clients' interests. The SVC PM engaged in regularly scheduled meetings with the other Services' SVC managers to discuss common issues, training needs, and share best practices. For instance, early on the Services agreed that the default SVC for each victim would come from the same Service as the victim, not the accused, unless the Services involved agreed that an exception was appropriate. The Army SVC PMO also collected and analyzed statistics, developed certification criteria for SVCs, and developed, in conjunction with The Judge Advocate General's Legal Center and School (TJAGLCS), specialized training courses.

In October 2013, the Army conducted its first SVC certification course at TJAGLCS in Charlottesville. It offered a special curriculum developed specifically for new SVCs. As this course was about to get underway, TJAG—at that time, LTG Flora D. Darpino—noted in a release, “Training of our future [SVCs] is of the highest priority” and she required completion of this training as a prerequisite to assuming SVC duties.<sup>32</sup> She also said, “Future [SVCs] will be selected for their knowledge, skill, and experience in both legal assistance and military justice.”<sup>33</sup>

The TJAGLCS faculty took on the course manager role for SVC certification. The course offered training on SVC roles and responsibilities, professional responsibility, victim psychology, investigative issues, victim services, relevant MREs, and included a presentation from an experienced Air Force SVC on lessons learned. Each of the next ten semi-annual certification courses built on its predecessors. The improvements developed by the course managers, SVC PM, and Chief of Legal Assistance Policy Division in post-course after action reviews have been reflected in the very high approval comments on student course evaluation feedback. To date, the Army has provided certification training to 779 Army SVCs, and has trained the majority of SVCs from the other Services.

While the program initially filled SVC slots by using judge advocates in legal assistance positions, the program recognized early in its existence that permanent authorizations for SVCs were critical to sustain it. In conjunction with OTJAG PPTO Division, the SVC PM conducted an analysis of the number of SVCs required at field locations. Based on manpower surveys, the program determined that each SVC should carry no more than twenty-five clients at a given time, in order to ensure high quality of representation. Temporary spikes above that number have occurred, but are not considered sustainable for a long-term. In order to remain within the desired caseload range and serve all clients, Army JAG PPTO pursued forty-eight SVC authorizations. Even in a time of personnel drawdown, the Army saw the value of this new program and created twenty-four MTOE (Modification Table of

Organization and Equipment) positions and twenty-three TDA (Tables of Distribution and Allowances) positions for SVC duty in the Army. From this point on, HQDA used the O-6 Chief of Legal Assistance position as the SVC PM. All these MTOE and TDA authorizations became effective in 2017, although the Army was able to fill TDA positions a year prior in anticipation of them coming online.

Initially, the SVC Program did not authorize child representation. The statutory requirement for representation, enacted shortly after the SVC Program stood up, included dependent children as eligible clients and included all offenses under Article 120c, UCMJ, covering sexual offenses against children. As a result, the Army SVC Program began training SVCs at child representation courses in August 2014. Army SVCs who complete child representation courses in addition to their baseline SVC certification can represent child sexual assault clients, with prior SVC PM permission.

Representation of child clients brings unique challenges and professional responsibility concerns. The child is the client in an attorney-client relationship if the child has the competency to form the relationship. When the child is the client, the SVC is required to provide legal advice to the child and advocate for the desires of the client, provided those desires are not illegal or unethical. This is true even if the SVC believes the child's desires are not in the child's best interests, so long as the child is competent and has the capacity to understand the specific issue. If the child is not competent or does not have the capacity to address the issue, the SVC must look to the appropriate guardian or representative of the child to make decisions on their behalf, which may be a parent, relative, or a court appointed guardian ad litem. It is necessary for the SVC to be able to determine competence and capacity of the child, which is not an easy task, but one which the SVC Program seeks to address through rigorous additional training.

Another problem facing the new Army SVC Program was an inherent, attitudinal barrier among other participants in the system who supported victims and/or the military justice process. While senior

leaders in the JAG Corps, commanders in the field, and SARCs and VAs for the most part embraced the implementation of the program, many trial counsel expressed concern that the attorney-client relationship of the SVC and the victim impaired a trial counsel's ability to build his or her own relationship with a victim. Many defense counsel viewed SVCs as yet another government attorney to oppose them. Some trial judges initially limited the role of SVCs and scheduled trial dates without regard to SVC availability. Also, Criminal Investigation Command (CID) investigators did not appreciate reduced access to victims for immediate questioning, or having limitations on victim interviews due to objections raised on behalf of the victim by their SVC. This sometimes led to acrimony between CID offices and SVCs, which included a number of complaints being lodged by both sides against the other for perceived wrongs.

The solution to these problems were found through program outreach, time, and familiarity. Members of the SVC PMO took action by testifying before the Judicial Proceedings Panel about victims' issues, meeting with and briefing congressional staff personnel, and taking every opportunity to speak at trainings for SJAs, the trial judiciary, military justice practitioners, SARCs, VAs, FAPs, and law enforcement. These engagements reinforced the role of SVCs in protecting victim rights and kept pace with new legislation. The SVC PM investment in engaging with personnel at CID and CID's receptiveness to make policy changes within their organization resulted in better relationships between SVC and CID investigators in the field. The changes made by CID de-emphasized a need for immediate, comprehensive interviews with victims who reported sexual offenses, particularly in those cases where the report was not close in time to the assault. The changes also stressed respect for victims' choices regarding the extent of their participation in the investigative process and the timing of that cooperation.

As time passed and interactions between SVCs and investigators, trial counsel, and judges became routine, an air of normalcy began to emerge. It is fair to say that the military justice system has grown

to accommodate SVC practice, and if there were to be a sudden removal of SVCs, the system would have a difficult time adjusting to their absence.

### **Development of Sexual Assault Victim Law**

As the Army initiated and developed the SVC Program, the law in the area of military victims' rights continued to advance. In addition to the passage of SVC legislation, the 2014 National Defense Authorization Act (NDAA)<sup>34</sup> included other significant changes in support of victims, to include:

- Crime victim rights as part of a new UCMJ Article 6b.
- Changing the pretrial investigation process under Article 32 to a Preliminary Hearing process. The new statutory language explicitly provides that a crime victim has the right to decline to testify at these hearings.
- Amending Article 46 to place limits on defense counsel interviews of victims.
- Allowing victims to submit matters to convening authorities on the issue of clemency.

In May 2014, the Secretary of the Army extended SVC services to Reserve Component Soldiers and their adult family members. The SVC PMO has a USAR officer serving as the Deputy SVC PM for the USAR. The Reserves now have 208 SVCs who are certified after training alongside other active component SVCs at semi-annual certification courses. Reserve SVCs participate in Army regional SVC training and hold their own annual training keyed on reserve issues. They are a vital part of the holistic approach to Army victim support.

The 2015 NDAA<sup>35</sup> included:

- Expanding eligibility for SVC to sexual assault victims in the Reserve Component and National Guard.
- Allowing victims to express their preference to convening authorities as to whether they desire prosecution in military or civilian courts.
- Amending Article 6b of the UCMJ to reflect that SVCs can represent victims and speak for them at proceedings,

as opposed to merely accompanying victims.

- Expanding the privilege under MRE 513 concerning communications between psychotherapists and patients to include other licensed mental health professionals and increasing the burden on a party seeking production or admission of medical records to obtain these records or ask for a judicial *in camera* review.

The 2016 NDAA<sup>36</sup>:

- Modified Article 6b to allow victims to challenge an order to be deposed to a military Court of Criminal Appeals, by petitioning for a writ of mandamus to quash the order. It also expressly allows a victim to petition a military Court of Criminal Appeals to challenge rulings at a preliminary hearing that concerns MRE 412, 513, 514, or 615.
- Authorized the Services to expand SVC representation to DoD civilian employees.<sup>37</sup>
- Required military investigators and trial counsel, before questioning a victim, to inform the victim that they are entitled to the services of an SVC.

The 2017 NDAA<sup>38</sup>:

- Amended Article 46 of the UCMJ to require a defense counsel request to interview a sex assault victim to go through the victim's counsel (if the victim is represented) and codified the victim's right to have their SVC or the trial counsel present at any defense interview.
- Provided that on sentencing, a court-martial shall consider the impact of the offense on "the financial, social, psychological, or medical well-being of any victim of the offense."

As military victim rights law has evolved, Army Special Victim Counsel have been engaged to ensure the law is properly recognized and applied. SVCs do this through motions practice before trial courts and, if necessary, through writs to appellate courts. One example of SVC success in this area involves the changes to MRE 513 from the 2015 NDAA, noted above, which

provides a privilege for mental health records. The change effectively raised the burden for a moving party to obtain an *in camera* review of mental health records of a victim, which are considered privileged without one of the rule's limited exceptions. Although the new rule transformed the process of obtaining mental health records, years of practice under the old rule and questions regarding application of the new rule led to little practical change in the courtroom.

In a writ case reported as *LK v. Acosta & Sanchez*, the Army Court of Criminal Appeals (ACCA) reemphasized the changes to MRE 513 after an SVC filed a petition for a writ of mandamus.<sup>39</sup> At the trial level, the military judge ordered the government to produce a child's mental health records for *in camera* review without first meeting the rule's new requirements. Based on the language in the new MRE 513, the SVC objected to the judge conducting an *in camera* review of the records. When the trial judge denied the objection, the SVC filed a motion for reconsideration, which the trial judge also denied. The SVC then filed a petition for extraordinary relief with ACCA.

In its ruling on the matter, ACCA found, among other things, that the moving party had not met the rule's requirements and that those requirements were a prerequisite to the trial judge conducting an *in camera* review.<sup>40</sup> The court granted the SVC's petition, in part, by setting aside the trial judge's ruling directing *in camera* review of the records.<sup>41</sup> This decision, creating precedent for all Army trial courts, affirmed the legislatively enacted protections extended to victims to better safeguard their privacy interests in their mental health records. The opinion also reemphasized that MRE 513 is a rule of privilege, and should be analyzed as such, rather than a rule of discovery.<sup>42</sup> The writ in this case not only served the interests of the victim-client from that particular court-martial, but changed the practice of law throughout the Army for the benefit of all sexual assault victims with mental health records at issue.

## Current Standards for Army SVC

The greatest asset of the SVC Program is the strength and quality of the Army judge advocates who perform these duties. The strategy implemented since the beginning of the program has been to select SVCs based not only on their work experience, but also on their demonstrated maturity, compassion, and good judgment. That is why all nominations for SVCs originate with officers' SJAs, who know them best and can provide an informed and wise assessment for TJAG's consideration.

At all SVC training, and at any meeting where program personnel speak about SVCs, we emphasize four pillars of SVC success. If an SVC can master these attributes, they can provide their clients with superlative representation. They are:

- **COMPETENCE.** This includes knowing all applicable regulations and the law. Among other areas, SVCs must know the rules pertaining to eligibility for services, subject matter of the SVC Program, restricted versus unrestricted reporting, victim rights under UCMJ Article 6b, Article 32 Preliminary Hearings, collateral misconduct by victims, investigative procedures and evidence collection (especially as it pertains to phones and digital media), expedited transfer, retaliation/ostracism, communicating victims' preferences for venue and disposition, courts-martial procedures, non-judicial punishment, administrative actions, victims' rights under MRE 412 and 513, motions practice, ethics and professional responsibility, local court rules on an SVC's ability to be heard, appropriate actions for ACCA/CAAF writs and writ filing procedures, and victims' rights during the sentencing and post-trial phases of courts-martial. Special Victim Counsel must be able to spot issues and engage their technical chain within the JAG Corps when assistance is necessary. Competence also includes taking advantage of training and experience to develop skills in client interviewing and consultation, honing oral and written advocacy skills, and learning about victim psychology and applying

this learning to better interact with and relate to clients.

- **AVAILABILITY.** Timely response to reports of sexual assault is often critical to accomplish required command, medical, investigatory, and prosecutorial actions. These reports can come at any time and often reports made contemporaneously or immediately after an assault are made at odd hours of the night, during weekends or holiday periods. Special Victim Counsel should make contact with new clients as soon as possible in order to provide the best assistance to them while significant response efforts are being set in motion.<sup>43</sup> Preferably, this contact should be face to face. Special Victim Counsel should work with their clients to make themselves available to investigators and counsel, when it is in the best interest of the victim to pursue a complete investigation and administrative or criminal action against the accused.
- **MANAGING EXPECTATIONS.** Special Victim Counsel must explain their role to their clients at the initial meeting or first communication. Clients should understand the attorney-client relationship with the SVC, the concept of privileged communication, who asserts the privilege, and when it does not apply. Special Victim Counsel should inform clients of the scope of representation, and when representation terminates. The client must understand the services an SVC can provide, and those an SVC is not able to offer. Special Victim Counsel should employ a scope of representation memo to memorialize these concepts. Special Victim Counsel should foster the expectation in the client that if the SVC, at a later date, leaves military service or assumes new duties incompatible with continued representation of the victim, it will be necessary for the victim to form a new relationship with a new SVC. Special Victim Counsel must clearly explain to clients what they should expect to occur depending on the type of report and facts of the client's case. Special Victim Counsel should also manage the expectations of other participants in the response system by communicating the desires of the client (with client's consent) to commanders,

investigators, counsel, and others who provide services to victims.

- **PROFESSIONALISM.** Special Victim Counsel must always act in a professional manner when interacting with other personnel responding to sexual assault complaints, including commanders, investigators, counsel for the government and the accused, family members, and those providing services to victims. Special Victim Counsel must always treat everyone with dignity and respect. Part of professionalism is fostering good relationships with other participants in the sexual assault response system. Special Victim Counsel should reach out to these personnel in their community and seek to include them in professional meetings and joint training sessions so that when they meet during a time of crisis for a client, a good relationship already exists. Many victims understandably have significant emotional responses to the trauma they have experienced. Through competence, availability, expectation management, and professional engagement, an SVC can help relieve some of a client's anxiety. Special Victim Counsel must be aware they may be exposed to disturbing descriptions of events from many clients. Special Victim Counsel should not let their own emotional responses compromise their interactions with their clients or other professionals. Repeated exposure to layers of descriptive trauma can cause stress for those representing trauma victims. Therefore, it is important for SVCs to live a work-life balance that includes time with family, exercise, and other breaks from their experiences at work. It is also important for SVCs to recognize when to seek behavioral health services for themselves and not worry about any stigma from seeking such support.

The exceptional work done by all SVCs since the beginning of the program has made an impact on others in embracing a commitment to protecting victim rights. Special Victim Counsel have established their appropriate place and boundaries in working with investigators, prosecutors and military judges. They have become

a respected, go-to resource for SARCs and VAs as they represent the interests of victims. Contrary to initial fears, SVCs are no longer seen as a source of inefficiency or confusion, but are viewed as a normal, and often vital, participant in the investigative and disciplinary process in sexual assault cases.

### **Current Challenges and Program Responses to Those Challenges**

Although the SVC Program has proven its value to victims and established itself within the military justice process, challenges remain. Decentralization of SVC services at the installation level has been a positive way to put SVCs closer to their clients, but it has also resulted in an imbalance in workload for SVCs, with some SVCs at busy locations representing too many clients, while SVCs at other locations represent too few. At times there is a need to cross-level work between nearby installations to create better workload balance. Also, when a conflict prevents a local SVC from representing a victim, or a victim leaves the installation due to PCS, ETS, or an expedited transfer, there often is a need to detail a new SVC at the client's new location or de-conflict representation.

As a solution to the above issues, the program obtained approval from TJAG to appoint five geographic SVC Regional Managers (RMs). Nothing about local detailing of SVC clients changed with the advent of RMs, however, the RMs have authority to detail SVCs in authorized positions to cases at, or originating from, other installations. The ideal method for this is to find the closest SVC to the client's location, so long as the SVC is not already over-capacity. The RMs can also detail cases among nearby installations to cross-level and balance out SVC workloads. This should enhance the efficiency of the SVC system by reducing travel and maximizing the utility of our SVCs, who are a valuable but limited resource.

In addition to functioning as a cross-installation detailing authority, RMs can fulfill a number of other roles as middle-managers in the SVC technical chain. They can provide technical advice to SVCs in their region, collect and analyze statistical reports, plan and execute annual regional



training, provide expertise on motions and writ practice, and serve as facilitators and presenters at SVC certification training. While these RM positions have just come online, they are already proving to be a tremendous asset to the efficiency of the program and support to other SVC.

Another challenge has been the amount of travel required for SVCs due to client movement. As an example, if a victim of sexual assault at Installation A obtains an expedited transfer after reporting an offense, and arrives at new Installation B on the other side of the country (or world), the victim most likely will seek SVC representation at the new Installation B because local representation is better. However, as the accused will remain at Installation A, and a trial will be held at that location, the SVC at the new location would need to travel back to Installation A, not only for the trial itself, but potentially multiple times for investigative interviews, prosecutorial or defense interviews, an Article 32 Preliminary Hearing, arraignment, motions hearings, and discussions with the chain of command and SJA. If an SVC has multiple clients from other installations, TDY can be extensive and time-consuming.

The solution comes from recognition that a victim who moves after reporting an

offense, might need two SVCs, one based at the trial location to continue in-court representation, and one at the victim's new location, to assist the victim with any issues at the new installation and help direct the victim to local service providers. While this increases the number of clients SVCs represent, it reduces TDY and increases the time SVCs are available at their home station.

During site visits conducted by the SVC PM to installations, we frequently meet with CID to assess whether the SVC-CID relationship is positive and whether there are any friction points. One enduring issue is tension between victims and investigators about access to victims' cell phones. On occasion, this tension rose to the level of physical confrontation between victims and CID agents trying to seize their phones. In some cases, cell phones contain relevant information about a sexual assault and are of use to the investigation. However, phones can also contain a substantial amount of personal information that is not relevant to the report of sexual assault, the release of which would constitute an infringement on the privacy interests of the victim. Also, once information is released to investigators, it is almost certainly discoverable, and likely to be revealed or provided to the accused. It is very difficult

to parse out relevant evidence from private information that should be protected from disclosure. Victims are also troubled by the physical loss of their phone for extended periods of time when it is collected as evidence—phones are expensive and not easy for victims to replace, and many Soldiers depend on them heavily.

Through SVC PMO engagement, investigators have become increasingly sensitive to victims' concerns about cell phone confiscation and information privacy. Investigators now pursue a consent to search authorization from victims for their phones, as opposed to a demand that phones be surrendered. Technology continues to advance, and agents can now obtain consent to do a targeted extraction of a category of information on a phone, for instance, all text messages or all photos. Of course, SVCs must be vigilant that additional information is not extracted, as once information is collected by investigators it is very difficult to put the genie back in the bottle. As an alternative, screen shots of phone information may not be admissible in court proceedings, but can sometimes provide probable cause to allow agents to obtain a search or seizure authorization for the accused's phone.

Special Victim Counsel advise victims on the need for evidence collection related to phones in order to allow victims to make an informed decision on whether, and to what degree, to turn over their phone information. Sometimes a victim needs to hear from a trusted source that failure to turn over potential evidence to an investigator could result in an investigative or prosecutorial decision adverse to the victim.

Another area of continuing challenge for SVCs is representation of children. As noted earlier, it is difficult for an SVC, who may have very little experience with children or child psychology, to determine the competence or capacity of their child clients. And if a child-client is not competent, and a parent is not available or in an appropriate position to make decisions on their child's behalf, it can be difficult to secure a guardian ad litem or another official to act on the child's behalf. At this time, the best solution for SVCs is to utilize military FAP personnel and civilian child protective services, who can act when it is

necessary to remove a child from parents who are not acting in their child's interest, or find sources of guardianship for children in need.

## The Future of the Program

Despite initial doubts and challenges, some of which we continue to address, the Army SVC Program has proven to be tremendously successful. Current and former victim-clients consistently cite their SVC representation as contributing greatly to both their short-term and long-term resiliency. Special Victim Counsel have given victims the ability to engage in the military justice process with confidence that their dignity, privacy, and interests are important and will be respected. The confidence that SVCs provide to victims will likely, over time, help increase the percentage of victims who choose to immediately report offenses and engage in disciplinary actions against offenders.

The Army implemented the SVC Program in a thoughtful manner, one that endeavored to best serve Soldiers and their family members who are victims of sexual assault. The program has adapted and evolved in a positive direction during its five years of existence, and will continue to address emerging victim issues. We owe that to our victim-clients and to our military justice system. **TAL**

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## Notes

1. COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE, REPORT (2001), at 3, <https://nimj.org/wp-content/uploads/topics/cox-commission/coxcommission2001/2001%20Report%20of%20the%20Commission%20on%20the%2050th%20Anniversary%20of%20the%20Uniform%20Code%20of%20Military%20Justice%20282001%20Cox%20Commission%20Report%29.pdf>.
2. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY (FY2012), at 16.
3. *Id.*
4. *Id.*
5. Essa Yip, *The Invisible War Impacting Efforts to Combat Military Sexual Assault*, MSNBC (Sep. 12, 2013), <http://www.msnbc.com/jansing-co/the-invisible-war-impacting-efforts-comb>.

6. Lt Col Rhea A. Lagano, MAJ Sarah W. Edmundson, and MAJ L. Dustin Grant, *The Air Force SVC Program: The First Five Years*, 44 REPORTER, no. 3, 2017, at 31, 32, citing Dep't of Def. Authorization Act of 1985, Pub. L. No. 98-525, § 651 (1984).

7. *Id.*, citing Nat'l Def. Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 581 (2011) [hereinafter FY2012 NDAA].

8. *Id.*, citing Memorandum from Gen. Counsel, Office of the Gen. Counsel of the Dep't of Def., subject: Legal Assistance to Victims of Sexual Assault (9 Nov. 2012).

9. Jennifer Hlad, *Air Force to Assign Counsel for Victims of Sexual Assault*, STARS AND STRIPES (Jan 9, 2013), <https://www.stripes.com/news/air-force-to-assign-counsel-for-victims-of-sex-assault-1.203281>.

10. Military Rule of Evidence (MRE) 412 is the military "rape shield" evidentiary rule that generally prohibits evidence of a sexual assault victim's past sexual history, unless an exception applies; MRE 513 is a privilege rule concerning behavioral health records; and, MRE 514 is a privilege rule for communications between a sexual assault victim and victim advocate.

11. LRM v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013).

12. *Id.* at 11.

13. *Id.* at 21-22.

14. Nat'l Def. Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701 (2013) [hereinafter FY2014 NDAA].

15. Air Force Special Victims' Counsel Program Victim Impact Survey (2013), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/04-SVC\\_VictimAccess/20141114/04\\_USAF\\_SVCProgram\\_VictimImpactSurvey\\_201303.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/04-SVC_VictimAccess/20141114/04_USAF_SVCProgram_VictimImpactSurvey_201303.pdf).

16. Press Release, Patty Murray, Senator, U.S. Senate, Air Force Chief of Staff Praises Special Victims' Counsel Pilot Program (Jun 4, 2013), <https://www.murray.senate.gov/public/index.cfm/newsreleases?ID=AAF3E8E1-BB79-49D6-8EA2-620A94836E8A>.

17. *Id.*

18. *Id.*

19. Air Force Special Victims' Counsel Charter, 2013, [http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub\\_Committee/20140226\\_VS/Materials\\_Related/04\\_USAF\\_SpecialVictimsCounsel\\_Charter.pdf](http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/04_USAF_SpecialVictimsCounsel_Charter.pdf).

20. *Id.*

21. Memorandum from Sec'y of Def. to Secretaries of the Military Departments, et al, subject: Sexual Assault Prevention and Response (14 Aug 2013), [http://sapr.mil/public/docs/news/SECDEF\\_Memo\\_SAPR\\_Initiatives\\_20130814.pdf](http://sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf).

22. *Id.*

23. LTG Flora D. Darpino, TJAG Sends, Volume 39-02, 15 Oct 2013, [http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub\\_Committee/20140226\\_VS/Materials\\_Related/03\\_USA\\_TJAGSends\\_39\\_02\\_SpecialVictimAdvocateProgram\\_20131015.pdf](http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03_USA_TJAGSends_39_02_SpecialVictimAdvocateProgram_20131015.pdf).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. LTG Flora D. Darpino, Office of The Judge Advocate General, Policy Memorandum #14-01, 1 Nov 2013, [http://jpp.whs.mil/Public/docs/RFI/Set\\_1/Encl13-25/RFI\\_Enclosure\\_Q21\\_USA.pdf](http://jpp.whs.mil/Public/docs/RFI/Set_1/Encl13-25/RFI_Enclosure_Q21_USA.pdf).

29. FY2014 NDAA, *supra* note 14.

30. Article 120, UCMJ, addresses sexual assaults that include penetrative offenses, as well as touching of parts of another person's body for sexual gratification; Article 120a, UCMJ, addresses stalking; Article 120b, UCMJ, concerns sexual assaults against a child; and, Article 120c, UCMJ, addresses "other sexual misconduct." At the time of passage of the statute, Article 125 criminalized forcible sodomy.

31. The statute has since been amended to allow SVCs to represent their clients and speak for them at proceedings. See Nat'l Def. Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 534 (2014).

32. LTG Darpino, TJAG Sends, *supra* note 23.

33. *Id.*

34. FY2014 NDAA, *supra* note 14.

35. FY2015 NDAA, *supra* note 31.

36. Nat'l Def. Authorization Act for Fiscal Year 2016, Pub L. No. 114-92 (2015) [hereinafter FY2016 NDAA].

37. The Acting Secretary of the Army authorized Army SVCs to represent DoD civilians within the scope of 10 USC 1044e, on 1 May 2017. [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/ARN3282\\_AD2017-16\\_Final.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3282_AD2017-16_Final.pdf).

38. Nat'l Def. Authorization Act for Fiscal Year 2017, Pub L. No. 114-328 (2016).

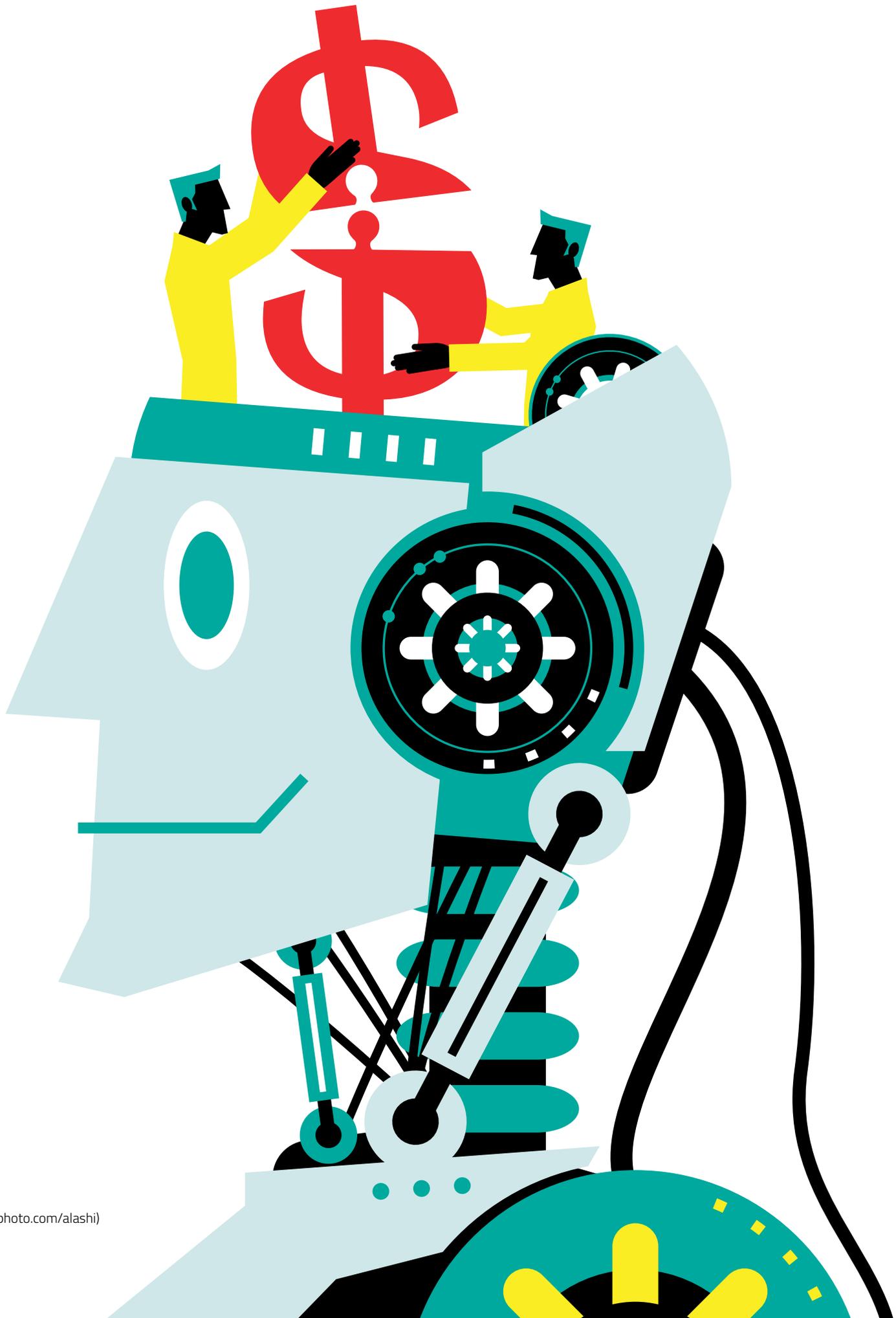
39. LK v. Acosta & Sanchez, 76 M.J. 611 (A. Ct. Crim. App. 2017).

40. *Id.* at 13.

41. *Id.* at 14.

42. *Id.* at 1.

43. The Army SVC OPM issues "smart" phones to all SVCs for official use. This allows SVCs to receive and send client calls whenever necessary, and also allows SVC communication with clients via text messaging.



(Credit: istockphoto.com/alashi)

## No. 5

# Innovation Acquisition Practices in the Age of AI

*By Major Andrew S. Bowne, USAF*

Upon his confirmation as the Assistant Secretary of the Air Force (Acquisition, Technology & Logistics), Dr. Will Roper issued a memorandum to the acquisition workforce, proclaiming, “artificial intelligence (AI) will revolutionize warfare.”<sup>1</sup> He stressed the importance of networking, data, and software in pioneering a new warfighting domain.<sup>2</sup> While the efforts of the Air Force in air, space, and cyberspace have tightened the observe–orient–decide–act (OODA) loop, efforts in the new domain of AI “will likely draw this loop into a knot of unprecedented decision speed.”<sup>3</sup>

Doctor Roper is not alone in his vision of the near future of the military and the starring role AI will play. Artificial intelligence has been described by science and strategy experts as a revolutionary technology, changing the way wars are fought.<sup>4</sup> The stand-up of the Army Futures Command, the announcement of the Joint Artificial Intelligence Center, the 2018 National Defense Strategy, and the Fiscal Year (FY) 2019 National Defense Authorization Act (NDAA) all demonstrate that the Department of Defense (DoD) is ready to enter into this new domain. It can be said, however, that the DoD’s realization of the importance of AI is late; the U.S.’s near-peer competitors have elevated AI to strategic priorities, with China and Russia as leaders in the field.<sup>5</sup> Consequently, AI, along with autonomous weapons and robotics, is the focus on the DoD’s Third Offset Strategy to maintain a technological advantage over military capabilities of near-peer competitors.<sup>6</sup> However,

while the intent to build national security capabilities in AI is clear, questions remain as to how the DoD will meet its strategic objectives through its acquisition efforts. Acquisition attorneys can provide value to requiring activities and their contracting office by understanding the technical possibilities of AI, considering the ethical and legal implications of such acquisition, and knowing the acquisition tools available to meet these challenges.

### **What is AI?**

Despite the recent attention and the DoD’s embrace of AI, the technology and application remains shrouded in misunderstanding and vague notions of HAL 9000 and the Terminator. There is no universally accepted definition of AI, though that is not for lack of trying.<sup>7</sup> In the FY2019 NDAA, Congress tasked the Secretary of Defense to delineate a definition of the term “artificial intelligence” for use within the department.<sup>8</sup> Congress provided working definitions of various forms of AI:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring

human-like perception, cognition, planning, learning, communication, or physical action.

3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.
5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.<sup>9</sup>

This broad definition covers many current research and development (R&D) projects underway throughout the DoD and other federal agencies. With many applications of AI ranging from the already ubiquitous *Siri* or *Alexa*, to predicting maintenance requirements of vehicles, to the revolutionary uses of autonomous weapon systems, AI—as we know it and as we foresee it developing—will likely permeate our everyday lives, and fundamentally change how the DoD operates. Artificial intelligence-enabled software is expected to be particularly helpful in intelligence, processing large amounts of data, such as video footage from a remotely piloted aircraft (RPA) to free human analysts to make decisions based on the data.<sup>10</sup> Such work was the focus of the Algorithmic Warfare Cross Functional Team, known as Project Maven, a DoD partnership with Google’s AI team. This contract resulted in protests by Google employees, who opposed the use of its technology for war-fighting efforts, and ultimately led Google to decide not to renew the contract.<sup>11</sup> This episode illustrates the uphill battle the DoD faces in leveraging the commercial sector—especially Silicon Valley technology firms that do not typically compete for government contracts—in its pursuit of keeping up with Russia and China. Compounding the problem is the relative lack of a coherent AI acquisition and adoption strategy when juxtaposed to its competitors.

### Our “Sputnik Moment”

China and Russia have both articulated their plans for developing AI. Vladimir Putin stated that AI leadership was a means to become the leader of the world.<sup>12</sup> China has estimated that they can boost economic growth with AI by twenty-six percent by 2030.<sup>13</sup> Both countries are striving to be the dominant power in AI and are utilizing the blurred line between private and public industry in their countries, which is very different from the commercial sector and government procurement system in the U.S. In both China and Russia, there is little, if any, distinction between defense and commercial sectors.<sup>14</sup> Additionally, China is acquiring AI expertise from the U.S., funding over \$1 billion in venture capital in U.S.-based tech firms since 2010.<sup>15</sup>

Because of the capabilities of AI, and the anticipated uses of such capabilities by China and Russia, experts have sounded the alarm, including former Deputy Secretary of Defense Bob Work, who claimed AI is in a “Sputnik Moment” akin to the Cold War’s space race.<sup>16</sup> Like the space race, supremacy in the AI domain cannot be won by the DoD alone—the defense industrial base, augmented by non-traditional contractors such as technology firms, must be leveraged by the government.

### Obstacles to AI Acquisition

There are several challenges the DoD must overcome to remain competitive in the AI domain. The first is understanding the potential of AI and determining the legal and ethical restrictions on the use of such technology. In order to do so, requiring activities must agree on concrete definitions of terms such as *AI* and *autonomy* prior to drafting requirements.<sup>17</sup> Beyond communicating with potential offerors what the requirements are, definitions are necessary to conduct a legal review of any new weapon system. A legal review of the intended acquisition or procurement of weapons or weapon systems is required by the DoD Directive 5000.01, *The Defense Acquisition System*.<sup>18</sup> Such review must ensure compliance with the laws of war.<sup>19</sup> Understanding the capabilities of AI, particularly autonomous systems, is challenging to experts in the field; lawyers may require

training or consultation with such experts to ensure that the review is sufficient.

Perhaps the most challenging sector of AI in terms of ensuring legal compliance with the laws of war is that which includes lethal autonomous weapons systems (LAWS). Defined as “AI systems capable of independently identifying a target and employing an onboard weapon system to engage and destroy it with no human interaction,” LAWS are one special class of AI that poses a host of legal questions.<sup>20</sup> Elon Musk has warned that LAWS will “permit armed conflict to be fought at a scale greater than ever, and at timescales faster than humans comprehend.”<sup>21</sup> While the United Nations struggles to define, let alone establish restrictions on the development of LAWS,<sup>22</sup> the U.S. must consider its position on how much control it is willing to cede to AI.<sup>23</sup> While some may argue that the U.S. will be left behind in the AI arms race if it limits its use of AI by keeping humans “in the loop” (requiring human approval prior to the system carrying out an action),<sup>24</sup> such decisions have yet to be made by the international community.

While the legal and ethical dilemmas posed by LAWS is worth considering, many AI applications short of LAWS are being procured by the federal government already. The fundamental question facing current AI acquisition is whether the acquisition system can keep up. Due to the pace of innovation in AI and the rate technology diffuses across international boundaries, any advance in technology resulting in fielding new military capabilities is likely to be short-lived; it is unlikely that any technology advantage in AI will last more than two to five years given the level of competition.<sup>25</sup> Not coincidentally, the topic that has taken up more time and energy within Congress and the Pentagon than AI in recent years is acquisition reform.<sup>26</sup> Much of the reform that has taken place has been for speeding up the lethargic pace of defense acquisitions and removing regulatory and bureaucratic roadblocks that hinder the DoD’s access to the commercial sector, particularly in Third Offset technologies like AI. Unlike most major defense-related technologies in the past, AI development is led by civilian companies; thus, to achieve success in AI acquisition, these reforms are

necessary. Because private sector funding dwarfs current government R&D,<sup>27</sup> the DoD must leverage the commercial sector to achieve its AI and wider strategic goals. Attorneys should understand the potential obstacles to engaging with the commercial sector. The highest hurdles are attracting industry to participate with the DoD and then overcoming the traditional acquisition system's red tape. These are not mutually exclusive; much of the recent acquisition reform is focused on providing the acquisition corps tools to bypass lengthy, costly, and burdensome procurement laws and regulations in order to become a more attractive customer.

By knowing the tools and innovative business practices available to the DoD to attract the commercial sector and develop, acquire, and field new AI applications at high speed, attorneys can help shape the acquisition strategy to align with the National Defense Strategy. Under the traditional procurement system, governed by a system of statutes and regulations, such as the Federal Acquisition Regulation (FAR) and its supplements, common complaints from industry are that government acquisition is too slow, rigid, overbearing, and expensive.<sup>28</sup> One potential tool to address these complaints is the DoD's other transaction authority (OTA) under 10 U.S.C. § 2371b. While OTAs are not new,<sup>29</sup> the authority has been expanded several times since the FY2016 NDAA,<sup>30</sup> and OTAs are now experiencing a renaissance within the DoD. Because OTAs are not encumbered by many procurement statutes or the FAR, the DoD can enter into agreements with the commercial sector in much the same way as a commercial buyer. The agreements can be negotiated and tailored to the requirements, while bypassing restrictive compliance regulations and expensive accounting systems. Importantly, the intellectual property (IP) requirements under the Bayh-Dole Act and Defense Federal Acquisition Regulation Supplement (DFARS) Part 227 that force technology firms to hand over IP to the government do not apply under section 2371b. For technology firms developing certain AI applications, IP could be that firm's only asset—agreeing to provide unlimited rights to the government could result in corporate suicide. The freedom to

deviate from the rigid IP rules under traditional contracting procedures could be the difference between a firm choosing to enter into an agreement with the DoD or turning to purely commercial pursuits.

Additionally, because the Competition in Contracting Act (CICA) does not apply to OTAs, the timeline between the request for proposal (or other solicitation method) and award can be significantly reduced.<sup>31</sup> While section 2371b authorizes the DoD to enter into an agreement for a prototype that enhances mission effectiveness, the term prototype is not defined.<sup>32</sup> The DoD has interpreted prototype broadly to include hardware, software, and even business practices adapted to military use. Moreover, section 2371b(f) provides for the option to award a follow-on OTA or contract for production of the prototype without competition, provided the original OTA was competed and the agreement provided for a follow-on option, and the prototype project was successfully completed.<sup>33</sup> Given the possibility to bypass many barriers to commercial participation and a clear path to developing and fielding emerging technology through use of section 2371b, the DoD should continue to embrace and expand its use of OTAs for AI acquisition. An attorney well-versed in this alternative acquisition method, in both its possibilities and its pitfalls, will be able to effectively advise requiring activities, program managers, and contract officers in AI procurements.

Other potential acquisition tools to consider for AI acquisition are section 804 authority—which permits rapid acquisition and rapid fielding for middle tier programs intended to be completed in two to five years<sup>34</sup>—and section 806 authority—which allows the Secretary of Defense to, under certain circumstances, waive any provision of acquisition law or regulation if the acquisition of the capability is in the vital national security interest of the U.S.<sup>35</sup> These authorities help bypass parts or all of the programmatic requirements under DoD Directive 5000.02, leading to faster acquisition timelines. When contracting with nontraditional technology firms that are performing AI R&D, rapid acquisition is critical. Obtaining funding is necessary for start-ups to survive. Long acquisition lead times in the range of years can limit

competition as cash-starved start-ups lack the capital to stay in business throughout the source selection process of many traditional procurements. For more established tech firms with no funding concerns, the fear becomes that they will look outside the federal government for business, potentially to near-peer competitors. Limiting programmatic requirements can help ensure funding goes to the most innovative solutions, rather than simply the biggest contractor.

However, even if the DoD fully embraces the tools made available to it through recent acquisition reform, it still has to attract businesses like Google to develop technology such as Project Maven. Overcoming public perception and employee protests will have to be a part of the DoD's overall AI acquisition strategy. To help address that issue, the DoD has stood up several organizations that focus on building relationships with non-traditional defense contractors from Silicon Valley, Austin, Boston, and other tech hotbeds. The Defense Innovation Unit (DIU) was a pioneer in this field, and the Army is embracing the concept with its newly stood-up Army Futures Command in a skyscraper in downtown Austin, Texas, rather than inside the wire of an Army post. Another organization within the Pentagon that utilizes these new acquisition tools to fast-track the development of military applications of commercially available technologies is the Strategic Capabilities Office (SCO).<sup>36</sup> While much of the SCO's portfolio is classified, it is known as the initial phase of the Third Offset Strategy.<sup>37</sup>

Recent successes in attracting commercial start-ups by organizations such as the DIU has come from competitions where the DoD can evaluate multiple prototypes from industry, and the firm can claim primacy in that particular market area.<sup>38</sup> For start-ups, recognition as the standard-bearer is "a more valuable incentive than return on investment, which is why competitors in the DARPA robotics challenge were willing to spend a collective \$85 million to a win \$1 million prize."<sup>39</sup> These contests can be carried out under a simple OTA to increase interest in the commercial sector in working with the DoD, and they can provide the DoD with an opportunity to see what

advancements the commercial sector has made in AI that would be worthwhile to pursue and adapt to military purposes.

## Forming an AI Acquisition Strategy

While the previously discussed acquisition tools will assist the DoD in procuring discrete AI applications, it is important for the DoD to develop an overarching AI acquisition strategy. To start, requiring activities should procure AI applications with a purpose. Before acquisition of new AI capabilities, the requiring activities should understand what the AI will do and how those it will be incorporated into doctrine, as well as ensure interoperability with existing systems. The key to leveraging AI to meet the National Defense Strategy is not to simply acquire AI and then learn what it does and field it in the future. Adopting and fielding AI faster than competitors is essential to maintaining a technological advantage, however incremental and temporary that advantage may be.

To provide sound counsel, acquisition attorneys should become conversant with the legal and ethical issues posed by the advancement of AI technology. From the initial drafting of requirements through award, attorneys can help navigate the various issues that face the program manager and contracting officer in procuring AI. Mastering the acquisition tools available to meet this national security priority is critical to maintaining a technological advantage in this new arms race. **TAL**

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## Notes

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5. *See* DANIEL S. HOADLEY & NATHAN J. LUCAS, CONG. RESEARCH SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 17-21 (2018).
6. JESSE ELLMAN, LISA SAMP & GABRIEL COLL, CTR. FOR STRATEGIC & INT'L STUDIES, ASSESSING THE THIRD OFFSET STRATEGY 3 (2017). The "Third Offset Strategy" is the DoD's focused efforts to ensure "the ability of the

United States to project military power in the face of an emergent suite of advanced military capabilities" such as AI. *Id.* at 1.

7. *See* HOADLEY & LUCAS, *supra* note 5, at 1, 23.
8. Nat'l Def. Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 238, 132 Stat. 1636 (2018) [hereinafter FY2019 NDAA].
9. *Id.*
10. HOADLEY & LUCAS, *supra* note 5, at 9.
11. Palmer Lucky & Trae Stevens, Opinion, *Silicon Valley should Stop Ostracizing the Military*, WASH. POST (Aug. 8, 2018), [https://www.washingtonpost.com/opinions/silicon-valley-should-stop-ostracizing-the-military/2018/08/08/7a7e0658-974f-11e8-80e1-00e80e1fdf43\\_story.html?noredirect=on&utm\\_term=.eb54ad0fbb2a](https://www.washingtonpost.com/opinions/silicon-valley-should-stop-ostracizing-the-military/2018/08/08/7a7e0658-974f-11e8-80e1-00e80e1fdf43_story.html?noredirect=on&utm_term=.eb54ad0fbb2a).
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13. Colin Clark, *Our Artificial Intelligence 'Sputnik Moment' is Now: Eric Schmidt & Bob Work*, in FALLING BEHIND, DO D SCRAMBLES TO BUY TECH FASTER 14 (2018).
14. Andrew Hunter, *A Strategic Approach to Defense Investment*, CTR. FOR STRATEGIC & INT'L STUDIES (Mar. 26, 2018).
15. HOADLEY & LUCAS, *supra* note 5, at 19.
16. Clark, *supra* note 13, at 14.
17. Connie Lee, *Army to Pursue 'With Urgency' Autonomous Systems Strategy*, NAT'L DEF. (June 1, 2018), <https://www.roboticresearch.com/news/army-to-pursue-with-urgency-autonomous-systems-strategy/>.
18. DoD LAW OF WAR MANUAL 337 (June 2015, updated Dec. 2016); U.S. DEP'T OF DEF., DIR. 5000.01, THE DEFENSE ACQUISITION SYSTEM, para. E1.1.15 (12 May 2003, certified as current as of Nov. 20, 2007) [hereinafter DoDD 5000.01].
19. DoDD 5000.01.
20. HOADLEY & LUCAS, *supra* note 5, at 12.
21. *Id.* at 1.
22. *See id.* at 23.
23. The current U.S. policy is found in DoD DIRECTIVE 3000.09, *Autonomy in Weapon Systems* (Nov. 21, 2012). The Directive states that it is DoD policy that "[a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force." *Id.* at para. 4a.
24. *See* SCHARRE, *supra* note 4, at 29.
25. *See* ELLMAN ET AL., *supra* note 6, at 1.
26. From Fiscal Years 2016–2018, "National Defense Authorization Act (NDAA) titles specifically related to acquisition reform contained an average of 82 provisions (247 in total), compared to an average of 47 such provisions (466 in total) in the NDAs for the preceding 10 years." MOSHE SCHWARTZ & HEIDI PETERS, CONG. RESEARCH SERV., R45068, ACQUISITION REFORM IN THE FY2016–2018 NATIONAL DEFENSE AUTHORIZATION ACTS (NDAs) 1-2 (2018).
27. "There are multiple Silicon Valley and Chinese companies who each spend more annually on AI R&D than the entire United States government does on R&D for all of mathematics and computer science combined." Gregory C. Allen & Taniel Chan, *Artificial Intelligence and National Security*, BULLETIN OF THE ATOMIC SCIENTISTS (Feb. 21, 2018).

28. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-644, MILITARY ACQUISITIONS, DOD IS TAKING STEP TO ADDRESS CHALLENGES FACED BY CERTAIN COMPANIES, (2017), at 9.

29. Other Transaction Authority was first granted to the National Aeronautics and Space Administration (NASA) in 1958 to permit the new agency to enter into agreements with commercial entities outside of the procurement system in order to respond to the Soviet launch of Sputnik. Space Act, Pub. L. No. 85-568, 72 Stat. 426 (1958).
30. *See* Nat'l Def. Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 815, 129 Stat. 726, 893 (2015) [hereinafter FY2016 NDAA]; Nat'l Def. Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017) [hereinafter FY2018 NDAA].
31. The Competition in Contract Act (CICA), 41 U.S.C. § 253, sets out timelines for publication, solicitation, and award; requires full and open competition unless an exception applies and written justification is obtained; and provides options to protest the specifications and source selection.
32. 10 U.S.C. § 2371b(a).
33. 10 U.S.C. § 2371b(f); *see also* Oracle America, Inc., Comp. Gen. B-416061, 2018 CPD ¶ \_ (Comp. Gen. May 31, 2018) at 18–19. Oracle was a protest testing the limits of Section 2371b and its follow-on authority. While GAO ultimately sustained the protest, it affirmed DoD's interpretation of the term prototype and made clear the path to successful follow-on activities.
34. FY2016 NDAA, Pub. L. No. 114-92, § 804, 129 Stat. 726, 882 (2015).
35. FY2016 NDAA, § 806 at 885.
36. Cheryl Pellerin, *DOD Strategic Capabilities Office is Near-Term Part of Third Offset*, DOD NEWS (Nov. 3, 2016), <https://www.defense.gov/News/Article/Article/995438/dodstrategic-capabilities-office-is-near-term-part-of-third-offset/>.
37. Larry Lewis, *Insights for the Third Offset: Addressing Challenges of Autonomy and Artificial Intelligence in Military Operations*, CNA (Sept. 2017), [https://www.cna.org/CNA\\_files/PDF/DRM-2017-U-016281-Final.pdf](https://www.cna.org/CNA_files/PDF/DRM-2017-U-016281-Final.pdf).
38. ELLMAN ET AL., *supra* note 6, at 8.
39. *Id.*

## AROUND THE CORPS

Two JAG Corps civilian employees speak in a walkway above the atrium at TJAGLCS.  
(Credit: Chris Tyree)





The Army's new PT test includes tossing a 10-pound medicine ball backwards. (Credit: Jason Wilkerson)

# Closing Argument

## One Army, One Standard

### The New Fitness Test Should Have a Single Scoring System

By Major Sam Gabremariam

**The Army Physical Fitness Test is changing after nearly four decades.** The new Army Combat Fitness Test (ACFT) is a seismic change to the way we measure fitness and readiness in the Army. It's comprised of six events that must be completed within fifty minutes, culminating with the infamous, but steadfast, two mile run. It would be an understatement to say that the new test is merely difficult—it is a game changer.

Aside from the sheer physical challenge that the test presents, the other notable change introduced by the ACFT is a gender

and age neutral scoring paradigm. Where the current test is a health based assessment, taking into account gender and age to score fitness, the ACFT is indifferent to these distinctions. The ACFT is focused more on combat readiness, and its varying exercises and movements are designed to better indicate how effective a Soldier will be in a combat environment.

In fact, a major reason for the Army's transition to the gender and age neutral ACFT is to ensure that all Soldiers are ready for combat operations. The argument is

simple enough. First, all Soldiers will be expected to do the same basic tasks in combat so they should all have to pass the same test. Second, the test should be a more realistic measure of a Soldier's physical ability to withstand the rigors of a combat environment.

That is why it is profoundly confusing that the Army, after moving away from gender and age based scoring, is still considering the possibility of another bifurcated scoring model. The option would set one minimum passing standard for those in combat-arms units or with a Military Occupational Specialty (MOS) designation of combat-arms, and another, less challenging, standard for all others. It is perplexing because the option is the antithesis of why we did away with gender and age based scoring. The confusion is compounded when one realizes that the difference between these "minimum" standards are themselves slight. For instance, the difference in repetition between the combat-arms and non-combat arms for leg-tucks is four additional tucks. Such minor differences will nevertheless have a tremendous impact on our Army. It would arguably create a profound dichotomy between Soldiers and units, undermining the very readiness we seek while subverting the cohesion we need as an Army.

While other services like the Marine Corps laud that every Marine is a rifleman, we would undermine our Soldiers by quietly pronouncing that not all Soldiers are expected to soldier. How else would Soldiers perceive entire segments of the Army population that are held to a lower standard—it will cause adverse cultural reverberations that will overtly split Soldiers into distinct tiers. As a result of lowered expectations, represented by an insignificant number of fewer repetitions, we subordinate the value of an entire sector of our Army. I believe we are better than that as an Army, and hopefully this bifurcated scoring option will not spring to fruition in 2020. **TAL**

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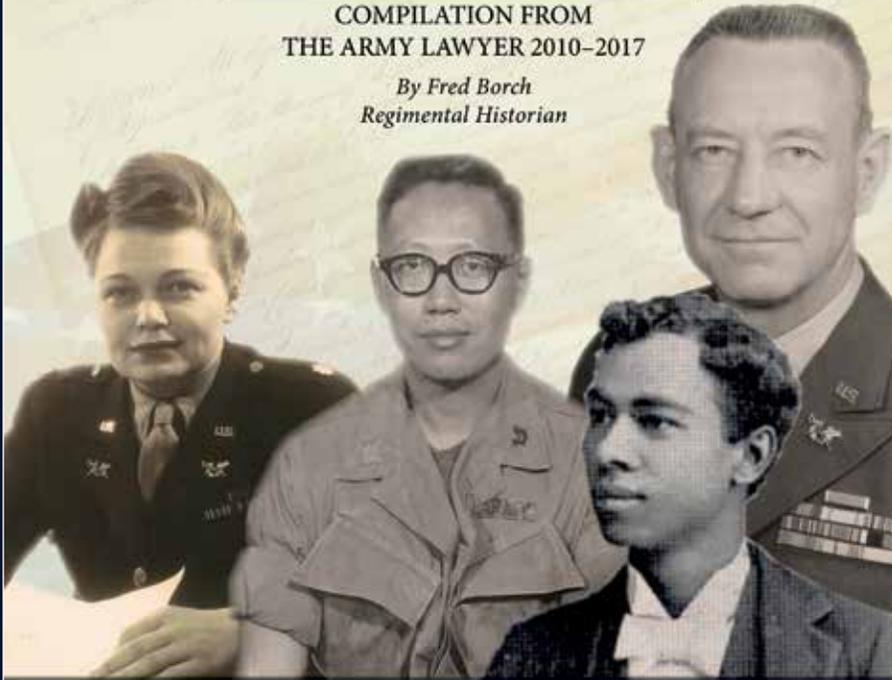
## AROUND THE CORPS

Chief Warrant Officer 2 Matthew Casey takes a turn on the putting green located outside the U.S. Army Legal Service Agency building at Fort Belvoir, Virginia. (Credit: Chris Tyree)

# LORE OF THE CORPS

COMPILATION FROM  
THE ARMY LAWYER 2010-2017

By Fred Borch  
Regimental Historian



The *Lore of the Corps* is a collection of more than eighty previously published history articles from *The Army Lawyer*. The book is being distributed to every fort, post, camp, and station where members of the Regiment are located. Contact Fred Borch, the regimental historian, at [frederic.l.borch.civ@mail.mil](mailto:frederic.l.borch.civ@mail.mil) if your office has not received its copies.

