

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 1 • 2020



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A member of the 82d Airborne Division's OSJA participates in the the standing power throw portion of the Army Combat Fitness Test. (Credit: Justin Kase Conder/AP)



# Army Lawyer

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On the cover: (Credit: istockphoto.com/arthobbit).

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# Court Is Assembled

## Top Ten Secrets of Managing Civilians

By William J. Koon

**The labor counselor down the hall from you is perhaps the best student of the on-again, off-again relationship between managers and employees.** In fact, I can recall commenting to my wife, after surviving my first labor counselor action as a young Judge Advocate General's (JAG) Corps captain at the Presidio of Monterey,

the labor counselor's role felt like a 50/50 split—half-lawyer, half marriage counselor. And, sure enough, more than twenty years later, with most of those years spent practicing labor and employment law, I still believe the vast majority of problems managers have with civilian employees are

related to a breakdown of the relationship between the two.

From our experience as human beings, we all know relationships take work. The relationship between a manager and employee is no different. In order to make that relationship successful—and thereby make both the civilian employee and the supervisor successful—both must be dedicated to working together. In my opinion, it all starts with engagement and investment. New Beginnings and Defense Performance Management and Appraisal System (DPMAP) was designed under the theory that an engaged employee is a productive employee. The more an employee identifies with the organization, its mission, its leaders, and their colleagues, the more invested that employee is. And, the more invested or engaged an employee is, the more effort they will put into accomplishing the mission.

Before I dive into the ten secrets to successfully managing civilians, I want to start by dispelling two commonly held myths. First, civilians are not watching the clock because they don't want to work hard. The vast majority of our civilian employees are incredibly devoted, diligent, and professional public servants. They are proud of their service, and proud to be a member of the team. However, at 1700, they need to leave—not because they don't want to finish the work on their desk, but because they want to save you from possibly violating the Fair Labor Standards Act, the Collective Bargaining Agreement, or other rules, regulations, and policy regarding pay and attendance. Second, there is a myth that civilians are hostile to management and development—they are set in their ways and just want to be left alone. *False.* Put some thought and effort into leading your Civilians and remember to follow the Golden Rule—manage them as you would like to be managed.

And now, the moment you have been waiting for . . . here are the ten secrets to success as a manager of Civilians. These are in no particular order, but I guarantee if you make at least five to seven of these part of your routine, you'll see the difference in your workforce and they'll see the difference in you.

1. Find the Facebook from the office's last Article 6 visit, and read the bios of each and every civilian in the office. Get to know them—where they have been, what they've been doing, and what they would change about the JAG Corps.
2. Read each and every word in each of your employees' position descriptions. If it's not accurate, talk to your legal administrator (and, maybe, your labor counselor) about it.
3. Make a spreadsheet showing each employee that works for you listing each award they've received and when they received it. This includes both kinds of awards—the annual performance award employees normally get when they've received a positive evaluation and the honorary award they should receive every three years or so, under normal circumstances. Ideally, you will find that your office has been hitting all the right marks to recognize civilian employees, but if that is not the case, fix it. Remember, we have triggers—natural prompts—for recognizing our Soldiers—e.g., promotions, PCS, and ETS. You don't necessarily have those triggers for recognizing civilian employees. You have to make recognizing your hard-working Civilians a priority and create the mechanism to make sure you do just that.
4. Schedule a meeting with each Civilian, either near their birthday or near the time they receive their DPMAP assessment, and review their Individual Development Plan (IDP) with them.
5. Send each and every Civilian who works for you to some sort of training each year. Whether it's TDY to The Judge Advocate General's Legal Center and School, or as simple as across the hall to shadow someone in a different section—push them out of their comfort zone. They'll eventually appreciate the broadening. And, bonus—your office will be all the better for it!
6. Once a month, host a lunch or breakfast with the Civilians who work for you. Spend time talking with them and getting to know them. Let them get to know you.
7. Do something for their birthdays. A card signed by everyone in the office or take them and their closest coworkers out to lunch or bring them their favorite Starbucks drink. Just don't let them go home that day thinking the only thing you did for their birthday was review their IDP!
8. Talk to each and every Civilian that works for you at least once a day, if you're in the office. If you're TDY, send them an email or text. Even if it's just a quick "hello," or "how was your weekend?" But, if you're going to ask, mean it. With every member of your team, regardless of their tribe, sincerity goes a long, long way. I find this is especially true with our Civilian employees who have seen a lot of Deputy Staff Judge Advocates and Staff Judge Advocates come and go.
9. Do performance counseling. Prepare for it. Do it face-to-face. Do it on-time. Follow-up in writing. Put effort into DPMAP—do NOT just copy and paste from previous years. There is nothing worse than feeling like your contributions are not valued and are not unique. The easiest way to fix that is to put more effort into their yearly performance counseling and evaluation.
10. Cross-train your judge advocates, paralegals, and legal administrators with your Civilian employees. This will allow your Civilian employees an opportunity to coach, train, and mentor, and will guarantee you have a back-up labor counselor or ethics attorney when that employee is not at work. Everyone loves an opportunity to show what they know and to share knowledge.

What will all this make you? An "active" manager and leader, rather than a "passive" manager and leader. It's so tempting to passively manage and lead Civilian employees. I mean, they've been doing the job for years, right? They know it better

than you, right? So, why not just let them do what they do, and free up some time to do all the other work you have?

Because it's not fair to them, not fair to the office, and not fair to you as a manager. Employees, even those who don't need any "help" to do their job because they're the subject-matter expert, appreciate your taking an interest in them, their work, and their development as professionals. So, take the time to get involved, and watch what happens! You, your employees, and your entire organization will be all the better for the effort you put in! **TAL**

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*Mr. Koon is the Corps's Senior Civilian and the Director, Civilian Personnel, Labor and Employment Law, Office of The Judge Advocate General, Pentagon, Washington, D.C.*

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The Headquarters Company, 129th Support Battalion conducts a non-tactical vehicle (NTV) drivers' training event at Camp Buehring, Kuwait. (Credit: CPT Christian Turley)

# News & Notes

## Non-Tactical Vehicle Guidance

*By the Office of The Judge Advocate General Administrative Law Division*

**On 27 September 2019, the Secretary of the Army (SA) signed a memorandum, subject Non-Tactical Vehicle (NTV) Policy Guidance, which clarified Army policy regarding the use of NTVs to transportation terminals, including those located in the National Capital Region.** It affirmed the capacity of approving officials (AOs) to assess whether such use is appropriate and necessary on a case-by-case basis.

This memo stated that Army Regulation (AR) 58-1, *Management, Acquisition, and Use of Motor Vehicles*, paragraph 2-3i(1) will be modified to add a new subparagraph (f), which will expressly authorize

discretion to determine that NTV use to transportation terminals is “[n]ecessary because other methods of transportation cannot reliably or adequately meet mission requirements, based on a case-by-case factual assessment.”

The SA’s guidance, which was effective immediately, clarifies that AOs may make a case-by-case determination that NTV use is necessary under certain circumstances. Under this clarifying language, NTV use may be authorized when it is necessary because other methods of transportation cannot reliably or adequately meet mission requirements. This is a significant expansion of the previous

interpretation of the authority that limited NTV use to: when “[n]ecessary because of emergency situations or to meet security requirements” (subparagraph 2-3i(1)(c)), or when “[t]erminals are located in areas where commercial methods of transportation cannot meet mission requirements in a responsive manner” (subparagraph 2-3i(1)(d)).

Office of The Judge Advocate General has previously issued information papers (IPs) on the subject of NTV use for travel to and from the airport, most recently on 26 June 2018. Those IPs are superseded by the SA’s 27 September 2019 memo and should no longer be relied upon. **TAL**



**Photo 1:** On 26 November 2019, Ms. Karen Carlisle and Mr. William Koon were inducted into the U.S. Army Senior Executive Service. Mr. Koon is our new Director, Civilian Personnel, Labor and Employment Law, Office of The Judge Advocate General (OTJAG). Additionally, in his new role, Mr. Koon will serve as our Corps's Senior Civilian. Ms. Carlisle is our new Director, Soldier and Family Legal Services, OTJAG.

**Photo 2:** The OSJAs from U.S. Army Japan and U.S. Forces Japan pose with the staff of the Kodaira School, Japan Ground Self Defense Forces (JGSDF) for the International Humanitarian Law Education Symposium. Major Travis Covey, USMC (1st row, 3d from left), provided a lecture on "Prisoner of War Management"—the primary focus was on transporting and transferring POWs. Pictured in the first row are MG Nanashima, JGSDF TJAG (1st row, 4th from right), MG Danjo, Kodaira School Commandant (1st row, 5th from left), LTC Stephen McGaha, USARJ SJA (1st row, 4th from left).



**Photo 3:** Members of 4th Psychological Operations Group (Airborne) attended SPC Kelvin A. Washington's graduation from the Army's Basic Leadership Course at Fort Bragg, North Carolina. Featured in the photo are (from left to right) SFC Troy B. Gibson (Senior Paralegal NCO), SPC Kelvin A. Washington, CPT Mohamed T. Al-Darsani (Group Judge Advocate).



**Photo 4:** Mr. G. Zachary Terwilliger, the U.S. Attorney from the Eastern District of Virginia, invited The Judge Advocate General, LTG Charles N. Pede, to speak at their Veterans Day celebration.

Lieutenant General Pede was honored to share the stage with the Quantico Marine Corps Band and U.S. Air Force veteran Jaafar Hassan, a service-dog trainer instructor with Warrior Canine Connection. The Judge Advocate General spoke about the origins of Veterans Day, originally Armistice Day, which celebrated the formal ending of World War I on the 11th hour, of the 11th day, of the 11th month. Armistice Day was changed to Veterans Day in 1954 as recognition and celebration of veterans from all branches of military service.

The ceremony was followed with an appearance of some very special guests—new

service puppies in training! Service dogs provide a tremendous benefit to those with disabilities and various health conditions, and Warrior Canine Connection enlists recovering veterans to train these service animals for their fellow veterans.

**Photo 5:** Department of Defense General Counsel, the Honorable Paul Ney, accompanied by CENTCOM and DoD delegates, met with U.S. Forces Afghanistan judge advocates on Camp Resolute Support. The OSJA hosted a round table with the Honorable Paul Ney and delegation team to discuss legal and operational actions throughout Afghanistan.

Pictured: Back row, left to right, Capt Christian Gordon, SFC Margaret Murphy, CPT Jules Szanton, MAJ Aaron McCartney, MAJ James Kim, Capt Colin Hotard, COL Jeff Palomino, Mr. Matt Hoover. Front

Row, left to right, CPT Timothy Ross, Capt Jacquelyn Fiorello, Maj Tomas Kucera, LTC Walter Parker, COL Joseph Fairfield, Hon. Paul Ney, Col Matt Grant, Maj Sivram Prasad, LTC Cara Hamaguchi, SGT Kody Yongue.

**Photo 6:** 11D FWD legal team poses with their British allies at the conclusion of 7ATC and JMRC's Dragoon Ready 20. The Division and 2CR legal teams demonstrated their interoperability capabilities by working closely with the pictured allies in non-lethal targeting efforts.

Pictured (front row): MAJ Trent Powell, Command Judge Advocate; MAJ Scott Eberlein, 11D FWD G9; MAJ Victor Carreras, 11D FWD DIV IO Planner; CPT Robert Besier, Chief, NSL 7ATC.

Not Pictured: MAJ J.P. Policastro, 2CR RJA; CPT Jonni Stormo, 2CR Operational Law Attorney; SGT Rashadric Jones, Reg. Paralegal; SPC Christopher Collins, Reg. Paralegal.

**Photo 7:** General Gustave F. Perna, Commander, U.S. Army Materiel Command, recently recognized CW4 Craig Russell for his outstanding performance in organizing, assembling, and processing first and second quarter family housing property management incentive fee approval packets on all IMCOM-managed installations. His efforts were critical for the continued maintenance of on-post housing, and the ongoing provision of housing services to Soldiers and their Families.





(Credit: istockphoto.com/MATJAZ SLANIC)

# Career Notes

## Readying the Road

### Future Concepts Preps for Future Conflicts

By Lieutenant Colonel Matthew A. Krause, Major Jason C. Coffey, and Major Jonathan J. Wellemeyer

*The nature of war is never [going to] change. But the character of war is changing before our eyes—with the introduction of a lot of technology, a lot of societal changes with urbanization and a wide variety of other factors.<sup>1</sup>*

**Imagine you are a brigade judge advocate with a brigade combat team (BCT),** forward-deployed during a future conflict.<sup>2</sup> Your BCT is the battlespace owner in a foreign country, engaged in active combat operations in a densely populated city against a combination of non-state actors and mercenaries from a private military company in the employ of a near-peer competitor.<sup>3</sup> Your BCT's order of battle includes both manned and unmanned combat vehicles, unmanned aerial vehicles from your headquarters' reconnaissance platoon, ultrasonic systems, and micro-drones at the squad and platoon level. Your BCT

also has its own organic tactical offensive cyber capability that has the ability to shut down every utility in the city. Because of a tactical cyber-attack against the theater's joint task force, you are not able to communicate with your higher-headquarters' Office of the Staff Judge Advocate (OSJA) via phone or email. The only way you have to communicate with the OSJA is by radio from your BCT's command post, which is ten miles away from your forward line of troops. Your headquarters is taking indirect fire from non-state actors and is actively defending against a local cyber-attack of its own, resulting in highly-degraded

tactical network capability. Even while enemy mortar rounds begin to land close to your command post, an integrated team of software and design engineers from the military and the private sector in your S2 section are developing and implementing new defensive-cyber code to stop the enemy cyber-attack. You have to provide legal advice on lethal and non-lethal targeting and a key acquisition. You are alone and you have to provide principled legal counsel at the speed of operations.

Fortunately, you came prepared for this scenario. You attended at least one Decisive Action Training Environment training exercise, and you are already comfortable operating in an analog setting. You deployed with an off-network Operational Law Kit-Expeditionary from the Center for Law and Military Operations, you have printed copies of key resources you will need to conduct multi-domain operations (MDO), including the Operational Law Handbook,<sup>4</sup> the Law of Armed Conflict Documentary Supplement,<sup>5</sup> Army Doctrine Publication (ADP) 3-0 (Operations),<sup>6</sup> the new Field Manual (FM) 6-27 (Commander's Handbook on the Law of Land Warfare),<sup>7</sup> Joint Publication 3-60 (Joint Targeting),<sup>8</sup> and others.

You have also trained. You listened closely to your instructors at the graduate course at The Judge Advocate General's Legal Center and School about national security law, administrative law, contract and fiscal law, and criminal law, and you are prepared to conduct tactical and operational legal operations within all four core competencies. You trained your legal staff and trained with the brigade staff prior to deployment, and you were fully integrated in the planning of all your operations. You are an expert in at least one area of law, competent in all core legal functions, and you understand the capabilities and needs of your brigade, which includes understanding its systems, processes, and weapon systems.

This is one of many scenarios the Future Concepts Directorate (FCD) envisions when researching the future operating environment<sup>9</sup> for the Judge Advocate General's (JAG) Corps. The FCD is the JAG Corps's think tank and is one of four directorates of the Judge Advocate General's Legal Center.<sup>10</sup> Its mission is to serve as

the JAG Corps's subject matter expert on the application of the law to future conflict by assessing the legal requirements of the future operational environment. It also reviews Army doctrine on behalf of the JAG Corps and provides the intellectual foundation and disciplined approach to design, develop, and field a JAG Corps that is ready for future operations.<sup>11</sup>

The FCD operates along three primary lines of effort: future conflict, doctrine, and strategic initiatives.<sup>12</sup> First, it seeks to be the premier organization within the U.S. government on the application of the law to future conflict. The FCD thinks of this broadly as applying the law of armed conflict to the future operational environment, or law of armed conflict-future. To that end, FCD partners and engages with any organization thinking about technology and its applications on the future battlefield. Second, the FCD provides timely, ethical, responsive, and purposeful support and analysis to military doctrine development organizations in all branches of the Army, the joint force, and the multinational force. Third, the FCD provides support to the JAG Corps's strategic initiatives in order to prepare its legal professionals to support future MDO.<sup>13</sup>

### Future Conflict

Despite being a think tank and located far from the edge of battle, one of the FCD's goals is to empower leaders across the JAG Corps by providing them with information and subject-matter to prepare them for future MDO. In the near future, the FCD will field several initiatives to assist in this endeavor. First, a redesigned website will include a doctrine library with key pieces of doctrine that tactical and operational<sup>14</sup> judge advocates (JAs) will need in order to integrate with staffs and plan operations from beginning to end. Second, the FCD website will contain a repository of scholarly articles addressing the legal challenges for future MDO. Third, the FCD will publish frequent blog posts written by JAs and others. Fourth, the FCD is producing the JAG Corps's very first podcast entitled *Battlefield Next*<sup>15</sup> that will feature doctrinal concepts, information on strategic initiatives, and interviews with military leaders, scholars, and members of industry.

Substantive topics intended to be tackled on the website and podcast will be the use of artificial intelligence, offensive cyber operations, space operations including ground operations, autonomous weapons, ultrasonic effects, low-yield tactical nuclear devices, emerging biological threats, deep fakes and their dangers to national security, private special operations-capable organizations in light of Syria and Crimea, and effects of technology on civilian populations on future battlefields. Although there is much discussion about the use of emerging technology on the battlefield, many future conflicts will still bear similar characteristics to present-day conflicts in places like Syria, Libya, and Yemen. Accordingly, the FCD will continue to explore chronic issues in warfare that will likely remain issues in the future, including the use of explosive ordnance in densely-populated urban areas, the continuing practice of targeting medical personnel and facilities, and accountability mechanisms for violations of the law of war.

### Doctrinal Development

The FCD is also the JAG Corps's doctrine development organization. Doctrine is a body of knowledge unique to military service and plays a critical role in planning and conducting military operations.<sup>16</sup> Joint doctrine contains "fundamental principles that guide the employment of United States military forces in coordinated action toward a common objective and may include terms, tactics, techniques, and procedures."<sup>17</sup> Army doctrine contain "fundamental principles, with supporting tactics, techniques, procedures, and terms and symbols, used for the conduct of operations and as a guide for actions of operating forces, and elements of the institutional force that directly support operations in support of national objectives."<sup>18</sup> Army doctrine is contained in Army Doctrine Publications found on the Army Publishing Directorate's website.<sup>19</sup>

Doctrine should not be confused with other elements of the Army's body of knowledge. Regulations address the administration of the Army. For details on specific training tasks and how to train those tasks, the Army uses training publications.<sup>20</sup> For details on using specific pieces of equipment, the Army uses technical manuals.<sup>21</sup> Doctrine, on the other hand, is guidance on

how the U.S. Army employs and supports land power.<sup>22</sup> Think of it as the common language of our military profession and those deliberate processes that help us conduct business. Although authoritative, doctrine is not necessarily prescriptive, and requires sound judgment in its employment.<sup>23</sup> Unlike a regulation, at times, forces may deviate from doctrine for various reasons.

The FCD reviews all Army doctrine from all branches for legality. As a branch of the Army, the JAG Corps has its own doctrine contained in FM 1-04, *Legal Support to Operations*, and FM 6-27, *The Commander's Handbook on the Law of Land Warfare*. The FCD is the proponent of a new version of FM 1-04 that is currently in Army-wide staffing with an expected publication in 2020. The most recent published version of FM 1-04 is from 18 March 2013, and contains language and concepts that have become, or may quickly become, outdated, as the Army continues to innovate and focus on peer-to-peer MDO, while remembering lessons learned from decades of fighting counter-insurgencies.<sup>24</sup>

The new FM 1-04 accounts for the evolution of the term "international and operational law" into the new umbrella concept of "national security law."<sup>25</sup> With the changing nature of warfare, the JAG Corps recognized that it requires expertise in several different emerging areas to account for new capabilities of the joint force. National security law, along with administrative and civil law, contract and fiscal law, and military justice, is one of the four legal functions supporting the Army.<sup>26</sup> Use of the term "national security law" recognizes that JAs need expertise in constitutional authority, cyberspace law, intelligence law, and support to special operations—all of which are becoming increasingly complex as we integrate new technology and capabilities. International and operational law remain areas of practice under national security law in the new FM 1-04. The new FM 1-04 will also account for changes to the Uniform Code of Military Justice from the Military Justice Act of 2016 and Military Justice Redesign.<sup>27</sup> The new FM 1-04 will contain revised roles for the trial counsel and guidance on the intended duties of the commander's military justice advisor.

Additionally, the FCD assisted in the staffing and publication of the new FM 6-27, *The Commander's Handbook on the Law of Land Warfare*, a multi-service piece of doctrine shared with the United States Marine Corps.<sup>28</sup> The predecessor doctrinal publication of FM 6-27 was FM 27-10,<sup>29</sup> which had not been updated since 18 July 1956. Much has changed in international law and the way that the United States interprets international law since then. Field Manual 6-27 represents a complete re-write of FM 27-10 and incorporates revisions made to the *Department of Defense Law of War Manual*, dated June 2015 and updated May 2016.<sup>30</sup> Further, FM 6-27 is an important document to military practice, not only for its contemporary articulations of international law, but also because it reinforces the *Department of Defense Law of War Manual*, which is the United States' interpretation of the law war. Governmental interpretations of the law are authoritative, in contrast to interpretations made by non-governmental organizations and academia.

### Where Is Strategic Initiative?

The fictional scenario at the beginning of this article may seem to describe the "hardest of the hard" with respect to tactical legal advising in MDO. Nevertheless, future operations are increasingly complex, and future JAs will need to operate accurately with deliberate speed and be fully integrated with their non-JA staff counterparts. They will need to be smart enough and confident enough to operate in a decentralized formation, while at times operating independently from traditional reach-back resources. With mindful envisioning of the future operating environment and training, Army JAs will be prepared to fight on "Battlefield Next." The FCD aspires to support the JAG Corps with ensuring the right lawyers with the right skills and attributes are advising at the right echelons, and our hope is that leaders will be able to use the FCD resources to develop their own training programs. **TAL**

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### Notes

- Comments by then-Army Chief of Staff, General Mark A. Milley at the Association of the United States Army annual convention in October 2017. See *State of Defense*, DEFENSE ONE, <https://www.defenseone.com/feature/state-defense-2018/> (last visited Jan. 22, 2020).
- The brigade combat team (BCT) "is the Army's primary combined arms, close combat force." See U.S. DEP'T OF ARMY, FIELD MANUAL 3-96, BRIGADE COMBAT TEAMS intro., at ch.1 (8 Oct. 2015). Brigade combat teams "conduct decisive action, which is the continuous, simultaneous combinations of offensive, defensive, and stability tasks." *Id.*
- Private military companies (PMCs) are private business entities that provide military or security services, and often supplement official military formations. INT'L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT: ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT 9 (Aug. 2009). One of the more well-known PMCs in recent events is "ChVK Wagner," also known as "Wagner Group," a Russian paramilitary organization operating in Syria and Ukraine. Laurence Peter, *Syria War: Who are Russia's Shadowy Wagner Mercenaries?* BBC NEWS (Feb. 23, 2019), <https://www.bbc.com/news/world-europe-43167697>. Although controversial, one of the political advantages of using a PMC is the non-attribution of activities to state governments. *Id.*
- INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK (2018).
- INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT (2018).
- U.S. DEP'T OF ARMY, DOCTRINE PUB. 3-0, OPERATIONS (31 July 2019) [hereinafter ADP 3-0].
- U.S. DEP'T OF ARMY, FIELD MANUAL 6-27/U.S. MARINE CORPS, TECHNIQUES PUBLICATION 11-10C, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE (7 Aug. 2019).
- JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING (28 Sept. 2018).
- An operating environment is "the composite of the conditions, circumstances, and influences that affect employment of capabilities and bear on the decisions of the commander." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS IV-1 (17 Jan. 2017) (C1, 22 Oct. 2018).
- The mission of the Future Concepts Directorate is to serve as the Judge Advocate General's (JAG) Corps's subject matter expert on the application of the law to future conflict by assessing the legal requirements of the future operational environment, to propose and review Army doctrine, and to provide an intellectual foundation and disciplined approach to design, develop, and field a

globally responsive future JAG Corps. See FUTURE CONCEPTS DIRECTORATE (FCD), THE JUDGE ADVOCATE LEGAL CTR. & SCH., <https://tjagcspublic.army.mil/fcd> (last visited Jan. 22, 2020).

11. *Id.*

12. *Id.*

13. Operations conducted across multiple domains are known as multi-domain operations, or MDO. U.S. DEP'T OF ARMY TRAINING AND DOCTRINE COMMAND, PAM. 525-3-1 glossary (6 Dec. 2018). To date, MDO is not yet a doctrinal term, but rather represents an operational and strategic reality based on Russian and Chinese anti-access and area denial systems. *Id.* at vii. The MDO concept will drive future doctrine development. *Id.* at iii. These domains include land, air, maritime, space, and cyberspace. *Id.* For a discussion on how the Army participates as part of the joint force during operations across multiple domains, see ADP 3-0, *supra* note 6, para. 1-37.

14. There are three "levels" of warfare: tactical, operational, and strategic. ADP 3-0, *supra* note 6, para. 1-2. The tactical level refers to the use and arrangement of combat forces in relation to one another, generally at the brigade level and below, although sometimes at the division level. *Id.* The operational level links tactical forces with strategic objectives and generally focuses on the design, planning, and the conduction of operations. *Id.* This ordinarily occurs at the division level and higher. *Id.*

15. The *Battlefield Next* podcast can be found on Apple Podcasts, Stitcher, Spotify, and other popular podcast applications.

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

17. See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5120.02D, JOINT DOCTRINE DEVELOPMENT SYSTEM (5 Jan. 2015).

18. ADP 1-01, *supra* note 16, para. 1-5.

19. See ARMY PUBLISHING DIRECTORATE, <https://army-pubs.army.mil/> (last visited Jan. 22, 2020).

20. ADP 1-01, *supra* note 16, para. 1-2.

21. *Id.*

22. *Id.* para. 1-1.

23. *Id.* para. 1-5.

24. See *id.* para. 1-12 (one of doctrine's roles is to capture best practices and lessons learned).

25. U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-36 (forthcoming 2020).

26. There are also two legal functions supporting Soldiers and Families.

27. Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2894 (2016).

28. Field Manual 6-27 is an example of multi-service doctrine. Multi-service doctrine "contains principles, terms, [tactics, techniques, and procedures] used and approved by the forces of two or more Services." ADP 1-01, *supra* note 16, para. 2-15.

29. U.S. DEP'T OF ARMY, PAM. 27-10, THE LAW OF LAND WARFARE (July 1956).

30. U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL (May 2016).



(Credit: istockphoto.com/bubaone)

## Lessons from the Australian Defence Force

By LTC Laura A. Grace

*“That’s not a knife . . . THIS is a knife!”<sup>1</sup>  
—Crocodile Dundee*

**For over one hundred years, U.S. service members have fought alongside the Australian Defence Force (ADF).** On 4 July 1918, at the Battle of Hamel, the United States fought side-by-side with Australia. During that battle, Americans fought *under* the command of one of Australia’s most celebrated military officers, General Sir John Monash. After the fourth such mention during my visit with the ADF, I put down the book I was reading—*In a Sunburned Country*,<sup>2</sup> Bill Bryson’s hilarious travel book about Australia—and read, *Monash, The Soldier Who Shaped Australia*.<sup>3</sup> I highly recommend both books to learn more about Australian history and culture. However, to truly understand our allies and partners, there is no substitute for face-to-face engagements.

Recognizing the importance of enhancing interoperability through engagements, Lieutenant General (LTG) Charles N. Pede, The Judge Advocate General, and Commodore (CDRE) Peter Bowers, Director General Australian Defence Force Legal Services (DGAFLS), established a short-duration visit between the two countries. It was through this effort that I had the once-in-a-lifetime opportunity to spend seven weeks with ADF Legal in spring 2019. This article intends to familiarize the reader with the Visit Program, highlight the Program’s benefits, and discuss the Program’s future.

### **Visit Program with Australian Defence Force Legal**

The objective of the Program is partner-nation training and education, interoperability

with the ADF, and the opportunity to exchange ideas and perspectives in support of future coalition operations. This Program involved a robust schedule of attending academic courses and legal workshops; meeting with ADF Legal Headquarters personnel; and observing training exercises with brigade legal offices. Lodging in the officers’ mess and eating in their dining facilities provided additional opportunities to discuss issues with non-legal ADF members, from cadets to commanders. This provided me with a much more in-depth understanding of the ADF as a whole and the legal community’s role therein. This section provides an overview of the engagements and a small sample of some of the issues and policies discussed.

### **Academic Courses and Workshops**

The Program began with observing Legal Training Module One (LTM 1), the initial course of the Legal Officer’s Specialist Officer Career Structure, a tri-service two-week training, which is loosely akin to the Army’s Judge Advocate Officer Basic Course (JAOBC). The Army, the Royal Australian Navy (RAN), and the Royal Australian Air Force (RAAF) conduct legal training together and will often advise leadership from different services. According to the Army career manager, seventy percent of O-3 postings are Army specific, but only two O-6 jobs are NOT joint billets. Attending LTM 1 provided an opportunity to learn the basics of ADF’s core legal disciplines: administrative law, discipline law, operational law, and the legal officers’ career structure. After LTM 1, new legal officers begin an apprentice-like program, during which they must complete sixteen consolidation tasks (e.g., giving a rules of engagement (ROE) brief) before advancing to the next level. There are five Legal Levels (LL) in the permanent force, and advancement is linked to training and individual service and promotion requirements.<sup>4</sup> Unlike our judge advocates (JAs), who are certified and qualified upon completion of JA OBC, a legal officer cannot advise commanders or deploy until they reach LL 3, which can take three years.

A few weeks later, I had the opportunity to learn about Army-specific issues at the Junior Legal Officer Workshop

Program, a two-day workshop for new Army legal advisors. Topics included training and progression; “raise, train, and sustain” for operations; and the debate over “broadly employable” versus “expert.” Sound familiar? Another familiar topic discussed at this training that is regularly debated among the Judge Advocate General’s (JAG) Corps leadership is whether mentorship should be formal or informal. The ADF has a formal mentoring scheme that requires a mentor be assigned within two months of being appointed as an ADF legal officer.<sup>5</sup> The relationship lasts until the second anniversary of attaining LL 2 status. While it is a formal program, in many cases, new legal advisors choose their mentors personally or by recommendation based on common interests.

I also attended the Defence Legal National Joint Legal Issues Workshop—a bi-annual conference, similar to the World Wide Continuing Legal Education course—attended by over 300 ADF legal personnel and international guests. This workshop was a great opportunity to continue to build relationships and to hear about the strategic direction of the ADF. There were several common themes, including the ADF’s renewed focus on the Pacific and efforts to achieve greater integration of the services. Because of the ADF’s interconnected modality, it was surprising that many senior leaders discussed efforts to become more joint. All the speakers were informative; however, one speaker in particular reinforced the purpose of the Visit Program with his observations. Colonel David McCammon, speaking on “Taji—A Commander’s Perspective,” discussed the difficulties in working in coalitions when partners handle investigations and discipline law differently.

For example, a training death in the ADF will be investigated by an outside regulatory organization called “Comcare.” Based on Comcare’s investigation and conclusions, the Commonwealth Director of Public Prosecutions may then file charges against the ADF. In fact, during my visit, Comcare announced its recommendation that the Department of Defence be charged for a death that occurred during a live fire training. Another example is the discipline system. Under the Defence Force

Discipline Act of 1982 (DFDA), jurisdiction is based on “service connection.”<sup>6</sup> That is, the military has jurisdiction if prosecution could reasonably be regarded as substantially serving the purpose of enforcing service discipline. This differs from the “service status” test in the U.S. military. Additionally, the decision to prosecute a member resides with an independent prosecutor, not the commander. Understanding the differences in our coalition partners’ policies and procedures prior to operations will decrease friction and enhance interoperability.

#### **Headquarters Engagements**

After LTM 1, I spent two weeks with headquarters personnel at Defence Legal Division in Australia’s capital, Canberra. The Defence Legal Division is an integrated organization that includes Army, RAN, and RAAF legal personnel—similar to the Office of The Judge Advocate General (OTJAG), but joint. I met with the Head Defence Legal,<sup>7</sup> the DGAFLS, and several Directors and staff who report to DGAFLS. We discussed a variety of issues, including domestic law and treaty obligations applicable to the ADF in combat operations. Perhaps most relevant to coalition operations, we discussed the impending changes to Australia’s ROE doctrine.<sup>8</sup>

I spent a day with Australia’s only combatant command—Headquarters Joint Operations Command (HQJOC). In addition to operations and other real-world activities, HQJOC conducts joint exercises. During my visit, legal advisors were preparing for Pacific Sentry 19.3, a Chairman of the Joint Chiefs of Staff-sponsored, bilateral Command Post Exercise (CPX) between Australia and the United States. United States Army Pacific Command (USARPAC) served as a four-star Combined Joint Task Force (CJTF) for the exercise. The Visit Program afforded me the opportunity to meet the ADF legal advisors who would participate in the exercise from several different locations, including the CJTF Headquarters.

#### **Army Forces Command**

I spent my final weeks in Australia with the Forces Command Headquarters (FORCOM) and two of its three regular force combat brigades: 1st Brigade in

Darwin and 7th Brigade in Brisbane. The brigades continuously rotate; they switch between “ready, readying, or resetting.” During my visit, 1st Brigade was the readying brigade, and was participating in a CPX. 7th Brigade was the ready brigade, and was serving as the opposition force for the same exercise. I did not have an opportunity to observe 3rd Brigade, which was resetting. The legal briefing style and content were very similar to my experience as a brigade judge advocate. Spending several days with each office allowed for conversations about a brigade legal officer’s general legal duties, which include advising on disciplinary charges, reviewing summary proceedings for legal sufficiency, investigations, reviewing minor contracts, and operational law issues. It was a great opportunity to see issues on a tactical and operational level and to gain a different perspective on the many topics I had learned about.

#### **Benefits of the Visit Program**

The opportunity to spend time in Australia, with the purpose of building relationships and learning, is a career highlight for an extroverted life-long learner, such as myself. More importantly, the relationships established and the understanding of ADF perspectives and legal obligations springing from that experience are already paying dividends for the U.S. Army. During Pacific Sentry 19.3, my relationships facilitated staff integration and information sharing at all echelons. Additionally, my familiarity with various Australian domestic laws, treaty obligations, and national caveats helped me identify where legal authorities differ and could be leveraged to expand the legal maneuver space on the battlefield.

Australia is a leading Western world power, especially in the Pacific, whose voice carries significant weight in the development of international law by a nation state. Our countries have common national security interests and have committed to work together to preserve those interests. Understanding each other’s operational restrictions and interpretation of law will help our countries identify commonalities so that we can strengthen our combined efforts. We improve this understanding through continued engagements.



Australian Service Light Armoured Vehicles drive through Tangi Valley, Afghanistan. (Credit: Army Spc. Edward A. Garibay)

### The Future of the Visit Program

In spring 2020, an ADF legal advisor will take part in the second phase of this important Program, spending time with the U.S. Army JAG Corps. The ADF legal advisor was the 1st Brigade Legal Officer who hosted me during my visit to Darwin. Her visit will begin in late February with an introduction of the Army JAG Corps at OTJAG and U.S. Army Legal Services Agency, followed by attendance at the National Security Law of Armed Conflict course at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. Around the same time, another member of the JAG Corps will have the amazing opportunity to participate in the Visit Program with the ADF in Australia. Whether going to Australia or hosting an ADF legal officer in the United States, this Program provides an excellent opportunity to build relationships, exchange ideas and perspective, and learn more about a critical partner.

### Conclusion

From the Revolutionary War to the Global War on Terror, the United States has fought in many wars with our coalition partners. With the growing interdependence of the world's economies, cultures,

and populations, it is likely the United States will continue to fight as part of a combined force. Interoperability, not only of equipment, tactics, techniques, and procedures, but also of a common understanding of legal support to operations between the military forces, will be critical to success. Coalition partners will have different operational restrictions impacting military decision-making procedures, which may appear to limit or hinder the mission. Understanding our differences can decrease tension, and even create opportunities when we look to maximize our unique authorities and capabilities. Gaining this legal interoperability can best be achieved through face-to-face engagements. The Visit Program with the ADF provides the opportunity to build relationships while gaining an in-depth knowledge of one of our closest allies. The Australian and U.S. militaries have fought together since World War I, and through initiatives like the Visit Program, we will continue to increase our readiness and effectiveness as future coalition forces. **TAL**

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### Notes

1. CROCODILE DUNDEE (Rimfire Films 1986) (Australian comedy).
2. BILL BRYSON, IN A SUNBURNED COUNTRY (2000).
3. GRANTLEE KIEZA, MONASH, THE SOLDIER WHO SHAPED AUSTRALIA (2015).
4. AUSTRALIAN DEFENCE FORCE, ADF LEGAL OFFICERS' SPECIALIST OFFICER CAREER STRUCTURE (LOSOCS) POLICY (25 July 2019).
5. DIRECTOR GENERAL AUSTRALIAN DEFENSE FORCE LEGAL SERVICES DIRECTIVE NO. 2/2015, MENTORING SCHEME FOR ADF LEGAL OFFICERS (Oct. 26, 2015).
6. Based on a 2005 report on the Effectiveness of Australia's Military Justice System, Australian Military Courts were established in 2007. They were found unconstitutional in 2009 in *Lane v Morrison*. *Lane v Morrison* [2009] HCA 29 (Austl.). Parliament enacted legislation ratifying the approximately twelve decisions made by the Australian Military Court. The Australian Defence Force is currently working under the pre-2007 system of tribunals and disciplinary officer scheme.
7. The Head Defence Legal is two-star equivalent. Head Defence Legal can be civilian or military, but has historically been filled by civilians. DEFGRAM 385/2004 (15 July 2004).
8. Australian Defence Doctrine Publication 06.01 contains Rules of Engagement doctrine. Because the briefs I received are for Official Use Only or a higher classification, the new doctrine is not discussed in this article.



Phyllis L. Propp-Fowle, the first female Judge Advocate. (Courtesy Fred L. Borch III)

insignia for the crossed-quill-and-sword worn by all officers in the Judge Advocate General's Department (JAGD). In the more than seventy-five years that have followed Propp-Fowle's trailblazing career, hundreds and hundreds of female lawyers have served as Army lawyers, and what follows is a short history of their exemplary service in our Corps.

### 1940s to 1960s

Since the Army was gender-segregated in the 1940s, 1950s, and 1960s, the opportunities for women to soldier were limited because of this decidedly second-class status. Additionally, not only were most women in a separate Corps (the WAC), but the Congress prohibited women from serving in combat units, from commanding men, and from being promoted to general officer. Despite these restrictions, there were 9,000 women in the WAC by 1960 and 12,500 by 1970.<sup>1</sup> But, since there were a total of 1.32 million Soldiers in the Army in 1970, this meant that less than one percent of the Army was female.<sup>2</sup> Despite these low numbers, there were a handful of women in our Corps, and three deserve special mention because they achieved "firsts" in military legal history: Phyllis L. Propp-Fowle, Elizabeth R. Smith Jr., and Nancy A. Hunter.

### *Phyllis L. Propp-Fowle*

Phyllis L. Propp-Fowle was the first female judge advocate; first female post judge advocate (similar to a command judge advocate (CJA)); first female judge advocate to earn a combat patch and overseas service stripes; and, the *only* female judge advocate to serve overseas in World War II. No one—male or female—is likely to have so many "firsts" again.

Born in Jasper County, Iowa, on 8 March 1908, Propp-Fowle obtained her law degree from the University of Iowa in 1933. She was the only woman in her graduating class.<sup>3</sup>

After America entered World War II, Propp-Fowle was one of the first 1,000 women to join the Women's Army Auxiliary Corps (WAAC) in 1942. She

# Lore of the Corps

## Women in the Corps

### A Short History of Female Judge Advocates

By Fred L. Borch III

While lawyers have been in the Army from the days of the Revolution, there were no female judge advocates until 1944,

when Captain (CPT) Phyllis Propp-Fowle, an attorney serving in the Women's Army Corps (WAC), traded her WAC branch



Phyllis Propp-Fowle (left) was the first female judge advocate in history. This photo was taken circa 1943.

commissioned as a second lieutenant on 3 October 1942. When Congress gave the WAAC military status as part of the Army and renamed it the Women's Army Corps in September 1943, Propp-Fowle became one of its first members.<sup>4</sup>

Given her legal training, Propp-Fowle began requesting a transfer from the WAAC/WAC to the JAGD in mid-1942. After two years, her transfer was finally approved and, on 4 May 1944, then-CPT Propp-Fowle (she had been promoted on 30 October 1943) became the first woman to wear the judge advocate (JA) insignia on her collar. She immediately requested to attend The Judge Advocate General's School, U.S. Army (TJAGSA) at the University of Michigan—only to be refused because the school did not accept women. Consequently, she was assigned as the Post Judge Advocate at Fort Des Moines, Iowa. This made sense, given that the WAC headquarters was located there.<sup>5</sup>

While CPT Propp-Fowle never attended TJAGSA, she did deploy to Europe in January 1945, becoming the first, and only, female judge advocate to serve overseas in World War II. She was assigned to the Office of the Staff Judge Advocate (OSJA), Headquarters, European Theater, in Paris. As a result of her duty in the European-African-Middle Eastern Theater, Propp-Fowle received a right-sleeve shoulder (combat

patch and three overseas service bars (reflecting a total of eighteen months' service in a combat theater). She was promoted to major (MAJ) on 1 June 1945.

In early 1947, MAJ Propp-Fowle was still on active duty as a JA in Heidelberg, Germany, where she was serving as the Chief, Legal Affairs, Judge Advocate Division, U.S. Forces European Theater. At this time, however, the Army decided to discharge all women then serving. Propp-Fowle was released from active duty on 21 July 1947, and awarded the newly created—and then-prestigious—Army Commendation Ribbon.

Propp-Fowle was immediately re-hired as a civilian attorney in the Military Affairs Branch, Judge Advocate Division, Headquarters, European Command, in Heidelberg, Germany. In this position, she prepared circulars and other directives, drafted legal opinions interpreting U.S. law and Army and European Command directives, examined contracts for legal sufficiency, and supervised the legal assistance program in the European Command. She also remained in the JAGD as a Reservist, and was promoted to lieutenant colonel (LTC), WAC-Reserve, in 1949.<sup>6</sup>

Propp-Fowle remained in Heidelberg until 1951, when she married Mr. Farnsworth Fowle, a newspaper reporter for the *New York Times*, and returned to the United States. She subsequently practiced law in New York City. Propp-Fowle remained in the Army Reserve and retired as a LTC in 1968. In 1999, she was inducted as a "Distinguished Member of the Regiment." She died on 12 June 2000 at ninety-two years old. A suite of rooms at The Judge Advocate General's Legal Center and School (TJAGLCS) has been dedicated to her memory in recognition of her many contributions to the Army and the JAG Corps.

#### **Elizabeth R. Smith Jr.**

"Liz" Smith was the first female attorney to attain the rank of colonel.<sup>7</sup> She also was the first female judge advocate to graduate first in the Judge Advocate Basic Course. Colonel Smith also holds the record in the Corps for having been a CJA to a commanding general for twelve consecutive years.

Born in Ravenna, Kentucky, on 27 December 1926, she was the only child of



Elizabeth Smith Jr. was the first female to reach the rank of colonel in the Corps.

R. W. and Elizabeth Ratliff Smith. Colonel Smith really was a "junior" because she was named after her mother.<sup>8</sup>

Smith grew up in Irvine, Kentucky, and entered the University of Kentucky in 1944 in a six-year combined Bachelor of Arts and Bachelor of Laws degree program. After graduating in 1950, motivated by patriotism (the Korean War was underway), adventure, and a desire to get away from the small Kentucky town in which she had grown up, Smith applied to join the WAC. She was accepted, commissioned as a second lieutenant, and completed the WAC basic course at Fort Lee, Virginia.<sup>9</sup>

Smith served first at Fort Eustis before being reassigned to Heidelberg, Germany, in March 1954. The plan was for now-First Lieutenant Smith to work as a supply officer in a Quartermaster unit in U.S. Army, Europe, but when the senior WAC officer in Europe learned that Smith was an attorney, this officer arranged for Smith to be assigned to the Northern Area Command legal office located near Frankfurt. First Lieutenant Smith spent three years in Germany, and served in legal assistance, administrative law, and military justice. She was not formally assigned or even detailed to the JAG Corps; Smith remained a member of the Army WAC.<sup>10</sup>

In 1957, 1LT Smith applied to attend the 25th Special Class (the forerunner of today's Judge Advocate Basic Course). She completed the course, graduating first in her class.<sup>11</sup> A letter to Smith from Major General George Hickman Jr., then serving as The Judge Advocate General (TJAG), congratulated 1LT Smith for finishing number one in the Special Class. Hickman also wrote that this "award has added



significance when it is realized that you [Smith] were competing with 54 other officer lawyers who graduated from *better law schools*.<sup>12</sup> One has to wonder what Smith thought of this backhanded compliment.

First Lieutenant Smith was then assigned to Fort McClellan, where she was an instructor in the General Military Subjects Division, WAC Training Battalion. Promoted to captain in 1958, Smith then served a one-year tour as the commanding officer of Company B, WAC Training Battalion, “an opportunity she thoroughly enjoyed.”<sup>13</sup>

Captain Smith next served at Fort Leavenworth, Kansas, where she was the only female judge advocate in the OSJA. She still had her WAC status, but was now temporarily detailed to the JAG Corps for a period of three years.<sup>14</sup>

In 1961, at the urging of Major General Charles L. “Ted” Decker, the Army formally granted qualified WAC officers permanent detail to the JAGD. Smith applied for the new status, which was approved. This permanent status with the Corps meant that while she remained in the WAC, CPT Smith’s career was now managed by the JAG Corps rather than by the WAC Career Management Branch. It also meant that CPT Smith was authorized to wear JAG Corps brass on her uniform.<sup>15</sup>

Captain Smith’s next assignment was to TJAGSA, where she worked as the Deputy Director of the Academic Department. The only female lawyer on the staff and faculty, Smith “managed the school’s academic schedule, guest speakers, coordinated support to the academic departments, and otherwise assisted in the administration of the academic program.”<sup>16</sup> It was not easy to be a lone woman at TJAGSA, especially as not every male Soldier was convinced that women should be in Army uniforms. Certainly, CPT Smith’s supervisors were aware that some Soldiers held those views, as reflected in this senior rater comment from COL John F. T. Murray, the TJAGSA Commandant: “For anyone with a built in prejudice against women lawyers, I suggest a tour with Major Smith. She will overcome the prejudice and demonstrate why she is an outstanding officer.”<sup>17</sup>

After a promotion, now-MAJ Smith completed the 13th Career Course (today’s

Graduate Course) in 1965, finishing in the top third of the class. Then, she joined the Military Affairs Division, Administrative Law Division, Office of the Judge Advocate General (OTJAG). In her opinion, “it was one of the best assignments you could have.”<sup>18</sup> As she put it in her oral history:

It was far better than the Military Law Division, International Law, or anything else because a commander’s “meat and potatoes” is running his post, camp, or station, and he is going to be in the area of administrative law far more than the courts-martial. Anybody can do courts-martial. I think it takes real talent to do Administrative Law.<sup>19</sup>

In December 1966, then-LTC Smith left the Pentagon for an assignment as the first legal advisor for the U.S. Army Recruiting Command (USAREC), then located in Hampton, Virginia. Her job as the command’s first CJA was challenging, as the Vietnam War was in full swing and the increasing unpopularity of the draft meant that Smith and her staff wrestled with a variety of issues, including sometimes violent anti-war demonstrations at Armed Forces Examining and Entrance Stations, and handling responses to private habeas corpus actions used to impede the induction of men who had been drafted.<sup>20</sup>

When USAREC moved from Virginia to Fort Sheridan, Illinois, LTC Smith went with it. On 10 July 1972, while still serving as the CJA at USAREC, Smith made history as the first female judge advocate to reach the rank of colonel. The following year, after the draft and inductions ended, COL Smith helped USAREC transform itself so that it could better focus on recruiting for an all-volunteer Army. She was particularly interested in institutional changes at USAREC that would create more opportunities for women in the Army. In any event, COL Smith was so valued by the command at USAREC that she remained as its top judge advocate until she retired—with more than twenty-six years of service—on the last day of May 1978, the last twelve having been exclusively at USAREC.<sup>21</sup>

In retirement, Liz Smith continued to play golf (she described herself as “fair” at

the game) and collect opera records. Opera, in fact, was her passion and the last month of her tour in Germany, she went “to the opera every week.”<sup>22</sup> Colonel Smith died at her home in Newport News, Virginia, on 8 July 2007, at eighty-one years old.

### **Nancy A. Hunter**

After entering the Corps in 1967, Nancy Hunter became the first female judge advocate to deploy to Vietnam and the first female military judge in Corps history. She also was the first female Army lawyer to be decorated with the Bronze Star Medal. Hunter also was the first female instructor on the faculty at TJAGSA.

Born in Detroit, Michigan, on 20 June 1939, Hunter graduated from the University of Colorado with a degree in business. She then joined the Navy, serving as a Supply Corps Officer from 1959 to 1964, when she began law school at Georgetown University. After graduating in 1967, and passing the New York and Virginia bar examinations, Hunter transferred from the U.S. Naval Reserve to the Army and the Corps. She completed the 47th Judge Advocate Officer Basic Course in December 1967.<sup>23</sup>

Promoted to major in March 1968, Hunter served in Japan until 1970, when she deployed to Vietnam and was assigned to the U.S. Army Judiciary. At the end of her tour of duty as a special court-martial judge, MAJ Hunter was decorated with the Bronze Star Medal—most likely the first female judge advocate to receive this medal.<sup>24</sup>

Major Hunter’s next assignment was at TJAGSA. She first taught in the Civil Law Division and then moved to be an Instructor, Criminal Law Division—both jobs resulting in her being the first female faculty member in our history.<sup>25</sup> Hunter retired as a lieutenant colonel in 1979.

Four other female judge advocates from these early years deserve mention: LTC Nora G. Springfield, the first WAC granted permanent detail to the Corps in 1961; MAJs Mary Attaya and Ann Wansley, the first two female judge advocates in history to attend the Career Course (12th Class, 1963-64); and CPT Adrienne M. McOmber, the first lawyer permanently detailed to the Corps directly from civilian life in 1966.<sup>26</sup>

## 1970s to 1990s

The end of the draft after the Vietnam War and the elimination of the WAC as a separate part of the Army meant increased opportunities for women who wanted to soldier. The JAG Corps also recognized that it should encourage female attorneys to serve as JAs. By 1974, the total number of female attorneys in uniform increased from twenty-one to forty-five.<sup>27</sup> Here, in alphabetical order, are some of the many notable female judge advocates from the last three decades of the twentieth century.

### **Malinda Dunn**

Malinda Dunn was the first female attorney to serve as the Staff Judge Advocate (SJA) of the 82d Airborne Division and XVIII Airborne Corps. She also was the first active component female JA to be promoted to brigadier general.

Born in Parkersburg, West Virginia, Dunn graduated with her Bachelors of Science from Randolph-Macon College in Virginia and received her law degree from Washington and Lee University in Virginia. She received a direct commission into our Corps in June 1981. As a captain, Dunn served at the 2nd Infantry Division, 82nd Airborne Division, and 4th Infantry Division. After completing the 36th Graduate Course in 1988, she worked in the Procurement Fraud Division in the Pentagon before returning to Fort Bragg, where she was assigned to U.S. Army Special Operations Command before re-joining the 82nd Airborne Division to serve as its Deputy Staff Judge Advocate (DSJA) and the SJA—the first female judge advocate to serve as the division’s top lawyer. Then-MAJ Dunn also worked at XVIII Airborne Corps as the Chief, Administrative Law Division.<sup>28</sup>

After completing Command and General Staff College at Fort Leavenworth, now-LTC Dunn was assigned to the 25th Infantry Division as its DSJA. Her next tour of duty was in the Pentagon, where she served as the field grade assignments officer and subsequently the Chief, Personnel, Plans and Training Office (PP&TO), OTJAG. After completing her studies at the National War College in June 2002, then-COL Dunn served as the SJA at the Joint Readiness Training Center and Fort



BG Malinda Dunn was the first active component female to reach flag rank in the Corps.

Polk until March 2003, when she became the first female JA to be the SJA at XVIII Airborne Corps. Her assignment at XVIII Airborne Corps included tours as the SJA, Combined Joint Task Force-180, Bagram Air Force Base, Afghanistan, Operation Enduring Freedom from March—May 2003; and the SJA, Multi-National Corps-Iraq, Operation Iraqi Freedom from January through July 2005.<sup>29</sup>

Selected for promotion to brigadier general in 2005, Dunn was the Commander, USALSA, and Chief Judge, USACCA, before serving as the Assistant Judge Advocate General for Military Law and Operations, OTJAG. Brigadier General Dunn retired on 1 January 2010. Today, she is the Executive Director for the American Inns of Courts, a professional non-partisan association of lawyers, judges, and other legal professionals.<sup>30</sup>

### **Pamela Kirby**

Pam Kirby entered the Army in 1973, with encouragement from her father, a retired Army Infantry officer, and from her fiancé CPT Robert (Bob) Kirby, an active duty JAG Corps officer. Kirby completed the Women’s Army Corps Officer Basic Course and then, as one of the first group of women to be sent through officer training in formerly all-male branches of the Army, she completed the Military Intelligence Officer Basic Course and was detailed to Military



LTC Pam Kirby USA was one of the first female officers selected for the Funded Legal Education Program.

Intelligence (MI). After three years as an MI officer, Kirby applied for and was selected for the Funded Legal Education Program (FLEP). She was the second female Army officer to be selected for the program.<sup>31</sup> The Funded Legal Education Program had been created two years earlier to allow up to twenty-five active duty officers a year from each of the services to attend law school at government expense. Kirby was the only female officer that year out of the twenty-five officers selected.

Kirby completed law school at the University of Virginia and was transferred to our Corps, thereby making her and her husband, then-MAJ Bob Kirby, one of the earliest “JAG Corps couples.” While it is not uncommon today for one JA to be married to another, this was unusual in the 1970s, given the limited opportunities for women in the Army generally and the small number of female lawyers in the Corps in particular.

Kirby served in a variety of locations and assignments as a JA. In the mid-1980s Kirby served in Germany as the Chief, Criminal Law, 3rd Armored Division, where she dealt with repercussions from allegations of unlawful command influence resulting from public remarks made by the division commander.<sup>32</sup> Kirby served as the Chief, Judge Advocate Recruiting Office, in the late 1980s, and was instrumental in bringing on active duty Malinda Dunn,

who would be the first active component brigadier general in the Corps.

In 1993, after serving twenty and one-half years in the Army, Pam Kirby retired in the rank of lieutenant colonel. Her husband Bob retired then as well after twenty-six years of active duty in the rank of colonel. After moving to Orlando, Florida, Kirby went on to have a successful second career as an associate dean and legal studies faculty at the University of Central Florida (UCF). She retired from UCF in 2012.

### **Musetta Tia Johnson**

In 2002, Musetta Tia Johnson made history as the first African-American female in the Corps to be promoted to the rank of colonel. She also was the first African-American female to earn an LL.M. at TJAGSA.

In her nearly thirty years of outstanding service as an Army lawyer (she retired from active duty in 2013), COL Johnson specialized in international and national security law, and served in a variety of overseas locations, including Bosnia, Cuba, Italy, and Korea. She was the top Army lawyer in Korea from 2008 to 2010. In her final assignment in our Corps, Johnson was the Senior Military Assistant to the Department of Defense General Counsel.<sup>33</sup>

In retirement, Johnson first served as the Senior Advisor to the Director, U.S. Immigration and Customs Enforcement and then as the Assistant Secretary for Legislative Affairs, U.S. Department of Homeland Security. In this latter position, she was the department's principal liaison with the Congress, where she worked closely with authorization, appropriation, and oversight committees in both the House and Senate.<sup>34</sup> She currently is the Director, National Security Law LL.M. Program at Georgetown University and serves there as a Visiting Professor of Law.<sup>35</sup>

### **Sarah Park Merck**

Sarah Merck was the first female Director of Academics at TJAGSA and the first woman judge advocate promoted below the primary zone to colonel.

After graduating from Georgia State University in 1972 and earning her law degree from Emory University in 1979, Merck was directly commissioned into the Corps. She then served at a variety of locations,



COL Tia Johnson was the first African-American female to be promoted to colonel.

including: Fort Knox, Kentucky; Stuttgart, Germany; Leavenworth, Kansas; and the Pentagon.<sup>36</sup> Then-MAJ Merck taught criminal law at TJAGSA from 1988 to 1991, and returned almost ten years later to be the school's first female academic director in 1999. Colonel Merck retired from active duty in 2001.

### **Joyce E. Peters**

Joyce Peters had a remarkable career in our Corps. She was the first female JA to serve as the SJA for a general court-martial convening authority and the first female JA to be an Army Corps SJA. She also was the first JA in history to serve as the Senior Military Assistant to the Secretary of the Army, the first female JA to attend a Senior Service College, and the first female JA to be awarded the Distinguished Service Medal. Colonel Peters was the second female attorney to reach the rank of colonel—eighteen years after COL Liz Smith Jr. reached that rank.

Born in Ann Arbor, Michigan, in January 1947, Peters spent her childhood in Texas, Pennsylvania, Michigan, Kansas, and Ohio because her father's job as a petroleum engineer meant frequent moves for the family. After graduating from Radcliffe College in 1968 and obtaining her law degree from the University of Michigan in 1971, Peters spent a year practicing law in Cleveland, Ohio, before joining the WAC in 1972.<sup>37</sup>



COL Joyce Peters (left) was the first female SJA at I Corps, Fort Lewis (now-Joint Base Lewis-McChord) and then the first female officer to serve as the Senior Military Assistant to the Secretary of the Army.

She was immediately—and permanently—detailed to the JAG Corps. After completing the 65th Judge Advocate Basic Course, then-CPT Peters served as a trial counsel and Chief, Administrative Law at V Corps, Frankfurt, Germany. She then returned to TJAGSA, where she was the only woman in her Graduate Course. She graduated first in the class in 1977 and then remained on the faculty, where she taught administrative and civil law.<sup>38</sup>

After leaving Charlottesville in 1980, Peters served in a variety of assignments, including DSJA, 2d Infantry Division, Korea, and Chief, Military Personnel Branch, Litigation Division, OTJAG. In 1986, she made history as the first female JA to be the SJA to the general court-martial convening authority at U.S. Army Logistics Center and Fort Lee. When she left that position in 1989, she went to the Pentagon, where she served three years in the Office of the Chief of Legislative Liaison. She also completed the National War College in 1992, she was the first female JA to attend an Army Senior Service College.

Promoted to colonel, Peters made military legal history once again as the first female SJA at I Corps and Fort Lewis, Fort Lewis, Washington. She served in this position until 1994, when she was selected by

then-Secretary of the Army, Togo D. West Jr., to be his Senior Military Assistant—the first time in Corps history that a JA was chosen for this assignment. In fact, Peters was the first woman to serve in this position, and most likely the first non-combat arms officer chosen for the job. Colonel Peters retired in 1994.<sup>39</sup>

### **Coral W. Pietsch**

Coral Pietsch is the first female JA to reach flag rank in our Corps. She also is the first Asian-Pacific American female general officer in Army history. She was born in Waterloo, Iowa, to a Czech-American mother and a Chinese-immigrant father who had come to the United States to start a restaurant.<sup>40</sup>

Pietsch earned her undergraduate degree at the College of Saint Teresa and an M.A. in drama from Marquette University. She obtained her law degree from Catholic University, Washington, D.C. Commissioned into the JAG Corps in 1974, Pietsch served for four years on active duty in Korea and Hawaii before transferring to the Army Reserve.

After active duty, she served as a deputy attorney general for the State of Hawaii for six years. She then accepted a position as a Department of the Army (DA) civilian attorney at Headquarters, U.S. Army Pacific (USARPAC), Fort Shafter, Hawaii, rising to be the senior civilian attorney.

During her Army Reserve career, Pietsch held assignments as a contract law and claims officer at Headquarters, IX Corps (Augmentation), Fort DeRussy, Hawaii; contract law officer, chief of legal assistance, and chief of the administrative law division at Headquarters, IX Corps (Reinforcement), Fort DeRussy; and as the SJA, 9th U.S. Army Reserve Command, Fort DeRussy. As a reservist she deployed to Johnston Atoll, Japan, and the Philippines.<sup>41</sup>

Brigadier General (BG) Pietsch made history in July 2001, when she was promoted to general officer—the first female JA to achieve that rank. She then served as the Chief Judge (Individual Mobilization Augmentee) and Commander, Judicial/Defense Services Unit, until retiring in July 2006.<sup>42</sup>

But, even after leaving the Army Reserve, BG Pietsch continued to take



BG Coral W. Pietsch was the first female officer to be promoted to brigadier general in the Corps. Pietsch was an Army reservist.

on tough challenges. As part of the 2007 “surge” in Iraq, she volunteered as a Department of Defense civilian to deploy to Iraq for a year where she was seconded to the U.S. Department of State. Assigned to be the Deputy Rule of Law Coordinator for the Baghdad Provincial Reconstruction Team, Pietsch assisted numerous civil society projects involving a variety of rule of law partners, including the Iraqi Jurist Union, Iraqi Bar Association, law schools, and international rights, women’s rights, and human rights organizations. During her time in Iraq, she also established meaningful relationships with numerous Government of Iraq ministries, nongovernmental organizations, and Coalition partners to help reinvigorate the rule of law in Iraq.<sup>43</sup>

On 1 November 2011, President Obama nominated her to the United States Court of Appeals for Veterans Claims as his replacement for Judge William P. Greene (a retired JA colonel), who had reached the end of his fifteen-year term.<sup>44</sup> The U.S. Senate confirmed BG Pietsch as the newest judge of the Court of Appeals on 24 May 2012.<sup>45</sup> Her fifteen-year term will expire in 2027.<sup>46</sup>

### **Elyce K. D. Santerre**

In 1988, CPT “Lisa” Santerre made history as the first recipient of the newly authorized LL.M. in military law. She achieved

this distinction because she graduated first in the 36th Graduate Class in May 1988, which was the first class to receive the Masters of Law degree authorized by Congress just months earlier. Since the student graduating at the top of the class was the first to walk across the stage at TJAGSA, Santerre was the first to receive the new post-graduate law degree from Major General Hugh Overholt, who was presiding over the graduation ceremony.

Santerre was a 1975 graduate of the University of North Dakota. Commissioned as a lieutenant in the Transportation Corps, she served as a platoon leader and motor operations officer before entering law school as a FLEP student at the University of California-Berkeley. After graduating in 1981, and completing the Judge Advocate Officer Basic Course (JAOBC), she served at Fort Richardson, Alaska, and Fort Riley, Kansas, prior to attending the 36th Graduate Class.<sup>47</sup>

Then-CPT Santerre left active duty soon after receiving her LL.M. She continued her career as a DA civilian attorney in Alaska, where she specialized in labor law.<sup>48</sup>

### **Kathryn Stone**

“Kat” Stone has a number of “firsts” in Corps history. She was the first female SJA at the 10th Mountain Division (Light Infantry) and Fort Drum, and the first female SJA in a combat zone (Afghanistan). Then-COL Stone also was the first female SJA at U.S. Southern Command and the first female JA to serve as the Executive Officer to TJAG.

A native of Florida, Stone completed her undergraduate degree at Stetson University in 1979. She was a Distinguished Military Graduate and consequently commissioned into the Army in MI. After taking an educational delay to complete law school at Stetson, then-CPT Stone elected to remain in MI in order to serve in Germany, before transferring to our Corps in 1987.<sup>49</sup>

In 2010, when she retired from active duty after twenty-seven years of active duty, COL Stone had served in a variety of assignments and locations, including: 8th Infantry Division (Mechanized), Germany; 6th Infantry Division (Light), Fort Richardson and Fort Greely; 2d

Armored Division, Fort Hood; U.S. Special Operations Command South, Panama; and 10th Mountain Division (Light Infantry) and Fort Drum. While serving as the 10th Mountain Division SJA, then-LTC Stone deployed to Southwest Asia in late 2001 to serve as the SJA, Coalition Joint Task Force-Mountain during Operation Enduring Freedom. She arrived in Uzbekistan in early December 2001 and, while LTC Stone spent the early days of her deployment in Karshi Khanabad, she ultimately lived and worked in Bagram until re-deploying to Fort Drum. This deployment meant that Stone was the first female SJA to deploy to a combat zone.<sup>50</sup>

Colonel Stone also had previous service as the SJA, U.S. Special Operations Command South (SOCSOUTH). During this assignment in Panama, she deployed to Peru and Ecuador in late 1995 as part of Operation Safe Border. This SOCSOUTH mission deployed a small number of special forces personnel to prevent a limited border war between Peru and Ecuador from expanding into all-out war. Stone is now the top civilian attorney in OTJAG's Professional Responsibility Office.<sup>51</sup>

**Denise Vowell**

Denise Vowell was the first female SJA at 1st Infantry Division and the first female Chief Trial Judge in Corps history. An honors graduate of Illinois State University, she earned her law degree through the FLEP at the University of Texas in 1981.<sup>52</sup>

Vowell enlisted in the Army in 1973 while an undergraduate and received a direct commission in the WAC in 1974. She served as a military police officer at Fort Knox and with the 1st Cavalry Division, where she was in command of a company at the time of her selection for the FLEP. As a JA, COL Vowell served in a variety of positions and locations, including: Government Appellate Division, Falls Church, Virginia; PP&TO, OTJAG; Tort Branch, Litigation Division, OJTAG, and Trial Judge and Chief Circuit Judge, 1st Judicial Circuit; and SJA, 1st Infantry Division. She made history when she was selected to serve as the first female Chief Trial Judge, U.S. Army Trial Judiciary. She retired from active duty in January 2006, and was then appointed by the Court of



COL Denise Vowell was the first female Chief Trial Judge.

Federal Claims as a Special Master in the National Vaccine Injury Compensation Program by the judges. A year later, Vowell was assigned as one of three special masters in the Omnibus Autism Program, handling one-third of the court's more than 5,000 cases alleging vaccine causation of autism spectrum disorders.<sup>53</sup>

**2000s to Present**

While hundreds and hundreds of women have served as JAs in the first two decades of the twenty-first century, and there are many who deserve mention, this short history can only identify a small number of them, and furnish limited details.

**Rebecca E. Ausprung**

Rebecca E. "Becky" Ausprung is one of four attorneys with Senior Executive Service (SES) status in the Corps. She is the Director, Civil Law and Litigation, USALSA. Ausprung began her career in the Corps as a uniformed attorney. From 1999 to 2001, she served at III Corps as a trial counsel and legal assistance officer before being reassigned to Germany, where she served first as a defense counsel in Kitzingen and the Senior Defense Counsel in Wuerzburg. Ausprung then served in the Litigation Division from 2004 to 2007 before leaving active duty and transitioning to the Army Reserve. She left the Reserve Component in 2012.<sup>54</sup>



BG LeAnne Burch was the first female commander of U.S. Army Reserve Legal Command.

**LeAnne Burch**

LeAnne Burch was the first female commander of U.S. Army Reserve Legal Command. She entered our Corps in 1986 and served on active duty until 1998, when she transitioned to the Army Reserve. Burch was a private practitioner in Arkansas for a few years before joining the Office of Chief Counsel, where she worked on cases involving child welfare and adult protective services.<sup>55</sup>

As she continued her JA career, then-COL Burch deployed to Afghanistan from September 2008 to August 2009. She was assigned to the Combined Security Transition Command-Afghanistan and served as the Chief, Afghan National Army/Ministry of Defense Legal Development.<sup>56</sup>

In 2012, Burch was selected for brigadier general, and she served first as the Reserve Chief Judge for USALSA before becoming the Commander, U.S. Army Reserve Legal Command in 2013. She retired from the Army Reserve in May 2016. Today, Burch serves in the House of Representatives in Arkansas, where she is the current Minority Whip.<sup>57</sup>

**Kirsten Brunson**

Kirsten Brunson was the first African-American female in our Corps to qualify and sit as a military trial judge. She graduated from the University of Maryland in 1987 and, having been cross-enrolled in Howard



Judge Paulette Burton was the first African-American female to be a judge on the U.S. Court of Military Commissions Review.

University’s Reserve Officers’ Training Corps program, commissioned into the Military Police Corps (MPC). But, Brunson received an educational delay and obtained her law degree from the University of California, Los Angeles in 1991.

Colonel Brunson joined the Corps and served in a variety of assignments, including: V Corps and XVIII Airborne Corps; Defense Appellate Division, USALSA; 101st Airborne Division; and U.S. Special Operations Command. After completing the Military Judges Course in 2008, she served as a trial judge at Fort Hood, Texas, before retiring from active duty.

**Paulette V. Burton**

Paulette Burton is the first African-American female JA to serve on the U.S. Court of Military Commissions Review (CMCR), a federal court created by Congress to hear appeals from military commissions. She was appointed by President Barack Obama to serve on the CMCR in May 2016. Lieutenant Colonel Burton became the Chief Judge of the CMCR in May 2017. Burton also is the first African-American female to serve as a judge on the Army Court of Criminal Appeals. She is now the Senior Judge on Panel 2.<sup>58</sup>



BG Marilyn Chiafullo is currently a brigadier general in the Army Reserve.

**Karen H. Carlisle**

Karen Carlisle is a member of the SES and is the Director, Soldier and Family Legal Service, OTJAG. She had a long career as a JA prior to joining the SES.<sup>59</sup>

Commissioned after graduating from college in 1990, Carlisle served first in the MPC before obtaining her law degree as a FLEP student at Florida State University in 1998. She then served in a variety of locations and assignments, including: DSJA, Fort Benning, Georgia; DSJA, U.S. Forces-Afghanistan; SJA, 1st Armored Division, Fort Bliss, Texas; Chief, Administrative Law, OTJAG; and SJA, U.S. Army Africa/Southern European Task Force, Vicenza, Italy. She retired from active duty in 2019.<sup>60</sup>

**Marilyn S. Chiafullo**

In May 2016, Marilyn S. Chiafullo was confirmed by the Senate to be a brigadier general in the Army Reserve. In her almost thirty years of active and Reserve service, BG Chiafullo has been the Chief of Staff, U.S. Army Reserve Legal Command, Chief of Reserve Component Management in OTJAG’s PP&TO, and SJA, Division West, First U.S. Army. She also has a combat tour in support of Operation Enduring Freedom while serving as the Theater Defense Counsel, U.S. Army Trial Defense Service, Afghanistan. In addition to her Army Reserve duties, BG Chiafullo serves as an attorney-advisor at PP&TO.



LTC Jennifer Crawford was Instructor of the Year at Command and General Staff College.

**Jennifer L. Crawford**

Jennifer “Jen” Crawford was the first JA named as the Military Instructor of the Year at Command and General Staff College. The award is presented yearly to be best military instructor and is based on “excellence in the four domains of teaching, service, scholarship and faculty development.”<sup>61</sup>

Lieutenant Colonel Crawford entered the Corps with a direct appointment in 1999 and served in a variety of locations and assignments, including Korea, Germany, and Iraq. Then-MAJ Crawford was an Assistant Professor at Command and General Staff College from 2006 to 2010, during which time she was named Military Instructor of the Year. She left active duty and transitioned to the Army Reserve. Lieutenant Colonel Crawford is currently serving as the Associate Dean for Adjunct Professors at TJAGLCS.<sup>62</sup>

**Flora D. Darpino**

No JA—male or female—has been more successful in the twenty-first century than Lieutenant General (LTG) Flora D. Darpino. She was the first female TJAG, first directly commissioned officer to be the Army’s top lawyer in the modern era, and first half of a JAG Corps couple to achieve general officer rank. She also was the first female Commander at TJAGLCS. Finally, Darpino was an SJA at both a division and a corps in a combat zone.



Then-CPT Flora Darpino receives an award from COL Walter B. Huffman. Huffman was TJAG from 1997 to 2001 and Darpino was TJAG from 2013 to 2017.

Directly commissioned into our Corps in 1987 after receiving her law degree from Rutgers University, LTG Darpino served in a variety of assignments and locations, including Germany, Iraq, Texas, and the Washington, D.C. area. Then-LTC Darpino was the SJA, 4th Infantry Division (Mechanized), when that unit deployed from Fort Hood to Iraq in 2003. She subsequently served as the DSJA at III Corps at Fort Hood before working as the Chief, Criminal Law Division, OTJAG. Then-COL Darpino's next assignment was as the SJA, V Corps, Heidelberg, Germany. She deployed to Iraq with that unit to serve as SJA, U.S. Forces-Iraq, where she was the senior military attorney in the country.

In 2009, Darpino was selected for brigadier general. She was the first female commander of TJAGLCS and later served as the Commander, USALSA, and Chief Judge, ACCA. Darpino was promoted to lieutenant general in September 2013 and served as the 39th Judge Advocate General of the Army until retiring in July 2017.

**Susan Escallier**

Susan K. Escallier was the second female SJA at the 101st Airborne Division (Air Assault). She also is the third female JA in

the active component Army to reach general officer rank.<sup>63</sup>

After graduating from the University of California-Berkeley in 1988, Escallier was commissioned through ROTC in the Signal Corps. She subsequently served in the 25th Infantry Division until attending law school as a FLEP student at Ohio State University. After transferring to the Corps, she served in a variety of assignments and location, including Fort Bragg, North Carolina, and Fort Campbell, Kentucky, where then-COL Escallier was the SJA at the 101st Airborne Division (Air Assault). Her last assignment prior to being selected for brigadier general was at Fort Hood, Texas, where she was the SJA for III Corps. Brigadier General Escallier now serves as the Commander, USALSA and Chief Judge, U.S. Court of Criminal Appeals.<sup>64</sup>

**Patricia A. Ham (formerly Martindale)**

In August 1990, then-CPT Patricia Martindale was the first female JA to deploy to Southwest Asia in Operation Desert Shield/Desert Storm in August 1990.<sup>65</sup> Almost fifteen years later, from 2004 to 2006, then-LTC Ham was the first female chair of the Criminal Law Department at TJAGLCS. Her last active duty assignment



COL Pam Harms (formerly Stahl), December, 2009 at Camp Higashi, Chitose, Hokkaido, Japan.



COL (Ret.) Patty Ham was the first female judge advocate to deploy in Desert Shield/Desert Storm. She was also the first female to head the Criminal Division at TJAGLCS. She is pictured here with LTG Charles Pede, The Judge Advocate General.

was as the Chief of Staff, Response Systems to Adult Sexual Assault Crimes Panel. Colonel Ham retired in early 2015.<sup>66</sup>

**Jeannine C. Hamby**

The first and only female JA to be awarded the Soldier's Medal—the Army's highest decoration for non-combat valor. On 14 July 2002, Hamby "saved a second-year law student working in the Judge Advocate

General's Summer Intern Program from a violent rape attack." As her citation explains:

When Major Hamby awoke to the screams of the intern being attacked by a male intruder in her house, she ran to find the naked male intruder attacking the terrified intern. Though Major Hamby was herself unarmed and in danger from the attacking intruder, she bravely confronted the attacker, interposed herself between the attacker and the terrified intern, and drove the attacker away from the intern and out of the house. Major Hamby then gave the police the information that led to the attacker's arrest, line-up identification, and conviction.

#### ***Pamela Harms (formerly Stahl)***

Pamela "Pam" Harms was the first female SJA of the 101st Airborne Division (Air Assault). She also was the first female SJA at USARPAC.

Born in Aberdeen, South Dakota, COL Harms grew up on a farm. She earned a degree in English and Speech from Northern State University and completed her legal studies at the University of Denver. After directly commissioning into the Corps in late 1987, Harms served in a variety of assignments and locations, including: VII Corps, Stuttgart, Germany; 2d Corps Support Command, Nellingen, Germany, and Saudi Arabia (as part of Operations Desert Shield/Desert Storm); and DSJA, 1st Armored Division. Then-LTC Harms also served as the Chair, Administrative and Civil Law Department, TJAGLCS, and as the Director, Center for Military Law and Operations. While the SJA at the 101st Airborne Division, she deployed to Iraq to serve as the SJA, Multi-National Division-North and Task Force Band of Brothers. She completed her military career as the SJA, USARPAC.

#### ***Denise R. Lind***

Denise Lind was the presiding judge in the high-profile general court-martial of Private First Class Bradley (now-Chelsea) Manning in 2012. After retiring from active duty in 2015, she took a position as an attorney advisor with the U.S. Military Commissions Trial Judiciary.<sup>67</sup>

#### ***Ellie Trefzger Morales***

Army Reserve CPT Ellie Morales was the first female JA to be awarded the General Douglas MacArthur Leadership Award. This prestigious honor is presented to fewer than twenty Army junior officers each year.

After graduating from Davidson College, North Carolina, and obtaining her law degree from Wake Forest University, Morales joined the Corps in 2010. She served one tour in Afghanistan and transitioned to the Army Reserve in 2015. Today, she works as an Assistant U.S. Attorney for the Department of Justice.<sup>68</sup>

#### ***Tara A. Osborn***

Tara Osborn served as the Chief Trial Judge of the U.S. Army until she retired as a colonel in 2017. In that position, she oversaw judicial operations at military installations worldwide, and led all active duty and Army Reserve judges of the U.S. Army Trial Judiciary. Osborn also presided over a number of felony criminal trials, to include the high-profile death penalty court-martial of MAJ Nidal Hasan at Fort Hood, Texas. Hasan was convicted of killing thirteen individuals and wounding another thirty men and women in a November 2009 mass shooting.<sup>69</sup>

In her JA career, COL Osborn served in a variety of assignments and locations, including Germany, Iraq, and Korea. Osborn had over twenty-nine years' active duty in the Corps when she left active duty.<sup>70</sup>

#### ***Sharon E. Riley***

Sharon Riley was the first female director of the Center for Law and Military Operations and the first female director of the Legal Center.

After receiving her law degree from Temple University, Riley directly commissioned into the Corps in January 1987. She subsequently served in a variety of increasingly important assignments, including: Officer in Charge, Schweinfurt Law Center, Germany, from 1996 to 1998 (which included being the DSJA (Forward), 1st Infantry Division, Tuzla, Bosnia from 1997 to 1998); SJA, 1st Armored Division, Baghdad, Iraq, and Wiesbaden, Germany; Director, Legal Center, TJAGLCS, from 2011 to 2014. She completed her career as

the SJA, U.S. Army Training and Doctrine Command and retired in July 2015.<sup>71</sup>

#### ***Sarah J. Rykowski***

Then-CPT Sarah Rykowski was the first female JA to be awarded the Purple Heart. On 17 May 2007, she was part of a convoy that was hit by an improvised explosive device. Rykowski was hit in the face with debris and a piece of shrapnel also pierced her bicep. She was the only survivor in her High Mobility Multipurpose Wheeled Vehicle; one of the Soldiers killed was Specialist Coty Phelps, an MOS 27D Paralegal Specialist.<sup>72</sup>

#### **Conclusion**

From only few female JAs in the 1940s and 1950s, the Corps today has more than 500 female lawyers in uniform. When one also considers that it was not until 1972 that a female wearing the crossed-pen-and-sword on her collar was promoted to colonel, and that another eighteen years would pass before a second female JA wore eagles on her shoulders, one can only conclude that gender equality was a long time coming. In retrospect, it is clear that it was not until the WAC was eliminated as a separate part of the Army in 1978 that progress was possible.

If anything, this short history of women in the Corps illustrates that once barriers to joining the Corps faded away, the chief problem for female JAs was upward mobility. Colonel Liz Smith, for example, knew that "promotion to colonel was a distant hope, at best."<sup>73</sup> Even in the early 1970s, senior JAs like Brigadier General Wilton Person, who would serve as TJAG from 1975 to 1979, was telling aspiring female lawyers like Joyce Peters that she would not be able to go beyond the rank of colonel.<sup>74</sup> Certainly, Persons never anticipated that a woman would wear three stars and serve as TJAG while he was still living. In fact, female JAs now have served in every rank in our Corps except for major general, and one expects that this omission will disappear sooner rather than later. Moreover, there are few if any assignments that have not been filled by female Army lawyers, reflecting that gender is no longer a barrier to service. Certainly gender no longer is an obstacle to service in a combat zone, as more than a few female JAs have



served as division- (e.g., then-LTC Flora Darpino at 4th Infantry Division) and corps-level SJAs (e.g. then COL Dunn at XVIII Airborne Corps).

While no one can be certain what the future will bring, if the past is prologue, then female JAs will continue to serve with honor and distinction. **TAL**

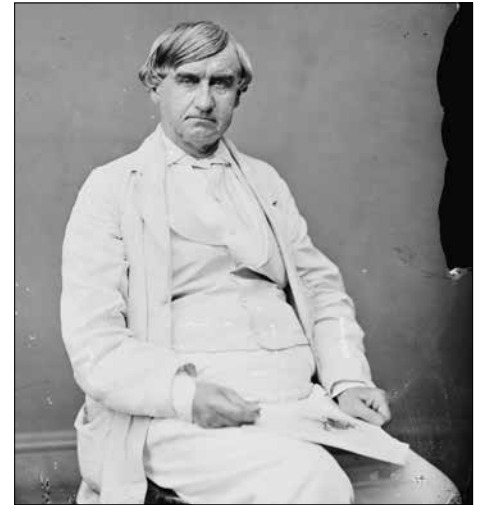
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*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

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## Notes

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3. Wolfgang Saxon, *Phyllis Propp Fowle, 92, Officer in Army Judge Advocate Corps* (sic), N.Y. TIMES B7 (June 26, 2000).
4. *Id.*
5. *Id.*
6. *Id.*
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8. *Id.*
9. *Id.* at 183.
10. *Id.* at 184.
11. *High Court Admits WAC to Practice*, SUNDAY STAR (Jan. 17, 1962).
12. Letter from Major General George Hickman to 1LT Elizabeth Smith (June 10, 1957) (unpublished) (on file with author).
13. Smawley, *supra* note 7, at 187.
14. *Id.*
15. *Id.*
16. *Id.* at 190.
17. U.S. Dep't of Army, DA Form 67-5, Officer Efficiency Report—Elizabeth R. Smith Jr. (31 Mar. 1963).
18. Smawley, *supra* note 7, at 191.
19. *Id.*
20. Recruiters and personnel manning Armed Forces Examining and Entrance Stations (AFEES) faced demonstrators who threw real and artificial blood on them and their files, and one AFEES was bombed. *Id.* at 193.
21. *Id.*
22. *Id.*
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**Left:** The Joseph Holt Mansion was built in the 1850s and was once part of a 10,000 acre estate. The home was placed on the National Register of Historic Places in 1976. **Above:** Brigadier General Joseph Holt was President Lincoln’s judge advocate. He served as The Judge Advocate General from 1862-1875.

## The Holt House’s History

By Fred L. Borch III

**In 1997, local school teacher Susan B. Dyer was out for a long Sunday afternoon drive when she spotted the Holt family mansion.** Dyer decided that her mission was to bring awareness of the historical importance of Joseph Holt and the Holt home to people all across Breckinridge County, Kentucky, and all across the nation. As she tells all who will listen, her “heart was touched” by the sight of Holt’s boyhood home. For many years, the house had been vacant and had deteriorated badly.

Joseph Holt (1807-1894) was President Abraham Lincoln’s lawyer. President Lincoln chose Holt to be the Judge Advocate General (tJAG) of the Army during the Civil War. Even after the President was assassinated at Ford’s Theater on 14 April 1865, Brigadier General Holt continued to serve as the Army’s top lawyer. In fact, Holt did not retire as tJAG until 1875, which means that he is the longest-serving tJAG in history.<sup>1</sup>

Holt was born in Breckinridge County, Kentucky, and his family home is still standing. Located on the banks of the Ohio River, it is a magnificent structure. The three-story, brick building is located on State Highway 144, one mile west of Addison, Kentucky, and is situated in a grove of trees on a plain. The western two-thirds of the home date from 1850, but the east wing and trim seem more characteristic of the 1870s. The home has many features of an Italianate villa. The Holt family mansion is unique in that no other tJAG home has been restored and is open to the public.

Thanks to Ms. Dyer’s truly relentless efforts, the Holt mansion is undergoing a complete restoration. The Breckinridge County Fiscal Court purchased the structure in 2008 with funding secured from the Lincoln Bicentennial Commission. Since that time, Dyer and other restoration project volunteers have secured sixteen grants toward

stabilization and restoration of the home for a total of \$1.4 million. This amount includes a \$150,000 Save America’s Treasures Grant and two \$500,000 Transportation Enhancement Grants. The Friends of the Holt House, Inc., is now planning the final stages of the restoration of the interior of the home. For more information on this project, visit [www.jholt-houseky.org/Events](http://www.jholt-houseky.org/Events).

Over the years, many judge advocates have visited the Holt home in Kentucky, and all members of the Regiment are invited to see what Susan Dyer and other volunteers have accomplished. The Corps owes her a debt of gratitude for preserving this important part of our history.<sup>2</sup> **TAL**

*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

### Notes

1. When first appointed as the Judge Advocate General in 1862, Joseph Holt held the rank of colonel. He was promoted to brigadier general in June 1864 and, some years after the Civil War had ended, was breveted a major general in recognition of his faithful, meritorious and distinguished services during the conflict. *THE JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER* 50, 53 (1975).

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Sergeant Major (Ret.) Howard Metcalf was the Regimental Sergeant Major from 1998 to 2002.

# In Memoriam

## Remembering Recently Departed Members of the Judge Advocate General Corps in 2019

By Fred L. Borch III

*The following members of our Regiment, in alphabetical order, passed away in 2019.*

### **Wilsie Horton Adams Jr. (1938–2019)**

Born in Baltimore, Maryland, on 6 December 1938, Adams went to Loyola Blakefield High School, Towson,

Maryland, from which he graduated in 1956. He then entered the U.S. Military Academy (USMA). Commissioned into the infantry in 1960, Adams served in the

82nd Airborne Division with the First Battle Group, 325th Airborne Infantry Regiment from 1961 to 1963 before entering law school on the Excess Leave Program.

After obtaining his juris doctor (J.D.) from Georgetown University in 1966, Adams spent a year at the Office of The Judge Advocate General (OTJAG) before moving to Charlottesville, Virginia, where he attended the 16th Advanced Course and taught two years in the Procurement Law Division of The Judge Advocate General's School (TJAGSA). In May 1970, then-Major (MAJ) Adams deployed to Saigon, Vietnam, where he served a tour of duty at the Army Procurement Agency. He resigned his Regular Army commission in 1971 and transferred to the Army Reserve, from which he retired as a lieutenant colonel (LTC). He was a partner in several Washington, D.C., law firms before his death. Lieutenant Colonel Adams is survived by his wife, Rosemary, and two daughters and four grandchildren.

### **Kenneth J. Allen (1949–2019)**

Born in Patterson, New Jersey, on 6 November 1949, Allen enlisted in the Army in 1970 as a Private (E-2) on the Delayed Entry Program. He left active duty as a sergeant to attend law school at the University of Louisville, from which he graduated in 1976.

Allen then applied for a commission as a judge advocate (JA); and, after being accepted and completing the 82d Judge Advocate Basic Course, then-CPT Allen served as a defense counsel at Fort Jackson, South Carolina. From 1980 to 1982, he was the Chief Commissioner, Army Court of Military Review (today's Army Court of Criminal Appeals). He then attended the 31st Graduate Course, from which he graduated in 1983.

After Allen left active duty the following year, he worked as a Department of the Army civilian attorney in three locations: Primasens and Zweibrucken, Germany, from 1984 to 1987; Fort Ritchie, Maryland, from 1987 to 1997; and Fort Detrick, Maryland, from 1997 to 2007, when he

retired. Allen also had a career as a JA in the Army Reserve, and served as the Command Judge Advocate (CJA), 412th Engineer Command (Forward), and Seckenheim, Germany, and CJA, 315th Engineer Group, Cumberland, Pennsylvania.

Allen was the author of a number of professional publications, including Thomson Reuters's 900-page *The Contract Interpretation Handbook: A Manual for Avoiding and Resolving Government Contract Disputes*, and its 1,600-page *Federal Grant Practice*. He also was an adjunct member of the Naval Postgraduate School, where he taught on topics such as ethics in public contracting.

Lieutenant Colonel (Ret.) Allen died on 18 May 2019. He was sixty-nine years old and is survived by his wife, Terry.

#### **Gary Layton Anderson (1943–2019)**

Lieutenant Colonel (Ret.) Anderson died on 17 September 2019. Born in Kansas City, Missouri, on 12 February 1943, Anderson earned his undergraduate degree from Westminster College and his law degree from the University of Texas. He then served as a JA for twenty years and, before being appointed as an Assistant U.S. Attorney for the Western District of Texas, he worked in the Civil Division in San Antonio until retiring in early 2018. Lieutenant Colonel (Ret.) Anderson was interred in the Fort Sam Houston National Cemetery.

#### **Leonard Neil "Leo" Atkinson Jr. (1959–2019)**

Sergeant First Class (Ret.) Atkinson died on 11 March 2019. Born in Sweet Grass, Montana, on 24 August 1959, Atkinson enlisted in the Army when he was seventeen years old. He was a paralegal specialist military occupational specialty (MOS) 71D (today's MOS 27D) and served in Southwest Asia during Desert Shield/Desert Storm. After retiring as a sergeant first class with twenty-two years of active duty, Atkinson worked as a civilian employee at Fort Jackson, South Carolina.

Sergeant First Class (retired) Atkinson's wife predeceased him. Atkinson is survived by two sons, a daughter, and a grandson. He was interred at the Fort Jackson Military Cemetery.

#### **Brian Banks (1955–2019)**

Major (Ret.) Banks died on 13 September 2019. He had retired from the Corps in 2004 and was sixty-four years old at the time of his death.

Born on 5 June 1955, Banks enlisted in the Army in 1975 and completed Infantry Basic Training and Advanced Individual Training at Fort Polk, Louisiana. He then served as an infantryman (MOS 11C) in the 2nd Infantry, 4th Infantry, and 10th Mountain Divisions before attending college at University of Colorado and earning dual-major bachelor degrees in Political Science and History in 1983.

He subsequently earned his J.D. from Washburn University School of Law. After directly commissioning in the Corps in 1987, Brian completed the 114th Judge Advocate Basic Course. He then served in a number of locations and assignments, including: Group Judge Advocate, 5th Special Forces Group (Airborne); Deputy Staff Judge Advocate, 5th US Army; Senior Defense Counsel, 3rd Infantry Division; CJA, U.S. Army John F. Kennedy Special Warfare Center and School; and SJA, Joint Special Operations Task Force-Afghanistan, Kharshi-Kanabad, Uzbekistan, and Bagram, Afghanistan.

In 2005, Banks returned to work for the Army as a civilian administrative law attorney at 1st Special Forces Command (Airborne), Fort Bragg, North Carolina. Major (Ret.) Banks is survived by his wife, two daughters, and one son.

#### **Charles Raphael Cherry (1991–2019)**

Sergeant (SGT) Cherry died on 4 September 2019. He was twenty-eight years old. Born in Brooklyn, New York, on 25 June 1991, he attended Long Beach Community College before enlisting in the Army Reserve. After successful completion of Advanced Individual Training as a paralegal specialist MOS 27D in 2013, SGT Cherry was assigned to the Headquarters and Headquarters Company, 425th Civil Affairs Battalion in Encino, California. In 2016, Cherry was assigned to the 79th Theater Sustainment Command in Los Alamitos, California. While in this assignment, he demonstrated a superior competitive spirit by participating in multiple "Best Warrior Competitions." He also, successfully,

completed airborne training and earned the Basic Parachute Badge in 2017.

In October 2018, SGT Cherry joined the Active Guard Reserve (AGR) program and was assigned to the United States Army Reserve Legal Command, 2nd Legal Operations Detachment (LOD). Although SGT Cherry's time spent with the Legal Command was brief, he left a lasting impression on his fellow Soldiers and will be truly missed by his colleagues, leaders, and friends. Sergeant Cherry is survived by his parents.

#### **Joseph Powell Creekmore (1938–2019)**

Colonel (COL) (Ret.) Creekmore died on 28 March 2019. He was eighty years old.

Born in Whiteville, North Carolina, on 24 May 1938, Creekmore graduated from the University of North Carolina at Chapel Hill in 1960 and finished his law degree there two years later. After passing the North Carolina bar examination in 1962, then-First Lieutenant Creekmore joined the Corps. Between 1962 and 1982, when he retired as a colonel, Creekmore served in Vietnam, Okinawa, Philippines, Taiwan, Thailand, Korea, Italy, and Germany.

After leaving active duty, Creekmore was the Clerk of Court, U.S. District Court for the Middle District of North Carolina until he retired a second time in 2002. Colonel (Ret.) Creekmore was predeceased by his wife and survived by two children, three grandchildren, and six great-grandchildren.

#### **Howard C. "Howie" Eggers (1942–2019)**

Colonel (Ret.) Eggers died on 25 March 2019 in Colorado Springs, Colorado. Born in San Francisco, California, on 30 August 1942, he was the eldest of four children and also grew up in San Francisco. After graduating from the University of San Francisco in 1967, he entered the Corps.

When he retired from active duty in 1994, COL Eggers served in a variety of assignments. He was the SJA, U.S. Army Southern European Task Force in the early 1980s and later served in the Army Trial Judiciary. He also had a tour of duty at the Office of Congressional Legislative Liaison. After retiring from active duty, COL Eggers joined the faculty of the U.S. Air Force Academy Law Department, where he worked as a civilian law professor for nineteen years.

Colonel (Ret.) Eggers was predeceased by his wife. He is survived by one daughter, one son, and three grandchildren.

**Francis X. "Frank" Gindhart (1940–2019)**

Colonel (Ret.) Gindhart died on 18 February 18, 2019. He was seventy-eight years old. Born in Philadelphia, Pennsylvania, on 27 August 1940, Gindhart attended La Salle University before earning his law degree from the University of Pennsylvania School of Law. He then joined the Corps, and served a tour of duty as an Army lawyer in Vietnam from 1967 to 1968. After leaving active duty, Gindhart transitioned to the Army Reserve and he retired as a colonel after thirty years of combined active and Reserve service.

Frank also served in a number of important judicial administrative positions, including: Reporter of Decisions and Clerk of Court of the U.S. Court of Appeals for the Armed Forces; Chief Deputy Clerk, U.S. Court of Appeals for the Second Circuit; and Clerk of Court, U.S. Court of Appeals for the Federal Circuit in Washington, D.C.

After retiring in 2000, COL Gindhart and his wife moved to South Carolina. He is survived by his wife, one son, one daughter, and three grandchildren. Colonel Gindhart is to be interred at Arlington National Cemetery.

**William Henry "Bill" Lantz Jr. (1942–2019)**

Colonel (Ret.) Lantz died on 22 October 2019. He was seventy-six years old. Born on 21 November 1942, Lantz graduated from Villanova University and commissioned into the infantry through the ROTC program. He then served in Vietnam and at Fort Ord before returning to Villanova in 1971 to earn his law degree. Then-CPT Lantz returned to active duty as a JA and served in a variety of assignments and locations, including 2d Infantry Division, Korea, where he was a trial and defense counsel. He also was the SJA in Berlin when the Berlin Wall came down in November 1991.

After retiring from active duty as a colonel, Lantz began a second career with the Department of Justice's Criminal Division, where he worked on national security issues. Colonel (Ret.) Lantz is survived by his wife, daughter, and two sons.

**Robert Michael "Mike" Lewis (1952–2019)**

Lieutenant Colonel (Ret.) Lewis died on 14 August 2019. He was sixty-seven years old. Born in Auburn, New York, on 23 March 1952, Lewis joined the Army in 1973 after graduating from the University of Delaware. Initially, he served as a military intelligence officer, but left active duty to attend law school at Syracuse University. He then returned to active duty with the Corps in 1981.

Lewis served in many assignments, including Fort Eustis, Virginia, Fort Stewart, Georgia, and Korea. A graduate of the 37th Graduate Class, Lewis served as the OTJAG Assistant Executive Officer before attending George Washington University, where he earned an LL.M. in environmental law. Lieutenant Colonel Lewis then served as the Environmental Law Specialist at U.S. Forces Command before being assigned as the Chief, Litigation Branch, Environmental Law Division (ELD), U.S. Army Legal Service Agency. He retired from active duty in 1998. Lewis remained at ELD as a civilian attorney until he retired in 2014. Lieutenant Colonel (Ret.) Lewis is survived by his wife.

**Howard Metcalf (1948–2019)**

Sergeant Major (Ret.) Metcalf, the 8th Regimental Sergeant Major of the Corps, died on 25 November 2019. He was seventy-two years old.

Born in New Orleans, Louisiana, on New Year's Day 1947, Metcalf graduated from Sevier High School, Ferriday, Louisiana, in 1969. He then enlisted in the Army and completed Basic Training and Infantry Advanced Individual Training (AIT) at Fort Polk, Louisiana. Howard then served as an infantryman in Vietnam from January 1970 to February 1971 with both the 90th Replacement Battalion and the 321st Transportation Company.

Metcalf left active duty and resumed his life as a civilian. But, he missed soldiering, and enlisted again in 1977 as a legal specialist MOS 71D. His initial assignment after graduation from AIT at Fort Ben Harrison, Indiana, was as a battalion legal noncommissioned officer (NCO) with the 1st Battalion, 44th Air Defense Artillery, Korea. His follow-on assignments included: Office of the Staff Judge Advocate,

21st Support Command, Kaiserslautern, Germany; Instructor Developer with Company C, 1st Battalion, Troop Brigade, Fort Ben Harrison, Indiana; Senior Legal NCO, Combined Field Army, Korea; and MOS 71D Branch Manager, Military Personnel Center, Falls Church, Virginia.

In November 1997, Metcalf was selected as the 8th Sergeant Major of the Corps, and he assumed that position on 17 February 1998. Metcalf served with honor and distinction under both Major Generals Walter B. Huffman and Thomas J. Romig. He retired as our Corps's Sergeant Major on 30 August 2002.

Sergeant Major (Ret.) Metcalf is survived by his wife and their two sons. He was interred on 1 December 2019, in the Fort Jackson National Cemetery, Fort Jackson, South Carolina.

**Joseph Andrew Rehyansky Jr. (1946–2019)**

Lieutenant Colonel (Ret.) Rehyansky was born in Irvington, New Jersey, on 6 August 1946. He died on 21 June 2019 in Chattanooga, Tennessee. He was seventy-two years old.

Rehyansky graduated from Parsons College in 1968, served a tour of duty in Vietnam, and then returned to earn his law degree from the Cumberland (Alabama) School of Law in 1972. He then directly commissioned into the Corps and, after retiring from active duty in 1990, moved to Chattanooga, Tennessee, where he served as a prosecutor in Bradley and Hamilton counties until retiring again in 2001.

Lieutenant Colonel (Ret.) Rehyansky is survived by his wife, one son, one daughter, and four grandchildren.

**Daniel Wayne Shimek (1947–2019)**

Colonel (Ret.) Shimek was born in Wisconsin and died on 5 November 2019 in Roswell, Georgia. He was eighty-two years old. Shimek graduated from the USMA in 1960. After serving a tour of duty as an engineer, Shimek attended law school on the Excess Leave Program and, after graduating from the University of Wisconsin in 1965, then-CPT Shimek transferred to the Corps.

He then served at XVIII Airborne Corps and 8th Infantry Division. After a tour in Vietnam and the Advanced Course at TJAGSA, Shimek served as an Associate



Flags stand vigil at gravesites in Arlington National Cemetery. (Credit: Adam Skoczylas)

Professor in the Law Department at West Point. He would later also serve as the SJA at USMA from 1975 to 1976—during the infamous USMA Electrical Engineer cheating scandal. Shimek finished his JA career as the SJA, 4th Army. He retired in 1987 and worked as the civilian Chief of Legal Assistance at West Point. Colonel (Ret.) Shimek is survived by his wife.

**Walter James Wadlington III (1931–2019)**

Captain Wadlington was born in Biloxi, Mississippi, on 17 January 1931. Wadlington died on 27 May 2019 in Charlottesville, Virginia.

After attending Duke University and Tulane Law School, and serving one tour of duty in the Corps, Wadlington discovered that his passion was teaching. He subsequently taught at Tulane for two years before joining the law faculty at the University of Virginia, where he taught for over forty years as the James Madison Professor of Law and later as Professor of Legal Medicine at UVA’s medical school.

He was the author or co-author of leading casebooks in domestic relations, children in the legal system, and law and medicine. Captain Wadlington is survived by his wife, one son, and three daughters.

**Of Note:**

**John W. “Jack” Matthews (1940–2019)**

Jack Matthews, known to many JAs from his time as the Deputy Assistant Secretary of the Army responsible for the Army Board of Correction for Military Records, died on 5 June 2019. Born on 30 November 1940, Matthews graduated from Duke University in 1962 and obtained his law degree from George Washington University in 1965. He then served in the Air Force Judge Advocate General’s Corps from 1965 until 1971, when he left active duty and transitioned to the Air Force Reserve.

Matthews then joined the Department of the Army as a civilian attorney in 1973. He subsequently became the Executive Secretary, Army Board of Correction of Military Records. In 1984, was selected for entry in the Career Senior Executive Service Program and then served as the Deputy Assistant Secretary of the Army for the Army Military Review Boards. Matthews is survived by his wife, two daughters, and a grandson.

**Richard M. “Rich” Mollison (1944–2019)**

Born on 4 July 1944, Mollison died on 26 June 2019. He was a retired captain in

the U.S. Navy Judge Advocate General’s Corps. Army JAs who served in the 1990s will remember Mollison from his tenure as the senior Navy lawyer on the Defense Department’s Joint Service Committee on Military Justice. Captain (Ret.) Mollison was just shy of his seventy-fifth birthday at the time of his death.

**Harris Goodall Squires (1985–2019)**

Harris, son of Colonel (Ret.) Malcolm and Kathy Squires, died on 12 November 2019. Harris was thirty-four years old. Born at Fort Leavenworth, Kansas, on 3 November 1985, Harris moved many times in his youth with his military family. He was a graduate of Virginia Tech and Seattle University. Harris taught English for three years in South Korea before returning to teach in Fairfax schools and coach girls’ soccer at Madison High School. He had a passion for travel and adventure with friends around the world. Harris is survived by his parents, his brother, sister-in-law, and niece.

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*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership.*

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Attendees of the U.S. Army Europe Leaders' Continuing Legal Education course in Germany pose for a group photo. (Courtesy: MAJ Jamie L. Gurtov)

# Azimuth Check

## U.S. Army Europe Legal Leadership Continuing Legal Education

By Major Jamie L. Gurtov

**An Army leader is anyone who, by virtue of assumed role or assigned responsibility, inspires and influences people by providing purpose,** direction, and motivation to accomplish the mission and improve the organization.<sup>1</sup>

Over 80,000 books on leadership,<sup>2</sup> over 1,500 definitions of leadership,<sup>3</sup> and over

forty different distinctive leadership theories make studying and learning this topic a challenging task for military service members looking to improve and enhance their leadership skills. Everyone has a favorite book on leadership or a must-read. Engage in a discussion with your peers on leadership, and some common themes emerge on

what makes a good leader and bad leader. Leadership and the *importance* of good leaders is widely recognized as a means of keeping employees happy and a reason people stay at their jobs. The Judge Advocate General's (JAG) Corps is following the trend of fellow legal leadership scholars and practitioners through institutional thinking and education.

In June 2019, the Leadership Center was tasked with the mission of creating and implementing a strategy to develop JAG Corps leaders and teams. The Center supports Army and JAG Corps leadership education and training in order to develop JAG Corps leaders and teams so they are adaptive to any environment. From the start of the project, any current curriculum the Center developed would consider leaders' experiences as a focus of the curriculum. As part of this training and education, the Leadership Center created an exportable and experiential training



(Credit: istockphoto.com/z\_wei)

package, and it put through its proof of concept at the U.S. Army Europe Leaders Continuing Legal Education.

Experiential learning plays a key part in the development of the training module and balances doctrine, personalities, and experiences of participants. What issues do new and experienced leaders face that could play out in a scenario that all members of the JAG Corps might face? The Center focuses on ways to provide practical scenarios that integrate the leadership requirements model as a means of coaching and teaching. With teaching focused on leadership doctrine, the Center came up with common leadership challenges a JAG Corps leader would likely encounter, thereby developing scenarios to use as a teaching tool in an experiential learning model.

The U.S. Army Europe Leaders' Continuing Legal Education event tested this experiential learning model in November 2019. Using the scenarios developed at TJAGLCS, the Center was able to test the scenarios with an experienced, captive audience. Attendees were selected to play the roles created in the scenario. Those not actively playing a role were incorporated into the scenario by taking distinct breaks between issues to obtain feedback and ask questions. This provided the Center the ability to obtain instant feedback and identify best practices and refinements in the scenarios. The attendees were provided the briefest of background information to obtain the most realistic training possible. The other attendees observed and provided periodic feedback. The ability for the

Center to observe the players and attendees provided a mechanism to identify ways to improve learning and foster growth.

All attendees actively participated in these scenarios, and there was a general feeling of interest in this new training. The scenario-based training is a tool to help emphasize the doctrine taught in the lectures and provide a meaningful albeit notional leadership experience. There was a special emphasis placed on facilitating discussion on leadership and involving officers, warrant officers, noncommissioned officers, and civilians. The goal is to make better leaders, not just better attorneys and paralegals. The scenarios and training were said to be engaging and thought-provoking for the attendees. The intent of this program will be implemented in the current Graduate Course, future Officer Basic Courses, Judge Advocate Officer Advanced Course, as well as the Noncommissioned Officer Academy and short courses. The attendees provided valuable feedback for the Center to continue to hone the scenarios to develop better-equipped leaders through experiential learning.

The Leadership Center will continue to develop leadership education and training in order to evolve JAG Corps leaders and teams, making them more adaptive to any environment. This work will, in turn, benefit present and future leaders throughout the JAG Corps, and will close the gap in educational and experiential leadership. **TAL**

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#### Notes

1. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-74 (31 July 2019) (C1, 25 Nov. 2019) [hereinafter ADP 6-22].
2. DEBORAH L. RHODE, *LAWYERS AS LEADERS* 1 (2013).
3. *Id.* at 7.





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# Practice Notes

## GOAD-ing Civilian Employees

By William J. Koon

**In the Army, the concept of Good Order and Discipline (GOAD) began, perhaps, with its first commander in chief.** While commander of the Virginia Regiment during the French and Indian War, then-Lieutenant Colonel George Washington wrote in a letter to his regiment captains, “Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.”<sup>1</sup>

The eventual criminalization of conduct deemed prejudicial to GOAD has been challenged at, and upheld by, the Supreme Court—who recognized “the fundamental necessity for obedience, and the consequent necessity for imposition of discipline” in the military . . . .<sup>2</sup>

The Army’s policy regarding GOAD is set forth in Army Regulation 27-10, where paragraph 17-2 states: “The military justice system is designed to ensure good order and discipline within the Army and also to

protect the lives and property of members of the military community and the general public consistent with the rights of the accused.”<sup>3</sup>

It’s the next-to-last clause that I focus on in this article: the protection of “the lives and property of members of the military community.” Specifically, if the Uniform Code of Military Justice is designed to preserve GOAD on installations and within the military community, yet only applies to members of the uniformed services, then what about the rest of the men and women who work for the U.S. Army? What about the 300,000 Civilian employees working shoulder to shoulder with Soldiers, and what can we do when their conduct is prejudicial to GOAD?

On 7 September 2016, Army Civilian employee Clifford Currie walked into First Lieutenant (1LT) Katie Blanchard’s office—his supervisor—and doused her with a water bottle of gasoline.<sup>4</sup> “As she stood

up to run, he tossed two lit matches at her and there was a burst of flames.”<sup>5</sup> Blanchard “stumbled out of the room and ran down the hall screaming.”<sup>6</sup> A coworker grabbed a blanket and smothered the flames.<sup>7</sup> Currie ran back to his office, then reappeared with a pair of scissors and straightedge razor.<sup>8</sup> Currie put his foot on Blanchard’s neck and began stabbing at her before a sergeant grabbed Currie and restrained him.<sup>9</sup>

The attack wasn’t out of the blue. In fact, while lying on the ground burned and bloody, 1LT Blanchard screamed, “I told you this would happen!”<sup>10</sup> As witnesses would later relate, Blanchard, a first-time supervisor of fifteen military and Civilian staff, had difficulties supervising Mr. Currie from the start.<sup>11</sup> She kept telling herself it would get better, but it only got worse as time went on.<sup>12</sup> “He was blowing up twice a day or not coming into work,” she said.<sup>13</sup> First Lieutenant Blanchard related Currie’s erratic and aggressive behavior to her leadership, who encouraged her to stay the course.<sup>14</sup>

For months, she warned her supervisors and coworkers that something would happen to her.<sup>15</sup> She told them that Currie scared her; that he would yell and physically intimidate her.<sup>16</sup> The report Blanchard provided media related that on multiple occasions, Blanchard told her chain of command she felt unsafe around Currie.<sup>17</sup> Over twenty-five witnesses supported her claim that she’d warned her supervisors.<sup>18</sup> And, it wasn’t just Blanchard. “The report noted that Currie was the subject of 53 complaints from patients between 2013 and 2016—31 of which occurred in 2016 while Blanchard was his supervisor.”<sup>19</sup>

Can you imagine the immediacy at which the chain of command would react if a Soldier behaved as Currie did in the months—no, for more than a year—leading up to the attack? Imagine a Soldier in your office accumulating over fifty negative Interactive Customer Evaluation (ICE) comments from customers and behaving erratically and physically aggressive toward his or her officer in charge (OIC)? My guess is after just a couple negative ICE comments or one, possibly two, outbursts directed toward the OIC, appropriate, effective action would be taken.

I know what you’re thinking. “It’s different with Civilians.” “It’s too hard to take

action against a Civilian.” “It’s impossible to fire a Civilian—don’t even try!”

Only the first thought is correct. But, even that thinking is flawed if you combine it with the next two ideas. In fact, as Ms. Rebecca Ausprung explained at this year’s WWCLE, taking appropriate action against a Civilian is more like taking adverse action against a Soldier than you think. All you need to be successful is documentation of the poor performance or misconduct, and a desire to hold the employee accountable.

The Players: supervisors of Civilians have two primary advisors when it comes to Civilian employee (poor) performance and (mis)conduct: (1) the Labor Management-Employee Relations (LMER) specialist at the Civilian Personnel Advisory Center (CPAC), and (2) the installation or organization’s assigned Labor Counselor. Think of them as your brigade paralegal and assigned trial counsel, respectively. They are there to listen to your dilemma; look at your documentation; advise a course of action; and assist in execution. Under normal circumstances, you go to your CPAC first, and they’ll pull in the labor counselor at the appropriate time.

The Process: it’s just like you tell the platoon sergeant or company commander who wants to take action against a Soldier—“you need documentation.” For misconduct, you will need ICE comments, witness statements, a memorandum for record memorializing what you observed, a 15-6 investigation—whatever documentation there is to support the action. If it’s a performance problem, you’ll need the employee’s Performance Plan from the Defense Performance Management and Appraisal System and, most likely, the most recent progress review and assessment as well as samples of the employee’s work product.

The Pain: yes, it takes time. Yes, it’s not pleasant—especially with long-time employees who you work with every day and with whom you have to maintain a professional relationship. And, yes, eventually most supervisors who do the right thing and hold employees accountable to the appropriate standards of professional behavior and performance have some sort of complaint filed against them. Grievances, Equal Employment Opportunity complaints, Inspector General complaints—those mechanisms are there to protect employees against

mistreatment, with good reason, and as long as you’re taking action for the right reasons and have your supporting documentation together, the action will be upheld.

For those of you who either are a senior leader, or advise one, and are worried about delays in favorable personnel actions due to being named in some complaint and that coming up through various scrubs: there is a process in place for assessments (of any complaint) to be completed and provided to Army Senior Leadership as soon as possible, so they can decide to proceed or not with whatever action is being contemplated. Meanwhile, take the appropriate action—do the right thing—it’s why the Army put you there in the first place.

The Payoff: take the right action, at the right time, and the payoff is immediate. Either the employee straightens up and returns to drama-free productivity, or doesn’t . . . and you now have reason to take the appropriate next steps, up to and including removal from federal service. Either way, you and, perhaps more importantly, your workforce will know you’re taking action for the good of the organization. Morale will improve and, in the long-run, the office will trust you as a manager who cares about everyone doing their fair share and acting professionally while doing so.

So, now what? Here is advice to deputy and staff judge advocates:

1. Take action when appropriate. Take it promptly.
2. Get to know your labor counselor’s case load. Have at least bi-weekly meetings with them, just like your trial counsel. Get a copy of the tracker and review it for unexplained delays or outcomes. Knock down obstacles, whether it’s a reluctant manager or commander, or an uncooperative staff member—intercede and facilitate.
3. Instill confidence in the system. Talk to your colleagues at command and staff. Mention significant cases to the Commanding General (CG) (beware—much like we guard against unlawful command influence, it’s best to keep adverse action decision-making at the lowest practical levels, so briefing the CG will be information-only, in most cases), or, better yet, have your labor counselor come brief the CG on a case or two.

Good order and discipline is the bedrock of the U.S. military and applies to not only military personnel, but also to Civilian personnel. It is important to develop good relationships with your CPAC L/MER specialist and labor counselor now, so that, should there ever become a problem, you can take swift action. Being more knowledgeable about the options you have available to you regarding Civilian personnel actions creates a healthier working atmosphere for everyone and makes you a better leader. **TAL**

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## Notes

1. U.S. Army Center of Military History, *Washington Takes Command of Continental Army in 1775*, ARMY.MIL (June 5, 2014), [https://www.army.mil/article/40819/washington\\_takes\\_command\\_of\\_continental\\_army\\_in\\_1775](https://www.army.mil/article/40819/washington_takes_command_of_continental_army_in_1775).
2. *Parker v. Levy*, 417 U.S. 733,758 (1974); see UCMJ art. 134 (2018).
3. U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 18-2 (11 May 2016).
4. Elaine Sanchez, *Workplace Violence Survivors Unite to Turn Tragedy Into Hope*, DEFENSE.GOV (Oct. 24, 2017), <https://www.defense.gov/Explore/News/Article/Article/1352092/workplace-violence-survivors-unite-to-turn-tragedy-into-hope/igphoto/2001773969/>.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Tony Rizzo, *20 Years in Prison Ordered for Man Who Set Fort Leavenworth Army Nurse on Fire*, KAN. CITY STAR (Nov. 2, 2017, 10:49 AM), <https://www.kansascity.com/news/local/crime/article182270571.html>.
11. Sanchez, *supra* note 4.
12. *Id.*
13. *Id.*
14. *Id.*
15. James Clark, *The Army Ignored Her Warnings About a Dangerous Colleague. Then He Set Her on Fire*, TASK & PURPOSE (June 5, 2019, 12:28 PM), <https://taskandpurpose.com/katie-blanchard-feres-doctrine>.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*



(Credit: istockphoto.com/erhui1979)

## Equal Employment Opportunity (EEO) Complaints, Not Your Army Regulation 600-20 Process

In short, and for purposes of this article, two distinct administrative complaint systems exist for Army personnel, based solely on their status.<sup>6</sup> The Army handles EO complaints of service members internally, while DA Civilians, and potentially others, as discussed below, may avail themselves of the processes dictated by the Equal Employment Opportunity Commission (EEOC), an independent federal agency with statutory authority to regulate and enforce federal employment anti-discrimination laws.<sup>7</sup> Formal complaints by military members are brought to the commander's attention for investigation, typically under the provisions of Army Regulation 15-6.<sup>8</sup> In contrast, formal EEO complaints by DA Civilians are generally processed by the organization's servicing EEO office.<sup>9</sup> The EEO officer performs a gatekeeping function as it concerns these complaints, with one of the threshold matters determining whether to accept or dismiss the complaint.<sup>10</sup> If dismissal is not appropriate, the Army (Agency) must accept the complaint for investigation and afford the complainant access to the Agency's administrative complaint process.<sup>11</sup>

## Liability Pitfalls with Contingent Workers

By Major Theodore B. Reiter

**While judge advocates (JAs) are familiar with the Army's policy and process for handling equal opportunity (EO) and sexual harassment complaints,** many are unfamiliar with the procedures for handling similar complaints by Department of the Army (DA) Civilian employees, which may be available to non-Army personnel, to include contingent workers.<sup>1</sup> As JAs potentially advise on both military and civilian personnel law, understanding these basics, along with how leaders may unwittingly and substantially increase the Army's financial liability, is imperative.<sup>2</sup> The importance of this topic

is even greater for those whose commands possess large numbers of contract workers or while deployed to combat environments, where otherwise-available labor and employment law support is limited.<sup>3</sup> Complaints of discrimination filed by DA Civilians and contingent workers against the Army may result in thousands of dollars per case—potentially hundreds of thousands of dollars—all paid from the activity where the alleged discrimination took place, using the offending organization's operational and maintenance funds.<sup>4</sup> No corresponding concern exists for service member complainants.<sup>5</sup>

### Contingent Workers Are Not Army Employees Under Federal Anti-discrimination Laws

Contingent workers are generally those outside of federal employment, such as volunteers and employees of government contractors.<sup>12</sup> One reason to dismiss a complaint is that the aggrieved worker lacks standing, i.e., that person does not qualify as an Army employee, applicant, or former employee under federal anti-discrimination laws.<sup>13</sup> As an initial matter, a contingent worker must specify whether their complaint is against their employer or the Army. If the latter, the EEO counselor informs the aggrieved that, depending on the facts and circumstances of their situation, the Army may not be their employer under federal anti-discrimination laws.<sup>14</sup>

Proceeding initially as though the standing of the complainant is not in question, an EEO counselor is assigned to conduct a pre-complaint inquiry. This

inquiry begins with contacting the management officials to determine the facts behind the working relationship, specifically, the supervisory factors discussed below.<sup>15</sup> The EEO counselor then forwards that information to the organization's servicing legal office "for a fact based analysis and legal opinion on whether the aggrieved is a covered Army 'employee' under the anti-discrimination laws."<sup>16</sup> If the Agency determines that the Army is not the contingent worker's employer for these purposes, the EEO officer shall dismiss the complaint for failing to state a claim.<sup>17</sup> An aggrieved who is prohibited from filing an EEO complaint against the Army for discrimination is not entirely without recourse, though, as other avenues of redress remain available.<sup>18</sup>

### **The Worker's Employer Is the One Who Controls the Worker's Means and Manner of Their Work Performance**

The determination as to whether a contingent worker qualifies as an Army employee and thus has standing to file a complaint against the Agency is conducted on a case-by-case basis after an examination of the working relationship between the management officials and the worker.<sup>19</sup> To make this determination, the EEOC applies the common law of agency, originally set forth by the EEOC in *Ma v. Department of Human and Health Services*.<sup>20</sup> This examination of "whether an employer-employee relationship exists is fact-specific and depends on whether the employer controls the means and manner of the worker's performance."<sup>21</sup>

While every aspect of the relationship is considered, the EEOC will look to the following non-exhaustive list of components, known as the "Ma" factors:

1. The extent of the employer's right to control the means and manner of the worker's performance;
2. The kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
3. The skill required in the particular occupation;

4. Whether the "employer" or the individual furnishes the equipment used and the place of work;
5. The length of time the individual has worked;
6. The method of payment, whether by time or by the job;
7. The manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;
8. Whether annual leave is afforded;
9. Whether the work is an integral part of the business of the "employer";
10. Whether the worker accumulates retirement benefits;
11. Whether the "employer" pays social security taxes; and
12. The intention of the parties.<sup>22</sup>

Contractual language may demonstrate the intent of the parties, but the language itself is not conclusive, nor is the element of who pays the complainant's salary.<sup>23</sup> Neither the number of factors met nor the finding of any one factor is controlling to the analysis.<sup>24</sup> With that said, as discussed below in *Wilson v. Department of the Army*, the EEOC has placed increased importance on some of these factors, such as constructively terminating the contingent worker from their employment.<sup>25</sup>

### **Actions Could Convert Contingent Workers into "Army Employees," Providing Standing to File a Discrimination Complaint Against the Army**

The EEOC recognizes a situation where more than one entity, to include two or more private entities, is potentially liable under federal anti-discrimination laws. This working relationship, termed "joint employment," involves the existence of "two or more employers that each exercises sufficient control of an individual to qualify as the worker's employer."<sup>26</sup> The potential for the creation of this relationship increases with the prevalence in the organization of workers provided by "staffing firms," which are "temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firm's clients."<sup>27</sup> The analysis is holistic, similar to the *Ma* factors enumerated

above.<sup>28</sup> Thus, the EEOC will examine "the comparative amount and type of control the staffing firm and the Agency each maintain over [the] complainant's work," with the burden on the complainant to demonstrate the existence of the joint employment relationship.<sup>29</sup>

As with any area of law, demonstration of the legal standard by way of examples is preferential to offering a list of rules. The case of *Wilson v. Department of the Army* illustrates a joint employer relationship and reflects the importance placed by the EEOC's analysis, where the Agency involves itself in the decision to remove the worker from their employment.<sup>30</sup> A DA Civilian referred the complainant, a retired enlisted Airman with experience as a personnel specialist, to a private contractor, who hired the complainant and placed him in the S1 section of a Logistics Readiness Center within the Communications-Electronics Command.<sup>31</sup> The DA Civilian S1 assigned daily tasks to the complainant, who worked in the Agency's facilities alongside DA Civilians using Agency-provided equipment.<sup>32</sup> Citing to the lack of work for the complainant, the Agency manager informed the complainant that he was terminated from his position.<sup>33</sup> The private employer informed the complainant that they had no input on the Agency's decision, and subsequently severed his employment based on the Agency's action.<sup>34</sup> The complainant filed an EEO complaint against the Agency, which dismissed the complaint on the basis that the complainant was not the Agency's employee.<sup>35</sup> The EEOC reversed the dismissal, providing that "[one] of the most important factors in making the Agency a joint employer was its power to remove [the complainant] from providing services to the Agency where this is tantamount to removal."<sup>36</sup>

Reflecting the degree of importance placed by the EEOC in the hiring process, a complainant unsuccessfully sought employment with Dyncorp Technical Services LLC (Dyncorp) for a licensed practical nurse (LPN) contract position.<sup>37</sup> The complainant alleged discrimination by the Agency, who dismissed her complaint on the basis that the complainant was not an employee or applicant for Agency employment.<sup>38</sup> The EEOC reversed the decision, finding "that the Agency exercised sufficient control



(Credit: istockphoto.com/erhui1979)

over the LPN position to qualify as a joint employer with Dyncorp.<sup>39</sup> The record reflected that Dyncorp forwarded the resumes of prospective candidates to an Agency representative who then made the selection and informed Dyncorp, who hired the selectee accordingly.<sup>40</sup>

Numerous other cases involve situations where the EEOC upheld the Agency's dismissal of the EEO complaint, finding the Agency had sufficiently maintained its separation to keep from becoming considered the complainant's employer.<sup>41</sup> The point of this article is not to discuss any one particular fact pattern or demonstrate all the permutations of this rule, but rather to raise overall awareness of the issue to the field, especially to JAs who have yet to practice labor and employment law. Involvement with this type of situation may arise by either a military or Civilian attorney supervising a contingent worker directly (to include a volunteer or intern in a legal office) or advising a manager who maintains contingent workers as part of their workforce, the latter the more likely scenario.

While detailed guidance on the proper supervision of contracted workers by federal employees is outside the scope of this article, as a best practice, it is recommended to adhere to the terms of the contract, as—if drafted correctly—abiding by the terms should avoid the types of issues discussed above.<sup>42</sup> Those in managerial positions with contract workers within their workspace should tread cautiously in any matter that may involve a personnel action, such as taking or requesting disciplinary action, issuing or recommending awards or promotions, directing or suggesting the removal of a worker, or evaluating individual performance.<sup>43</sup> These managers should instead remain in close contact with their respective contracting officer representative to address any concerns involving individual contract workers as they arise.<sup>44</sup> Through an understanding of this potential issue, attorneys may best advise their leaders to sidestep this avoidable liability trap. Successfully doing so may save your command hundreds of thousands of dollars in damages paid to a non-Army employee

complainant, money better spent on the organization's warfighting mission.

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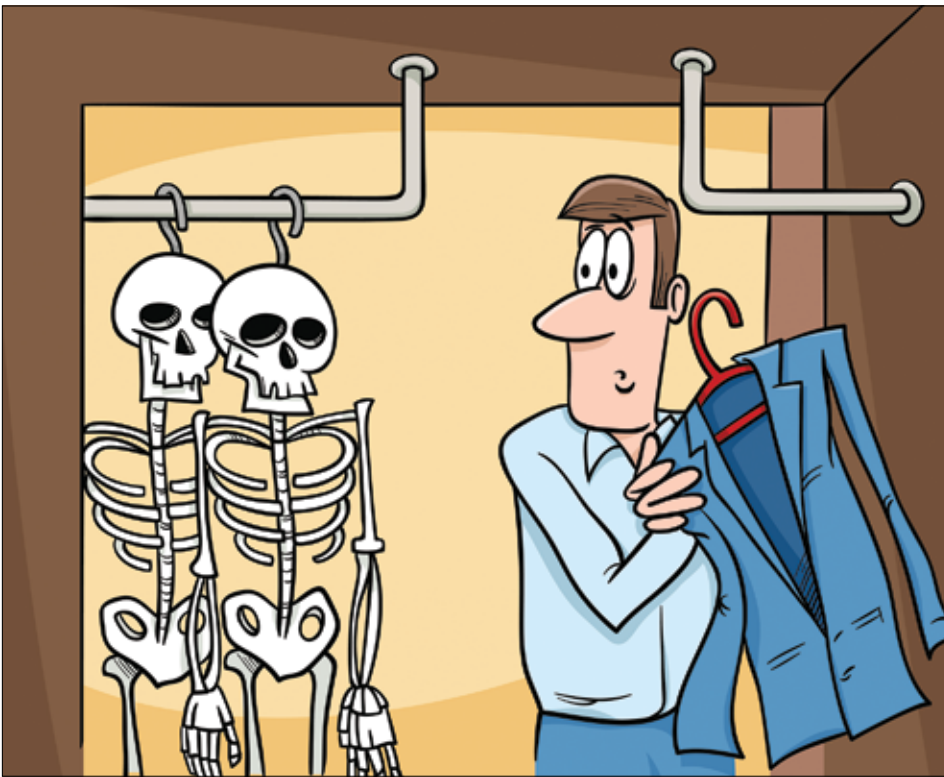
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## Notes

1. U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS para. 3-10 (9 Feb. 2004) [hereinafter AR 690-600]. The other listed types of contingent workers are "individuals participating in training, work-study or fellowship programs, and all other individuals working on Army installations or projects without being on the activity's payroll or meeting the definition of a civil service employee . . . or a nonappropriated fund employee." *Id.* For a definition of civil service employee and nonappropriated fund employee, see 5 U.S.C. § 2105 (2020).

2. See generally U.S. DEP'T OF ARMY, REG. 690-12, EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY app. D-1 (22 Dec. 2016) [hereinafter AR 690-12] (information on how the Army may be liable for complaints of harassment). The regulation directs that "supervisors will make reasonable efforts to prevent and promptly correct harassing behavior in the workplace," and will investigate when an employee makes a complaint about alleged harassment. *Id.* apps. D-2(a), D-2(b).

3. See U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-11(b)(3) (24 Jan. 2017).
4. AR 690-600, *supra* note 1, para. 5-13(c); U.S. EQUAL EMP. OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1613, ch. 12 (5 Aug. 2015) [hereinafter EEO-MD-110]; U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION, vol. 10, ch. 12, sec. 120309 (Aug. 2019).
5. See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY app. C (6 Nov. 2014) [hereinafter AR 600-20].
6. There are potentially other avenues of redress available, such as the Merit Systems Protection Board and filing a civil action in U.S. District Court, but most Equal Employment Opportunity (EEO) complaints against the federal government are handled within the system established by the Equal Employment Opportunity Commission (EEOC).
7. 42 U.S.C. § 2000e-4 (2019). Although the military departments are subject to the provisions of 29 C.F.R. § 1614 (which applies EEO protections and processes to the federal sector), the uniformed members of those departments are explicitly excluded from its provisions. *Id.* §§ 1614.103(b)(1), 1614.103(d)(1).
8. AR 600-20, *supra* note 5, app. C-4(b). Commanders are then free to dispose of the misconduct as they deem appropriate. *Id.* app. C-7. See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].
9. See AR 690-600, *supra* note 1, paras. 1-12(k), 3-1(a). Management must still investigate alleged harassment, regardless of whether the EEO office accepts or dismisses the complaint. AR 690-12, *supra* note 2, app. D-2(b). The supervisor or manager who receives the complaint will contact their serving legal office within one business day to seek guidance on the appropriate type of inquiry. *Id.* app. D-5(a). This inquiry may, if necessary, be conducted under the provisions of AR 15-6. *Id.* app. D-5(b).
10. AR 690-600, *supra* note 1, para. 1-12(k). 29 C.F.R. § 1614.107 (2019) and AR 690-600, *supra* note 1, para. 4-4, provide the criteria for when to dismiss a complaint.
11. 29 C.F.R. § 1614.108 (2019); AR 690-600, *supra* note 1, para. 4-3(d).
12. AR 690-600, *supra* note 1, para. 3-10.
13. *Id.* para. 3-1(a).
14. *Id.* para. 3-10(a)(3). See also AR 690-600, *supra* note 1, para. 1-4.
15. AR 690-600, *supra* note 1, para. 3-10(b), fig. 3-8.
16. AR 690-600, *supra* note 1, para. 3-10(b). Legal offices must be cognizant of the requirement in EEO-MD-110, which directs separation between "the agency's EEO complaint program and the agency's defensive function," i.e., there must be a firewall between the attorneys conducting the acceptance or dismissal analysis and those attorneys for the organization who defend the agency and litigate the case. EEO-MD-110, *supra* note 4, ch. 1, sec. IV(D). This separation avoids any potential conflict of interest for the agency. *Id.*
17. AR 690-600, *supra* note 1, para. 3-10(b)(1)(b); 29 C.F.R. § 1614.107(a)(1) (2019). See also 29 C.F.R. § 1614.106(a) (2019) ("[a] complaint must be filed with the agency that allegedly discriminated against the complainant"); EEO-MD-110, *supra* note 4, ch. 5, sec. IV(A)(3); Strickland v. Dep't of the Army, 111 LRP 15660, 111 FEOR 197 (2011).
18. These methods of redress include filing a complaint with the contingent worker's employer (through the processes established by that employer, if any), filing an EEO complaint with the nearest EEOC field office, or appealing the EEO office's decision to the EEOC Office of Federal Operations. AR 690-600, *supra* note 1, paras. 3-10(a), 3-10(b).
19. *Id.* para. 3-10(b).
20. Ma v. Dep't of Health and Human Servs., 105 LRP 31239, 98 FEOR 3226 (1998), citing Nationwide Mutual Ins. Co. v. Darden, 103 LRP 43160, 503 U.S. 318, 323-24 (1992).
21. Bryant v. Dep't of Justice, 107 LRP 27058, 107 FEOR 385 (2007).
22. Strickland, 111 LRP 15660. See also AR 690-600, *supra* note 1, fig. 3-8.
23. See generally Taylor v. Dep't of Ed., 108 LRP 15015, 108 FEOR 294 (2008); Tucker v. General Servs. Ad., 111 LRP 63706, EEOC No. 0120102242 (2011); Serita B. v. Dep't of the Army, 116 LRP 49261, 117 FEOR 122 (2016); Joanna G. v. Dep't of the Army, 118 LRP 33643, EEOC No. 0120180957 (2018).
24. See Strickland, 111 LRP 15660. See also Darden, 103 LRP 43160 (providing that "[since] the common-law test contains 'no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive'" citing NLRB v. United Ins. Co. of America, 390 U.S. 254, 258, 88 S.Ct. 988, 991 (1968)).
25. See Wilson v. Dep't of the Army, 111 LRP 65157, EEOC No. 0120112541 (2011); Ames v. Dep't of the Air Force, 108 LRP 10175, 108 FEOR 263 (2008).
26. Joanna G., 118 LRP 33643. The finding by the EEOC that the Agency has created this relationship does not only impart potential financial liability on the Agency, more fundamentally, it allows the complainant to use the Agency's administrative complaint process. *Id.*
27. U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS, EEOC Notice No. 915.002 (1997).
28. Joanna G., 118 LRP 33643 ("[the] EEOC considers, *inter alia*, the Agency's right to control when, where, and how the worker performs the job; the right to assign additional projects to the worker; whether the work is performed on Agency premises; whether the Agency provides the tools, material, and equipment to perform the job; the duration of the relationship between the Agency and the worker, and whether the Agency controls the worker's schedule; and whether the Agency can discharge the worker"), citing U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, sec. 2-III(A)(1) (12 May 2000) (rev. Aug. 2009).
29. Herrera v. Dep't of the Army, 108 LRP 64943, 109 FEOR 96 (2008).
30. Wilson, 111 LRP 65157.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Wilson, 111 LRP 65157. See also Tucker, 111 LRP 63706.
37. Baker v. Dep't of the Army, 106 LRP 16330, 106 FEOR 292 (2006).
38. *Id.*
39. *Id.*
40. *Id.* With regards to the complainant, the Agency representative had, in addition to denying her application, sent a note to Dyncorp that the complainant's resume clearly showed "that she is NOT someone we want and that [the Regimental Surgeon] does not believe a woman should fill the position over a male." *Id.* The EEOC also found that the Agency had retained supervisory control over the LPN position, and the work was performed on Agency premises with Agency equipment, as contributing factors to their determination. *Id.*
41. See generally, Palmer v. Dep't of Homeland Sec., 111 LRP 41481, 112 FEOR 4 (2011) (upholding agency's dismissal, despite the agency and private employer sharing supervision, work assignments, and creation of the complainant's work schedule, as the contractor paid the complainant's salary and the employer's portion of her retirement benefits, provided her health and life insurance, approved or disapproved her leave, prepared her job evaluation, and removed her from the agency's project); Strickland, 111 LRP 15660 (upholding Agency's dismissal, despite the complainant working on the Agency's premises using Agency equipment, when the contractor hired her, paid her salary, prepared her performance evaluations, set her work hours, and approved her leave requests); Herrera, 108 LRP 64943 (upholding Agency's dismissal, despite complainant working on Agency premises using Agency equipment, attending mandatory Agency training, receiving Agency tasks, and requiring the pre-clearance of leave requests, as the contractor hired, paid, and terminated the complainant, completed his evaluations, and addressed performance concerns with the complainant).
42. See FAR 37.104 (2019), which prohibits the creation of personal service contracts (unless specifically authorized). The section describes such contracts as those "characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. An employer-employee relationship under a service contract occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee." *Id.*
43. See FAR 37.602, subpart 37.603 (2019) (authorizing the evaluation of performance standards to ensure contract compliance, but not extending such performance assessments to individual contract workers).
44. See generally U.S. DEP'T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (OCS) (20 Dec 2011) (C2, 31 Aug. 2018); U.S. DEP'T OF ARMY, REG. 715-9, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (24 Mar. 2017).



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## Skeletons in the Foot Locker

### Defining and Identifying Adverse Actions

By S. Tennaile Timbrook

A federal employee finds a vacancy for a position as a **Civilian Senior Executive (CSE)**<sup>1</sup> and applies on the website USAjobs.gov. An accusation against this same employee exists in a closed Equal Employment Opportunity (EEO) complaint—an accusation of sexually harassing a subordinate that was quickly settled. The Army will never know about it and may choose this person as their best candidate.

Before the Army decides to entrust an increased level of responsibility and authority as a CSE, colonels (COL) selected for promotion, and general officers (GOs), the Army vets them by looking for adverse information. How does the Department of Defense (DoD) define a skeleton and where do we look for them? This article will discuss the process and some pitfalls

in the process. The DoD defines skeletons by providing guidance on the classification of “adverse” and “reportable information.”<sup>2</sup> The DoD established a process for identifying, reporting, and maintaining adverse information for promotable COLs and GOs. The Army uses a similar process for vetting its CSEs for selection, promotions, and awards.<sup>3</sup> The Department of Defense Instruction (DoDI) 1320.04 defines “adverse information” as:

[A]ny substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. To be credible, the information must be resolved and supported by a preponderance

of the evidence. To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual.<sup>4</sup>

Determining if the information is adverse is easier because it is a finding or conclusion. However, the more challenging determination is when something is “reportable.” These “reportable” matters are a little trickier to muddle through. Reportable information is:

(1) Information other than adverse information requested to be reported by the Senate Armed Service Committee or by any member of the Senate; or

(2) Information related to alleged misconduct or impropriety, which is subject to an on-going investigative, administrative, or judicial process. Normally a nomination will be delayed pending resolution of the investigative, administrative, or judicial process; however, in extraordinary cases and where the resolution is not expected within a reasonable time, the nomination may be processed with an appropriate summary of the case. The summary will include an opinion from a qualified senior leader on the probable outcome of the investigative, administrative, or judicial process; or

(3) Credible information related to an individual’s involvement or affiliation with a significant event that is widely known to the general public or members of Congress that brings discredit upon or calls into question the integrity of members of the DoD, Components of the DoD, or the DoD. Ordinarily, such information that has been known for more than 3 years prior to the nomination process, or information that was previously considered by the SASC as part of a prior nomination of that individual, will not be reported.<sup>5</sup>

The U.S. Constitution creates a shared architecture for the appointment of military officers.<sup>6</sup> From the 1st Congress in 1790, Congress has considered nearly all military officers subject to confirmation (distinct from civilian agencies, where Congress typically only confirms principal officers).<sup>7</sup> The vetting process, birthed from the Constitution, prevents CSEs or GOs from selection, reassignment, promotion, and receiving high-profile awards without the transparency of reportable adverse information.<sup>8</sup> However, what happens when a skeleton is hiding in plain sight? What should be reported is a question of debate across the services, as there is a lack of standardization and sharing of information. This article delves into challenging the status of the category listed above as “reportable,” requiring the reporting of “on-going administrative processes”—found inside the EEO complaint process.

### **Are There Skeletons Hiding in EEO Closets?**

Allegations of senior leader improprieties are reported in various forums.<sup>9</sup> Therefore, when looking at a candidate for an award or selection, all offices with potential adverse or reportable information are contacted. While the procedures are nearly identical, complaints made against federal Civilian employees, to include CSE employees, are filed at local EEO offices, while complaints against military members go through EO offices. The EEO process often hides other allegations of impropriety. These other allegations (i.e., failure to act or counterproductive leadership) are tucked inside the complaint of discrimination. Therefore, when other allegations are made, they are often left unaddressed.<sup>10</sup> Consider the EEO complaint process. It is easy to see how a misdeed or act (i.e., a skeleton) hides in plain sight.

### **Example of EEO Complaint with Nondiscriminatory Allegation**

For example, Ms. Smith files an EEO complaint alleging she was not selected for promotion due to her protected status as a female. In describing the discriminatory behavior alleged, the complainant also describes behaviors that do not squarely fit into the EEO box. The complainant may

allege that the CSE or GO in question is a counterproductive leader—the evidence of which is not necessarily related to complainant’s protected status. Also, around her allegations of gender discrimination, the complainant offers evidence that the leader has a destructive leadership style.<sup>11</sup> Under these circumstances, the leader who is the subject of the complaint is a responsible management official (RMO) and identified as such inside the EEO pre-complaint.<sup>12</sup> The EEO counselor identifies the RMO and then will highlight the protected status of the complainant; however, the EEO counselor focuses on the discriminatory act and is not required to address the allegation about the leadership style.<sup>13</sup> The focus for an EEO counselor is on the discriminatory act, as this is the goal of both the EEO and EO process, there is no mandate or requirement for them to identify and investigate collateral misconduct. In the EEO pre-complaint phase, there is no common understanding whether the counselor is required to notify the Department of the Army Inspector General (DAIG) when a senior leader is named as a RMO.<sup>14</sup>

### **Reporting Allegations to DAIG**

When the Army is informed that a GO, promotable COL, or CSE is named as a RMO, there is a reporting requirement.<sup>15</sup> Army Regulation 20-1 requires, “[a]ny and all allegations of impropriety or misconduct (including criminal allegations) by a general officer, a promotable colonel, a member of the Civilian SES, and any other DA Civilians must be forwarded by commanders or [Inspector Generals] directly to the DAIG Investigations Division by a rapid and confidential means within 2 working days of receipt.”<sup>16</sup> Reports made to commanders in such cases trigger additional responsibilities and potential liability on their part. Therefore, unlike making a report to a commander, not all EEO offices are reporting allegations of misconduct raised in EEO complaints to DAIG. Equal Employment Opportunity complaint guidance does not require or explain when to report. Additionally, there is no report or an additional investigation when there are allegations against someone below the rank of colonel. If provided by an EEO or EO office, DAIG receives the report and opens

a case that monitors the complaint. There is no parallel or separate investigation conducted by DAIG. Considering the EEO process, failures to act are unintentionally ignored by DAIG.

### **The Skeletons Are Not Necessarily Investigated in EEO Complaints**

After a complainant files a formal complaint, the appropriate EEO office coordinates an investigation that yields a report of investigation (ROI) from Defense Civilian Personnel Management Service Investigations and Resolutions Division (IRD).<sup>17</sup> The IRD investigates only the allegations associated with a protected status, not allegations of prohibited personnel practices, failure to act, or counterproductive leadership.<sup>18</sup> The IRD does not take any direction from the Army. The resulting investigation consists of gathering documentary evidence, sworn statements, and testimony for use by the adjudicator elected by the complainant—either an Equal Employment Opportunity Commission (EEOC) administrative judge, Army EEO Compliance and Complaints Review Directorate (EEOCCR), or the Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) on behalf of the Secretary of the Army.<sup>19</sup> The IRD can choose to do the entire investigation electronically, rather than holding a fact-finding conference. Electronic investigations can sometimes miss valuable information that would otherwise come out requiring a conference. As pressures increase to do investigations faster, electronic investigations are becoming a more typical process. Furthermore, inside the final ROI, the IRD investigator does not make findings.<sup>20</sup> If requested at this stage of the process, an adverse screening must rely upon the ROI that may not have all of the necessary facts.

In the hypothetical, the complaint moves through the process and concludes years later with an administrative judge. For argument’s sake, in this case, the finding is “no discrimination.” Therefore, a complaint of gender discrimination that includes allegations of counterproductive leadership can appear thoroughly investigated, when in fact the allegations of counterproductive leadership are neither investigated nor



addressed. Meanwhile, an administrative judge or EEOCCR concludes the allegations of discrimination are unsubstantiated, and the case is dismissed. Even when the ASA (M&RA) makes findings of discrimination, the evidence does not focus on the ancillary complaint of counterproductive leadership. Again, the ancillary complaints are not investigated as the goal is to make a complainant whole as it relates to allegations of discrimination. Therefore, a finding from an administrative judge or ASA (M&RA) typically will not discuss the ancillary misconduct of a particular person. It focuses on what happened to the complainant, not the additional misconduct of the leader. When this finding is reported to DAIG, it is not necessarily providing the entire picture. The skeleton can still be there, uninvestigated, and DAIG will still close the case.

### Settlement Agreements Hide Skeletons

In an alternative scenario, Ms. Jones, an employee, files an EEO complaint alleging discrimination based on her gender, and before it even reaches the IRD for investigation, the complainant and the federal agency agree to a negotiated settlement agreement (NSA). At the informal pre-complaint stage, the EEO counselor responsible for intake is not obligated to report allegations of CSE, promotable COL, or GO misconduct to the commander or DAIG with specificity.<sup>21</sup> Therefore, allegations of impropriety raised in EEO complaints are not generally reported by the commander or to DAIG when it is in the pre-complaint stage. Throughout the complaint process, the labor counselor advises on the likelihood that the complainant was discriminated against by reviewing the evidence. Therefore, the Agency counsel is often the best and only person able to advise on the basis for the settlement. Even if impropriety by a CSE, promotable COL, or GO named as an RMO is contemplated, disciplinary and/or corrective action against the RMO(s) cannot be included as a term of either the NSA or the adjudication of the complaint.<sup>22</sup> While a recommendation may be made to pursue it, these types of recommendations are not standard clauses in an NSA nor required by administrative procedures.<sup>23</sup>



(Credit: istockphoto.com/Aleutie)

When a subsequent adverse screening requests information for a GO, promotable COL, or CSE (i.e., RMOs), in these instances when there is an NSA, there are no findings. Therefore, DoDI 1320.04 instructs the Army to request a labor counselor to provide an opinion of the RMO's culpability.<sup>24</sup> In some cases, the labor counselor is no longer with the Army. Therefore, when trying to go back to find out additional information from the labor counselor, there is no labor counselor with the requisite information. The Army is left holding an NSA with no evidence for review and no opinion to rely upon. An example NSA typically includes this language:

By entering into this Settlement Agreement, the Agency does not admit that it, or any Agency official or employee, has violated Title VII of the Civil Rights Act of 1964, as amended; the Rehabilitation Act of 1973, as amended; the Age

Discrimination in Employment Act, as amended; the Equal Pay Act, or any other federal or state statute or regulation.<sup>25</sup>

The DAIG uses this typical clause as the basis to close the case, reporting to the Department of Defense Inspector General (DoDIG) that the matter, as it relates to the GO or SES, is resolved.

### The DAIG Closes the Case, and a Skeleton Is Buried

If the allegation was reported, e.g., through the EEO Director, to the DAIG upon formal complaint filing, the regulation requires the DAIG to determine how best to adjudicate "each complaint, issue, and allegation."<sup>26</sup> With EEO complaints, the DAIG opens a case that monitors the complaint believing all allegations are investigated. In the past, they did not typically open up their own investigation. The EEO Director notifies the DAIG that the complaint was settled, and

they report the settlement disposition to the DoDIG as closed.<sup>27</sup> Additionally, when there is notification of no findings of discrimination from EEOCCR or the administrative judge, the DAIG closes the case without further investigation, and the DoDIG is none the wiser.<sup>28</sup>

### The Way Ahead—Agency Representatives, EEO, and EO Personnel Must Report to the DAIG

There are several pitfalls identified with the EEO process as it relates the search for skeletons. As discussed, the process focuses not on allegations of impropriety, but on providing relief to the complainant, rather than pursuing action against the RMO. Additionally, allegations raised through the complaint process may not be reported to the DAIG. If reported, as required, they are unaddressed because the DAIG deferred the responsibility to investigate to EEO and EO, not realizing the ancillary allegations of impropriety will almost certainly not be investigated. It is the intent of the Deputy Assistant of the Secretary of the Army (Equity and Inclusion) to promulgate a draft Army Directive (AD) for the Secretary of the Army's consideration.

While an AD is forthcoming to address this pitfall; in the interim, this article suggests useful methods to bridge the gap, requesting the field to assist by identifying the types of cases discussed above and making a prompt referral to the DAIG. Therefore, referral to the DAIG should happen upon formal complaint filing and NSA which will assist in ensuring we investigate these ancillary allegations of improprieties and provide prompt notification to the DoDIG of the report of the investigation, as required.<sup>29</sup> Also, for reasons mentioned above, initiating an AR 15-6 administrative investigation for the population of RMOs not classified as senior leaders is prudent. As we move forward, it is wise to recommend the initiation of an AR 15-6 investigation for both populations of RMOs to ensure all issues are addressed and that commands comply with reporting requirements.<sup>30</sup>

Mr. Michael Lacey, Deputy General Counsel of Operations and Personnel, states, "when we investigate these allegations earlier, rather than later, we assist in providing evidence, holding the leader

accountable, or validating them for their appropriate conduct."<sup>31</sup> Reporting and addressing the underlying allegations of misconduct with referral of investigation through DAIG assists the Army in maintaining order and discipline by ensuring accountability and preventing recurrence. On 25 May 2018, reemphasizing the importance of accountability, Executive Order 13839 mandates that we are "holding federal employees accountable for performance and conduct."<sup>32</sup> Revealing and investigating the skeletons in the EEO and EO complaints gives credence to the EEO and EO process while reducing the Army's risk of selecting inappropriate candidates for positions, promotions, and/or awards.

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### Notes

1. Army Civilian senior executives (CSEs) include Senior Executive Service (SES), Scientific and Professional, Senior Level, Defense Intelligence Senior Executive Service, Senior Intelligence Professional and Highly Qualified Experts. 5 U.S.C. § 3392 (2019).
2. U.S. DEP'T OF DEF., INSTR. 1320.04, MILITARY OFFICER ACTIONS REQUIRING PRESIDENTIAL, SECRETARY OF DEFENSE, OR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS APPROVAL OR SENATE CONFIRMATION encl. 4 (3 Jan. 2019) [hereinafter DoDI 1320.04].
3. See Memorandum from Sec'y of Army to Principal Officials of HQDA et al., subject: Executive and Senior Professionals (ESPs)—Allegations of Misconduct and/or Unsatisfactory Performance (13 April 2011).
4. DoDI 1320.04, *supra* note 2, encl. 4.
5. *Id.* encl. 4, para. 1b.
6. See U.S. CONST. art. 1, § 8 (giving Congress the powers to "raise and support armies"); see also U.S. CONST. art. 2, § 2 (giving the President the "power, by and with the advice of Senate, to . . . appoint . . . officers of the United States").
7. See Act of July 22, 1790; see also U.S. DEP'T OF DEF., DIR. 5124.02, UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS para. 4.1 (giving the Under Secretary of Defense (Personnel and Readiness) the responsibility to act as advisor to the Secretary of Defense for Total Force Management to "develop policies, plans, and programs" for DoD Components).
8. DoDI 1320.04, *supra* note 2, encl. 4.
9. A report is made in the following forums: (1) Equal Employment Opportunity (EEO) complaint; (2) EO complaint (3) Labor and Management-Employee Relations (LMER); (4) Department of Army Inspectors

General (DAIG); (5) Commander/Supervisor; (6) the Administrative Grievance System; (7) Criminal Investigations Command (CID); and (8) the Office of Special Counsel (OSC).

10. See 5 U.S.C. § 2302 (2019).

11. "Destructive leadership styles can compromise organizational effectiveness and discourage subordinates from continuing their Army service. In a variety of ways, they undermine mutual trust and impede mission accomplishment. In senior leaders, destructive styles are particularly damaging . . ." U.S. DEP'T OF ARMY, REG. 600-100, ARMY PROFESSION AND LEADERSHIP POLICY para. 1-11e (5 Apr. 17); see also U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION (31 July 19).

12. See 29 C.F.R. § 1614.104 (2019); U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS para. 3-3(b) (9 Feb. 2004) [hereinafter AR 690-600].

13. AR 690-600, *supra* note 12, para. 3-3.

14. *Id.*

15. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 8-3(i) (29 Nov. 2010) (RAR 3 July 2012) [hereinafter AR 20-1].

16. *Id.*; U.S. DEP'T OF DEF., DIR. 5505.16, INVESTIGATIONS BY DoD COMPONENTS (23 June 2017) [hereinafter DoD Dir. 5505.16].

17. See 29 C.F.R. 1614 (2019); U.S. DEP'T OF DEF., DEF. CIVILIAN PERSONNEL ADVISORY SERV., FACT-FINDING CONFERENCES IN COMPLAINT INVESTIGATIONS: PARTICIPANT'S GUIDE (May 2015), <https://www.dcpas.osd.mil/content/documents/FFCGuide.pdf>; U.S. DEP'T OF DEF., INSTR. 1400.25, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: INVESTIGATION OF EQUAL EMPLOYMENT OPPORTUNITY (EEO) COMPLAINTS vol. 1614 (5 Nov. 2015).

18. 29 C.F.R. § 1614.105 (2019); *Investigative Methods*, DEF. CIVILIAN PERSONNEL ADVISORY SERV., <https://www.dcpas.osd.mil/IRD/InvestigativeMethods/> (last visited Jan. 29, 2020).

19. See AR 690-600, *supra* note 12, para. 3-3(b).

20. *Supra* note 17.

21. AR 690-600, *supra* note 12.

22. See 29 C.F.R. § 1614 (2015), U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1614 (EEO-MD-110), (Aug. 5, 2015), <https://www.eeoc.gov/federal/directives/md110.cfm>.

23. 29 C.F.R. § 1614.504 (2019).

24. See 29 C.F.R. § 1614.603 (2019).

25. DoDI 1320.04, *supra* note 2, encl. 4, para 1(b)(2).

26. AR 20-1, *supra* note 15, para 8-3.

27. DoD Dir. 5505.16, *supra* note 16, para 3(b).

28. *Id.* encl. 2, para 2.

29. *Id.* encl. 2, para 2(c-e).

30. See Exec. Order No. 13839, 83 Fed. Reg. 25,343 (May 25, 2018); U.S. DEP'T OF DEF., INSTR. 1020.03 HARASSMENT PREVENTION AND RESPONSE IN THE ARMY FORCES (8 Feb. 2018).

31. Interview with Michael Lacey, Deputy of Operations and Personnel, Office of General Counsel, in Arlington, VA. (Nov. 31, 2019).

32. *Supra* note 30.



(Credit: istockphoto.com/RapidEye)

## The Three R's of Anti-Harassment

By Heidi M. Hanley

*"Harassment is the one type of discrimination that can be stopped in progress."*<sup>1</sup>

**Army commanders are familiar with the programmatic R's that stand for Ready and Resilient**, and their alignment with the Sexual Harassment/Assault Response and Prevention initiative. But, when it comes to management of Civilian employees, leaders at all levels could use a primer on three related requirements that resonate in the broader anti-harassment context: recourse, relief, and ramifications.

As a federal government employer, the Department of the Army (Agency) is responsible for preventing both sexual and non-sexual harassment in the workplace;

providing a sensible, accessible system for reporting allegations; investigating credible claims; effecting remedial relief where liability or culpability is found; and holding offenders accountable. Federal and Agency policy also favor early resolution of employment disputes, wherever possible. These overlapping functions are accomplished through different channels. So, while conceptually successive, they can and should occur simultaneously in practice—a premise that is often misunderstood, especially when individual equal employment opportunity (EEO) claims are resolved via

negotiated settlement. This article discusses why and how the Agency must meet these various obligations.

### Federal Employment Discrimination Law

Title VII of the Civil Rights Act of 1964<sup>2</sup> (Title VII) initially defined prohibited employment discrimination as follows: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>3</sup> Title VII also provided for creation of its own governing body, the Equal Employment Opportunity Commission (EEOC), established in 1965.

Further development of federal employment law on discrimination in the interim has included the Age Discrimination in Employment Act (ADEA) of 1967,<sup>4</sup> as amended by the Older

Workers Benefit Protection Act (OWBPA) of 1990;<sup>5</sup> the Pregnancy Discrimination Act of 1973 (which amended Title VII);<sup>6</sup> the Rehabilitation Act of 1973,<sup>7</sup> as amended; the Americans with Disabilities Act (ADA) of 1990,<sup>8</sup> as amended by the ADA Amendments Act (ADAAA) of 2008;<sup>9</sup> the Civil Rights Act of 1991 (which amended both Title VII and the ADA);<sup>10</sup> the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act);<sup>11</sup> and the Genetic Information Nondiscrimination Act (GINA) of 2008.<sup>12</sup>

Consequently, the list of prohibited bases for employment discrimination, under laws enforced by the EEOC, has expanded. The EEOC is currently responsible for enforcing “federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.”<sup>13</sup> In addition to protecting these characteristics, federal discrimination law protects civilians who engage in EEO activity: “It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.”<sup>14</sup> Retaliation for protected EEO activity is commonly referred to as reprisal.

### Harassment as Discrimination

It is well-settled that harassment—whether sexual or non-sexual—is a form of discrimination under federal employment law, when it occurs in or with a nexus to the workplace.<sup>15</sup> Harassment is unwelcome conduct based on protected status or activity that “becomes unlawful where (1) enduring the offensive conduct becomes a condition of continued employment, or (2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.”<sup>16</sup>

Types of discriminatory harassment include: sexual harassment (*quid pro quo*); hostile work environment; religious coercion; and retaliatory harassment, which can encompass either after-action reprisal or

up-front interference that creates a “chilling effect” on the exercise of EEO activity.<sup>17</sup>

Sometimes retaliatory conduct is characterized as ‘retaliatory harassment.’ The threshold for establishing retaliatory harassment is different than for discriminatory hostile work environment . . . . If the conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.<sup>18</sup>

### EEOC Anti-Harassment Policy Directive

On 1 October 2003, the EEOC issued EEO Management Directive 715 (MD-715), which establishes that model EEO programs, which federal government employers are supposed to emulate, must issue written policies and procedures for addressing all forms of harassment.<sup>19</sup> As “legal authority for this requirement,” the EEOC cited two Supreme Court decisions concerning harassment liability<sup>20</sup> for the proposition that a government employer with “many departments in far-flung locations” could not protect against harassment “without communicating some formal [anti-harassment] policy, with a sensible complaint procedure.”<sup>21</sup>

In *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), the Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions is premised on two principles: (1) an employer is responsible for the acts of its supervisors, and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment. In order to accommodate these principles, the Court held that an employer is always liable for a supervisor’s harassment if it culminates in a tangible employment action. However, if it does not,

the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>22</sup>

So, the rationale for this measure was preventive—against the incidence of harassment itself and against employer liability, where it did occur.

While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on [EEOC] guidance which has long advised employers to take all necessary steps to prevent harassment. The new affirmative defense gives credit for such preventive efforts by an employer, thereby ‘implement[ing] clear statutory policy and complement[ing] the Government’s Title VII enforcement efforts.’<sup>23</sup>

The EEOC explained: “The question of liability arises only after there is a determination that unlawful harassment occurred. Harassment does not violate federal law unless it involves discriminatory treatment . . . or protected activity under the anti-discrimination statutes.”<sup>24</sup> Nonetheless, as a model employer: “An agency’s internal anti-harassment process should take immediate and appropriate corrective action to eliminate harassing conduct regardless of whether the conduct violated the law.”<sup>24</sup>

In addition to responding promptly, the goal of the anti-harassment policy is to prevent harassment before it becomes severe or pervasive . . . it can be used to avoid liability at the outset by correcting harassing conduct before it is cumulatively ‘severe or pervasive’ enough to constitute a legal claim of harassment.<sup>25</sup>

Under the EEOC's Enforcement Guidance, an agency's anti-harassment policy should contain:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.<sup>26</sup>

## Recourse

The Army's written policy and procedures for civilian anti-harassment were incorporated into a major revision of Army Regulation (AR) 690-12, *Equal Employment Opportunity and Diversity* (formerly *Equal Employment Opportunity and Affirmative Action*).<sup>27</sup> Army Regulation 690-12 places responsibility squarely on the shoulders of "Commanders at all levels" to: "Execute EEO programs and create an inclusive command climate in which it is clear to all Soldiers and civilians that unlawful discrimination and harassment (sexual/non-sexual) will not be tolerated."<sup>28</sup> It also specifically provides that all supervisors and management officials, whether Civilian or military, who supervise Army employees "have a responsibility to maintain a workplace free of harassment" and requires them to "make reasonable efforts to prevent and promptly correct harassing behavior in the workplace."<sup>29</sup>

In keeping with the principles espoused by the EEOC, the Army procedures indicate that

[w]hen an employee makes a complaint to a management official about alleged harassment, the Army will investigate the allegation regardless

of whether the harassment rises to the level of being severe or pervasive. Complaints of harassment do not need to conform to any particular format or be in writing.<sup>30</sup>

And, more specifically:

Supervisors and managers of Army civilian employees will promptly address allegations of harassment with the employees directly involved in the incident, along with any witnesses who might have firsthand information. Managers must take prompt preventive and corrective action, including discipline, as appropriate, in consultation with the servicing staff judge advocate and the Labor Management Employee Relations (LMER) staff.<sup>31</sup>

The regulation defines harassment and acknowledges the requirement for "prompt and appropriate corrective action" to avoid liability, as follows

### D-1. Unlawful Harassment

a. Unlawful harassment includes, but is not limited to, unwelcome conduct, intimidation, ridicule, insult, offensive comments or jokes, or physical conduct based on race, color, religion, sex (whether or not of a sexual nature), national origin, age (over 40), disability, genetic information, or reprisal when an employee's acceptance or rejection of such conduct explicitly or implicitly forms the basis for a tangible employment action affecting the employee, or the conduct is sufficiently severe or pervasive as to alter the terms, conditions, or privileges of the employee's employment or otherwise create a hostile or abusive work environment.

b. The harasser can be a person's supervisor, a supervisor in another area, a coworker or someone who is not an employee of the agency, such as a contractor or customer.

c. The Army may be liable for unlawful harassment by a supervisor

that results in a tangible (negative) employment action, such as termination or a failure to promote. If the supervisor's harassment results in a hostile work environment, but not in a tangible employment action, the Army may nevertheless be liable, unless—

(1) Management reasonably tried to prevent and promptly correct the harassing behavior, and

(2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities the Army provided.

d. The Army may be liable for harassment by nonsupervisory employees or nonemployees it has control over (for example, independent contractors or customers on the premises), if management knew or should have known about the harassment and failed to take prompt and appropriate corrective action.<sup>32</sup>

The procedures outline avenues of recourse in addition to those found in AR 600-20, *Army Command Policy*,<sup>33</sup> and AR 690-600, *Equal Employment Opportunity Discrimination Complaints*,<sup>34</sup> for Civilian employees experiencing or perceiving harassment. Specifically:

### D-4. How to Report Harassment

a. An employee who believes another person has subjected them to unwelcome harassing conduct should inform the person(s) responsible for the conduct that it is unwelcome and offensive and request that it cease.

b. If the conduct continues, or if the employee is uncomfortable confronting the responsible person(s) about the conduct, he or she should immediately report the matter to his or her immediate supervisor, the supervisor of the harasser or any other management official in the chain of command. The employee may also report the matter to other officials, including The Inspector General, EEO or CPAC

[Civilian Personnel Advisory Center] LMER personnel, union officials, or chaplains. If using these alternative options to report harassing conduct, the employee should give the official permission to notify the employee's supervisory or management chain.<sup>35</sup>

Accordingly, and importantly, whenever a manager or supervisor of a Civilian employee becomes aware that the employee is being subjected to unwelcome conduct, that official must ensure that an investigation or inquiry is conducted, regardless of whether the employee has already initiated or goes on to file an EEO complaint.

When an Army employee, former employee, or applicant files a formal EEO complaint, any claims that are accepted by the servicing EEO officer will be investigated by the Department of Defense (DoD) Investigations and Resolutions Directorate (IRD), as part of EEO's complaint processing procedures.<sup>36</sup> However, management should not sit back and wait for that investigation to wrap up before conducting its own internal investigation or inquiry. According to Mr. Spurgeon Moore, Director, Army EEO Compliance and Complaints Review: "If an employee reports harassment to a supervisor, that supervisor should still initiate an inquiry, even if the employee has initiated an EEO complaint" slated for investigation by IRD.<sup>37</sup> "One doesn't preclude the other. They can do that simultaneously," Mr. Moore explains.<sup>38</sup>

Notably, the first thing IRD will ask management witnesses when investigating a claim of harassment is what prompt, appropriate corrective action they took when they learned of the alleged harassment. Moreover, since the IRD investigation may not occur for several months following the initiation of the EEO complaint,<sup>39</sup> the expectation is that such action would have already been taken.

## Relief

The distinction between an IRD investigation of an EEO claim(s) and an internal Army investigation of an allegation(s) of harassment lies in the type of remedy each of these processes is able to afford. Under the EEO laws, victims of discriminatory harassment are "made whole" by remedial

relief that is awarded to them personally and individually, but the EEOC is not able to direct the Army to take disciplinary or other measures against the personnel who engaged in the misconduct.<sup>40</sup> Only the Army can do that—specifically, management officials in consultation with the servicing LMER specialist and labor counselor—and it must be done in keeping with the alleged offender's own due process rights to notice of any proposed adverse action and an opportunity to respond to the charge(s) and supporting materials. Such evidence could properly consist of sworn statements taken during an AR 15-6 investigation,<sup>41</sup> commander or management official inquiry,<sup>42</sup> or the like, without having to wait for the investigative report generated in the EEO complaint.

By contrast, an EEOC administrative judge or the Army Director of EEO, if no hearing is requested, can only award prevailing complainants certain equitable remedies such as retroactive reinstatement or promotion, back pay, front pay, and reimbursement of attorney's fees and costs, as well as pecuniary and/or non-pecuniary compensatory damages, sufficient to place them in the position or restore them to the circumstances that they would have been in absent the unlawful discrimination.<sup>43</sup> As such, federal agencies' "EEO process and anti-harassment programs do not exist for the same purposes."<sup>44</sup>

The EEO process is designed to make individuals whole for discrimination that already has occurred through damage awards and equitable relief paid by the agency and to prevent the recurrence of the unlawful discriminatory conduct. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Clarke v. Department of Justice*, EEOC Appeal No. 01922561 (1992). However, the EEO process cannot require an agency to discipline its employees. See *Cagle v. U.S. Postal Service*, EEOC Appeal No. 01903198 (1990). The internal anti-harassment program, on the other hand, is intended to take immediate and appropriate corrective action, including the use of disciplinary actions, to eliminate harassing conduct

regardless of whether the conduct violated the law. Ultimately, the goal of the anti-harassment program is to prevent harassing conduct before it can become 'severe or pervasive.'<sup>45</sup>

To that end, Agency management has an obligation to take prompt, appropriate corrective action to stop the harassment, prevent its recurrence, and remediate the workplace environment, regardless of the initiation or outcome of the alleged victim's EEO claims.

In its Enforcement Guidance, the EEOC offers the following:

Examples of Measures to Correct the Effects of the Harassment:

- Restoration of leave taken because of the harassment;
- Expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- Reinstatement;
- Apology by the harasser;
- Monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- Correction of any other harm caused by the harassment (e.g., compensation for losses).<sup>46</sup>

In this regard, the EEOC cautions: "Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise)."<sup>47</sup> This is because "[r]emedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment."<sup>48</sup>

## Ramifications

It should be noted that an internal commander's inquiry could potentially establish that there was no actionable harassment or misconduct on the part of the subject supervisor or coworker. Or, it may be determined that the responsible management official is non-culpable, for instance, if he or she acted with advice from counsel or upon direction from a higher authority,

or the violation was *per se* or *de minimis*.<sup>49</sup> In such cases, the evidence gathered during that Army-regulated command inquiry may be relied upon during an IRD investigation or under the regulatory procedures to show that no corrective action was necessary.

However, in the event the inquiry turns up evidence of harassment, hostile work environment, retaliation or other misconduct, the EEOC's Enforcement Guidance suggests the following:

Examples of Measures to Stop the Harassment and Ensure that It Does Not Recur:

- Oral or written warning or reprimand;
- Transfer or reassignment;
- Demotion;
- Reduction of wages;
- Suspension;
- Discharge;
- Training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- Monitoring of harasser to ensure that harassment stops.<sup>50</sup>

The Army regulation provides as follows in this regard:

#### **D-6. Action to Take After an Inquiry**

a. Upon completion of the inquiry or investigation, the management official who is responsible for taking disciplinary action against the alleged harasser will promptly evaluate the evidence and determine the appropriate action to take in consultation with the servicing staff judge advocate and the LMER specialist in the servicing CPAC. This responsibility normally rests with the first-line supervisor of the employee alleged to have engaged in the harassing conduct, unless the supervisor is involved in the allegation. In those cases, the record of the investigation will be provided to the senior management official in the supervisor's chain of command.<sup>51</sup>

As Mr. Moore explains, "Commanders are responsible for their command. They

have an obligation to investigate and try to resolve the situation, to prevent it from escalating into a situation that would become an EEO complaint."<sup>52</sup> But, if the EEOC or DoD want to "capture data" on resolution of harassment claims outside of the EEO process, "to be able to say, 'this is what we're doing' and [ask] 'is it effective,' there needs to be a way to track engagements."<sup>53</sup>

Thus, the Agency is required to report such activity to the EEOC in its annual MD-715 and No FEAR Act Report. In Instructions to federal agencies for MD-715, Section 1, The Model EEO Program, the Army EEO Director must certify the following:

#### Element C-Management and Program Accountability

...

B. The agency has established procedures to prevent all forms of EEO discrimination.

1. Consistent with EEOC guidance, agencies must develop a comprehensive anti-harassment policy to prevent and address harassment on all protected bases. The policy should:

- a) Establish a separate procedure outside of the EEO complaint process;
- b) Require a prompt inquiry of all harassment allegations to prevent or eliminate conduct before it rises to the level of unlawful harassment;
- c) Establish a firewall exists between the EEO Director and the Anti-Harassment Coordinator to avoid a conflict of interest. If the anti-harassment program resides within the EEO office, the firewall is a procedure preventing the EEO Director from involvement in the day-to-day functions of the anti-harassment program; and
- d) Ensure that the EEO office informs the anti-harassment program of all EEO counseling activity alleging harassment.<sup>54</sup>

Additionally, in its annual No FEAR Act Report, the Agency must provide:

6. A detailed description of the agency's policy for taking disciplinary action against federal employees for conduct that is inconsistent with federal antidiscrimination laws and whistleblower protection laws or for conduct that constitutes another prohibited personnel practice revealed in connection with agency investigations of alleged violations of these laws.<sup>55</sup>

This responsibility to ensure that offenders are subject to disciplinary action, not just for Title VII discrimination, but for "conduct that constitutes another prohibited personnel practice" requires Agency management to look beyond an administrative dismissal or negotiated settlement agreement in certain EEO cases.<sup>56</sup>

As discussed above, the EEOC strongly favors settlement.<sup>57</sup> And the Army agrees. Army Regulation 690-600 provides, at paragraph 1-4e, that: "Early resolution of complaints achieves better employee relations, cuts administrative costs, avoids protracted litigation and is consistent with the Army's commitment to EEO."<sup>58</sup> However, in cases involving harassment, management's responsibility to investigate, substantiate and/or exonerate the actions of a responsible management official is independent of any settlement with the aggrieved (at the pre-complaint stage) or the complainant. Settlement agreements, by their nature, incorporate the caveat that neither party admits to any wrongdoing. With respect to EEO complaints, this is limited to violations of the laws under the jurisdiction of the EEOC. They don't address other objectionable conduct that does not meet a statutory definition of discrimination. As Mr. Moore points out, leaders "can't tell from the settlement piece whether a management official has committed some other misconduct or a prohibited personnel practice."<sup>59</sup>

Thus, in the anti-harassment arena, resolution is not absolution. The underlying conduct, if found to have occurred, may not constitute a violation of Title VII, but could still constitute supervisory misconduct on the part of management officials and/or adverse, reportable information for purpose of screening General Officers or members of the Senior Executive Service

for suitability for placement, promotion, retirement, awards, etc. As Mr. Moore observes: “Good judgment of leadership is a focus of the Senate Armed Services Committee.”<sup>60</sup> With certain exceptions, adverse information concerning senior leaders’ own conduct or that of their subordinate supervisors must be reported if substantiated, Mr. Moore explains, and it may transpire that aggrieved constituents report their version of events to their senators voluntarily.<sup>61</sup> Accordingly, Mr. Moore recommends to practitioners: “If the Service Secretaries go before the Senate with a nomination, make sure they know all the ins and outs of the case. If a settlement was reached because a leader did something wrong, the Senators should know about it.”<sup>62</sup> They will want to see the settlement agreement, along with a departmental assessment of whether there was wrongdoing, and whether leadership acted with integrity afterwards.<sup>63</sup>

## Conclusion

The Army, as a federal employer, is required to provide a sensible and accessible means for employees to report or complain about harassment; to conduct an inquiry or investigation into credible claims; to take swift, corrective action to stop the harassing behavior(s) and prevent its recurrence in the workplace; to process EEO complaints through resolution or adjudication; and to hold offenders accountable. These obligations, while overlapping, are distinct. Commanders at all levels are responsible for seeing that they are understood and executed by any management officials with Army Civilian employees in their supervisory chain. Ensuring that leadership is well-advised on the fundamentals of civilian anti-harassment laws and policies will help keep the Army rolling along readily and responsibly. **TAL**

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## Notes

1. *Model EEO Programs Must Have An Effective Anti-Harassment Program*, U.S. EQUAL EMP’T OPPORTUNITY

COMM’N app. 3, [https://www.eeoc.gov/federal/model\\_eeo\\_programs.cfm](https://www.eeoc.gov/federal/model_eeo_programs.cfm) (last visited Jan. 27, 2020) [hereinafter *Model EEO Programs*].

2. 42 U.S.C. § 2000e (1964).

3. *Id.*

4. 29 U.S.C. § 621 (1967).

5. 29 U.S.C. §§ 623, 626, 630 (1990).

6. 29 U.S.C. § 701 (1973).

7. 29 U.S.C. § 791 (1973).

8. 42 U.S.C. § 12201 (1990).

9. 42 U.S.C. § 12101 (2008).

10. 42 U.S.C. § 1981a (1991).

11. 5 U.S.C. § 2301 (2002).

12. 42 U.S.C. §§ 2000ff–2000ff–11 (2008).

13. *Overview*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/eeoc/> (last visited Jan. 27, 2020).

14. *Id.*

15. Harassment is expressly prohibited under Title VII, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA).

16. *Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited Jan. 27, 2020).

17. *Retaliation—Making it Personal*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [https://www.eeoc.gov/laws/types/retaliation\\_considerations.cfm](https://www.eeoc.gov/laws/types/retaliation_considerations.cfm) (last visited Jan. 28, 2020).

18. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES, No. 915.004 sec. II.B.3 (Aug. 25, 2016).

19. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE 715 (Oct. 1, 2003).

20. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

21. *Faragher*, 524 U.S. at 809.

22. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, No. 915.002 (June 18, 1999) [hereinafter ENFORCEMENT GUIDANCE].

23. *Id.* § 1.

24. *Id.* (citing *Oncala v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002 (1998)).

25. *Model EEO Programs*, *supra* note 1, app. 3.

26. *Id.* app. 2.

27. U.S. DEP’T OF ARMY, REG. 690-12, EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY (8 Nov. 2019) [hereinafter AR 690-12].

28. *Id.* para. 1-4e(1).

29. *Id.* app. D-2. *See also id.* app. D-2a (responsibilities of supervisors and management officials).

30. *Id.* app. D-2b.

31. *Id.* app. D-2c.

32. *Id.* app. D-1.

33. U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014) [hereinafter AR 600-20].

34. U.S. DEP’T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (9 Feb. 2004) [hereinafter AR 690-600].

35. AR 690-12, *supra* note 27, app. D-4.

36. U.S. DEP’T OF DEF., DIR. 1400.25, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: INVESTIGATION OF EQUAL EMPLOYMENT OPPORTUNITY COMPLAINTS vol. 1614 (5 Nov. 2015).

37. Interview with Spurgeon Moore, Director, Army Equal Employment Opportunity Compliance and Complaints Review (Nov. 20, 2019) [hereinafter Mr. Moore Interview].

38. *Id.*

39. The agency must provide the complainant with a copy of the investigative file within 180 days from the filing of the complaint or, where a complaint was amended, within the earlier of 180 days after the last amendment or 360 days after the filing of the original complaint. 29 C.F.R. 1614.108 (f) (1992).

40. 29 C.F.R. 1614.501(1992).

41. U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].

42. AR 690-12, *supra* note 27, app. D-5, D-6.

43. *See* 29 C.F.R. 1614.501 (1992).

44. *Model EEO Programs*, *supra* note 1.

45. *Id.*

46. ENFORCEMENT GUIDANCE, *supra* note 22, para. V.C.1.

47. *Id.*, *supra* note 22 (citing *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994) (employer remedial action for sexual harassment by supervisor inadequate where it twice changed plaintiff’s shift to get her away from supervisor rather than change his shift or work area), *cert. denied*, 513 U.S. 1082 (1995)).

48. *Id.* (citing *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (“a remedial measure that makes the victim of sexual harassment worse off is ineffective *per se*”).

49. AR 600-20, *supra* note 33, para. 4-7d(1).

50. ENFORCEMENT GUIDANCE, *supra* note 22.

51. AR 690-12, *supra* note 27, app. D-6.

52. Mr. Moore Interview, *supra* note 37.

53. *Id.*

54. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, INSTRUCTIONS TO FEDERAL AGENCIES FOR MD-715, SECTION 1, THE MODEL EEO PROGRAM (last visited Jan. 27, 2020).

55. 5 C.F.R. 724.302 (a)(6) (2006).

56. *Id.*

57. *See* 29 C.F.R. 1614.603 (1992); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, EQUAL EMPLOYMENT OPPORTUNITY MANAGEMENT DIRECTIVE FOR 29 C.F.R. PART 1614 chs. 2-14, 3, 12 (Aug. 5, 2015).

58. AR 690-600, *supra* note 34, para. 1-4e.

59. Mr. Moore Interview, *supra* note 37.

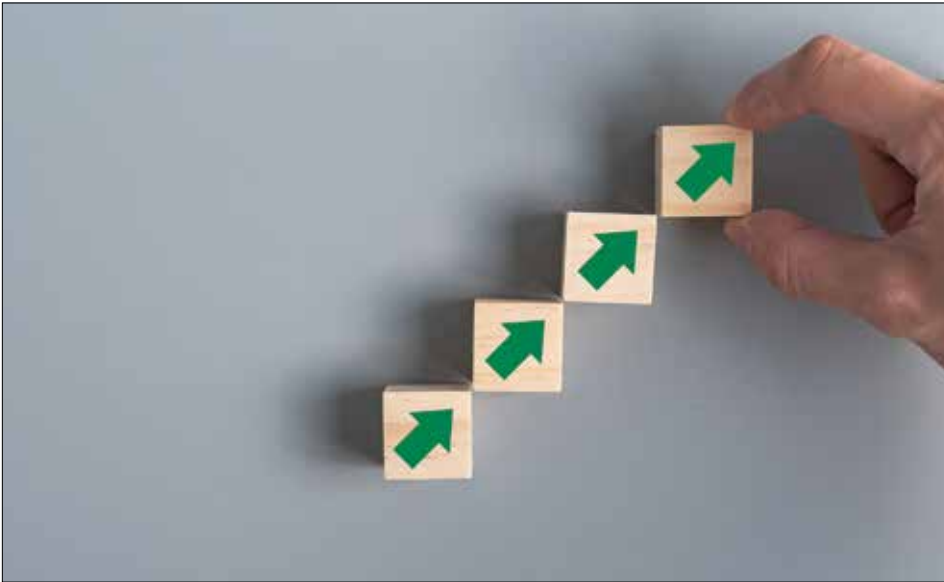
60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*





(Credit: istockphoto.com/WinnieVinzenze)

## Leading Leaders in Managing Civilians

By Major Mary E. Jones

**After successfully completing another rotation through a complex deployment, your commander,** Colonel (COL) Rock, had commanded superbly and shown great leadership potential for increased responsibility.<sup>1</sup> In order to prepare him for the next level of command, COL Rock has been given a broadening assignment at a large installation and assumed command of a garrison.<sup>2</sup> He recognizes that he will be presented with many unfamiliar challenges since he has not served on a garrison staff for quite some time.

After the change of command ceremony, COL Rock begins operating on a new battle rhythm with a new routine of meetings, new issues to tackle, and a new staff to command. He quickly recognizes that the structure, workforce composition, and mission of a garrison is inherently different from what he has been used to in a deployed environment. The number of service members on his new staff is greatly reduced in comparison to his staff while deployed; his new staff is comprised primarily of federal Civilian employees.

And, although different in many ways,<sup>3</sup> COL Rock begins to appreciate that his Civilian employees are equally value-adding members of the team and are focused on executing the same goal and achieving mission success. Twenty-four-hour operations become almost non-existent and urgency takes on a new meaning. And, while not to devalue the importance or complexity of garrison operations, COL Rock is starting to realize that command of a garrison will be a truly unique leadership challenge.

Since 2001, we have been a military at war. For the past nearly twenty years, our commanders have been entrenched in joint operations, leading highly sensitive missions, and asking complex questions about rules of engagement. Now, more than ever, commanders have been operating on a twenty-four-hour clock and demanding quicker turnaround response times. After a twelve- to fifteen-month deployment, our commanders generally return home for a brief period, reset, and prepare for another deployment. For many of our current active duty commanders, it is not unrealistic to

assume that from the time they commissioned until now, their service probably resembles this scenario. For officers who commissioned prior to 2001, command was probably at a very junior level where interactions with, and management of, a Civilian staff was infrequent, at best.

There are approximately 247,393 federal Civilian employees currently serving in the Department of the Army.<sup>4</sup> The overwhelming majority of these employees do not deploy alongside our service members, but instead remain in garrison and provide critical support and continuity required to accomplish the mission at home. As such, the majority of Civilian personnel encountered by commanders in deployed environments are likely local nationals or government contractors supporting the force;<sup>5</sup> neither group is categorized as Title 5, United States Code (U.S.C.), federal Civilian employees.<sup>6</sup> This distinction is important because Title 5 U.S.C. employees are statutorily vested with due process rights and protections,<sup>7</sup> concepts with which commanders of Civilian employees must be familiar.

As a legal advisor to the new garrison commander,<sup>8</sup> you are presented with the critical task of refreshing COL Rock on the laws and policies for managing his Civilian workforce. This article aims to discuss three pillars of command success—roles, relationships, and responsibilities to ensure your commander can complete and return home safely from this next assignment as a supervisor of Civilians.

### Roles

Commanders, as the initiators of many actions addressing service member misconduct, are not necessarily the initiators of adverse actions<sup>9</sup> involving Civilian employees. Rather, this responsibility is oftentimes reserved for the Civilian's first-line supervisor, who generally has firsthand knowledge of an employee's poor performance, misconduct, or other action or behavior that impacts the efficiency of the service, which serves as the trigger for when adverse action should be initiated.<sup>10</sup> The initiator of an adverse action is known as the proposing official and, for Civilian employee actions, is generally the Civilian's first-line supervisor.<sup>11</sup> But this does not imply that COL

Rock does not have oversight or command of adverse actions taken against his Civilian employees.

Certainly, COL Rock could, depending on the employee's grade and position, be a Civilian employee's first-line supervisor; however, more than likely, COL Rock will serve as the employee's higher level reviewer (HLR) (otherwise known as the "senior rater").<sup>12</sup> The decision-maker of a proposed adverse action is known as the deciding official, so for Civilian employee actions, this is generally the Civilian's HLR.<sup>13</sup>

This also does not imply that COL Rock and other commanders need not have a firm understanding of the Civilian adverse action process. Commanders and senior leaders should possess a clear understanding of the disciplinary process for Civilian employees and have confidence to take swift, deliberate, and appropriate action when necessary. Although, the conventional thinking seems to be sometimes that disciplining a Civilian employee is "too hard, [the process] takes too long, is ineffective, and just cannot be done, the reality is that Civilian employee discipline is essential to unit readiness and good order and discipline."<sup>14</sup> One way to instill confidence is to compare the Civilian disciplinary process,<sup>15</sup> something that COL Rock is likely less familiar with, to disciplinary actions taken against service members under the Uniform Code of Military Justice, something that COL Rock is probably quite familiar with.<sup>16</sup>

Aside from serving as a rater, HLR, proposing official, and a deciding official, there are other roles that COL Rock is likely to serve in, and hats that he will be expected to wear during his time in command. Judge advocates advising such supervisors should familiarize themselves with these roles to better guide their client.

One role that COL Rock is likely to serve in is as a grievance hearing official for bargaining unit and non-bargaining unit employees.<sup>17</sup> In this role, COL Rock will serve as the initial decision-maker for actions that an employee elects to grieve. The election to grieve matters that are deemed grievable, or to pursue other available avenues of redress, is an election made by the employee.<sup>18</sup> At times, COL Rock may feel that the parameters of his roles are becoming blurred if, for example, while wearing

the hat of a grievance hearing official to address Employee A's employment issue, Employee A simultaneously desires to use COL Rock's open-door policy to discuss a separate matter.<sup>19</sup> Colonel Rock may be hesitant to grant Employee A's request; however, he should likely allow Employee A to use his open-door policy, recognizing that regardless of the hats he wears, COL Rock, while in command, will always wear the hat of commander. He is ultimately responsible for the well-being of all his employees, regardless of rank or grade.<sup>20</sup>

Another role that COL Rock is likely to assume when commanding Civilian employees is as a responsible management official (RMO) during an Equal Employment Opportunity (EEO) complaint.<sup>21</sup> As an RMO, COL Rock may be identified as someone who allegedly took a discriminatory action against a Civilian employee.<sup>22</sup> If the complainant is a current employee,<sup>23</sup> COL Rock will likely have concerns about interacting with the complainant, for fear of further discriminatory actions being alleged against him. However, as stated above, COL Rock must continue to command and oversee his entire workforce, which the complainant is part of. Legal advisors should be heavily involved in guiding a commander like our hypothetical COL Rock facing this dilemma.

Within the realm of EEO complaints, if COL Rock is not a named RMO, but rather is senior in the supervisory chain to a named RMO, COL Rock could serve as a settlement authority (SA) during EEO or other complaints involving alternative dispute resolution.<sup>24</sup> As a SA, COL Rock may express concern that settling with the complainant may open the floodgates for other Civilian employees to file additional EEO complaints; however, the evidence does not support such a fear.<sup>25</sup> Rather, settlement avoids uncertainty in an outcome being decided by an independent federal agency; it allows resolution of a complaint without fault being assigned; it saves time and resources for both the agency and the complainant; and it achieves finality of one or more ongoing complaints.<sup>26</sup> Additionally, reaching settlement of a formal complaint filed by a current employee allows COL Rock to rebuild a fractured relationship with a member of his workforce, improve

the overall efficiency of his workforce, and maintain good order and discipline within his organization.

## Relationships

With COL Rock wearing various hats in the roles that he assumes during command, developing and maintaining good relationships is critical for his success and the success of his organization.<sup>27</sup> As COL Rock begins his transition into command, he should identify strengths and weaknesses of the previous commander's relationships with his teammates, and start to develop ways to improve and ultimately sustain effective relationships.

As a starting point, COL Rock should get to know his labor counselor and should have points of contact for the Civilian Personnel Advisory Center, EEO, Employee Assistance Program, and union leadership. Each teammate has a different and important role in addressing a Civilian personnel issue and is a subject matter expert (SME) within a particular area that impacts COL Rock's workforce. And although each teammate serves a different function in the overall success of COL Rock's organization, the common thread binding them together is the well-being of the workforce to achieve mission success for the organization. As COL Rock's legal advisor, you should be available to provide ongoing and timely advice and assistance. This will help COL Rock develop trust in you as his legal advisor and instill confidence that COL Rock is able to address Civilian personnel issues.

Additionally, COL Rock should seek input from the senior Civilian within his organization. This individual has likely worked for the organization for a long period of time, can provide valuable insight and observations of areas for improvement and systemic concerns, understands specific concerns related to his employees, and can provide continuity for COL Rock and future commanders. Collectively, these conversations should help COL Rock maintain effective relationships with his teammates and provide him with insight on where improvement within the organization is needed.<sup>28</sup>

However, change simply for the sake of change is not necessarily a good thing. Colonel Rock should be mindful to

implement proposed changes only after consulting with his labor counselor and complying with statutory requirements;<sup>29</sup> otherwise, COL Rock could risk committing an unfair labor practice, exposing the agency to litigation that could have easily been prevented.<sup>30</sup>

## Responsibilities

As the senior executive for installation activities, COL Rock is, in part, responsible for ensuring that the intent of the Senior Commander's mission is met—"the care of Soldiers, Families, and Civilians, and to enable unit readiness."<sup>31</sup> More specifically, as it applies to the Civilian workforce, COL Rock must ensure that he has a general understanding of the laws, rules, and regulations applicable to Civilian employees. He must also be confident to seek guidance from the proper SME if there appears to be a deviation from a requirement. Just as it would not be appropriate for COL Rock to be uninterested in daily operations of non-commissioned officers and junior enlisted Soldiers, COL Rock cannot be uninvolved in his Civilian workforce. His duty to ensure the well-being of his organization means that he must understand how to operate in the terrain of Civilian personnel matters, even if it is unfamiliar to him, with the help of his legal team.

As a starting point, COL Rock should understand that the federal civil service is grounded upon brick and mortar principles, known as the Merit System Principles.<sup>32</sup> The Merit System Principles require all Civilian personnel actions to be based on fairness, equity, and merit, not only with regard to hiring and firing Civilian employees, but also as it relates to performance ratings, details, and opportunities for advancement.<sup>33</sup> A violation of the Merit System Principles, an allegation of discrimination, retaliation, or improper hiring practice could result in an alleged prohibited personnel practice.<sup>34</sup> Affirming adherence to fairness, good faith bargaining is also statutorily required when negotiating with federal labor unions representing bargaining unit employees within the organization.<sup>35</sup>

To underscore unit readiness, COL Rock should communicate to his supervisors clearly defined goals and expectations,

then hold them accountable and take appropriate action if they fail in meeting those goals and expectations.<sup>36</sup> Colonel Rock should recognize that performance management includes more than simply following the four phases of the Civilian performance management program,<sup>37</sup> it means having a clear vision about the mission of his organization and ensuring that every Civilian employee has a position description and performance plan that aligns with accomplishing that mission.<sup>38</sup>

His legal advisor and/or labor counselor is pivotal in helping COL Rock with these two tasks, especially the latter one. Knowing this information will help him identify skill gaps and vacancies in positions that are value-added to the organization.<sup>39</sup> The broader umbrella of workforce management means understanding how to grapple with the very occasional odd, aggressive, and even threatening behavior<sup>40</sup> of an employee, accommodating individuals with disabilities,<sup>41</sup> and ensuring a safe workplace for all. In conjunction with the labor counselor, COL Rock should also review command policies currently in effect to ensure compliance with recent changes in the law, and ensure that all federally required annual notices are posted.<sup>42</sup>

By highlighting the various roles that COL Rock will likely juggle during his command; underscoring the value in developing and sustaining effective relationships; educating him about the organization's statutory and agreed-upon responsibilities; and providing support and advice throughout these processes, you, as COL Rock's legal advisor, will have effectively equipped him with the tools necessary to serve confidently in another complex environment. Not only will COL Rock feel empowered to take swift, deliberate, and appropriate action in Civilian personnel actions within his garrison, but his knowledge will carry with him as he continues to progress into increased leadership roles, thereby creating greater opportunities to educate and mentor our future leaders. **TAL**

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## Notes

1. All names used in this article are fictional and not intended to represent a particular individual.
2. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-5b(4)(b) (6 Nov. 2014) [hereinafter AR 600-20] (The "Garrison Commander" commands the garrison, is the Senior Commander's senior executive for installation activities[, . . .] is responsible for day-to-day operation and management of installations and base support services." *Id.*
3. See generally 5 C.F.R. Parts 1-3 (1963) (methods of appointment into federal service); 5 U.S.C. § 6329a (2016) (administrative leave); 29 C.F.R. § 1630 (1991) (reasonable accommodations); U.S. DEP'T OF ARMY, REG. 690-12, EQUAL EMPLOYMENT OPPORTUNITY AND DIVERSITY app. C (12 Dec. 2019) [hereinafter AR 690-12] (reasonable accommodations within the Department of the Army).
4. OFFICE OF PERS. MGMT., FEDSCOPE REPORT, COUNTS FOR EMPLOYEES BY AGENCY (June 2018).
5. See generally U.S. DEP'T OF DEF., DIR. 1404.10, DoD CIVILIAN EXPEDITIONARY WORKFORCE (23 Jan. 2009).
6. The scope of this article is limited to Title 5 employees as defined in 5 U.S.C. § 2105 (2013).
7. 5 U.S.C. § 7513(b) (1978); 5 C.F.R. § 752.404 (2009). Prior to pursuing disciplinary action, the proposing official should check with the Civilian Personnel Advisory Center (CPAC) Labor Management and Employee Relations (LMER) Specialist servicing their organization to determine whether the employee is a probationary employee. See 10 U.S.C. § 1599e (2015) (discussing probationary periods for employees).
8. Whether a seasoned labor counselor, an inexperienced administrative law attorney, or simply a judge advocate asked to review a particular situation dealing with a federal Civilian employee, this article is designed to provide a starting point in your role as legal advisor.
9. 5 C.F.R. § 752.401 (2009) (noting adverse actions include removals, suspensions for more than fourteen days, including indefinite suspensions, reductions in grade, reductions in pay, and furloughs of thirty days or less); 5 C.F.R. § 432 (1989) (discussing performance-based actions).
10. 5 C.F.R. § 752.403 (2009); See *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir. 1999).
11. See generally 5 C.F.R. pt. 432 (1989); 5 C.F.R. pt. 752 (2009).
12. U.S. DEP'T OF DEF., INSTR. 1400.25, DoD CIVILIAN PERSONNEL MANAGEMENT & APPRAISAL PROGRAM, vol. 431, at 22 (4 Feb. 2016) [hereinafter DPMAP vol. 431] (defining Higher Level Reviewer (HLR) as "a senior-level management official, normally above the level of a rating official"). The Defense Personnel Management and Appraisal Program does not mandate a higher level reviewer. Memorandum from Assistant Sec'y of Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Army Policy on Requirement for a Higher Level Reviewer (HLR) for the Dep't of Army Civilian Employees Covered Under the Defense Performance Management & Appraisal Program (9 May 2016) (Department of Army established a HLR to "serve as an internal organizational review contributing to organizational rating consistency and provide checks and balances for finalizing employee ratings.").

13. See 5 C.F.R. §§ 752.404(c)(2), 752.404(g) (2009) (describing the contents of the agency notice of decision).
14. Rebecca Ausprung, Director, Civil Law and Litigation, United States Army Legal Services Agency, Presentation at The Judge Advocate General's Legal Center and School, Worldwide Continuing Legal Education: Civil Service Disciplinary Rules and Procedure (Sept. 19, 2019) [hereinafter Ausprung WWCLE].
15. 5 C.F.R. § 752.403 (2009) ("An agency may take adverse action, including a performance-based adverse action or an indefinite suspension, under this subpart only for such cause as will promote the efficiency of the service."); 5 C.F.R. § 752.404 (2009) (describing the procedures for the notice of proposed action and the notice of decision).
16. Ausprung WWCLE, *supra* note 14 (comparing LMER Specialist to a paralegal/military justice advisor; Table of Penalties to the *Manual for Courts-Martial*; notice of disciplinary action to referral; decision of disciplinary action to referral; labor counselor to trial counsel; administrative leave to pretrial confinement; an Equal Employment Opportunity or Merit Systems Protection Board hearing to an Article 15, administrative separation board, or court-martial).
17. 5 C.F.R. Part 771 (1995) (describing the agency Administrative Grievance System); U.S. DEP'T OF DEF., INSTR. 1400.25, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: ADMINISTRATIVE GRIEVANCE SYSTEM, vol. 711 [hereinafter DoDI vol. 771] (13 June 2018). See also all Collective Bargaining Agreements that impact your organization. There are approximately 49,970 (22.4%) appropriated fund employees and 8,940 (36.1%) non-appropriated fund employees employed by the Department of the Army who are either represented or entitled to be represented by a federally recognized labor union, as well as 459 bargaining units comprised of appropriated fund employees and 49 bargaining units comprised of non-appropriated fund employees serving Department of the Army federal civilian employees. HEADQUARTERS, ARMY CIVILIAN PERSONNEL SYSTEM (8 July 2019).
18. 5 C.F.R. § 752.405(b) (2009); DoDI vol. 771, *supra* note 17, para. 3b(3)(c) ("An employee may not grieve the same matter raised in any other grievance, appeal, complaint, or other dispute resolution process.").
19. AR 600-20, *supra* note 2, para. 2-2. The labor counselor and LMER can provide suggestions on appropriate courses of action. *Id.*
20. *Id.* paras. 2-1(b), 3-3(n) ("[All] leaders . . . will provide an environment that contributes positively to the mental, physical, spiritual, and emotional dimensions of the lives of their subordinates. [Additionally, all leaders will] demonstrate and promote resilience by setting the example, encouraging help-seeking behavior, and by remaining actively engaged with their . . . Army Civilians. . .").
21. See U.S. DEP'T OF ARMY, REG. 690-600, EQUAL EMPLOYMENT OPPORTUNITY DISCRIMINATION COMPLAINTS (9 Feb. 2004) [hereinafter AR 690-600]; EQUAL EMP'T OPPORTUNITY COMM'N, MANAGEMENT DIRECTIVE 110 (5 Aug. 2015) [hereinafter MD-110].
22. 29 C.F.R. § 1614.103 (1992).
23. AR 690-600, *supra* note 21 (defining complainant as an Army employee, a former Army employee, an applicant for Army employment, or certain contract employees who files a formal complaint of discrimination based on their race, color, religion, sex, national origin, age, physical or mental disability, and/or reprisal).
24. *Id.* paras. 2-2(d), 2-3(g).
25. Kimberly Mlinaz, Director, Negotiation and Dispute Resolution, United States Air Force, Presentation at The Judge Advocate General's Legal Center and School, 72d Law of Federal Employment Course: Command the Litigation Space through Negotiation (July 31, 2019).
26. Michael Lassman, Senior Civilian Attorney, Office of The Staff Judge Advocate, Installation Management Command, Presentation at the U.S. Army Legal Services Agency, The Second Annual Senior Labor Counselor Forum (Sept. 25, 2019).
27. U.S. DEP'T OF ARMY, DOCTRINE PUB. 6-22, ARMY LEADERSHIP AND THE PROFESSION para. 1-11 (25 Nov. 2019) ("Within the Army profession, trust is shared confidence among commanders, subordinates, and partners in that all can be relied on and all are competent in performing their assigned tasks."); *Id.* para. 1-12 ("Trust has a direct relationship on the time and resources required to accomplish the mission. Subordinates are more willing to exercise initiative when they believe their commander trusts them [and] more willing to exercise initiative if they believe their commander will accept and support the outcome of their decisions.").
28. See generally 5 C.F.R. pt. 251 (1996).
29. There are three instances when the union representation has statutory rights: (1) 5 U.S.C. § 7103(a) (14) (2004) (management is required to provide notice to the union of a proposed change and allow the union an opportunity to negotiate a change to conditions of employment for bargaining unit members); (2) 5 U.S.C. § 7114(a)(2) (1978) (management is required to provide notice to the union of the formal discussion and allow the union an opportunity to attend a formal discussion); and (3) 5 U.S.C. § 7114(a)(2)(B) (1978) (during an investigative inquiry, when a Civilian employee is being questioned and has a reasonable belief that the investigative inquiry by the agency could result in disciplinary action being taken against the employee, the employee may invoke *Weingarten* rights, prompting management to either stop the interview, coordinate with the union representative and resume questioning once the union representative is present; terminate the interview; or give the employee the choice).
30. 5 U.S.C. § 7116 (1978).
31. AR 600-20, *supra* note 2.
32. 5 U.S.C. § 2301 (1990). See also 5 C.F.R. § 7.1 (1963) ("[An appointing officer] shall exercise his discretion in all personnel actions solely on the basis of merit and fitness and without regard to political or religious affiliations, marital status, or race.").
33. 5 U.S.C. § 2301.
34. 5 U.S.C. § 2302 (2017).
35. 5 U.S.C. § 7117 (1978).
36. U.S. DEP'T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT para. 3-82(a) (19 Aug. 2014) ("Supervisors are responsible for the training and education of Army [c]ivilians, identifying capability requirements and competency gaps, recommending employees for training, coaching and counseling, . . . and setting performance [standards] that include training and educational opportunities."). When a supervisor fails to hold an underperforming employee accountable,
- then the supervisor is presumably failing to perform appropriate duties as a supervisor, and should be held accountable. Supervisors are also subject to a probationary period when they assume duties as a supervisor; therefore, monitoring and evaluating their performance is a critical aspect of supervisory performance management.
37. 5 C.F.R. § 430.102(a) (1995) (defining performance management as "the systematic process by which an agency involves its employees, as individuals and members of a group, in improving organizational effectiveness in the accomplishment of agency mission and goals").
38. DPMAP vol. 431, *supra* note 12, § 3.3; 5 C.F.R. § 430.203 (2015) (defining performance plan as "all of the written, or otherwise recorded, performance elements that set forth expected performance. A plan must include all critical . . . elements and their performance standards."); U.S. OFFICE OF PERS. MGMT., THE CLASSIFIER'S HANDBOOK (TS-107) 18 (Aug. 1991) (Position description (PD) is defined as "a statement of the major duties, responsibilities, and supervisory relationship of a position. The purpose of a position description is not to spell out in detail every possible activity during the work day.") Annual PD reviews are strongly encouraged to ensure that the work being performed by the employee aligns with the mission of the organization, but also to provide a basis upon which to hold an employee accountable for unacceptable performance if ever necessary.
39. DPMAP vol. 431, *supra* note 12, § 3.3(b). See U.S. MERIT SYS. PROT. BD., MANAGING FOR ENGAGEMENT—COMMUNICATION, CONNECTION AND COURAGE, A REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 11 (July 2009) ("Immediate supervisors . . . link employees to the larger organization by helping them understand how their individual accomplishments lead to the achievement of agency goals.").
40. *Jolly v. Department of the Army*, AT-0752-15-0013-I-1 (11 Sept. 2017) (nonprecedential). The United States Court of Appeals for the Federal Circuit (denied an employee's appeal from a decision whereby she was removed from federal service for making menacing remarks, including "have you [her supervisor] heard about the [recent] Camp Lejeune and Fort Hood shootings . . . her supervisor and [] her second line supervisor needed to be careful, to leave her alone and not to mess with her." *Id.* See also Susan Henry, Labor and Employment Law Division, Office of The Judge Advocate General, Presentation at the U.S. Army Legal Services Agency, The Second Annual Senior Labor Counselor Forum: Workplace Violence Prevention, Assistance, and Response (Sept. 25, 2019) (discussing efforts to study potentially violent behavior in the workplace).
41. See 29 C.F.R. § 1630 (1991); AR 690-12, *supra* note 3, app. C; 28 C.F.R. § 36 (1991).
42. See generally 5 U.S.C. § 2302 (2017) (The Office of Special Counsel requires annual posting of *Your Rights as a Federal Employee and Know Your Rights When Reporting Wrongs*). Both notices are generally posted by either the G-1 or the servicing LMER Specialist.

# COVID-19: A Judge Advocate's Role in Advising Decision-Makers

By Major Matthew T. Bryan

**The virus known as COVID-19 is a novel coronavirus originating in Hubei, China.**<sup>1</sup> Since its discovery in December, the virus has spread the world over. As of 12 March 2020, the World Health Organization reported more than 125,000 cases and 4,600 deaths worldwide. Those infected include service members, dependents, and overseas Civilian employees.

As of this writing, we have our first confirmed cases on Camp Humphreys.<sup>2</sup> Resources at 2d Infantry Division are stretched thin—we are ready to “Fight Tonight,” ready to combat North Korean aggression, and already running twenty-four-hour operations attempting to blunt the spread of this virus.

Judge Advocate General's (JAG) Corps personnel will see COVID-19 issues related to every foundational area of law. COVID-19 travel restrictions are affecting witness travel for courts-martial. National security law teams associated with U.S. Forces Korea were recently preparing for combined exercises, and now they are focused on internal security and gate screening. Client services is assisting service members with the financial repercussions of command-directed leave cancellations and the real-world need for thoughtful estate planning. Administrative law and contract and fiscal law are also taxed. The competing requests for information coming out of the command operations and information center, from across the division staff, and from our subordinate elements are varied, time-sensitive, and have serious implications.

Chiefs of administrative law on an installation near a COVID-19 hotspot should refresh their knowledge of several legal issues that may arise. What follows is a list of key issues they should consider.

**Command Authority.** You may face questions about restricting installation

access, rules for the use of force, conditions on liberty, mandatory recall, cancelling leave, cancelling classes in Department of Defense (DoD) Education Activity schools, and involuntary extensions. You must consider whether and under what conditions command authority extends to civilians. Familiarize yourself with DoD Instruction 6200.03, “*Public Health Emergency Management*.”<sup>3</sup> Print it, and keep it on your desk.

#### **Government Information Practices.**

Evaluate how your organization uses personal information protected by the Privacy Act and the Health Insurance Portability and Accountability Act.<sup>4</sup> Is there too much information in that battle update brief slide? Who is on the division surgeon's distribution list, receiving trackers with personally identifiable information of infected personnel? Read up on the minimum necessary information rule, disclosure, and civil remedies.

**Law of Federal Employment.** Which civilian employees are mission-essential and which are not? Commanders will need advice on telework policies, alternate work schedules, paid time off, and administrative leave (hint: weather and safety).

**Federal and State Relations.** In Korea it's “Federal and Host-Nation Relations.” The issues are analogous and generally pertain to the extent and impact of command decisions and authority outside of the installation. Know the difference between exclusive and concurrent jurisdictions. Review the mutual support agreements your installation may have with local governments. Familiarize yourself with defense support of civil authorities.

**Contract and Fiscal Law.** Want to be a hero? Know fiscal law. You will eat, sleep, and breathe the “necessary expense test.” Stockpiling is a bona fide needs violation—except for emergency planning. Your commands will become very interested

in Government Purchase Card purchases and required sources of supply for infrared thermometers, N95 respirators, hand sanitizer, and disposable coverall suits. Contract administration decisions will impact operations when risk mitigation measures restrict installation access. We have had U.S. civilians request to be quarantined, and we said yes—then had to figure out how to write a contract for quarantine services (i.e., lodging, food, linens, and laundry, etc.). Speaking of quarantine, what about free internet for Soldiers in isolation for fourteen days? The list goes on.

While judge advocates should not be nervous or anxious, they must be ready. The issues you will confront are diverse, interesting, and complex. Leaders will rely on your answers because they value your principled counsel in challenging times and circumstances. The advice you give will be critical to facilitating the commander's ability to assess risk and make necessary tough decisions. **TAL**

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*MAJ Bryan is currently the Chief of Administrative and Civil Law at 2d Infantry Division, Camp Humphreys, Republic of Korea.*

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## Notes

1. *Pneumonia of unknown cause—China*, WORLD HEALTH ORG. (Jan. 5, 2020), <https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

2. U.S. DEP'T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT (PHEM) WITHIN THE DoD (28 Mar. 2019).

3. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1897 (1974) (codified as amended at 5 U.S.C. § 522a (2019)); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (Aug. 21, 1996).



(Credit: istockphoto.com/filadendron)

## No. 1

# When Does an Employee Become an Employee?

By Maria D. Esparraguera

*“Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself . . .”<sup>1</sup>*  
—Chief Justice John Marshall

When does an applicant become a federal employee? If an entrance on duty (EOD) reporting date is delayed through no fault of the applicant, is there a legal basis to retroactively adjust an EOD to reflect the report date? Or, would the EOD be the date that the applicant actually in-processed and took the oath of office? In 1803, the actions necessary to give validity to a federal appointment ultimately resulted in the Supreme Court’s establishment of the doctrine of judicial review.<sup>2</sup>

Constitutional questions aside, let us consider hypothetical applicants, Apollo Creed and Rachel Chu, who have both applied for federal positions from the private sector. Both received final job offers from the Civilian Personnel Advisory Center (CPAC) and accepted them. Both went online to complete the registration process with an EOD date of 17 September 2018. On 14 September 2018, Hurricane Florence struck the U.S. East Coast. As a result, some federal offices were closed.

On 17 September 2018, Apollo Creed was to report to a South Carolina military base, but the building and offices were closed. In anticipation of the storm, on 13 September 2018, he was provided a password to the organization’s website for weather updates, but on 17 September 2018, he notified the CPAC that the website was not working. On that same day via email, the CPAC informed him

that, tentatively, he was to report on Monday, 24 September 2018. On 19 September 2018, he asked for an update and was told to report at 1000 on 25 September 2018. His supervisor provided a statement that, throughout the storm, Mr. Creed also participated in twice-daily “accountability exercises.” The South Carolina base remained closed and no one performed work other than employees on current telework agreements. Ultimately, those working for the organization who were federal employees prior to 17 September 2018 were paid, regardless of whether they performed work. On 25 September 2018, when the building opened, Mr. Creed reported and took the oath of office.

Rachel Chu was to report to a North Carolina base. That office did not suffer the same effects from the storm as the South Carolina base. As a result, the North Carolina base was open on 17 September 2018 at 1000. However, on Wednesday, 12 September 2018, the CPAC contacted her and told her not to report on Monday, 17 September 2018, due to the hurricane. Ms. Chu’s supervisor contacted her on Friday, 14 September 2018, and found out that the CPAC told her not to report. On Monday, 17 September 2018, her supervisor called CPAC for clarification. The supervisor then contacted Ms. Chu and advised her to report the next day. On Tuesday, 18 September 2018, Ms. Chu took the oath

of office, backdating the documentation for 17 September 2018. Subsequently, the CPAC advised that the documents could not be back-dated; they were corrected to reflect 18 September 2018.

Organization leadership argued that since both employees were in receipt of a firm offer with a report date of 17 September 2018, this date should be honored as the commencement of federal employment. They cited the *OPM Guide to Processing Personnel Actions (OPM Guide)*:<sup>3</sup>

4-1 Appointments to Federal Service [A]ppointments to positions in the civil service are effective only from date of acceptance and entrance on duty, unless a later date is stated on the Standard Form 52 . . . or other approving document . . . .

#### 4-2 Date of Acceptance

Acceptance may be shown by formal acceptance, by entry on duty, or by taking the oath of office. Date of acceptance is the date the applicant accepts, either orally or in writing, the appointment offer . . . .

#### 4-3 Entrance on Duty (EOD)

a. Entrance on Duty is the process by which a person completes the necessary paperwork and is sworn in as an employee . . . .

The organization's analysis centered on the language above stating that acceptance is demonstrated by formal acceptance of the offer *or* by taking the oath of office. They did not distinguish between "acceptance" and "appointment" to civil service, nor did they acknowledge the wording of subchapter 4-1, which states that appointments to civil service are effective from the date of acceptance *and* entrance on duty.

They offered one case in support of their position. In a 1966 decision, *Administrator, Federal Aviation Administration*,<sup>4</sup> the Comptroller General held that appointment acceptance was the start of federal employment when there was acceptance of a position on Sunday and the following day was a federal holiday. The issue was whether the appointee would be paid for the holiday. In that case,

the employee accepted the position on a Sunday, but did not take the oath of office or report to work until Tuesday after the holiday. The Comptroller General noted that "the appointment alone does not vest him with the position," but that if:

[T]here is evidence which establishes that any particular employee actually accepted the tendered appointment, either verbally or otherwise on Sunday, then he would be entitled to pay for the pay for the Monday holiday *notwithstanding that he did not take the oath of office and report for duty until Tuesday and there would be administrative discretion to deny him pay for the Monday.*<sup>5</sup>

The Comptroller General ultimately did not award pay for the holiday, but ordered that the agency consider the evidence and make a determination accordingly. Subsequent decisions have essentially overruled this holding.

Under the *OPM Guide*, federal appointments are effective *only* from date of acceptance *and* entrance on duty.<sup>6</sup> It also states that the entrance on duty is the process by which a person completes the "necessary paperwork and is sworn in as an employee."<sup>7</sup> Paragraph 4-3.c. provides that the oath of office and appointment affidavit are "executed" when the appointee "enters on duty" and are given by an official who has been delegated responsibility to administer oaths.<sup>8</sup>

The organization requesting the retroactive appointment cited the *OPM Guide*, paragraph 4-2, for support that appointment can be made either by formal acceptance or entry on duty.<sup>9</sup> That paragraph discusses acceptance, not appointment.

Taken in totality, based on the complete language of the *OPM Guide*, an oath of office is required for a federal appointment. To interpret it differently would disregard the requirement in paragraph 4-3.a. for both necessary paperwork and swearing in.<sup>10</sup> "Acceptance" of a civil service position is different from "appointment," in that acceptance will govern whether an applicant has demonstrated acceptance of the offer of employment. This becomes critical for purposes of determining whether an

offer should then be issued to another applicant. In order to execute a personnel action effecting commencement of civilian employment, there must be completion of all steps required by law or regulation.

A subsequent (1972) Comptroller General decision ordered back pay where a job offer was erroneously withdrawn after initial acceptance.<sup>11</sup> In that case, Walter Dean was informed that he was to start as a Customs Officer on 12 March 1971.<sup>12</sup> On 9 March 1971, he was informed that his offer was withdrawn.<sup>13</sup> On 12 March 1971, Mr. Dean presented himself for work and was barred from entry.<sup>14</sup> Several months later, the Civil Service Commission (predecessor of the U.S. Merit Systems Protection Board (MSPB)) found that Mr. Dean had been legally appointed to the position on 12 March 1971 and that the Customs office had "improperly prevented him" from reporting for duty.<sup>15</sup> The Back Pay Act states that if an employee of an agency is found by "appropriate authority under applicable law or regulation" to have undergone an "unjustified or unwarranted personnel action," they would be entitled to back pay.<sup>16</sup> Based on the Civil Service Commission's determination, the Comptroller General ordered back pay.<sup>17</sup>

Other 1970s Comptroller General decisions narrowed this holding. In *Leonard Ross—Claim for Back Pay*, an applicant's EOD was delayed by two weeks because the Agency had failed to comply with its union agreement as to the length of time for posting of the vacancy announcement.<sup>18</sup> Mr. Ross had been notified that he was selected for a position with the Department of Agriculture with an EOD of 16 December 1974.<sup>19</sup> The afternoon of 12 December 1974, he was notified that his EOD would be 26 December 1974.<sup>20</sup> The claim for back pay was denied:

As a general proposition, one is not entitled to compensation until his appointment has been fully consummated by taking the oath of office. We have recognized an exception where one enters on duty and performs actual work prior to appointment, finding in that situation that his taking oath of office related back to the date of his entrance on duty, B-181294, November 8, 1974.



However, in the case where an employee has not actually entered on duty, he may be compensated only to the extent that his non-performance of work is the consequence of his having undergone an unjustified or unwarranted personnel action within the terms of the Back Pay Act.<sup>21</sup>

The Comptroller General differentiated *Ross* from its previous decision in *Dean*,<sup>22</sup> which ordered back pay based on an administrative decision by the Civil Service Commission that there was an “unwarranted” personnel action. In *Ross*, the claim for back pay was denied because the delay resulted from required compliance with a bargaining agreement.<sup>23</sup> Therefore, Mr. Ross had not undergone an unjustified or unwarranted personnel action.

In *Raymond J. DeLucia*,<sup>24</sup> an applicant who was given an employment offer and a firm EOD date was not entitled to a retroactive appointment despite withdrawal of the offer, delay, and subsequent appointment. Mr. DeLucia’s firm EOD date of 25 March 1974 was withdrawn on 21 March 1974 because of a large number of applicants to be processed. He alleged that an administrative error had delayed his appointment and that he should be compensated the back pay. In denying the relief, the Comptroller General stated:

An offer of public employment does not give rise to a contractual relationship in the conventional sense... As a general proposition, one is not entitled to compensation until his appointment has been fully consummated by taking the oath of office. We have recognized an exception where one enters on duty and performs actual work prior to appointment.

....

[I]n the ordinary case the decision to appoint or promote an individual in the Federal service is left to the discretion of the employing agency, and we have held that in such case the agency’s action in not hiring or promoting the individual on the date he expected or would have preferred,

does not constitute an “unjustified or unwarranted personnel action” under the Back Pay Act. This is so even though it appears that the appointment or promotion may have been delayed through error or an unusually heavy agency workload in the processing of personnel actions.<sup>25</sup>

Based on this rationale, administrative error leading to a delay in EOD does not rise to a level high enough to result in retroactive appointment to federal service.

In the hypothetical, Mr. Creed, who was to report to the South Carolina base, did not report on 17 September 2018 because the building and offices were closed. The offices remained closed and no one in the building performed work, nor did they in-process Mr. Creed or administer his oath of office. He took the oath of office on 25 September 2018 when the building opened. Under these circumstances, it is difficult to argue that the delay in his EOD was either “unjustified” or “unwarranted.” The hurricane closed the South Carolina base, not any overt act by the Army; therefore, he was not “improperly prevented” from reporting for duty.

Ms. Chu was to report to the North Carolina base. That office did not suffer the same effects from the storm as the South Carolina base. As a result, the building reopened on 17 September 2018 at 1000. However, on 12 September 2018, the CPAC contacted her and told her not to report due to the hurricane. On 17 September 2018, her supervisor called her and advised her to report the next day. On 18 September 2018, Ms. Chu took the oath of office.

In Ms. Chu’s case, her duty station was operating, but the CPAC’s mistake in calling her and telling her not to report was argued as an administrative error. Ms. Chu’s situation is factually similar to *DeLucia*,<sup>26</sup> where an administrative error caused a delay in EOD. In *DeLucia*, an administrative error did not entitle the applicant to a retroactive appointment.<sup>27</sup> Subsequent cases further restricted retroactive adjustment of hiring dates/pay based on the definition of “employee” in 5 U.S.C. § 2105(a).<sup>28</sup>

The United States Court of Appeals, D.C. Circuit, in *National Treasury Employees Union (NTEU) v. Reagan*, denied retroactive appointment to applicants who were

notified that they were selected for federal positions and given EOD dates.<sup>29</sup> Prior to their EOD, the offers were revoked because of a hiring freeze.<sup>30</sup> The D.C. Circuit determined that they were not entitled to retroactive pay.<sup>31</sup> In that case, the court agreed that the applicants were “appointed” to positions, although it was determined that the appointments could be withdrawn prior to EOD.<sup>32</sup> In order to warrant relief, the court held that the appointees had to meet the 5 U.S.C. §2105(a) definition of “employee.”<sup>33</sup> Under the statute, which applies to Title 5 in its entirety, the court held that employees are (1) appointed in the civil service, (2) engaged in the performance of a federal function, and (3) subject to the supervision of a federal employee.<sup>34</sup> Because they did not report for EOD, the applicants in the case were not considered “employees” and were not entitled to pay.<sup>35</sup>

The MSPB has statutory jurisdiction over actions taken against employees, not applicants. Consequently, many MSPB decisions also examine 5 U.S.C. §2105(a) to determine when applicants become employees.<sup>36</sup>

To be a government employee under 5 U.S.C. §2105, it must be demonstrated that (1) the appointment actually occurred; that is, it was approved by an authorized appointing official aware that they were making the appointment, (2) the applicant took some action denoting acceptance of the appointment, and (3) the appointment was not revoked before the person performed in the position.<sup>37</sup> A federal appointment occurs when the appointing authority has performed the last act to effect the appointment.<sup>38</sup>

In *Robert McCarley v. MSPB*, an applicant sought to demonstrate that he was an employee because he received a job offer that was withdrawn when he reported for duty.<sup>39</sup> The Federal Circuit Court of Appeals held:

There is a clear difference between being an appointee and an employee, and the lines are drawn by [5 U.S.C. §] 2105. One may be an appointee and never achieve the status of employee. There are three elements of the statute and all must be complied with to achieve the status of an employee . . .

....

Back pay therefore cannot be awarded to an appointee who has not qualified as an employee by performing a federal function subject to the supervision of a federal employee. Such payment for work he did not perform, because the appointment was revoked before he did any supervised work, would be illegal.<sup>40</sup>

The Comptroller General has also applied the definition of “employee” under 5 U.S.C. § 2105 in decisions subsequent to 1980. In *Rodgers D. O’Neill: Entitlement to Military Leave Prior to Appointment*, Mr. O’Neill had a firm offer, acceptance, and an EOD date of 27 July 1980.<sup>41</sup> On 26 July 1980, he received orders to report for military training at his reserve unit.<sup>42</sup> He remained on active duty until 10 August 1980, when he reported for duty for the civilian position.<sup>43</sup> The decision held that “it has long been the general rule that an appointment is effective only after the appointee has accepted the appointment and actually entered on duty.”<sup>44</sup>

The Comptroller General decision most similar to the current case is *Harry Olson*.<sup>45</sup> The *Olson* decision denied an individual’s claim for a day’s pay for the time he spent filling out forms on his EOD.<sup>46</sup> During in-processing, the applicant disputed his proposed step-level salary rate.<sup>47</sup> He then declined the offer of employment and left the facility.<sup>48</sup> Relying on *McCarley*, the Comptroller General held that he never engaged in the performance of a federal function; that is, the duties of his position, under a federal supervisor.<sup>49</sup>

Thus, Mr. Olson never fulfilled the second and third essential elements of the definition of employee. We note that this distinction between being an appointee versus being an employee has been clearly recognized by the courts, *McCarley v. MSPB* and *NTEU v. Reagan*. In the final analysis, Mr. Olson never attained the status of a Federal employee, and he may not receive payment for any preliminary time he devoted to in-processing activities that did not entail an entrance on duty and the performance of work since “[s]uch payment for work he did not perform . . . would be illegal.”<sup>50</sup>

The *Olson* decision specifically states that even some in-processing, without actual performance of work under a supervisor, will not justify payment as an employee.<sup>51</sup> The decision further cites *McCarley*, in the conclusion that such payment under such circumstances would be illegal.<sup>52</sup>

The totality of the facts will ultimately be determinative of employee status. In *Hintz v. Department of the Army*, a probationary employee who was removed on the last day of his probationary period argued that he actually commenced work for the Army a week earlier than effected, resulting in non-probationary status.<sup>53</sup> Hintz reasoned that his probationary period began early when, after receipt of an appointment letter and before his proposed EOD date, he attended meetings at the request of his supervisor.<sup>54</sup> The Federal Circuit did not agree that the correspondence was an unconditional letter of appointment and that his participation at the meeting was the performance of a federal function.<sup>55</sup> Referring to the three requirements of 5 U.S.C. § 2105, the Federal Circuit noted that Hintz received notice that he had been selected for employment and should report on 7 October 1991.<sup>56</sup> The fact that his supervisor either encouraged or requested him to attend meetings before that date was “insufficient to establish that he was authorized to assume his duties before” that date.<sup>57</sup> Generally, the appointment of a federal employee cannot occur in the absence of the “last act” required by the person or body vested with appointment power, and that will be examined in the totality of the circumstances.<sup>58</sup>

In the hypothetical, the organization requesting the retroactive appointment characterized both Mr. Creed and Ms. Chu as participating in twice-daily accountability exercises with their supervisors during the storm event. In both situations, the extent of the exercises and what they entailed is not provided. There is no evidence that they can be characterized as performing a federal function of the organization. Comparing Mr. Creed’s participation in accountability exercises prior to his 17 September 2018 EOD to the applicant in *Olson*<sup>59</sup> filling out forms when he reported, Mr. Creed did not fulfill the essential

elements of the definition of employee. Prior to the EOD, 17 September 2018, Mr. Creed was told by the CPAC that the office was closed and that he should not come in. A request to participate in an accountability exercise did not mean that Mr. Creed was authorized to assume his duties before he was appointed as a federal employee.

In Ms. Chu’s situation, the CPAC contacted her on 12 September 2018 and told her not to report on 17 September 2018 due to the hurricane. Ms. Chu was contacted by her supervisor on Friday, 14 September 2018, and was informed that Ms. Chu was told not to report, although the office was scheduled to open. Ms. Chu’s supervisor also asserted that she participated in accountability exercises over the weekend. After coordination with the CPAC, on 17 September 2018, the supervisor contacted Ms. Chu and advised her to report the next day, 18 September 2018. There is no evidence that accountability exercises were anything other than verification of the status of personnel during a hurricane.

Without contravening facts, it is doubtful that these exercises rise to a level that can be characterized as a federal function. Mr. Creed and Ms. Chu were told not to report for duty, nor were they sworn in prior to 18 and 25 September 2018, respectively. In accordance with the *Olson* decision, they cannot receive payment as employees for any preliminary time devoted to verifying personnel safety or status activities that came prior to being sworn in.

Back pay may be awarded where applicants started working, but were erroneously never sworn in or processed.<sup>60</sup> In *Jackie R. Smarts, Defacto Employee*, the Comptroller General found that the employee “filled the office, discharged [her] duties, and did so under the approval of her supervisors” in “good faith and under color of authority.”<sup>61</sup> Based on that rationale, back pay for forty hours was allowed.<sup>62</sup>

In the hypothetical, there is no evidence the applicants performed work. This is not a matter of an inadvertent failure to process or swear someone in. Acknowledging that Mr. Creed and Ms. Chu participated in the accountability exercises, there was no characterization of the hurricane-related accountability measures

as work or accomplishment of the mission of the organization. Therefore, Mr. Creed and Ms. Chu were not de facto employees.

The wording of the *OPM Guide*, paragraph 4-1 requires that appointments to civil service are effective from the date of acceptance and EOD, further defining EOD as completing in-processing and being sworn in. Mr. Creed and Ms. Chu were required to take the oath of office before they could be considered appointed as federal employees. Since 1975, the Comptroller General has consistently held that there is no entitlement to compensation until an appointment has been fully consummated by taking the oath of office.

Under the Back Pay Act, 5 U.S.C. § 5596, an applicant may receive a retroactive appointment and back pay if they have undergone an “unjustified or unwarranted personnel action.”<sup>63</sup> Comptroller General decisions have considered actions “unjustified or unwarranted” when there was legal entitlement to the appointment.<sup>64</sup> Simple administrative errors will not rise to the level requiring back pay or retroactive appointment. The mistaken communication to Ms. Chu not to report on 17 September 2018 does not warrant back pay or retroactive appointment.

In 1981, the U.S. Court of Appeals, D.C. Circuit, in *NTEU v. Reagan*, used the 5 U.S.C. §2105 definition of “employee” to deny retroactive appointment and back pay.<sup>65</sup> That decision has been followed by the courts, MSPB, and Comptroller General to deny government employee status to applicants who have spent time in-processing on EOD, or for others who attended work meetings before their EOD who were not sworn in. Generally, the appointment of a federal employee cannot occur in the absence of the “last act” required by the person or body vested with appointment power, and that will be examined in the totality of the circumstances.<sup>66</sup>

Natural disasters occur with some frequency worldwide. During those events, the commencement of federal employment is a recurring issue. Be aware that the failure to take the oath of office or report for in-processing will be held to delay the commencement of federal employment. Assertions of performance of duties prior to EOD should be examined carefully. Without

specific performance of duties before applicants come on board, they should not be considered *de facto* employees. **TAL**

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## Notes

1. *Marbury v. Madison*, 5 U.S. 137, 157 (1803).
2. *Id.* at 177-79.
3. UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, THE GUIDE TO PROCESSING PERSONNEL ACTIONS (Mar. 2017), <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/#url=Processing-Personnel-Actions> [hereinafter OPM GUIDE].
4. Administrator, Federal Aviation Administration, 45 Comp. Gen. 660 (Apr. 28, 1966).
5. *Id.* (emphasis added).
6. OPM GUIDE, *supra* note 3, para. 4-1.
7. *Id.* para. 4-3.a.
8. *Id.* para 4-3.c.
9. *Id.* para 4-2.
10. *Id.* para 4-3.c.
11. Civilian Employee-Unjustified Personnel Action-Back Pay-Entitlement, 72 Comp. Gen. 20526 (21 Apr. 1972).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. The Back Pay Act, 5 U.S.C. § 5596 (2018).
17. Civilian Employee-Unjustified Personnel Action-Back Pay-Entitlement, B-175373, 72 Comp. Gen. 20526 (21 Apr. 1972).
18. Leonard Ross, Claim for Backpay, B-183440 (Aug. 12, 1975), <https://www.gao.gov/assets/400/396022.pdf>.
19. *Id.*
20. *Id.*
21. *Id.*
22. Civilian Employee-Unjustified Personnel Action-Back Pay-Entitlement, 72 Comp. Gen. 20526 (21 Apr. 1972).
23. Leonard Ross, Claim for Backpay, B-183440 (Aug. 12, 1975), <https://www.gao.gov/assets/400/396022.pdf>.
24. Raymond J. DeLucia, B-191378 (Jan. 8, 1979) (unpublished).
25. *Id.*
26. *Id.*
27. *Id.*
28. 5 U.S.C. § 2105(a) (2018).
29. National Treasury Employees Union v. Reagan, 663 F. 2d 239, 246 (May 20, 1981).

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. 5 U.S.C. §2105(a) (2018).
37. *Deida v. Department of Navy*, 110. M.S.P.R. 408, ¶ 13 (2009).
38. *Testart v. Department of Navy*, 42 M.S.P.R. 21 (2009).
39. *Robert McCarley v. MSPB*, 757 F.2d 278, 280 (Fed. Cir. 1985).
40. *Id.*
41. *Rodgers D. O'Neill: Entitlement to Military Leave Prior to Appointment*, B-205972 (May 25, 1982) (unpublished).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Harry Olson*, B-224600 (Oct. 8, 1986) (unpublished).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Robert McCarley v. MSPB*, 757 F.2d at 280.
50. *Harry Olson*, B-224600 (Oct. 8, 1986) (unpublished).
51. *Id.*
52. *Id.*
53. *Hintz v. Dept. of Army*, 21 F.3d 407, 409-10 (Fed. Cir. 1994).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* See also *Haverstock v. Dept. of Army, U.S. Merit Systems Protection Board*, DA-0752-10-0679-I-1 (nonprecedential 3/23/2012).
58. *Hoever v. Department of the Navy*, 115 M.S.P.R. 487, 8 (2011); *McGovern v. Equal Employment Opportunity Commission*, 28 M.S.P.R. 689, 692 (1985); *Scott v. Department of the Navy*, 8 M.S.P.R. 282, 287 (1981); *Bilodeau v. American Battle Monuments Comm'n*, 39 M.S.P.R. 243, 249-51 (1988). Cf. *Jackie R. Smarts, DeFacto Employee*, B-188574, Comp. Gen. (unpublished) (29 Dec. 1977).
59. *Harry Olson*, B-224600.
60. *Jackie R. Smarts, DeFacto Employee*, B-188574, Comp. Gen. (unpublished) (Dec. 29, 1977).
61. *Id.*
62. *Id.*
63. Back Pay Act, 5 U.S.C. § 5596
64. *Id.*
65. *National Treasury Employees Union v. Reagan*, 663 F. 2d 239, 245 (May 20, 1981).
66. *Id.*



(Credit: istockphoto.com/YinYang)

## No. 2

# Looking into the Crystal Ball

## Examining GAO's Oracle America Ruling

By Major William T. Wicks

*It hasn't attracted much attention but a seemingly minor quasi-judicial ruling is a prime example of how our acquisition system serves as a means to self-inflicted unilateral disarmament. Unless senior leadership in the Defense Department acts in the next few weeks, this Government Accountability Office's (GAO) protest decision in favor of Oracle and against the Army and Transportation Command will ensure that China will dominate the future military application of quantum computing, artificial intelligence and machine learning, data analytics, biotechnology, robotics and autonomous operations.<sup>1</sup>*

On 31 May 2018, the Government Accountability Office (GAO) sustained a bid protest against the U.S. Army, U.S. Transportation Command (TRANSCOM), and the Defense Innovation Unit-Experimental (DIUx) in *Oracle America* for improper use of Other Transaction Agreement (OTA) authority under 10 U.S.C. § 2371b in order to obtain “prototype” cloud computing services and follow-on production from REAN Cloud Services LLC.<sup>2</sup> The GAO decision caused a firestorm of reaction, including from outspoken former Senate Armed Services Committee (SASC) staffer, Mr. Bill Greenwalt, who predicted dire consequences to the Department of Defense's (DoD) technological edge from the GAO decision's application to DoD OTAs.<sup>3</sup> The GAO decision and Mr. Greenwalt's commentary further provoked a similarly extraordinary public rebuttal from the GAO, with the GAO Managing General Counsel, Mr. Kenneth Patton, asserting that the GAO did not create policy through its decision, but rather merely interpreted it in *Oracle America*.<sup>4</sup>

One does not need to search too far afield in current popular culture to find similar breathless predictions of the imminent demise of American military overmatch due to the alleged failures of

the defense acquisition establishment to prepare for technologies and conflicts of the future. A prime example of this, among others, is a hypothetical reprise of an attack on U.S. military facilities throughout the Pacific Rim by the Chinese and Russian militaries in the near-futuristic novel *Ghost Fleet: A Novel of the Next World War*, by P.W. Singer and August Cole.<sup>5</sup>

Set against this unusually dramatic backdrop for the field of acquisition law, the GAO decision siding with the protester in this case began with a critical finding that the protester, Oracle America, was an “interested party” with standing to challenge the Army OTA award in a GAO bid protest.<sup>6</sup> The GAO's rationale in finding Oracle to be an interested party in the sustained bid protest for the cloud prototype OTA may open other DoD OTA award decisions up to challenge through bid protests at the GAO, as suggested by Mr. Greenwalt and others.<sup>7</sup> The GAO's position in *Oracle America* undermines and may swallow the general rule that OTAs are generally not subject to the Competition in Contracting Act (CICA) and GAO bid protests. Furthermore, the GAO's decision finding that Oracle was an “interested party” likely is inconsistent with Congress's intent for streamlining prototype OTAs under

10 U.S.C. § 2371b.<sup>8</sup> Given these concerns, Congress should seriously examine limiting the GAO's jurisdiction to hear bid protests of OTAs under 10 U.S.C. § 2371b, much as it limited the GAO's jurisdiction to review task order protests less than \$25 million awarded by the DoD.

The next section will examine what OTAs are, provide a brief history of OTAs' use, and will examine how the DoD uses OTAs for prototyping and follow-on production today. It will then examine a renewed focus on DoD OTAs for prototypes enacted in the 2016 National Defense Authorization Act (NDAA). Next, the GAO's prior review of OTAs for other agencies within the U.S. government will be discussed. This article will then look at the GAO's *Oracle America* decision and analysis of "interested party" status, focusing on its flawed CICA-type analysis to establish *Oracle America* as an interested party. The final section will propose a solution to limit the GAO's jurisdiction over prototype OTA bid protests in order to facilitate innovative transactions and review a proposed way forward in light of the strategic environment. Appendices A and B contain examples of proposed legislation limiting bid protests of § 2371b OTAs.

## Background

An OTA is not a traditional procurement contract governed by the Federal Acquisition Regulation (FAR) or the Defense FAR Supplement (DFARS).<sup>9</sup> Additionally, an OTA is not considered a grant or cooperative agreement governed by 10 U.S.C. § 2358 through the DoD Grants and Agreements Regulations (DODGARS).<sup>10</sup> Other Transaction Agreements are simply acquisition authorities "other" than—or outside the bounds of—traditional FAR and DODGARS-based contract methods. Other Transaction Agreements can be much more flexible than traditional FAR-based procurement contracts, with clauses specifically crafted for each case. In addition, under the enabling statute for DoD prototypes, section 2371b OTAs are not explicitly subject to the broad "full and open" competition requirements of CICA,<sup>11</sup> nor are they subject to the Contract Disputes Act (CDA),<sup>12</sup> among other

significant limitations on other FAR-based federal procurement contracts.<sup>13</sup>

Instead of a "contracting officer" having authority to bind the government, under an OTA, an "agreements officer" fulfills a similar role binding the government to the agreement and ensuring the contractor's compliance with terms and conditions.<sup>14</sup> Additionally, as the updated 2018 DoD OTA Guide notes, one of the most advantageous aspects of section 2371b prototype OTAs is that data rights are generally much more negotiable, allowing the government and contractors to adjust certain data rights more flexibly than under traditional FAR-based instruments.<sup>15</sup>

These newly-modified acquisition authorities for DoD prototyping can serve as useful tools to enhance access to non-traditional defense contractors and academia-developed solutions for defense requirements as well. Since the 2016 NDAA and permanent codification of prototype OTA authority in 10 U.S.C. § 2371b, the defense contracting industry and the media have expressed significant interest in the potential flexibility associated with the use of these OTAs, for experimentation and follow-on production.<sup>16</sup>

## A Brief History of OTAs

Beginning with the National Aeronautics and Space Act of 1958, the National Aeronautics and Space Administration (NASA) was the first federal agency to use OTAs for research and prototyping efforts—many decades before other federal agencies.<sup>17</sup> Since NASA's inception, it has used OTAs—known as Space Act Agreements within NASA—significantly more than any other federal agency, and indeed currently maintains many more active OTAs than other federal agencies.<sup>18</sup> After approximately thirty years of OTA use by NASA, in 1989, Congress enacted 10 U.S.C. § 2371 to allow the Defense Advanced Research Projects Agency (DARPA) to enter into OTAs for basic, applied, and advanced research efforts.<sup>19</sup>

Section 2371 OTAs are commonly referred to as research OTAs, as opposed to prototype OTAs under section 2371b. Subsequently, Congress enacted Section 845 of the Fiscal Year (FY) 1994 NDAA to allow for DARPA, and by extension the DoD,

to enter into OTAs for prototype efforts as well.<sup>20</sup> As the original 2017 DoD OTA Guide points out, Congress enacted legislation authorizing OTAs for research and prototyping in order to supplement other well-known guidance for grants and cooperative agreements under 10 U.S.C. § 2358.<sup>21</sup>

Since the enactment of OTA authority for prototyping in 1994, in the late 1990s and early 2000s, DARPA and the Army initially utilized OTAs during the pre-materiel solution development phase of the Future Combat Systems (FCS) program.<sup>22</sup> Due to congressional concerns about the inapplicability of the Truth in Negotiations Act (TINA)<sup>23</sup> and the lack of certified cost data from the lead systems contractor, the Army eventually re-negotiated all of the OTAs under FCS as FAR Part 15 negotiated procurement contracts during the summer of 2005, preceding the ultimate cancellation of the FCS program in 2009.<sup>24</sup> This massive program cancellation served as background to the Army's perceived reticence to using non-FAR acquisition vehicles such as OTAs prior to the 2016 NDAA.

## Increased Emphasis on OTAs for Prototypes in 10 U.S.C. § 2371b

In the 2016 NDAA, Congress replaced the FY 1994 NDAA Section 845 DoD prototype authority with permanently codified authority for prototyping OTAs in 10 U.S.C. § 2371b, supplementing the already existing section 2371 for research OTAs.<sup>25</sup> Congress intended section 2371b for flexible and fast OTA prototype agreements in order to build prototypes quickly without strictures of the FAR and CICA, and then move to follow-on production.<sup>26</sup> Specifically, the statute authorizes "prototype projects directly relevant to enhancing mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed . . . or to improvement of platforms, systems, components, or materials in use by the armed forces."<sup>27</sup> Furthermore, in order to award such an OTA under section 2371b, a "non-traditional defense contractor" must participate to a significant extent, or a traditional defense contractor must provide one-third of the cost share unless waived by the service Senior Procurement Executive (SPE).<sup>28</sup>

In turn, 10 U.S.C. § 2302(9) defined a non-traditional defense contractor for a section 2371 research OTA or section 2371b prototype OTA as:

[A]n entity that is not currently performing and has not performed, or at least the one year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section.<sup>29</sup>

The statute unfortunately does not define what “significant participation” means, but the updated 2018 DoD OTA Guide states that the non-traditional defense contractor could, for instance, supply key technology, accomplish significant amounts of effort, or cause a material reduction in cost, schedule, or increase performance, among a list of non-exhaustive other efforts supplied by the guide.<sup>30</sup>

The statute also authorizes DoD agencies to provide for follow-on production after initial completion of a section 2371b OTA prototype.<sup>31</sup> In order to award a follow-on production section 2371b OTA without competing the requirement a second time, DoD agencies may do so if “(A) competitive procedures were used for the selection of parties for the participation in the transaction; and (B) the participants in the transaction successfully completed the prototype project provided for in the transaction.”<sup>32</sup> Congress did not, however, define what a “successful prototype” would be in the text of the statute, either.<sup>33</sup>

Subsequent to section 2371b’s enactment, the SASC stated openly in the report accompanying the 2017 NDAA that it would like DoD agencies with OTA authority to expand their use of OTAs, if possible.<sup>34</sup> As the SASC explicitly stated, OTAs are supposed to be very broad authorities:

The statutory authority for other transactions as delineated in section 2371 and 2371b of title 10, United

States Code, is written in an intentionally broad manner . . . making use of OTAs, and their associated flexibility, may require senior leaders and Congress to tolerate more risk . . . . Importantly, any such risk must be viewed as lesser than the risks of stymieing innovation or slowing the development and fielding of critical new capabilities.<sup>35</sup>

After the initial enactment of the 2016 NDAA authorizing section 2371b prototype and production OTAs, the DoD published the department-wide OTA Guide for prototypes in January 2017, including definitions and guidance for possible follow-on production of prototypes.<sup>36</sup> Arguably, portions of the initial 2017 guide were incomplete or ambiguous. Therefore, the November 2018 DoD OTA Guide replaced the initial January 2017 DoD OTA Guide, and is now in effect throughout all DoD agencies utilizing OTAs.<sup>37</sup> In the *Oracle America* decision itself, the GAO partly deferred to the 2017 DoD OTA Guide’s definition as to what constitutes a successful prototype for the purposes of section 2371b, given the lack of any statutory definition.<sup>38</sup> On a broader scale, in the Department of the Army, OTAs have become more prominent as acquisition vehicles since the 2016 NDAA and especially since the advent of U.S. Army Futures Command and the Cross-Functional Teams (CFTs).<sup>39</sup> Given the recent, renewed interest in OTAs across the DoD, the GAO’s ultimate involvement in reviewing bid protests of DoD OTAs may have been inevitable.

### ***The GAO’s Role in Reviewing Bid Protests of OTAs***

Concurrent with this broad and renewed interest in OTAs in the DoD since the 2016 NDAA, the GAO has carved out a role in reviewing OTAs over the years, mostly within federal agencies other than the DoD. Under normal circumstances, according to the GAO’s Bid Protest Regulations enacted pursuant to CICA, the GAO reviews bid protests from “interested parties” of traditional FAR-based contracts to ensure compliance with “procurement law and statutes.”<sup>40</sup> Based on its own previous bid protest decisions, discussed below, any

GAO review of an OTA protest is supposed to be a much more limited review than a typical bid protest reviewing a “procurement contract” for goods and services.

In addition to the GAO’s jurisdiction over OTA bid protests, the Court of Federal Claims (COFC) or the various federal district courts may have jurisdiction to review bid protests of OTAs under the Tucker Act,<sup>41</sup> including section 2371 or section 2371b OTAs. In an August 2019 decision, the COFC reviewed a section 2371b OTA regarding Air Force Launch Service Agreements in *Space Exploration Techs. Corp. v. United States*, but dismissed the bid protest by finding that they were not “procurement contracts” for Tucker Act purposes, and transferred venue to U.S. District Court in the Central District of California under 28 U.S.C. §1391(b).<sup>42</sup> However, the GAO has exercised jurisdiction over the vast majority of bid protests of section 2371b OTAs up to this point, in *Oracle* and subsequent cases.

Regarding the GAO’s Bid Protest Regulations, as stated above, the GAO will only review bid protests from “interested parties.”<sup>43</sup> Interested parties are those entities who are “[a]ctual or prospective offerors whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”<sup>44</sup> This in turn derives from the U.S. Code’s definition of an “interested party” for the purposes of a federal procurement contract.<sup>45</sup> Unlike the GAO’s general ability to review traditional procurement contracts subject to CICA under its Bid Protest Regulations, however, the GAO previously established much more limited views of its ability to review OTA award decisions for other non-DoD agencies in the decisions, *Rocketplane Kistler* and *MorphoTrust*.

### ***The GAO’s OTA Analysis in Rocketplane Kistler***

Representing the foundation for the GAO’s review of the OTA in *Oracle America*, *Rocketplane Kistler* was a 2008 GAO review of a NASA Space Act Agreement or OTA for low-earth orbit (LEO) transportation engineering services.<sup>46</sup> The protester, *Rocketplane Kistler*, contended that NASA must obtain research and development services for LEO engineering under a research and development procurement



(Credit: istockphoto.com/Pattanaphong Khuankaew)

contract, and not a Space Act agreement.<sup>47</sup> In denying the protest, the GAO stated that it would only review whether the Space Act Agreement was “knowing and authorized,” given that the primary purpose of the agreement did not principally provide for goods and services for the direct benefit of NASA, and otherwise complied with the authorizing statute—here, the Space Act.<sup>48</sup> The GAO analysis of the agency’s statutory authority to enter into the agreement is very short and the GAO does not attempt to dissect the agency’s rationale in so doing.<sup>49</sup> This deferential decision in *Rocketplane Kistler* set the stage for the GAO’s review in *MorphoTrust* in 2016.

#### ***The GAO’s OTA Analysis in MorphoTrust***

Subsequent to the 2008 *Rocketplane Kistler* decision, in 2016 the GAO reviewed a Transportation Security Administration (TSA) OTA in *MorphoTrust* that sought to purchase commercial technology in support of expedited screening at various airport

security checkpoints around the United States.<sup>50</sup> The TSA Head of Contracting Activity (HCA) concluded a determination and findings (D&F) stating that a traditional procurement contract under the FAR was inappropriate under the circumstances to procure commercial screening technology, as authorized under the Aviation & Transportation Security Act of 2001 (ATSA).<sup>51</sup> The protester, *MorphoTrust*, contended that the TSA was required to use a traditional procurement contract under the FAR to obtain the expedited screening technology, as opposed to an ATSA OTA.<sup>52</sup> The GAO further found, however, that there was no specific statutory requirement from Congress for the TSA to use a traditional FAR-based procurement contract for this particular requirement, as opposed to an OTA authorized under the ATSA.<sup>53</sup> Reiterating points from *Rocketplane Kistler* and associated GAO case law, the GAO concluded that where “the decision to use ‘other transaction’ authority—is authorized

by statute or regulation, [the GAO] will not make an independent determination of the matter.”<sup>54</sup> The GAO went on to find that the TSA OTA use was consistent with its statutory authority, and that the TSA HCA properly documented the correct rationale in its D&F setting forth conditions for the OTA.<sup>55</sup> Notably, the GAO’s analysis of TSA’s statutory authority to enter into other transactions was not lengthy, and did not attempt to pierce the rationale behind what TSA adequately documented in the D&F.<sup>56</sup> Therefore, the GAO denied the protest by *MorphoTrust* on the merits.<sup>57</sup> This 2016 decision served as a prelude to the GAO’s rationale in *Oracle America* discussed below.

#### ***The GAO’s Analysis in Oracle America, Inc.***

The cases discussed above lead up to the 2018 bid protest in *Oracle America*, explicitly dealing with a DoD section 2371b OTA for prototype cloud computing services.<sup>58</sup> In this decision, the GAO sustained the bid



protest against the Army, TRANSCOM, and DIUx in *Oracle America* for improper use of OTA statutory authority in obtaining prototype cloud computing services and follow-on production from REAN Cloud Services LLC.<sup>59</sup> The critical gateway was the GAO's decision that the protester, Oracle America, was an interested party pursuant to the Bid Protest Regulations with standing to challenge the OTA award decision. The GAO's finding that Oracle was an interested party came despite the fact that Oracle did not submit a response to the Commercial Solutions Opening (CSO) (roughly equivalent to a FAR-based Request for Proposals) for the OTA in the case.<sup>60</sup> Notably, however, the GAO did not accept Oracle America's argument that the 2017 DoD OTA Guide's definition of a prototype was improper and deferred to the DoD definition.<sup>61</sup> The GAO nevertheless went on to sustain two protest grounds against the Army, finding that the follow-on production OTA award to REAN Cloud was improper for two reasons. First, the GAO found the follow-on award improper because the CSO did not mention a follow-on production agreement.<sup>62</sup> Second, the GAO found the follow-on production OTA with REAN Cloud improper because the Army did not obtain a successful prototype before awarding the follow-on OTA.<sup>63</sup> Ultimately, the GAO's interested party finding allowed these sustained protest grounds to occur.

### **The GAO's Flawed Analysis Regarding Oracle's Interested Party Status**

In order to establish the protester's interested party status in *Oracle*, the GAO cited a number of cases where an offeror did not submit a proposal or bid—and yet considered the protester an “interested party.” The cases cited by the GAO are *Helionix Sys., Inc.*,<sup>64</sup> *Courtney Contracting Corp.*,<sup>65</sup> *Afghan Carpet Servs., Inc.*,<sup>66</sup> *MCI Telecomm. Corp.*,<sup>67</sup> *Coulson Aviation (USA) Inc. et al.*,<sup>68</sup> and *Space Exploration Techs. Corp.*<sup>69</sup> Each of these cases cited by the GAO to establish interested party status deals with the definition of an interested party in a traditional procurement contract for goods and services, drawn from the GAO's Bid Protest Regulations, FAR, and CICA. None of the cases cited by the GAO to establish Oracle's interested party status dealt with a

prototype OTA for the DoD under section 2371b or its predecessor, section 845 of the FY 1994 NDAA.

The GAO used obvious CICA-type definitions to establish Oracle's interested party status in *Oracle America*, allowing the protester to put a “foot in the door” and went on to sustain two protest grounds against the Army for the follow-on production agreement.<sup>70</sup> In its interested party analysis in *Oracle America*, the GAO did not explain why it applied CICA-based definitions to an OTA, under which CICA does not explicitly apply.<sup>71</sup> If the GAO will permit a firm that did not even submit a response to an OTA CSO such as Oracle and rely on CICA-based definitions of interested parties, there is real risk that valuable and quick OTAs may bog down the process in future lengthy bid protest litigation, much as Mr. Greenwalt predicts.<sup>72</sup>

### **Subsequent Applications of the GAO Rationale in Oracle America**

Additional section 2371b OTA protests filtered up to the GAO in the intervening months since the decision in *Oracle America*, discussed above. In September 2018, for example, in *Blade Strategies*, the GAO dismissed a section 2371b OTA award challenge to an Army OTA award due to the protest being untimely under GAO's Bid Protest Regulations—regulations enacted pursuant to CICA.<sup>73</sup> Though it was a dismissal, the *Blade* decision's rationale suggested that were it received a timely challenge, the GAO could undertake another comprehensive review of a section 2371b OTA.

Such a protest occurred shortly thereafter in January 2019. In a possible preview of section 2371b OTA bid protests to come, this type of fulsome GAO review occurred in *ACI Technologies*.<sup>74</sup> There, the GAO undertook a comprehensive protest of a Department of the Navy prototype OTA for electromagnetic spectrum (EMS) defense prototypes under section 2371b with a consortium of companies, dismissing the protest in part and denying it in part.<sup>75</sup> *ACI Technologies*'s protest was a pre-award challenge to the OTA Solicitation filed with the GAO prior to the due date for receipt of proposals in October 2018, preventing an OTA award to the consortium from

occurring.<sup>76</sup> The protester contended that the Navy's use of a section 2371b OTA was inappropriate for this type of EMS defense requirement and that the Navy should have used a traditional FAR-based procurement contract.<sup>77</sup>

In the decision on the merits, the GAO specifically cites its previous rationale in *Oracle America*, concluding that it will review established internal agency guidelines in reviewing section 2371b OTAs for prototypes because the protester and the agency both referred to the guidelines in the agency report and comments.<sup>78</sup> Oddly, the GAO also cites a previous decision, *Triad Logistics Services Corp.*, stating that it normally does not review bid protests that merely cite violations of internal agency guidance.<sup>79</sup> Regardless of *Triad*'s holdings, the GAO explains in *ACI Technologies* that it will follow agency guidance in effect at the time of the solicitation defining a prototype OTA under section 2371b—the 2017 DoD OTA Guide—due to the fact that the parties conceded the issue in briefing.<sup>80</sup> Ultimately, the Navy prevailed in this protest, but in the process the GAO expanded its power to review section 2371b OTAs and enlarged the incorrectly-decided legal standard in *Oracle America*.<sup>81</sup> Notably, the GAO did not mention interested party analysis at any point in the *ACI Technologies* decision.<sup>82</sup> It is unclear from the decision whether the Navy conceded interested party status, or whether the GAO established it some other way.<sup>83</sup> This apparently leaves the GAO's *Oracle* interested party rationale applying CICA-definitions to section 2371b intact.

Subsequent to *ACI Technologies*, in April 2019, the GAO issued another opinion on a section 2371b OTA for Army Futures Command's Future Armed Reconnaissance Aircraft in *MD Helicopters*.<sup>84</sup> In the decision itself, the GAO dismissed MD Helicopters' protest, and found that it does not typically review OTA bid protests, citing the source of its authority in the Bid Protest Regulations and CICA.<sup>85</sup> In fact, the GAO stated explicitly that “[w]e dismiss the protest because we do not review the award of non-procurement instruments issued under an agency's OTA authority.”<sup>86</sup> MD Helicopters argued that the term “generally” in 4 C.F.R. § 21.5(m) provided the GAO wide discretion to hear its protest.<sup>87</sup>

The GAO went on, however, to state that because CICA established the GAO's bid protest jurisdiction, providing it the ability to review protests for alleged violations of procurement laws and regulations, it could not therefore review OTAs because OTAs are not by definition procurement contracts.<sup>88</sup>

Interestingly, the GAO conceded that because its jurisdiction derives from CICA, and that its Bid Protest Regulations also derive from CICA, it therefore cannot review section 2371b OTA bid protests.<sup>89</sup> If this is the case, it is unclear how the GAO reached its decisions in *Oracle America* and *ACI Technologies*, as discussed previously in this article. In the end, the *MD Helicopters* decision was a win for Army Futures Command, but its rationale built upon inconsistent grounds from prior GAO cases and may leave protesters and federal agencies alike to wonder which way the GAO will decide in light of its previous decisions.

In contrast to its expansive interpretation in *Oracle America*—and apparent application in *ACI Technologies* and *MD Helicopters*—the GAO previously stated more deferential standards for reviews of non-DoD OTAs in *Rocketplane Kistler* and *MorphoTrust*, delineating criteria as to whether the use of an OTA under an enabling statute was “knowing and authorized.”<sup>90</sup> Due to the potential for continued disruptive litigation in the wake of *Oracle America*, *ACI Technologies*, and *MD Helicopters*, however, Congress should go much further to facilitate OTAs for section 2371b prototypes in the DoD by insulating the OTAs for the prototypes and follow-on production from bid protests entirely.

### **Congress Should Limit OTA Bid Protest Jurisdiction**

Given that the GAO is showing willingness to review section 2371b OTAs like traditional FAR-based procurement contracts and applying CICA-type definitions to OTAs, Congress should examine modifying section 2371b to explicitly limit the circumstances where protesters may challenge such OTAs. A legislative proposal limiting OTA bid protest jurisdiction under section 2371b would demonstrate greater deference shown to the DoD's use of prototype OTAs, as reflected in GAO's prior decisions in

*Rocketplane Kistler* and *MorphoTrust*, and not *Oracle America*.

Congress could more explicitly foreclose the possibility of disruptive bid protests by modifying the statute even further by limiting the circumstances in which a protester may challenge an OTA award. A legislative change of this type limiting protest jurisdiction has recent precedent in Congress's previous limitations on bid protests for DoD task orders under \$25 million within the 2017 NDAA, or if they increase the scope, period, or maximum ordering amount under an indefinite delivery-indefinite quantity (IDIQ) contract.<sup>91</sup> This amendment modified 10 U.S.C. § 2304c(e) in 2017, significantly increasing the threshold to protest DoD task orders from the original Federal Acquisition Streamlining Act (FASA) of 1994 threshold of \$10 million to \$25 million.<sup>92</sup> It further clarified again that only the Comptroller General has exclusive jurisdiction to hear bid protests over that amount.<sup>93</sup> Under the FASA, Congress gave the GAO exclusive jurisdiction to hear protests of those type and amount regarding task orders—based solely on Congress's policy choice.<sup>94</sup> Likewise, if Congress wants to insulate and encourage the DoD OTA prototyping process as mentioned in the 2017 NDAA SASC report, it should examine limiting the GAO's DoD OTA protest jurisdiction, possibly for both prototype and production OTAs.

This type of change resembles Congress's previous limitation on DoD task order jurisdiction.<sup>95</sup> This proposed change does not mean that OTAs under section 2371b would be completely without oversight, given that the statute already requires agencies to provide audit quality information regarding section 2371b OTAs over \$5 million to the Comptroller General and GAO.<sup>96</sup> This type of change merely means that Congress is limiting the risk of disruptive litigation as a policy choice to protect fast prototyping and rapid fielding for the DoD. Notably, the House of Representatives mandated increased reporting on section 2371b prototypes within the 2019 DoD Appropriations Act, requiring DoD agencies to provide quarterly notice to congressional appropriations committees for all active OTAs.<sup>97</sup> Certainly, Congress is contemplating OTA oversight in a broader

sense than just permitting the GAO to continue its bid protest jurisdiction over OTAs in the wake of *Oracle America*.

If Congress wants to preserve some level of bid protest review at the GAO for transparency purposes, it could enact a provision in a future NDAA modifying section 2371b by perhaps setting a high-dollar limit allowing the GAO to review section 2371b OTAs under limited circumstances—for instance, over \$100 million. This could ensure that lower value prototype OTAs move quickly toward solutions without the interruption of bid protest litigation. The current section 2371b statute already reflects a similar policy choice with the dollar-level thresholds of approval required for certain OTAs over \$100 million and \$500 million—under most circumstances by the agency HCA, service Senior Procurement Executive (SPE), or the Undersecretary of Defense for Acquisitions & Sustainment (USD—A&S).<sup>98</sup> The jurisdictional threshold for GAO bid protest jurisdiction over section 2371b OTAs for prototypes and production could mirror those approval levels.<sup>99</sup> Appendix A contains an example of proposed legislation limiting such protests of section 2371b OTAs over certain monetary thresholds and exclusively at the GAO.<sup>100</sup> Setting a monetary threshold may be arbitrary depending on the project, and constrain otherwise permissible prototyping.

Alternatively to setting a monetary threshold limit, Congress could incorporate a “knowing and authorized” legal standard of review—as articulated by the GAO in *Rocketplane Kistler* and *MorphoTrust*—as the definitive standard of review for OTAs. Given the GAO's prior deference to agencies' determinations and statutory authority in *Rocketplane Kistler* and *MorphoTrust*, this may be tempting at first glance. Without further guidance from Congress, however, section 2371b OTAs would still be exposed to disruptive protests and preserve the GAO's incorrect analysis from *Oracle America*—as *ACI Technologies* recently proved.<sup>101</sup> Indeed, in *ACI Technologies*, aside from citing *Oracle America*, the GAO also extensively cites its previous analyses in *Rocketplane Kistler* and *MorphoTrust*.<sup>102</sup> Such standards will be thin shields if *Oracle America* remains good law.

Given the limits of monetary thresholds and potential changes to a legal standard of review for OTAs, Congress could disallow bid protests of any and all DoD OTAs by including a provision in a future NDAA explicitly barring any such challenges. Appendix B contains such an example of proposed legislation prohibiting protests of section 2371b OTAs.<sup>103</sup> This radical solution barring any protests on section 2371b OTAs may be the cleanest method of dealing with the problem, especially in light of the GAO's expanded application of *Oracle America's* analysis in *ACI Technologies*.<sup>104</sup>

In order to provide comprehensive protection to section 2371b OTAs, Congress can explicitly prohibit protests of prototype OTAs, plus associated follow-on production OTAs. Such a model of expeditious prototyping and follow-on production without the threat of litigation gives DoD agencies latitude to experiment, "fail fast," and encourage innovation. Then-Secretary of the Army, Dr. Mark Esper, and then-Chief of Staff of the Army, General Mark Milley, emphasized exactly this type of urgency for "quick wins" and rapid innovation at U.S. Army Futures Command's activation ceremony in August 2018.<sup>105</sup> Without such agile acquisition vehicles, DoD's sought-after innovations may stagnate within bid protest litigation at the GAO.

Notably, since the GAO decision in *Oracle America*, the 2016 NDAA Section 809 panel recommended similar changes to the law curtailing the GAO's bid protest jurisdiction for a number of other types of federal contracts, resulting in three volumes of recommendations for reforming the DoD acquisition system.<sup>106</sup> Congress originally tasked the Section 809 Panel—composed of experts from within DoD, industry, and academia—with making recommendations to reforming the DoD acquisition system and associated regulations in the 2016 NDAA.<sup>107</sup> The Section 809 panel makes a number of recommendations aimed at reforming bid protests in its third volume report released in January 2019.<sup>108</sup> Among the proposed changes is a radical increase to the Micro-Purchase Threshold (MPT) to \$15 million dollars using "readily available procedures," and limiting post-award bid protests to the competition advocate of the contracting activity.<sup>109</sup> This

recommendation effectively prevents the GAO's review of post-award bid protests for any contracts under that threshold.<sup>110</sup>

Additionally, the Section 809 panel recommends further limiting the GAO's jurisdiction in other areas, including limiting the jurisdiction of the GAO and COFC to procurements whose expected value would exceed \$75,000, preventing protesters from filing protests at the COFC after unsuccessfully protesting at the GAO, and imposing the same timeliness rules that apply to GAO protests to the Tucker Act.<sup>111</sup> Though the Section 809 Panel does not recommend that Congress limit OTA protest jurisdiction in its most recent report, such legislation explicitly limiting protests of section 2371b OTAs should not remain out of the question in order to encourage speedy innovation.

### Conclusion

The GAO fundamentally "struck out" with the *Oracle America* decision and used a plainly flawed rationale in finding *Oracle America* to be an interested party for the cloud computing OTA. It applied CICA-type analysis when CICA was never explicitly intended to apply to these types of OTAs by Congress. Subsequent decisions in *Blade Strategies* and *ACI Technologies* ominously suggest the possibility of "open season" to review DoD OTAs by the GAO.<sup>112</sup> This application will possibly chill the DoD's use of OTAs, and runs counter to the SASC Report's intent requesting broader application of DoD OTAs.<sup>113</sup> Moreover, the GAO's decision does not represent the acceptable level of risk for innovative acquisitions anticipated by Congress in the same report.<sup>114</sup> Given these concerns, Congress should critically examine limits on bid protest jurisdiction under section 2371b, possibly prohibiting them entirely, while maintaining transparency through quality audit information anticipated in the statute. This resembles Congress's limitation on the GAO's jurisdiction to review DoD task orders less than \$25 million within the 2017 NDAA.<sup>115</sup> Congress should further evaluate whether to limit OTA protests in a manner suggested by the Section 809 panel, parallel to the increased MPT and other recommendations in the Volume 3 report.<sup>116</sup>

Without similar limits, valuable and speedy OTAs for DoD use will be delayed or halted in successive rounds of bid protest litigation, allowing the United States' global competitors to speed past unencumbered—much as Mr. Greenwalt predicts in his June 2018 criticism of the *Oracle America* decision.<sup>117</sup> The GAO's rebuttal to Mr. Greenwalt attempts to modestly reassure readers about GAO's intent in the *Oracle America* decision.<sup>118</sup> The GAO's defensive position, however, does not adequately address the possibility of disruptive litigation, putting DoD research and development at a disadvantage to strategic peer and near-peer competitors.<sup>119</sup> Indeed, the whiplash from GAO decisions felt by the industry and the DoD in *ACI Technologies* and *MD Helicopters* proves otherwise.<sup>120</sup>

Given the GAO's application of the wrongly-decided *Oracle America* decision, it is apparent that the GAO will continue to use its rationale to entertain bid protests of section 2371b OTAs.<sup>121</sup> Congress should act to foreclose time-consuming litigation of OTAs before global competition metaphorically flies by the United States. Without congressional action to ensure technological overmatch, a grim future similar to that predicted in *Ghost Fleet* may be one step closer for the U.S. military: a modern-day Pearl Harbor.<sup>122</sup> In no uncertain terms, the GAO's decision in *Oracle America* should be "OTA" here. **TAL**

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### Appendix A. Proposed Legislation to Limit § 2371b Bid Protest Jurisdiction

SEC. 2371b. AUTHORITY OF THE DEPARTMENT OF DEFENSE TO CARRY OUT CERTAIN PROTOTYPE PROJECTS. (d) APPROPRIATE USE OF AUTHORITY.—Section 2371b(d) of title 10, United States Code, is amended by inserting after paragraph (2) the following new paragraph: "(3) The Comptroller General of the United States shall have exclusive jurisdiction to review any bid protest, as defined in Section 3551 of title 31, United States

Code, of a prototype other transaction agreement or a follow-on production other transaction agreement executed by a Department of Defense agency under this section only where the subject other transaction agreement's value exceeds \$100,000,000.00.

## Appendix B. Proposed Legislation to Prohibit § 2371b Bid Protest Jurisdiction

SEC. 2371b. AUTHORITY OF THE DEPARTMENT OF DEFENSE TO CARRY OUT CERTAIN PROTOTYPE PROJECTS. (d) APPROPRIATE USE OF AUTHORITY.—Section 2371b(d) of title 10, United States Code, is amended by inserting after paragraph (2) the following new paragraph, “(3) The Comptroller General of the United States and the federal courts of the United States shall not have jurisdiction to review any bid protest, as defined in Section 3551 of title 31 and Section 1491(b) of title 28, United States Code, of a prototype other transaction agreement or a follow-on production other transaction agreement executed by a Department of Defense agency under this section.

### Notes

1. Bill Greenwalt, *GAO Decision Threatens U.S. Military Dominance; Reject It*, BREAKING DEFENSE.COM (June 27, 2018, 4:01 AM), <https://breakingdefense.com/2018/06/gao-decision-threatens-us-military-dominance-reject-it/>. Mr. Greenwalt is currently a Senior Fellow at the Atlantic Council and formerly worked for the late Sen. John S. McCain as a professional staffer on the Senate Armed Services Committee from 2015 to 2017. *Id.*
2. Oracle America, B-416061, 2018 CPD ¶ 180 (Comp. Gen. May 31, 2018).
3. *See* Greenwalt, *supra* note 1.
4. Kenneth Patton, *GAO Says Oracle Protest Did Not Make Policy; Criticizes Greenwalt Op-ed*, BREAKING DEFENSE.COM (July 9, 2018, 2:00 PM), <https://breakingdefense.com/2018/07/gao-says-oracle-protest-did-not-make-policy-criticizes-greenwalt-op-ed/>.
5. P.W. SINGER & AUGUST COLE, GHOST FLEET: A NOVEL OF THE NEXT WORLD WAR 51-82 (2015).
6. *See* Oracle America, 2018 CPD ¶ 180, at 12.
7. *See* Greenwalt, *supra* note 1.
8. *See* S. REP. NO. 115-125, at 189-90 (2017).
9. *See generally* Federal Acquisition Regulation (FAR), 48 C.F.R., Chapter 1 (2019); *see also* Defense FAR Supplement (DFARS), 48 C.F.R., ch. 2 (2019).

10. *See generally* DoD Grants and Agreements Regulations (DODGARS), 32 C.F.R. §§ 21-37 (2019).

11. *See generally* Competition in Contracting Act (CICA), 31 U.S.C. §§ 3551-3556; 41 U.S.C. § 3301 (2019).

12. *See generally* Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2019).

13. *See* 10 U.S.C. § 2371b(b)(2) (2019). The Truth in Negotiation Act (TINA) regarding certified cost data also does not explicitly apply to Other Transaction Authority (OTAs). *See* 10 U.S.C. § 2306a (2019); *see also* 41 U.S.C., ch. 35 (2019). Furthermore, the Bayh-Dole Act regarding intellectual property rights does not explicitly apply to OTAs either. *See* 35 U.S.C. §§ 200-212 (2019).

14. *See* U.S. DEP'T OF DEF., OTHER TRANSACTIONS GUIDE FOR PROTOTYPE PROJECTS, app. A, at 32 (Nov. 2018), [https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20\(OT\)%20Guide.pdf](https://www.dau.mil/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf) [hereinafter 2018 DoD OTA GUIDE].

15. *See id.*, app. F.

16. *See, e.g.*, Greenwalt, *supra* note 1; *see also* Susan B. Cassidy, Jennifer Plitsch, & Tyler Evans, *DIUx and DoD Other Transaction Prototype Agreements: The Fast Track to DoD Funding* (Feb. 22, 2018), <https://www.inside-governmentcontracts.com/2018/02/7476/>; *see also* Tim Greeff, *How the U.S. Can Put Its OTA Procurement Process to Best Use* (Mar. 23, 2018), <https://www.federaltimes.com/acquisition/2018/03/23/how-the-us-can-put-its-ota-procurement-process-to-best-use/>; *see also* Scott Maucione, *OTAs are the Cool New Thing in DoD Acquisition* (Oct. 19, 2017, 1:44 PM), <https://federalnewsnetwork.com/acquisition/2017/10/ota-contracts-are-the-new-cool-thing-in-dod-acquisition/>; *see also* Scott Maucione, *DoD Wants to Cut Contracting Time by 50 Percent as Part of AT&L Split* (Oct. 11, 2017, 5:44 PM), <https://federalnewsnetwork.com/defense/2017/10/dod-wants-to-cut-contracting-time-by-50-percent-at-part-of-atl-split/>.

17. *See* National Aeronautics and Space Act, Pub. L. 85-568, 72 Stat. 426 (1958); *see also* U.S. DEP'T OF DEF., OTHER TRANSACTIONS GUIDE FOR PROTOTYPE PROJECTS 8 (2017) [hereinafter 2017 DoD OTA GUIDE] (on file with author).

18. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-209, USE OF 'OTHER TRANSACTION' AGREEMENTS LIMITED AND MOSTLY FOR RESEARCH AND DEVELOPMENT ACTIVITIES 27 (2016).

19. *See* National Defense Authorization Act for Fiscal Year 1990, Pub. L. No. 101-189, 103 Stat. 1352 (1990) (codified at 10 U.S.C. § 2371 (2019)).

20. *See* National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845, 107 Stat. 1547; *see also* 2017 DoD OTA GUIDE, *supra* note 17, at 8.

21. *See* 2017 DoD OTA GUIDE, *supra* note 17, at 17; *see also* 10 U.S.C. § 2358 (2019).

22. *See* CHRISTOPHER G. PERNIN ET AL., RAND REPORT, LESSONS FROM THE ARMY'S FUTURE COMBAT SYSTEMS PROGRAM 167-72 (2012).

23. 10 U.S.C. § 2306a (2019); 41 U.S.C. §§ 3501-3509 (2019).

24. *See* PERNIN ET AL., *supra* note 22, at 180-81; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-132, ARMY MODERNIZATION: STEPS NEEDED TO ENSURE ARMY FUTURES COMMAND FULLY APPLIES LEADING PRACTICES 7 (2019).

25. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 815 129 Stat. 726 (2015) (codified at 10 U.S.C. § 2371b (2019)).

26. *See* S. REP. NO. 115-125, at 190 (2017).

27. 10 U.S.C. § 2371b(a)(1) (2019).

28. 10 U.S.C. § 2371b(d)(1)(D) (2019); *see also* 2018 DoD OTA GUIDE, *supra* note 14, at 13.

29. 10 U.S.C. § 2302(9) (2019).

30. *See* 2018 DoD OTA GUIDE, *supra* note 14, at 32.

31. 10 U.S.C. § 2371b(f)(1) (2019).

32. 10 U.S.C. § 2371b(f)(2) (2019).

33. *See* 10 U.S.C. § 2371b(f)(2). The lack of a definition of a “successful prototype” in the statutory language of section 2371b led the Government Accountability Office (GAO) to agree with the government's position and rely upon the definition provided in the January 2017 DoD OTA Guide in the *Oracle America* decision. *See Oracle America*, 2018 CPD ¶ 180, at 18; *see also* 2017 DoD OTA GUIDE, *supra* note 17, at 11.

34. *See* S. REP. NO. 115-125, at 190 (2017).

35. *Id.* (emphasis added).

36. *See generally* 2017 DoD OTA GUIDE, *supra* note 17.

37. *See generally* 2018 DoD OTA GUIDE, *supra* note 14.

38. *See Oracle America*, 2018 CPD ¶ 180, at 14.

39. *See, e.g.*, U.S. DEP'T OF ARMY, DIR. 2017-24, CROSS-FUNCTIONAL TEAM PILOT IN SUPPORT OF MATERIEL DEVELOPMENT (6 Oct. 2017); *see also* U.S. DEP'T OF ARMY, DIR. 2017-33, ENABLING THE ARMY MODERNIZATION TASK FORCE (7 Nov. 2017). The GAO has also noted all of the Army modernization focus areas in its January 2019 report about Army Futures Command containing recommendations for the improvement of Army acquisitions. Notably, OTAs figure prominently in each of the Army cross-functional team modernization focus areas: long-range fires, advanced air-missile defense, future vertical lift, increased Soldier lethality capabilities, the next generation Ground Combat Vehicle, and advanced networking capabilities. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-132, ARMY MODERNIZATION: STEPS NEEDED TO ENSURE ARMY FUTURES COMMAND FULLY APPLIES LEADING PRACTICES (2019).

40. 4 C.F.R. § 21 (2019) (GAO Bid Protest Regulations).

41. 28 U.S.C. § 1491(b)(1) (2019).

42. *See* Space Exploration Techs. Corp. v. United States, 2019 U.S. Claims LEXIS 1041 at 32-34, 144 Fed. Cl. 433 (Fed. Cl. 2019). The ultimate issue of Court of Federal Claims (COFC) or federal district court jurisdiction over OTA bid protests is beyond the scope of this article. However, the COFC has affirmatively taken jurisdiction over a contract dispute involving a NASA Space Act Agreement or OTA under the Tucker Act in denying the agency's motion to dismiss. *See* Spectre Corp. v. United States, 132 Fed. Cl. 626, 627-28 (Fed. Cl. 2017).

43. 4 C.F.R. § 21.0(a)(1) (2019).

44. *Id.*

45. *See* 31 U.S.C. § 3551 (2019).

46. Rocketplane Kistler, B-310741, 2008 CPD ¶ 22 (Comp. Gen. Jan. 28, 2008).

47. *Id.* at 5.

48. *Id.* at 10.

49. *See id.*
50. MorphoTrust, B-412711, 2016 CPD ¶ 133 (Comp. Gen. May 16, 2016).
51. *See* Aviation & Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597 (2001).
52. *Id.* at 9-10. After the Transportation Security Agency (TSA) completed and publicized its determination and finding, MorphoTrust sent an e-mail directly to the agency, alleging that the TSA could not use an OTA under the Aviation & Transportation Security Act and must use a traditional FAR-based contract for the procurement. The GAO found that this constituted an agency-level protest. *Id.* at 5.
53. *Id.* at 10.
54. *Id.* at 9.
55. *Id.*
56. *See id.*
57. *Id.* at 10.
58. *See Oracle America*, 2018 CPD ¶180, at 2.
59. *Id.*
60. *Id.* at 12.
61. *Id.* at 14.
62. *Id.*
63. *Id.* at 19.
64. *See Helionix, Inc.*, B-404905.2, 2011 CPD ¶ 106 at 3 (Comp. Gen. May 26, 2011). This was a General Services Administration (GSA) FAR-based contract for administrative and technical services for the Public Building Service. *Id.*
65. *See Courtney Contracting Corp.*, B-242945, 91-1 CPD ¶ 593 at 4 (Comp. Gen. June 24, 1991) (protester was interested party, despite not submitting bid or offer, where remedy sought was the opportunity to compete). This was a FAR-based invitation for bids (IFB) for the Department of Interior for mine gas drainage and maintenance. *Id.*
66. *See Afghan Carpet Servs., Inc.*, B-230638, 88-1 CPD ¶ 607 at 3 (Comp. Gen. June 24, 1988) (protester is an interested party if it is a potential competitor if the protest is sustained, even though it did not submit bid under the protested solicitation). This was a GSA Federal Supply Schedule FAR-based contract for carpeting in federal facilities. *Id.* The GAO cites CICA and its Bid Protest Regulations at 4 C.F.R. §21.0 in discussing “interested party” status. *Id.*
67. *See MCI Telecomm. Corp.*, B-239932, 90-2 CPD ¶ 280 at 4-5 (Comp. Gen. Oct. 10, 1990) (protester was interested party to challenge order as out of scope of the underlying contract, even where protester did not participate in the competition of the contract). This was a Bureau of Prisons FAR-based request for proposal (RFP) for telephone services for federal inmates. *See id.* In reviewing interested party status, GAO explicitly cites CICA and the Bid Protest Regulations at 4 C.F.R. § 21.0. *Id.*
68. *See Coulson Aviation (USA) Inc. et al.*, B-409356.2 et al., 2014 CPD ¶ 106 at 16 (Comp. Gen. Mar. 31, 2014) (protesters were interested parties to challenge a sole-source award because if an agency decided to meet its needs using a competitive procurement, the protester would be eligible to compete). This was a Forest Service FAR-based RFP for aviation services in support of wildfire suppression, containing justification and approval for a sole source decision. *Id.* Again,
- the GAO cites CICA and the Bid Protest Regulations in reviewing the protester’s interested party status. *Id.*
69. *See Space Exploration Techs. Corp.*, B-402186, 2010 CPD ¶ 42 at 4, n.2 (Comp. Gen. Feb. 1, 2010) (finding protester to be an interested party to challenge order under indefinite delivery-indefinite quantity (IDIQ) contract, even where protester was not a vendor under the IDIQ contract, where protester challenged the order as outside the scope of the IDIQ contract). This was a protest over procurement of commercial space launch services under scope challenge of a delivery order. *Id.* Despite the fact that this was a Space Act Agreement for launch services, the GAO cites to the Bid Protest Regulations at 4 C.F.R. § 21.0, defining an interested party, as shaped by CICA. *Id.*
70. *See Oracle America*, 2018 CPD ¶180, at 10-12.
71. *See id.*
72. *See* Greenwalt, *supra* note 1.
73. *See Blade Strategies, LLC*, B-416752, 2018 CPD ¶ 327 at 2 (Comp. Gen. Sept. 24, 2018).
74. *See ACI Technologies*, B-417011, 2019 Comp. Gen. LEXIS 16 (Comp. Gen. Jan. 17, 2019).
75. *Id.* at 2.
76. *Id.*
77. *Id.*
78. *Id.* at 4.
79. *ACI Technologies*, 2019 Comp. Gen. LEXIS 16 at 5 (citing Triad Logistics Serv., B-403726, 2010 CPD ¶ 279 at 2-3 (Comp. Gen. Nov. 24, 2010)).
80. *Id.* As discussed above, the 2017 DoD OTA Guide is no longer in effect, due to superseding guidance in the 2018 DoD OTA Guide, published November 2018. *Cf.* 2018 DoD OTA GUIDE, *supra* note 14.
81. *See ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 9.
82. *See id.* at 5-6.
83. *See id.*
84. MD Helicopters, B-417379, 2019 U.S. Comp. Gen. LEXIS 94 (Comp. Gen. Apr. 4, 2019).
85. *Id.* at 2.
86. *Id.*
87. *Id.* at 3.
88. *Id.*
89. *Id.*
90. *See Rocketplane Kistler*, 2008 CPD ¶ 22, at 10; *see also MorphoTrust*, 2016 CPD ¶ 133, at 9.
91. *See National Defense Authorization Act for Fiscal Year 2017*, Pub. L. No. 114-328, § 835, 130 Stat. 2000 (2016).
92. 10 U.S.C. § 2304c(e) (2019).
93. *Id.*
94. *See Federal Acquisition Streamlining Act of 1994*, Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified at 41 U.S.C. 4106(f) (2019)).
95. *See National Defense Authorization Act for Fiscal Year 2017*, Pub. L. No. 114-328, § 835, 130 Stat. 2000 (2016).
96. 10 U.S.C. § 2371b(c)(1) (2019).
97. *See* Conference Report to Accompany H.R. 6157, H.R. REP. NO. 115-952, at 153 (2018) (Conf. Rep.).
98. *See* 10 U.S.C. §2371b(a)(2) (2019).
99. *See id.*
100. *See infra*, app. A.
101. *See ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 5.
102. *See id.* at 5-6.
103. *See infra*, app. B.
104. *See ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 5.
105. Rose L. Thayer, *Army Expects to Spend Up to \$50 Billion a Year on Futures Command*, STARS & STRIPES (Aug. 24, 2018), <https://www.stripes.com/news/army-expects-to-spend-up-to-50-billion-a-year-on-futures-command-1.544234>.
106. *See* ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL REPORT, SUMMARY OF RECOMMENDATIONS, VOLUME 3, at 1, [https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Vol3\\_Summary\\_Letter-size.pdf](https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Vol3_Summary_Letter-size.pdf) (last visited Jan. 21, 2020) [hereinafter SECTION 809 PANEL REPORT SUMMARY].
107. *See National Defense Authorization Act for Fiscal Year 2016*, Pub. L. No. 114-92, § 809, 129 Stat. 726 (2015).
108. SECTION 809 PANEL REPORT SUMMARY, *supra* note 106, at 1.
109. *See* ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL REPORT, VOLUME 3, PART 1, at 22-24, 35, [https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Sec809Panel\\_Vol3-Report\\_Jan2019\\_part-1\\_0509.pdf](https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Sec809Panel_Vol3-Report_Jan2019_part-1_0509.pdf) (last visited Jan. 21, 2020) [hereinafter SECTION 809 PANEL REPORT PART 1].
110. *See id.* at 35.
111. *See* ADVISORY PANEL ON STREAMLINING AND CODIFYING ACQUISITION REGULATIONS, SECTION 809 PANEL REPORT, VOLUME 3, PART 2 at 355, [https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Sec809Panel\\_Vol3-Report\\_Jan2019\\_part-2\\_0307.pdf](https://discover.dtic.mil/wp-content/uploads/809-Panel-2019/Vol3/Sec809Panel_Vol3-Report_Jan2019_part-2_0307.pdf) (last visited Jan. 21, 2020).
112. *See Blade Strategies, LLC*, 2018 CPD ¶ 327, at 2-3; *see also ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 5.
113. *See* S. REP. NO. 115-125, at 190 (2017).
114. *See id.*
115. *See National Defense Authorization Act for Fiscal Year for Fiscal Year 2017*, Pub. L. No. 114-328, § 835, 130 Stat. 2000 (2016).
116. *See* SECTION 809 PANEL REPORT PART 1, *supra* note 109, at 22-24, 35.
117. *See* Greenwalt, *supra* note 1.
118. *See* Patton, *supra* note 4.
119. *See id.*
120. *See ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 5; *see also MD Helicopters*, 2019 U.S. Comp. Gen. LEXIS 94 at 3.
121. *See ACI Technologies*, 2019 Comp. Gen. LEXIS 16, at 6-9; *see also MD Helicopters*, 2019 U.S. Comp. Gen. LEXIS 94 at 4-5.
122. *See* SINGER & COLE, *supra* note 5, at 72.



Jackie Robinson poses in his Army uniform. (Courtesy: National Baseball Hall of Fame).

## No. 3

# The Court-Martial of Jackie Robinson

*By Major Adam Kama*

On a hot August afternoon at Camp Hood, Texas, in 1944, nine Army officers sat in judgment in the general court-martial of a second lieutenant (2LT) accused of insubordination and disrespect under the Articles of War.<sup>1</sup> The trial would last just four hours and fifteen minutes and result in a full acquittal.<sup>2</sup> This seemingly unremarkable court-martial was one of millions convened to mete out justice during World War II (WWII), and could have easily been lost and forgotten in the grand scale of the war.<sup>3</sup> No one alive today would remember this short proceeding had the accused not been the future American icon and baseball legend, Jackie Robinson.<sup>4</sup> Destined to break the baseball color barrier on 15 April 1947, he would go on to win many baseball accolades before becoming a businessperson and civil rights champion.<sup>5</sup> The character and resiliency Robinson displayed at his court-martial when his reputation, career, and freedom was on the line were precisely the qualities that Branch Rickey, President and General Manager of the Brooklyn Dodgers, was looking for when he selected Robinson for his “great experiment.”<sup>6</sup>

Many hundreds of books and articles would be devoted to the life and legend of Jackie Robinson in the ensuing decades. Several scholarly articles would detail and analyze the incident that led to the charges and the court-martial itself.<sup>7</sup> The court-martial convened under the Articles of War replete with detailed rules and procedures that inform the larger story of what 2LT Robinson experienced on the fateful night of 6 July 1944.

The advent of the internet has made possible a new evaluation of his court-martial. The Record of Trial, now in digital format, and accessible to anyone, contains the full transcript of the proceeding and provides a nearly complete picture of all that occurred in those four hours at Camp Hood. Additionally, the National Archives Catalogue has made available Robinson’s complete Official Military Personnel File under its Persons of Exceptional Prominence program, allowing incredible insight into his brief Army career. Finally, modern internet search engines allow us to research other “characters” associated with the court-martial, gaining insight into their backgrounds and motivations. In this context, the complete story of *United States v. 2LT Jack R. Robinson* can be told.

### **2LT Jack R. Robinson**

As a former four-letter collegiate athlete drafted into the Army in April 1942, Jackie Robinson was the ideal model of a citizen turned Soldier.<sup>8</sup> An enlisted cavalryman and later cavalry officer at Fort Riley, Kansas, Robinson experienced early in his career the racism of a segregated Army.<sup>9</sup> During one incident at this western Army post, Robinson would be denied admittance to the post’s baseball team, being told that he could play only on the “colored team.”<sup>10</sup> In April 1944, Robinson was transferred to the now fabled 761st Tank Battalion at Camp Hood, Texas, to assume the position of

tank platoon leader.<sup>11</sup> Formed in 1942 and classified as a “colored” unit, the 761st Tank Battalion was typical of the how the Army employed African-American Soldiers: all African-American enlisted Soldiers led by all white field-grade officers and a mix of white and African-American officers at the company-grade level.<sup>12</sup> Robinson would serve in the 761st for just three months before an ankle condition would threaten to sideline his promising military career.<sup>13</sup>

A 1937 football injury left Robinson with a floating bone chip in his right heel that plagued him throughout his military career.<sup>14</sup> To determine his fitness for continued service, Robinson was required to undergo an Army Retiring Board (ARB) physical assessment.<sup>15</sup> In order to make this process more efficient on the Army’s end, Soldiers stationed at Camp Hood undergoing the ARB battery of tests were temporarily transferred to McCloskey Hospital in Temple, Texas, thirty miles east of Camp Hood.<sup>16</sup> On 21 June 1944, Robinson was transferred to McCloskey Hospital to be stationed there for a few weeks to undergo his ARB physical.<sup>17</sup>

### **6 July 1944**

On the evening of 6 July 1944, Robinson set out from McCloskey Hospital and traveled to Camp Hood’s colored officers’ club to visit friends and socialize.<sup>18</sup> He remained there for several hours socializing, but did not drink, as Robinson was a teetotaler.<sup>19</sup> Several hours later, he boarded a bus near the club to return to the hospital.<sup>20</sup>

The bus Robinson boarded operated within Camp Hood as a shuttle moving Soldiers to and from locations on the sprawling installation.<sup>21</sup> The bus was headed to Camp Hood’s Central Bus Station, a transfer area located near one of the main gates where on-post shuttles would meet county and other buses to take Soldiers and civilians further off post.<sup>22</sup> Here, Robinson planned on boarding this bus to take him the rest of the way to McCloskey Hospital.<sup>23</sup>

When he stepped aboard the Army’s shuttle bus, Robinson recognized Virginia Jones, the wife a fellow African-American lieutenant in the 761st Tank Battalion who lived in nearby Belton.<sup>24</sup> Jones was sitting in the middle of the bus, and Robinson, as

an acquaintance, sat down next to her.<sup>25</sup> After proceeding five or six blocks, the bus driver, a white man named Milton Renegar, instructed Robinson to move to the rear of the bus.<sup>26</sup> Robinson refused, setting off a chain of events that would inform the rest of his life and career.<sup>27</sup>

Race-based seating on public transport was a staple of Jim Crow-era segregation laws throughout the south.<sup>28</sup> However, Camp Hood and other installations located throughout the United States were on federal property that notionally did not enforce these biased state and local laws.<sup>29</sup> Despite this, perhaps in an attempt to maintain the social order familiar to so many millions of white Americans, the Army maintained some segregated facilities, such as the colored officers club, even in states that did not have Jim Crow laws. But by June 1944, the War Department began to change some of its policies forbidding the enforcement of state Jim Crow era policies on busses on military installations.<sup>30</sup>

Given his connection to the African-American press, as well as other influential African-Americans, Robinson knew that segregation on public transport on federal installations was changing.<sup>31</sup> In refusing the order to move to the back of the bus, he felt he was within his rights.<sup>32</sup> But, the bus driver stood firm, telling him that he would “make trouble for him” upon their arrival at the bus station.<sup>33</sup> At the bus transfer station, Robinson disembarked with Ms. Jones to catch his connecting bus, but was now swirled into a larger incident when Irving Younger, the station dispatcher, appeared to confront the young Lieutenant.<sup>34</sup> Tempers were heated and voices were raised as a crowd formed around Robinson.<sup>35</sup> Several of the other passengers, mostly white women who worked on Camp Hood, made racist remarks to Robinson, goading him, causing him to raise his voice.<sup>36</sup>

Finally, the Military Police (MPs) arrived on scene to quell the incident.<sup>37</sup> One MP, Corporal (CPL) George Elwood, hoping to contain the situation, asked Robinson to sit in their patrol vehicle.<sup>38</sup> While Robinson was in the MP vehicle, a Soldier, changing busses on the way back to his barracks and had seen the commotion, Private First Class (PFC) Ben Mucklerath, approached the MPs and asked them

whether they had a “n----- lieutenant” in their car.<sup>39</sup> Robinson heard this incendiary slur and threatened to break PFC Mucklerath “in two.”<sup>40</sup> Corporal Elwood convinced Robinson to return with them to the MP guardroom to discuss the incident with the camp officer of day.<sup>41</sup> To act as an eyewitness, PFC Mucklerath was asked to return to the guardroom as well.<sup>42</sup>

If Robinson hoped to find a sympathetic ear at the MP station, he would soon be sorely disappointed. Upon arrival at the MP guardroom, Robinson met with Captain (CPT) Peelor Wigginton, the camp’s laundry officer who was assigned as the officer of the day for 6 and 7 July 1944.<sup>43</sup> The escorting MPs briefed Wigginton that an incident occurred at the bus station and he asked Robinson to explain what had happened.<sup>44</sup> Unhelpfully, Wigginton also asked PFC Mucklerath for his observations, which he relayed in front of Robinson.<sup>45</sup> This naturally led to a disagreement about the events at the bus station with Wigginton telling Robinson to stop interrupting the private.<sup>46</sup> Perhaps feeling out of his element, Wigginton called for CPT Gerald Bear, the Camp’s Assistant Provost Marshal and Commander of the MPs, to assist him at the MP guardhouse.<sup>47</sup> He ordered Robinson out of the building until CPT Bear arrived.<sup>48</sup>

Robinson intercepted CPT Bear outside the building, apparently eager to tell his story, and followed him into the MP building.<sup>49</sup> Inside, Wigginton debriefed Bear while Robinson waited in an adjoining waiting room.<sup>50</sup> The Dutch door to this room was left half open.<sup>51</sup> Robinson became frustrated because he could hear the story being told without his input.<sup>52</sup> He appeared several times at the doorway where Bear and the others were located, and protested about what he felt were inaccuracies in Wigginton’s story. According to Bear, he stated that Robinson “smirked or grimaced,” bowed, and rendered “sloppy salutes” whenever he was told to leave the doorway.<sup>53</sup> This action repeated itself “several times” according to Bear and would later draw a specification of disrespecting a senior commissioned officer.<sup>54</sup>

Finally, Robinson was allowed to make his statement to Bear and “Ms. Wilson,” a stenographer who enraged



Robinson with what he perceived as a racist attitude.<sup>55</sup> Robinson, normally a quick speaker, was asked to slow down his speech for his statement.<sup>56</sup> The incident at the guardhouse ended in a controversial manner that would end up being a major theme at the court-martial. Captain Bear directed that Robinson be escorted back to McCloskey Hospital in an Army vehicle by MP Soldiers.<sup>57</sup> Robinson was mystified as to why he was being treated in this manner. Bear justified that Robinson was under “arrest in quarters.”<sup>58</sup> Robinson likely arrived back at McCloskey Hospital around sunrise on 7 July 1944, his ordeal over, for now.

### ***The Investigation and Statements***

Almost immediately, Bear would drive an investigation into the matter of the previous evening. Having taken Robinson’s statement in the early hours of 7 July, over the next two full days, he would take sworn statement accounts from various witnesses who interacted with Robinson at the bus station or later at the MP station. More than a dozen individuals—enlisted MPs, civilian witnesses, as well as four fellow officers, including Bear and Wigginton—would provide sworn statements as part of Bear’s investigation.<sup>59</sup> All portrayed Robinson in a negative light.

Milton Renegar, the bus driver, passengers Elizabeth Poitevint and Ruby Johnson, two white Camp Hood Post Exchange employees, and Bevlia B. “Pinkey” Younger, the bus dispatcher, made statements. Though ostensibly they made these statements as witnesses to the incident at the bus station, they may better be described as participants. All four of the civilians’ statements reveal the racism and prejudice of the period.<sup>60</sup> Pinkey Younger openly referred to Robinson as a “n----- Lt.” twice and called him a “disgrace to the uniform he wears.”<sup>61</sup> Renegar, explaining why he wanted Robinson to move to the back of the bus, stated he didn’t think his passengers—all white women—would want to ride in a bus “mixed up like that,” meaning next to an African-American.<sup>62</sup> Elizabeth Poitevint, a post-exchange employee, displaying her displeasure at being close to an African-American stated, “I had to wait on them during the day,” referring to African-American Soldiers shopping at the

Post Exchange, “but I didn’t have to sit with them on the bus.”<sup>63</sup>

The sworn statements made by military personnel, who were likewise all white, were also marked by the racism of the period. These enlisted MPs, some of whom met Robinson at the bus station and transported him to the MP station, and several officers, all of whom were witnesses at the MP station, provided sworn statements. Without exception, Robinson was never referred to as a “lieutenant,” but as a “colored lieutenant.”<sup>64</sup> The distinction here is clear; he was less than a commissioned officer to these Soldiers. The MP and other officer statements, generally, all made the same observations: that Robinson’s actions in the MP station were disrespectful to Bear.

One other overarching theme was evident in the investigation. Bear was interested in whether or not PFC Mucklerath called Robinson a “n-----.” The two MPs dispatched to the disturbance at the bus station, CPL George Elwood and Private Lester Phillips, were asked whether they heard anyone call Robinson this epithet.<sup>65</sup> Though the word “n-----” was commonly used during the period, the distinct impression from reading the case file is that it was still a loaded, hateful term and generally frowned upon by polite society.<sup>66</sup> Private First Class Mucklerath would emphatically deny referring to Robinson in this way. From his sworn statement: “I had not any time called the Lt. a ‘n-----.’”<sup>67</sup> In fact, Mucklerath did call him this epithet at the bus station, as CPL Elwood noted in his sworn statement that night.<sup>68</sup> This denial and confrontation would pay off spectacularly later at the court-martial.<sup>69</sup>

The lone individual whose sworn statement was helpful to Robinson was that of Victoria Jones, the African-American woman he shared a bus seat with on that fateful night. She provided her sworn statement almost two weeks after the others and only after Robinson sought her out and encouraged her to make one.<sup>70</sup> Previous attempts by Bear during his initial investigation were unsuccessful in attempting to persuade Ms. Jones to provide this statement. In a separate statement made by CPT Bear, he revealed that he went to Ms. Jones’s home in Belton, Texas.<sup>71</sup> During this

meeting, Jones stated that she had spoken to Robinson and he asked her not make a statement without talking to Robinson first.<sup>72</sup> If CPT Bear, an MP, was troubled by Robinson’s alleged actions concerning Jones, he made no note of it in his sworn statement.

Ms. Jones gave her first and only statement on the matter in her home to Bear on 19 July.<sup>73</sup> She was generally a favorable witness to Robinson’s conduct at the bus terminal that evening. She did not observe Robinson saying anything to the white individuals on the bus or at the bus station that was offensive, stating: “I did not hear [Robinson] say anything vile nor vulgar at any time, nor did he raise his voice.”<sup>74</sup> While this statement from a friendly witness potentially could have been helpful, it seems unlikely that these statements were what actually occurred. Her version of events was likely colored by her acquaintanceship with Robinson, not least because Robinson, by his own admission and those of numerous other witnesses, threatened to break PFC Mucklerath “in two.”<sup>75</sup>

The historical record of the week following the incident is scant. Documents from Robinson’s military record indicate, unbeknownst to him and on account of his medical deployability status, was formally transferred from the 761st Tank Battalion to the 758th Tank Battalion (Light).<sup>76</sup> On 16 July, Robinson, by now concerned that he would face court-martial, penned a letter to Truman K. Gibson, an African-American attorney, then serving as a special assistant on racial affairs to the Secretary of War, Henry Stimson.<sup>77</sup> Robinson had met Gibson when he was stationed at Fort Riley, the year prior, when Gibson was sent as a special envoy to discuss racially charged incidents at the post.<sup>78</sup> In this letter, Robinson asked Gibson for advice.<sup>79</sup> He wanted to know whether he should appeal to the National Association for the Advancement of Colored People and the African-American press of the time.<sup>80</sup> Robinson recognized his heightened standing as a former National Collegiate Athletic Association athlete and semi-professional football player.<sup>81</sup> Robinson, worried about both the fairness of the trial and about negative publicity for himself and the Army, asked Gibson what steps he should take.<sup>82</sup>

Gibson's response to Robinson is unknown; however, handwritten on the letter from Robinson was a note: "this man is a well-known athlete. He will write you. Follow the case carefully."<sup>83</sup>

### **The Charges**

Robinson's suspicion or indication that he would be court-martialed would prove correct. In the latter half of July, Robinson felt the swift hand of WWII-era military justice. On 17 July, he was formally charged with six distinct violations of the Articles of War, the precursor to the modern Uniform Code of Military Justice (UCMJ).<sup>84</sup>

Charge I contained two allegations of disrespect to a superior commissioned officer, the Article of War 63.<sup>85</sup> In the first specification, he was alleged to have been disrespectful to CPT Bear by stating, "Captain, any Private, you or any General calls me a n----- and I'll break them in two, I don't know the definition of the word."<sup>86</sup> In the second specification, he was charged with contemptuous behavior by bowing to Bear "and giving him several sloppy salutes repeating several times 'OK Sir, OK Sir.'"<sup>87</sup>

The lone specification of Charge II, a violation of Article of War 64, alleged that Robinson failed to obey a lawful order by a superior officer, as Robinson violated Bear's order to remain seated in a chair at the reception area of the MP guardhouse.

The final charge, three specifications of a violation of Article of War 95, involved the language Robinson used on the bus and at the Central Bus Station. One specification charged him with abuse and vulgar language for telling Renegar, the bus driver, that he was not "going to move a God damn bit" and called Renegar a "Son of a Bitch." The second specification detailed "vile and obscene language" to Ms. Poitevint when he allegedly stated to her: "You better quit fuckin with me." The last specification was a catch-all charge for using "vile, obscene and vulgar language . . . in the presence of ladies."<sup>88</sup>

As part of being charged on 17 July, Robinson was also placed under arrest at McCloskey Hospital in Texas.<sup>89</sup> Likely, this was intended as a form of pretrial restraint. The decision to arrest Robinson was standard practice. Article of War 19, arrest and confinement, mandated placing the accused

in confinement or arrest, but states that confinement is not appropriate for minor charges (like the one that Robinson was facing).<sup>90</sup> Article of War 69 mandated that someone arrested must be "restricted to his barracks, quarters, or tent."<sup>91</sup> By arresting Robinson at McCloskey Hospital, they were limiting his freedom to the hospital grounds.<sup>92</sup>

Rarely do WWII court-martial records contain an extraordinary ancillary document that illuminates the thought process of the command. Luckily, the *United States v. Robinson* record does contain such a document. Filed on 17 July 1944, the same day that Robinson was charged, the document is a transcription of a telephone conversation between Colonel (COL) Edward A. Kimball, Commander, 5th Armored Group<sup>93</sup> and COL Walter D. Buie, Chief of Staff, XXIII Corps, located at nearby Camp Bowie, Texas.<sup>94</sup> XXIII Corps served as the training command and the General Court-Martial Convening Authority (GCMCA) for the 5th Armored Group.<sup>95</sup> Colonel Kimball initiated the phone call because he had a case "involving a colored officer who got into trouble in connection with a bus."<sup>96</sup> Colonel Kimball explained that "this is a very serious case, and it is full of dynamite."<sup>97</sup> Colonel Kimball then requested an "Inspector" be sent from Camp Bowie because the matter was "delicate" and best left to an "outside Inspector."<sup>98</sup> He was afraid that he had no one impartial whom he could assign as "any officer [in this command] in charge of troops at this Post might be prejudiced."<sup>99</sup> Colonel Buie gracefully declined helping his subordinate commander by stating that his Corps would like to send an "Inspector," but had none available.<sup>100</sup> Colonel Buie ended the phone call by telling COL Kimball to "go ahead and handle it" and to advise them if they needed further assistance.<sup>101</sup>

### **The Article 70 Investigation**

It is unknown why COLs Buie and Kimball referenced an "Inspector." It hardly seems likely that they were referencing an Army Inspector General. It is almost certain that they were speaking about who was to serve as the investigation officer at Robinson's upcoming Article 70 investigation; today known as an Article 32 hearing, the purpose

was essentially the same. An assigned officer, having been forwarded the preferred charges, would make inquiries as to the truth of the matter set forth in the charges "and to make a recommendation as to the disposition of the case made in the interest of justice and discipline."<sup>102</sup> The single most notable exception between pre-trial investigations under the Articles of War and today's UCMJ was that the accused, though provided the right to cross-examine witnesses against him, would not be afforded a defense counsel to assist in doing so.<sup>103</sup> In accordance with the procedures of the Articles of War of its time, a defense counsel would only be assigned after the referral of charges as part of the appointment of a standing court-martial, which included both the members of the court-martial as well as the trial judge advocate.<sup>104</sup>

The investigating officer was Major (MAJ) Henry S. Daugherty of the 5th Armored Group. Major Daugherty held his investigation of the remaining charges and specifications on 19 July 1944, two days after both the Buie/Kimball phone call and the referral of charges.<sup>105</sup> The evidence MAJ Daugherty used in his investigation was primarily comprised of the sworn statements taken by CPT Bear on 7 and 8 July 1944, with the addition of in-person testimony from CPT Bear and CPT Wigginton.<sup>106</sup>

Major Daugherty's formal "Pretrial Investigating Officer's Report" completed the day after the hearing on 20 July 1944, was composed on boilerplate forms of the era. His analysis of the facts and circumstances was not required under Article 70 nor was it included.<sup>107</sup> Major Daugherty did not find a sufficient basis to send to court-martial Charge I, Specification I—relating to the allegation that Robinson was disrespectful to Wigginton—nor the two remaining Specifications of Charge III—alleging that Robinson used vulgar language to Ms. Poitevint, the passenger, and Mr. Renegar, the bus driver.<sup>108</sup> The eliminated specifications had a common theme. Each alleged a reaction by Robinson at either being called a "n-----" or told to move to the back of the bus. Perhaps, MAJ Daugherty thought that Robinson's alleged reactions were reasonable under the circumstances and that justice required that these charges be dropped.

Despite not recommending that more than half of the charges go forward, MAJ Daugherty still recommended that two specifications proceed to general court-martial.<sup>109</sup> Two purely military offenses remained: a specification that Robinson was disrespectful in demeanor to CPT Bear, and another that he failed to follow Bear's instruction to stay away from the interview room door.<sup>110</sup> In another boilerplate memorandum, Lieutenant Colonel (LTC) Richard E. Kyle, the Staff Judge Advocate for the GCMCA, XXIII Corps, as part of his pre-trial advice to the convening authority, recommended that trial by general court-martial proceed against 2LT Robinson.<sup>111</sup>

### A WWII Court-Martial

A WWII-era court-martial was fundamentally similar to today's U.S. military court-martial. And, while recognizable as an American court of law, there are some major differences between a court-martial convened under the Articles of War and the UCMJ, a few that are worth noting in order to understand the story fully.

The composition of the court itself is the most striking difference between a court-martial during WWII and the modern era. Notably, there was no military judge.<sup>112</sup> The equivalent duties of today's military judge was split between two men: the President and the Law Member. A court-martial's President was the senior officer on the panel and was charged with "maintain[ing] order, giv[ing] the directions necessary for the regular and proper conduct of the proceedings, [and] tak[ing] proper steps to expedite the trial of all charges referred for trial."<sup>113</sup> In practice, however, the President's role was largely officious and any speaking he did during the court-martial was contained in prompts provided in the court-martial script. The duties that required legal analysis fell to the individual seated to the immediate left of the President, the Law Member. The Law Member was required to be an officer of the Judge Advocate's Department, but in extenuating circumstances, could be an officer of any branch of the Army<sup>114</sup> (it is almost unthinkable today to appoint a non-attorney to a purely legal role). Charged simply with "rul[ing] upon interlocutory



Jackie Robinson was drafted into the Army in 1942. His court-martial proceedings prohibited him from being deployed overseas. (Courtesy: National Baseball Hall of Fame).

questions," the Law Member in practicality ruled on questions of evidence and objections made during the course of the trial and advised the Accused of his rights.<sup>115</sup> The Law Member was required to be seated next to the President during the court-martial, but would also join the other members as a voting member after close of evidence to deliberate on guilt or innocence and, if necessary, the sentence.<sup>116</sup>

All courts-martial were composed exclusively of officers, known simply as "members."<sup>117</sup> Normally, the only requirement was that the officer have two years of service. A general court-martial like Robinson's could have any number of members, but no fewer than five officers (the required minimum).<sup>118</sup>

Similarities and differences existed with regard to those individuals who

represented the U.S. government and the accused. The Trial Judge Advocate (TJA), the precursor to the modern trial counsel, represented the government. In WWII, as today, the accused was represented by the defense counsel. Most strikingly, neither the TJA nor the defense counsel was required to be a judge advocate or even an attorney. At general courts-martial, each had an assigned assistant, acting in an identical capacity to the primary.<sup>119</sup>

All individuals were detailed to a standing court-martial, with the members, trial judge advocates, and defense counsels pre-detailed as a single bloc in the convening order. Members and counsel could be replaced (or viced in today's parlance) for other officers. There was no *voir dire*, but challenges could be made to members, including the Law Member, with cause.

### **The Members**

Robinson's fate would be decided by nine men. Though seventy-five years later, identifying some of the members is difficult, but several are noteworthy.

#### *Colonel Louis J. Compton*

The court-martial President, COL Louis J. Compton, was the father of Julia Compton Moore, wife of Lieutenant General Hal Moore famed for leading 1st Battalion, 7th Cavalry Regiment during the Battle of the Ia Drang in Vietnam.<sup>120</sup>

#### *Major John H. Shippey*

The Law Member, MAJ John H. Shippey, was the lone Army judge advocate at the court-martial. Though the government likely comprised fully-licensed attorneys, and the defense team certainly did, Shippey was the only member of the court trained in military justice. He graduated from the Judge Advocate General's School's first class after it commenced instruction at the University of Michigan Law School in 1943.<sup>121</sup>

#### *Major Charles O. Mowder*

Major Charles O. Mowder, another member, was a graduate of the University of California, Los Angeles—the University that Robinson himself attended and made himself known nationally, but ultimately did not graduate from.<sup>122</sup> Major Mowder,

though, graduated UCLA in 1934, years before Robinson attended.

#### *Captain Thomas M. Campbell*

Captain Thomas M. Campbell, a medical doctor—one of two African-American members who would help decide Robinson's fate—was a 1941 graduate of Meharry Medical College and was the battalion surgeon for the 614th Tank Destroyer Battalion, a Colored unit.<sup>123</sup> His medical expertise would come up during the court-martial.

#### *Second Lieutenant William A. Cline and First Lieutenant Robert H. Johnson*

The task of defending Jackie Robinson fell to two men.<sup>124</sup> Robinson's appointed defense counsel listed on the convening order was 2LT William A. Cline, a 34-year-old from Wharton, Texas.<sup>125</sup> Due to his ingrained Southern heritage, 2LT Cline was candidly unsure if he could provide Robinson effective counsel in defending against charges with strong racial undertones. Moreover, Cline later remembered telling Robinson that he "had little trial experience." In fact, Jackie Robinson's court-martial would be his first adversarial proceeding.<sup>126</sup> In his autobiography, Robinson remembers, "my first big break was that the legal officer assigned to defend me was a Southerner [Cline] who had the decency to admit to me he didn't think he could be objective. He recommended to me a young Michigan officer who did a great job on my behalf."<sup>127</sup> That Michigan officer was 1LT Robert H. Johnson, a 32-year-old infantry officer and native of Bay City, Michigan, who, like Cline, was a practicing attorney before the war.<sup>128</sup> Both Cline and Johnson were white officers in "Colored" Tank Destroyer Battalions. Being in sister battalions, they likely knew of each other as former practicing-attorneys-turned-Army-officers.<sup>129</sup> Johnson would join Robinson's defense team as Individual Counsel. The position of "Individual Counsel" allowed the accused to be "represented in his defense . . . by counsel of his own selection."<sup>130</sup> This could include a civilian attorney, but would not be paid for by the government.<sup>131</sup> Individual Counsel was the precursor to the Individual Military Counsel under the UCMJ. Though the

defense was a team, Johnson's experience at courts-martial and zealous advocacy would be instrumental to Robinson's acquittal.

### **The Court-Martial**

*United States vs. 2LT Jack R. Robinson*, a trial by general court-martial, began at 1345 at Camp Hood on 2 August 1944, a mere twenty-six days after the incident that precipitated it.<sup>132</sup> Preliminary matters such as the accused's defense counsel selection, challenges to members (Robinson and his team made none), and swearing of the government and members were handled by the TJA and the President. Robinson was then arraigned on the two remaining charges. The record reflected that that the government did not make an opening statement. Though the record does not specifically mention that the defense made no opening statement, it is unlikely that one was made. The *Manual for Courts-Martial* allowed for the defense to make an opening "immediately following the [government's] opening statement."<sup>133</sup> If the government made no opening at the outset of trial, the defense could make one only in "exceptional cases."<sup>134</sup>

The first witness called by the government was, in fact, a defense witness. Second Lieutenant Howard B. Campbell, of Robinson's new unit, Company C, 758th Tank Battalion was called to identify that the accused was in fact 2LT Jack R. Robinson.<sup>135</sup> Campbell was asked if he knew the accused and if he was present in the courtroom. Campbell pointed to his friend and replied "yes, sir."<sup>136</sup> This process of identifying the accused at the very start of the government's case-in-chief was the standard practice of the time.<sup>137</sup> With many millions of men serving in uniform, a witness to identify that the accused at the defense table was the individual named in the charge sheet would have been necessary to prevent cases of mistaken identity.

### **The Government's Case**

The government's first witness was CPT Gerald Bear.<sup>138</sup> On direct examination, Bear relayed to the court the circumstances of how he met Robinson on the night of 6 July 1944, the general layout of the two adjoining rooms with the Dutch door separating them, and which military members were

present at the MP station.<sup>139</sup> Bear testified that he had to order Robinson away from the door “on several occasions” as Bear was speaking to Wigginton, the MPs and PFC Mucklerath.<sup>140</sup> He described Robinson complying with these orders by sarcastically bowing, and saluting him with his palms facing out in an exaggerated manner, and replying sarcastically “O.K., Sir. O.K., Sir. O.K., Sir.”<sup>141</sup> Bear then described several other acts, like Robinson’s slow manner of walking and speech that he found “contemptuous and disrespectful.”<sup>142</sup> The defense objected to this testimony as conclusory.<sup>143</sup> The Law Member sustained the objection, but the tactic backfired as the TJA now had ample reason to go over in detail these acts that formed the basis of Bear’s belief that Robinson was disrespectful.<sup>144</sup>

Bear’s direct testimony would end with the issue that the defense would attack time and again in its case-in-chief: the manner and condition in which Robinson left the MP complex and returned to McCloskey Hospital.<sup>145</sup> According to Bear, in the early hours of 7 July, Robinson argued with him about the need to return to McCloskey Hospital under police escort. Robinson had a pass and believed he was free to be released. On the stand, Bear claimed that he “heard enough” of this argument and threatened to “lock [Robinson] up” if he did not return with the MPs.<sup>146</sup>

At the outset of cross-examination, the defense—led by 1LT Johnson—hoped to present Bear as out of control and argumentative. He began by exploring a statement that Bear made on direct, that he had “lost control of the lieutenant.”<sup>147</sup> Johnson fended off a government objection that the question was not material to the charged offenses and elicited testimony on the heated manner in which Bear and Robinson would interact while Robinson was trying to take a statement to the stenographer present on 6 July.<sup>148</sup> The defense made headway by presenting Bear’s complaints that Robinson was speaking too quickly for the stenographer as trivial and routine, considering that Bear had experienced such conduct from other individuals giving statements in his experience as an MP.

The defense next questioned Bear on the conditions of Robinson’s return to the

hospital in the early morning hours of 7 July under MP escort.<sup>149</sup> Demonstrating heavy-handed action by Bear in releasing Robinson under escort would be a theme throughout the court-martial. In an unusual twist, the defense’s resistance to this line of questioning did not come from the government, but from a member of the court. Lieutenant Colonel Perman, who likely was also an attorney at some point in his career, objected to questioning along these lines as outside the scope of the charged offenses and outside the scope of the direct examination.<sup>150</sup> The defense countered that the line of questioning responded to Bear’s direct testimony that the accused was unwilling to obey the order to return to the hospital. Major Shippey, the Law Member, overruled LTC Perman’s objection. After some back-peddling on Bear’s part over the nature of his order, the defense finally triumphed when Bear testified that he had placed Robinson in “arrest in quarters.”<sup>151</sup> Bear’s heavy-handed action was now in evidence.<sup>152</sup>

The defense scored another quick victory by impeaching Bear. He testified that his sworn statement of 7 July indicated that he put Robinson “at ease” in the waiting room of the MP station while he took other witness statements.<sup>153</sup> This contradicted the testimony he had given moments earlier under direct.

The latter half of the defense’s cross-examination of Bear demonstrated its attempts to bring out, through Bear’s testimony, Robinson’s racially-charged experience on the bus and at the bus station. The defense, knowing that Robinson’s sworn statement had been brought up during direct, attempted to elicit the facts contained within the sworn statement through Bear.<sup>154</sup> After this approach was objected to by court-martial member LTC Perman, the defense reasoned: “I am attempting to bring out whether or not there was an atmosphere [in the interview room], the background of this whole case should be before this court.”<sup>155</sup> The objection was sustained.<sup>156</sup> The bus incident would not come to light through this witness.

On a brief redirect and recross, seeking to gain clarification as to Bear’s order to Robinson to remain “at ease,” the members had an opportunity to ask questions

of the witness.<sup>157</sup> Two members, CPT Moore and CPT Spencer, questioned the compulsory nature of the transportation that Bear had arranged to take Robinson back to McCloskey Hospital. Bear responded reasonably, that “at that hour of the morning busses were not running on a regular schedule” and more to the point just “wanted him to go.”<sup>158</sup> At this point, CPT James H. Carr, himself African-American, and undoubtedly Robinson’s greatest champion among the members, took a turn to get answers from Bear.<sup>159</sup> He asked Bear point-blank, “Was he [Robinson] under arrest,” to which Bear replied, “Yes, sir.”<sup>160</sup> Carr would follow up two questions later with: “You wanted to make sure to send him where you wanted him to go, so you arrested him?”<sup>161</sup> Bear equivocated. “Yes, we call it arrest in quarters.”<sup>162</sup>

Major Mowder, the UCLA graduate, would squeeze out of Bear the fact that Robinson had no choice but to return the hospital with the escorts. “If busses had been available, would you have let him go back by himself?”<sup>163</sup> To which Bear would reply that he would not have released Robinson on his own.<sup>164</sup> He specifically ordered him back to the hospital.<sup>165</sup> Captain Carr then made the statement (that was perfunctorily styled as a question by the court-reporter) that “arrest in quarters can carry no bodily restrictions.”<sup>166</sup> After Bear admitted that he considered him in that status, Carr ended with “you admit that you sent three M.P.’s [sic] to see that he got back to where you decided to send him?”<sup>167</sup> Captain Carr had highlighted Bear’s overzealous enforcement of the matter.

Turning to the topic of what Bear intended when he put Robinson “at ease,” CPT Carr launched a string of salient inquires during another round of questions. When Bear gave him an evasive answer, Carr bluntly stated, “I want the question answered; was he at ease while he was leaning on the gate . . . ?”<sup>168</sup> Bear equivocated more before Carr got to the heart of the matter and said, “I do not see that the manner in which he leaned on the gate had anything to do with you, if you had not given him an order commanding him to attention . . . .”<sup>169</sup>

Captain Campbell, the African-American physician, honed in on Bear’s description of Robinson’s supposed



Robinson was commissioned as a second lieutenant in January, 1943. (Courtesy National Baseball Hall of Fame)

disrespectful, rolling walk.<sup>170</sup> No doubt, attempting to ascertain whether there was something medically amiss with his gait, CPT Campbell asked the Law Member if they could see a demonstration of Robinson walking.<sup>171</sup> Major Shippey wisely objected, saying that the defense could present it at a later time if Robinson and his attorneys desired.<sup>172</sup>

The cross-examination of CPT Bear ended with an attempt at impeachment by 1LT Johnson, the Individual Counsel. “Captain, is it true the Hospital called you the next day and asked if Lt. Robinson was supposed to be in arrest in quarters and you answered, “no?”<sup>173</sup> The question was objected to by the TJA and sustained.<sup>174</sup> But, it was too late. The defense strategy to show that Bear was a petty authoritarian had worked perfectly. Most of the tough questions at the court-martial were asked by the two African-American court-martial members of the government’s primary white witness.

The government’s second and final witness in its case-in-chief was CPT Wigginton, the camp laundry officer who served as the officer of the day on 6 and 7 July.<sup>175</sup> His direct examination was remarkable only in that he testified in a

minutes-long narrative relaying the events of 7 July.<sup>176</sup> His testimony largely mirrored that of Bear’s: Robinson continually interrupted Wigginton’s briefing to Bear and would not sit in the chair in the waiting room, as directed by Bear. He corroborated the earlier testimony by Bear that Robinson rendered sloppy salutes and bowed to him at the Dutch door.<sup>177</sup>

On cross-examination, Wigginton’s responses proved unhelpful to the defense and highlighted the defense’s biggest courtroom weakness: they violated the old litigation maxim to *never ask a question on cross-examination that the attorney does not know the answer to*.<sup>178</sup> The defense counsel’s attempt to pick apart Wigginton’s story or to establish his own personal bias was unsuccessful. Again, due to a government objection that the bus station incident was unrelated to the charged offenses, the defense was unable to bring about any evidence of the bus or bus station incident.<sup>179</sup>

Though inartful, the defense had sufficiently signaled that there was more than what was being presented at court-martial. Captain Carr picked up on the defense’s signals that there was more than meets the eye and the members were not being told the *full* story and was the lone court-martial member to ask CPT Wigginton questions. Carr comprehended that something had happened to put Robinson into an aggravated state in the MP station and because he was not provided the opportunity to explain himself in his own voice to Bear, he reacted in a negative manner.<sup>180</sup>

#### **The Defense’s Case**

The defense of 2LT Robinson began with its most powerful voice: the accused’s. After being advised of his rights by the Law Member, including the right to remain silent, and being sworn in by the TJA, Robinson took the stand in his defense.<sup>181</sup> In the opening moments of Robinson’s direct testimony, while Robinson was reciting some biographical information about himself, and again during his explanation on the night of 6 July, the defense counsel wisely asked him to slow his speech.<sup>182</sup> This was a wise ploy if done intentionally, because it illustrated Robinson had a quick manner of speech, something Ms. Wilson, the stenographer on duty the night of 6 July, and

CPT Bear thought was an intentional act of disobedience.

On direct, Robinson explained his side of the events on the evening of 6-7 July. He was extremely cautious not to bring up the incidents on the bus or at the bus station, likely because it would have drawn a sustainable relevance objection.<sup>183</sup> Instead, his story began with the vague explanation that he arrived at the MP station “on some matters.”<sup>184</sup> Robinson explained briefly his initial report to Wigginton, the officer of the day, and stated that he was present when Mucklerath gave his version of the incident at the bus station. On direct, Robinson stated that while Mucklerath was relating events to Wigginton, he would interrupt Mucklerath to “refresh his memory and correct his statement.”<sup>185</sup> He explained that upon Bear’s arrival some time later, he became frustrated that Mucklerath was being interviewed first. When Robinson asked why, he was told by Bear that Mucklerath was a “witness” to Robinson’s actions and that he was not to come into the interview room until told to do so.<sup>186</sup>

Finally, in the middle of his direct examination, Robinson was able to put forward the precipitating event that led to the charges. At last, he could explain that he was the victim of the ugly racial animus of the era. In correcting Mucklerath’s story, Robinson stated that he did not threaten Mucklerath for no reason.<sup>187</sup> He then related that Mucklerath had called him a “n-----” while he was sitting in the MP vehicle while waiting to be transported to the MP station. Robinson freely admitted under oath that he told Mucklerath that if he ever called him a n----- again “he would break him in two.”<sup>188</sup>

What came next—the question by defense counsel and the response given—is arguably the most poetic response ever captured in a U.S. military court-martial.<sup>189</sup>

Q - Let me interrupt you, Lieutenant—do you know what a n----- is?

A - I looked it up once, but my Grandmother gave me a good definition, she was a slave, and she said the definition of the word was a low, uncouth person and pertains to no one in particular; but I don’t consider

that I am low and uncouth. I looked it up in the dictionary afterwards and it says the word n----- pertains to the negroid or negro, but it is also a machine used in a saw mill for pushing logs into the saws. I objected to being called a n----- by this private or by anybody else. When I made this statement that I did not like to be called n-----, I told the Captain, I said, "If you call me a n-----, I might have to say the same thing to you, I don't mean to incriminate anybody, but I just don't like it." I do not consider myself a n----- at all, I am a negro, but not a n-----."<sup>190</sup>

This question and Robinson's answer could not have been prepared prior to court-martial, given the limited interactions Robinson had with his defense. Robinson's response was extemporaneous and captures the mindset of this future American icon.

Following this explanation to the court, the defense dove into the details of Robinson's version of events. Robinson claimed with respect to the charge of disrespectful behavior that he "did not recall" bowing and executing the so-called sloppy salutes that Bear and Wigginton claimed he gave them.<sup>191</sup> To the charge of failing to obey Bear's order to move away from the doorway and to sit in a chair in the opposite room, Robinson explained that he complied with Bear's order to get away from the door, but that Bear did not give an order to sit in a chair.<sup>192</sup> He claimed to have interrupted Bear and Mucklerath just one time the entire evening.<sup>193</sup>

Robinson also returned to his confrontation with the civilian stenographer that evening, Ms. Wilson. Robinson stated that after demonstrating he disagreed with her dictation, her racial animus became manifest when she "picked up her purse and said 'I don't have to make excuses to him' and went out."<sup>194</sup>

Finally, at the end of Robinson's direct, parts of the story regarding the bus station incident trickled out in front of the court-martial members. Robinson was asked by his defense team about his conversation with his Battalion Executive Officer, MAJ Charles Wingo, on the phone at about the time he was being released by

Bear. Robinson related to the members that he explained to Wingo he believed that the reasons Bear did not want him taking a bus back was because he would "get in trouble in the busses."<sup>195</sup> Robinson, without pause, and perhaps to put forth as much of his story before the members as he could before drawing an objection, immediately relayed a piece of what happened on the bus. "I abided by the Texas Law [on the way to Camp Hood], but I knew there was no Jim Crow rule on the Post and the bus driver had tried to make me move to the rear, and I told him that I would not move back."<sup>196</sup> The defense, seeing on opportunity to expand the narrative quickly, followed up by asking what his seating position on the bus had been. Robinson followed this lead and quickly answered "four seats from the rear . . . a little better than half way [from the back]." The prosecution, mindful that the bus incident was a liability to their case, quickly attempted to end the matter by objecting to the line of testimony, stating that it "had nothing to do with this specification" and that "what happened on the bus . . . had no place in this case."<sup>197</sup> The Law Member agreed and sustained the objections, claiming that he did not see the materiality of it.<sup>198</sup>

Robinson's direct examination was followed by the prosecution's cross-examination. The TJA, cognizant of the testimony that Robinson had brought forward evidence that PFC Mucklerath had called him a "n-----," attempted to staunch the bleeding. Fortunately for Robinson, the TJA trial team, who appeared to have been more experienced in the courtroom than his own attorneys, botched their objective. After setting the scene at the MP station, the trial team attempted to make Robinson appear less than credible by calling into question why no one else had heard him being called "n-----."<sup>199</sup> Playing with fire, the TJA asked Robinson again if Mucklerath called him a n-----, to which Robinson answered in the affirmative.<sup>200</sup> The TJA, back on his heels, quickly followed up by confirming that the insult did not occur at the MP station with any witnesses who had testified thus far in order to illustrate that there were no witness to the insult.<sup>201</sup> The TJA then made a series of mistakes by breaking two basic tenets

of cross-examination: he began asking open-ended questions that he did not know the answers to. Certain that Robinson was not insulted at the MP station, he asked him if anyone insulted him there, to which Robinson replied that CPT Bear did.<sup>202</sup> The TJA quickly established that Bear, the government's main witness himself did not call Robinson a n-----. The TJA asked whether Bear had provoked him in any way that evening, to which Robinson replied that Bear had indeed done so.<sup>203</sup> Inexplicably, the TJA asked to explain "in what way" Bear had done so, an open question that Robinson then used to illustrate Bear's anger when issuing him the order not to interrupt him during the Mucklerath interview.<sup>204</sup> The TJA then spent the next few minutes establishing through Robinson that Bear had a proper purpose in questioning Mucklerath individually without interruption.<sup>205</sup>

The TJA, concerned that Robinson had impeached Wigginton on direct, turned the court's attention to the conduct of the officer of the day for 6 July. The TJA asked Robinson if he believed that Wigginton had lied on the stand minutes earlier when he testified about witnessing Robinson bowing and saluting.<sup>206</sup> Robinson, hesitant at first to call a fellow officer a liar, stated that he did.<sup>207</sup> The TJA then listed every officer Robinson had interacted with that night and asked him if they had insulted him or had bias against him which Robinson replied that they had not.<sup>208</sup>

The rest of the cross-examination was more routine. Robinson withstood the TJA's scrutiny of his side of the events that evening. The TJA, concerned that Robinson's interactions with the stenographer had showed her racial bias, asked him to read aloud an excerpt from the *Manual for Courts-Martial*.<sup>209</sup> This attempted to demonstrate that Robinson slowed his speech in a facetious way when asked by the stenographer to slow down. The cross-examination ended with Robinson again being given another chance to explain his exit from the MP station under arrest to no benefit to the government.<sup>210</sup>

Robinson's testimony was over. He had conducted himself well on the stand under both direct and cross-examination. His answers were respectful and poised. He

never contradicted himself nor allowed his emotions to get the better of him.

The remainder of Robinson's defense would come in the form of the "good Soldier defense." This form of defense allows Soldiers to introduce evidence of the good military character through testimony in an attempt to distinguish the Soldier from the charged offense.<sup>211</sup> In other words, a "good" Soldier would not commit the charged offense. The 1943 MCM contained these instructions: "The accused may introduce evidence of his own good character, including evidence of his military record and standing in order to show the probability of his innocence."<sup>212</sup>

The defense called four character witnesses: LTC Paul Bates,<sup>213</sup> his former battalion Commander in the 761st Tank Battalion; CPT James R. Lawson, a white officer<sup>214</sup> and his former company commander in B Company, 761st Tank Battalion; and two fellow lieutenants, including 2LT Harold Kingsley and 2LT Howard Campbell, who had previously been the government's identifying witness in its case-in-chief. Each were asked a few basic questions in a classic good Soldier defense fashion. Whether they knew the accused, how long they had known him, whether they knew his reputation, and whether he had a good reputation at his "Camp, Post, or Station." This would culminate in two questions about his abilities as a Soldier and, in the case of his former commanders, Bates and Lawson, whether they would like to have him as a member of their command. All four witnesses reported that he had a good reputation and that he had excellent abilities as a Soldier. In the case of Bates, he was asked how he would rate him on a "66-1." Known as a fitness report, this was the Officer Evaluation Report of its time. Bates replied that he would rate him as "Excellent."<sup>215</sup>

The government did not cross-examine a single defense character witness. Though they did object when LTC Bates brought forward that Robinson was a "well known athlete" as unresponsive.<sup>216</sup> Though three of the four witnesses had known Robinson for only a few months, the evidence brought out through these witnesses was clear: Robinson's character was such that he was not the kind of officer to disobey an order or to be disrespectful.

With that, the defense of Robinson rested. However, it would be in the government's rebuttal that the standout moment of the court-martial would come.

In rebuttal, the government called 1LT George Cribari, a Medical Service Corps doctor, to rebut Robinson's testimony that CPT Bear showed animosity to Robinson. First Lieutenant Cribari did rebut this testimony and countered that it had been Robinson himself who was "very rude."<sup>217</sup> In a dry moment of testimony, Cribari demonstrated for the record Robinson's body language for the court.<sup>218</sup> Major Shippey, the Law Member, would then read these movements into the record such as "you shook your head from side to side" and "you put your hand in your pocket."<sup>219</sup> Upon cross-examination, Robinson's defense pursued a few short, unhelpful lines of questioning on Robinson's slowed pace of speech to the stenographer. Court-martial member CPT James Carr rose yet again to pointedly question a witness in the government's case. Carr questioned why Cribari felt putting one's hands in their pocket was disrespectful and what Cribari meant when he testified that Robinson "grimaced" at Bear. Cribari, dryly, gave a very technical response: "grimacing is done by the muscles of the face."<sup>220</sup> In one of the fleeting moments of mirth in the court-martial, Carr then himself contorted his face and asked Cribari if he was grimacing.<sup>221</sup>

Next, the TJA called CPL George Elwood, the MP who met Robinson at the Central Bus Station and accompanied him (and Mucklerath) back to the MP station. Corporal Elwood was called to rebut Robinson's testimony that he was not given an order to sit in a reception room chair.<sup>222</sup> He also rebutted Robinson's denial that he bowed and gave the contested, so-called sloppy salutes.<sup>223</sup> Corporal Elwood's direct came off as passionless and reasonable, and was limited to his observations of Robinson—not how Elwood construed his tone or mannerisms, as with the previous witnesses. Corporal Elwood's cross-examination by the defense illustrated no personal bias. He was a brief and persuasive witness for the government.

Expecting to end rebuttal with a third witness to contradict Robinson's testimony, the government made a spectacular

error. They called to the stand PFC Ben Mucklerath, the Soldier whom Robinson accused of calling him a "n-----." On the stand the government asked only one substantive question: "Did you call [Robinson] a n-----?"<sup>224</sup> Mucklerath quickly answered, "No, sir."<sup>225</sup>

The defense's cross-examination of Mucklerath was the climactic moment of the court-martial. The defense first asked him if he remembered Robinson saying that if he "ever called him a n----- again he would break [Mucklerath] in two?"<sup>226</sup> Mucklerath responded that he did remember Robinson make that statement. The defense then asked Mucklerath why Robinson would make that statement considering Mucklerath had explicitly not called him the epithet. Mucklerath stammered that he did not know what Robinson was thinking and that Mucklerath was merely "repeating something" that he had heard.<sup>227</sup> The defense posed two final questions:

Q - Do you deny that you went to the MP [CPL Elwood] on the truck at the bus station and said "Do you have the n----- lieutenant in the car"; do you deny that you made that statement?

A - At no time did I use the word "n-----."

Q - You deny that you made that statement?

A - I never used the word "n-----" at any time, sir.<sup>228</sup>

With that, the government rested its rebuttal case. The trap was set.

Immediately, the defense recalled CPL Elwood in sur-rebuttal. The defense asked Elwood only one substantive question that would prove devastating: "Did [PFC Mucklerath] ever ask you at any time if you had a n----- lieutenant in your car?"<sup>229</sup> Elwood, ever the bias-free witness, answered: "Yes, sir, he did at the bus station."<sup>230</sup> The defense rested, having proven the incident at the MP station was predicated on the use of a slur by an enlisted Soldier upon an officer. Only in the final moments of the court-martial did 2LT Robinson's later indignant demeanor and



frustration at the MP station make sense to the members. Both sides rested after the huge revelation that not only was Robinson called a racial slur, but that one of the government's own witnesses against him would so easily lie under oath.

After the presentation of evidence, both sides made closing arguments. Closing arguments were not and are still not considered evidence. As such, the court reporter did not transcribe what was said.<sup>231</sup> As a result, these arguments are lost to time, although Robinson recalled: "My lawyer [Johnson] summed up the case beautifully by telling the board that this was not a case involving any violation of the Articles of War, or even of military tradition, but simply a situation in which a few individuals sought to vent their bigotry on a Negro they considered 'uppity' because he had the audacity to exercise rights that belonged to him as an American and a Soldier."<sup>232</sup>

Also unknown is the length of deliberations on guilt or innocence. Given the relatively short length of the entire procedure, likely the members did not deliberate long. Because the ballots were secret, the number of members who voted guilty and not guilty will forever be unknown. However, the results of the court-martial are certainly known. At 1800, 2LT Jack R. Robinson and his defense counsel rose to hear the verdict of the nine members of the court.<sup>233</sup> Colonel Compton, the court-martial President, read aloud the verdict. "Upon secret written ballot, two-thirds of the members present at the time the vote was taken . . . finds the accused of all specifications and charges: Not guilty and therefore acquit the accused."<sup>234</sup> *United States v. 2LT Jack R. Robinson* was over.

### A Career Ends and Another Begins

Despite the acquittal, the close of the court-martial ultimately brought with it the end of 2LT Robinson's military career. Aggrieved by his treatment by the Army, Robinson remembered in his 1972 autobiography that following his court-martial, "I was pretty much fed up with the service."<sup>235</sup> Even before the court-martial, Robinson knew that because of his Army retiring board finding of the week before the court-martial on 21 July, he could not ship overseas with the 761st Tank Battalion.

Robinson wrote the Army Adjutant General on 25 August and requested to be retired from the service due to his medical issues.<sup>236</sup> Weeks later, Robinson reported to Camp Breckenridge, Kentucky, for several months, serving as a morale officer before receiving his honorable discharge "by reason of physical disqualification."<sup>237</sup> The irony that a future hall of famer and Rookie of the Year was physically disqualified from the Army before his entry into professional baseball should not be lost on anyone.

In August 1945, one year after his acquittal, Robinson's famed meeting with Branch Rickey would occur at Rickey's office in downtown Brooklyn.<sup>238</sup> Rickey was the President and General Manager of the Brooklyn Dodgers and offered Robinson the opportunity in this meeting to become the first African-American player to break the Major League baseball color barrier.<sup>239</sup> Rickey would explain that he had searched extensively for the right player to endure the inevitable hardships that would accompany the first African-American player to break the barrier.<sup>240</sup> Rickey told him that he was looking for a principled and restrained player with "guts," but the courage "not to fight back" and lash out.<sup>241</sup>

Given the exhaustive research into Robinson's background that Rickey conducted, he must have known about his court-martial and the acquittal twelve months earlier. The court-martial, reported on by the national African-American press, would have reached Rickey's ears. This major life event, in which Robinson stood firm against prejudiced opposition and faith in the system to run its course, knowing that it would prove his innocence, was likely a significant factor in Rickey's selection. **TAL**

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### Notes

\* The title comes from a letter Jackie Robinson wrote in the weeks before the court-martial. Letter from Jackie Robinson to Truman K. Gibson (July 16, 1944), in John Vernon, *Jim Crow, Meet Lieutenant Robinson*, PROLOGUE MAGAZINE, Spring 2008. Writing for advice to Truman K. Gibson, an influential African-American working as an assistant to the Secretary of War, he lay bare his feelings. "I don't mind trouble but I do believe

in fair play and justice. I feel that I'm being taken in this case and will tell people about it unless the trial is fair." *Id.* An entire record of trial for this court-martial is available on the history pages on the JAGCNet website.

1. *United States v. Robinson* (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). The temperature in nearby Waco, Texas, on 2 August 1944 reached 103 degrees. *Waco, TX Weather History*, WEATHER UNDERGROUND, <https://www.wunderground.com/history/daily/us/tx/waco/KACT/date/1944-8-2> (last visited Jan. 13, 2020).
2. The record of trial notes that the court met at "1:45 o'clock P.M." and adjourned until its next court-martial at "6:00 o'clock P.M." *United States v. Robinson* at 2, 80 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
3. Ranges of the number of U.S. military courts-martial convened during World War II (WWII) vary, but almost all accounts identify the number in the low millions. *Cf.* Randy James, *A Brief History of the Court-Martial*, TIME (Nov. 18, 2009) (more than 2 million) with Colonel Roger A. Drew Jr., *A Day in the Life of an Appellate Military Judge*, JUDGES' J., May 2017 [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2017/spring/a\\_day\\_in\\_the\\_life\\_of\\_an\\_appellate\\_military\\_judge/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/spring/a_day_in_the_life_of_an_appellate_military_judge/) (1.7 million).
4. The court-martial of Second Lieutenant (2LT) Jack R. Robinson has found its way into several storytelling mediums, proof that its enduring theme of personal dignity, determination, and justice are of interest to the American public. *The Court-Martial of Jackie Robinson* was a 1990 made-for-TV movie that took enormous liberties with facts in order to tell an entertaining story. THE COURT-MARTIAL OF JACKIE ROBINSON (Turner Pictures 1990). A children's book, intended for 4- to 8-year-old-readers, was recently published. SUDIPTA BARDHAN-QUALLAN, THE UNITED STATES V. JACKIE ROBINSON (2018).
5. Two comprehensive Robinson biographies, detailing his remarkable life, were published close in time in the 1990s. *See* ARNOLD RAMPERSAD, JACKIE ROBINSON: A BIOGRAPHY (1997); DAVID FALKNER, GREAT TIME COMING (1995).
6. Jackie Robinson scholar Jules Tygiel named his 1996 book on Jackie Robinson's career *Baseball's Great Experiment*. JULES TYGIEL, BASEBALL'S GREAT EXPERIMENT: JACKIE ROBINSON AND HIS LEGACY (1996).
7. The first notable piece chronicling the court-martial was published in 1984. *See* Jules Tygiel, *The Court-Martial of Jackie Robinson*, AM. HERITAGE, Aug.-Sept. 1984. Another important journalistic endeavor was published in 2008. *See* John Vernon, *Jim Crow, Meet Lieutenant Robinson*, PROLOGUE MAGAZINE, Spring 2008.
8. Jackie Robinson's military records are catalogued online in the National Archives Catalog. *Official Military Personnel File for Jack Roosevelt Robinson*, NAT'L ARCHIVES CATALOG, <https://catalog.archives.gov/id/57308498> (last visited Jan. 13, 2020) [hereinafter *Robinson Military Records*]. Each of the 371 documents that make up his record are assigned a number.
9. Robinson was inducted in the Army on 3 April 1942. *United States v. Robinson* at 43 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). He commissioned on 28 January 1943. *Robinson Military Records*, *supra* note 8, at 41.
10. FALKNER, *supra* note 5, at 70.
11. Robinson penned several autobiographies during his life. His final effort, *I Never Had It Made*, published

in 1972, contains the most insight into both his life and his court-martial. See JACKIE ROBINSON, *I NEVER HAD IT MADE: AN AUTOBIOGRAPHY OF JACK ROBINSON* 17 (1992).

12. See generally, KAREEM ABDUL-JABBAR & ANTHONY WALTON, *BROTHERS IN ARMS: THE EPIC STORY OF THE 761ST TANK BATTALION, WWII'S FORGOTTEN HEROES* 28-29 (2004).

13. Second Lieutenant Robinson was assigned to the 761st Tank Battalion from 3 April 1944 to 6 July 1944. United States v. Robinson at 61 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

14. *Robinson Military Records*, supra note 8, at 333.

15. *Id.*

16. RAMPERSAD, supra note 5, at 101.

17. *Robinson Military Records*, supra note 8, at 30.

18. ROBINSON, supra note 11, at 18.

19. *Id.* at 20.

20. *Robinson Military Records*, supra note 8, at 234.

21. The shuttle bus operated by the Southwestern Bus Company transported Soldiers and civilians across the sprawling installation. *Id.* at 225.

22. *Id.* at 233.

23. *Id.*

24. *Id.* at 240. Ms. Jones recalled that she and Robinson sat in the fourth seat from the rear of the bus. *Id.* at 233.

25. *Id.* at 240.

26. *Id.*

27. *Id.*

28. See Elizabeth Guffey, *Knowing Their Space: Signs of Jim Crow in the Segregated South*, DESIGN ISSUES, Spring 2012, at 41, 45.

29. RAMPERSAD, supra note 5, at 102.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Robinson Military Records*, supra note 8, at 240.

34. *Id.* at 234.

35. *Id.* at 225, 234, 235.

36. Ms. Elizabeth Poitevint, a white passenger, accosted Robinson after getting off the bus and stated she was going to report him to the military police (MPs) because he should have moved to the back of the bus, but failed to obey. *Id.* at 226, 233.

37. Corporal (CPL) George Elwood, an MP, was dispatched to the Central Bus Station "to investigate a disturbance." *Id.* at 235.

38. *Id.*

39. *Id.* at 235. Private First Class (PFC) Mucklerath claims that he simply asked CPL Elwood if he had a "colored Lt" in the patrol car. *Id.* at 224.

40. Robinson's sworn statement was taken in the early morning hours of 7 July by a white, female, civilian stenographer known only as "Ms. Wilson." ROBINSON, supra note 11, at 19. She transcribed "in two" as "into." *Robinson Military Records*, supra note 8, at 240. She repeated this grammatical mistake in Captain (CPT) Wigginton's statement. *Id.* at 221.

41. *Id.* at 235.

42. *Id.*

43. *Id.* at 221.

44. *Id.*

45. *Id.*

46. *Id.* After being silenced by Wigginton, Robinson remarked: "So this is democracy, I don't stand a chance." *Id.* at 222.

47. *Id.*

48. United States v. Robinson at 44 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

49. *Id.* In his own sworn statement concerning the events of 7 July and again at court-martial, Bear would state that he and Robinson were already in the building when he arrived. See *Robinson Military Records*, supra note 8, at 220; United States v. Robinson at 8 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

50. United States v. Robinson at 44, 45 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

51. *Id.* at 32.

52. *Id.* at 44. Robinson was likely frustrated and felt disrespected because he was not being interviewed prior to a white Private who had just called him a racially charged epithet.

53. *Id.* at 9-10.

54. *Id.* at 9.

55. ROBINSON, supra note 11, at 19.

56. United States v. Robinson at 36 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). Robinson was also asked to slow his speech twice early in his testimony. *Id.* at 43-44.

57. The return of Robinson that night would be among the most hotly contested issues of the court-martial. *Id.* at 27-30.

58. *Id.* at 30.

59. Bear's investigation survives as the accompanying documents in Major (MAJ) Daugherty's Article 70 Investigation. *Robinson Military Records*, supra note 8, at 219-37.

60. Robinson would call this behavior "southern chivalry." ROBINSON, supra note 11, at 19.

61. *Robinson Military Records*, supra note 8, at 234.

62. *Id.* at 225.

63. *Id.* at 226.

64. *Id.* at 229, 230, 231, 235, 236, 237.

65. *Id.* at 235, 237.

66. While taking Robinson's statement that evening, CPT Bear himself told Robinson that he considered the word "vulgar and vile." *Id.* at 222.

67. *Id.* at 224.

68. *Id.* at 235. Corporal Elwood also mentions in his sworn statement that Ms. Poitevint also called Robinson a "n——" to his face. *Id.*

69. United States v. Robinson at 77-78 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

70. *Robinson Military Records*, supra note 8, at 233.

71. *Id.* at 219.

72. *Id.*

73. *Id.* at 233. As the later charges did not include Robinson's conduct at the bus station, Ms. Jones did not testify for the defense at the court-martial.

74. *Id.*

75. *Id.* at 240.

76. See Vernon, supra note 7.

77. RAMPERSAD, supra note 5, at 92.

78. *Id.*

79. See Vernon, supra note 7.

80. *Id.* Notes from Robinson's military records displays national interest in his case. An 17 August 1944 internal War Department memo highlights the interest of Senator Sheridan Downey of Robinson's home state of California in the court-martial. *Robinson Military Records*, supra note 8, at 82. Also, a 15 August 1944 radioed request for information marked "Urgent" from the Army's Adjutant General to the Commanding General of Fort Hood. *Id.* at 78. It starts:

Two letters have been received in this office stating that Jackie Robinson is awaiting trial by court-martial at Camp Hood. Letters also refer to [enlisted member (EM)] as Jackie Robinson REPEAT Robinson and state that EM is Negro football star alumnus of U of CLA of excellent family and reputation. Letters request that consideration be given his case. *Id.*

This interest in the court-martial was likely without influence as these inquiries came about after the court-martial was over for some weeks.

81. See Vernon, supra note 7.

82. *Id.*

83. *Id.*

84. *Robinson Military Records*, supra note 8, at 212.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* This last specification of Charge III was lined out on the initial charge sheet and was subsequently not investigated by MAJ Daugherty, the Article of War 70 investigating officer.

89. *Id.* at 211.

90. MANUAL FOR COURTS-MARTIAL, UNITED STATES Article of War 69 (1943) [hereinafter 1943 MCM].

91. *Id.* As only males served in the Army at the time of the drafting of the *Manual for Courts-Martial*, it only used male pronouns.

92. Robinson claims in his 1972 autobiography, *I Never Had It Made*, to have traveled to San Francisco to see his fiancée and later wife Rachel Isum during the period between the 6 July incident and the court-martial on 2 August. ROBINSON, supra note 11, at 20-21. Given the nature of his restriction to McCloskey Hospital on 17 July, he could not have left absent permission from a commander, which would have been unlikely. *Robinson Military Records*, supra note 8, at 211. The only possible time that he could have returned to California is between 7 July and 16 August when he wrote his letter from the hospital to Truman Gibson. See Vernon, supra note 7. Given the distance and modes of transportation of the day, it seems unlikely that he would have returned home between the incident and

his formal charging on 17 July. More likely than not, Robinson, writing twenty-eight years later, misremembered the timeline of this visit.

93. The 5th Armored Group commanded the Army's three African-American tank battalions. Designated to tank battalion training prior to being sent to the European Theater, the Headquarters, 5th Armored Group would not deploy overseas. See generally, DAVID J. WILLIAMS, *HIT HARD* (1983). Williams, the commander of A Company, provides great background on the 761st Tank Battalion from a commander's perspective on race, training, and the war in Europe. Unfortunately, on the subject of the 6-7 July incident at the MP station, Williams does not let the truth get in the way of a good story. He states that he was present that night and witnessed Robinson being brought out of the MP station handcuffed and in leg shackles. *Id.* at 126. Williams also never knew that the matter went to court-martial, believing that Lieutenant Colonel (LTC) Bates had the case "thrown out." *Id.* at 127.

94. *Robinson Military Records*, *supra* note 8, at 210.

95. *United States v. Robinson* at 5 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

96. *Robinson Military Records*, *supra* note 8, at 210.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. 1943 MCM, *supra* note 90, art. 70.

103. Later at his court-martial, it became evident that Robinson was not represented at his Article 70 hearing. *United States v. Robinson*, at 46 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). He stated during direct testimony that he asked "the Lieutenant," likely Cline, to subpoena the investigating officer's notes to prove a discrepancy between Wigginton's sworn statement and his trial testimony. *Id.* Likely he told his attorney this because he attended the hearing alone without representation.

104. *United States v. Robinson* at GCM Appointment (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

105. Daugherty did not investigate or make a recommendation on Charge III, Specification III, "obscene and abusive language . . . in the presence of ladies" as it had been eliminated by placing an "X" in ink pen across the specification prior to referral. *Robinson Military Records*, *supra* note 8, at 212.

106. This would be evident during the court-martial when Robinson would reference Wigginton and Daugherty's Article 70 testimony during his direct examination. *United States v. Robinson* at 46 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

107. The investigating officer's report was a boilerplate form known as WD AGO Form 120. *Robinson Military Records*, *supra* note 8, at 216-17. Designed to minimize the effort of the investigating officer, it also had the effect of limiting any insight into their analysis of the charges, becoming a go or no-go report of their investigation.

108. The instruction in the 1943 MCM allowed an investigating officer to make "notations on the charge sheet" which Daugherty did by lining out three of the

five remaining specifications. 1943 MCM, *supra* note 90, at 26.

109. *Robinson Military Records*, *supra* note 8, at 216.

110. *Id.*

111. *Robinson Military Records*, *supra* note 8, at 238.

112. The position of military judge would not come about until 1969. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1969). From 1951 to 1969 the position was known as the "law officer." *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951).

113. 1943 MCM, *supra* note 90, at 28.

114. *Id.* app. 1, 205.

115. *Id.* at 29.

116. *Id.*

117. *Id.* app. 1, 204. The term "panel" would not become part of the parlance until a few years later in 1949. *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1949).

118. *Id.* app. 1, 204.

119. *Id.* app. 1, 205.

120. See *Julia Compton Moore*, *LEDGER-ENQUIRER* (Apr. 21, 2004), <https://www.legacy.com/obituaries/ledger-enquirer/obituary.aspx?page=lifestory&pid=2155032>. The court-martial of Jackie Robison is not the only noteworthy court-martial Colonel Compton would serve on during the war. He would later serve on the 1945 military commission of four German civilians who killed a distressed U.S. Airman who parachuted to safety over Germany. *U.S. Army Justice Falls on Germans*, *LIFE MAG.*, July 16, 1945, at 17.

121. Documents on the short life of John Shippey can be found online. See *Obituaries, etc. - Shippey, John Hall, 1911-1950*, *SHIPPEY.INFO*, <http://shippey.info/documents/o10975.html> (last visited Jan. 17, 2020). Major Shippey is listed as graduating from the Judge Advocate General's School as a member of the Fifth Judge Advocate's Course. *Graduation Exercises: Fifth Class, JUDGE ADVOCATE GENERAL'S SCHOOL* (Nov. 21, 1942), [http://www.loc.gov/tr/frd/Military\\_Law/Scrapbooks/pdf/P-3-booklet.pdf](http://www.loc.gov/tr/frd/Military_Law/Scrapbooks/pdf/P-3-booklet.pdf). This was the first course that graduated in Ann Arbor since the classroom and office space was leased by the Judge Advocate General's Corps at the University of Michigan Law School after moving there 1942 from Washington, D.C. Colonel Richard D. Rosen, *The Judge Advocate General's School, U.S. Army: 50 Years in Charlottesville*, *MIL. L.*, Dec. 2001, at 14, <https://www.vsb.org/docs/valawyer/magazine/dec01rosen.pdf>.

122. Major Mowder attended UCLA, graduating and commissioning in 1934. *UNIV. OF CAL., SOUTHERN CAMPUS 102* (1920), <https://archive.org/stream/southern-campus-1933-univ/southern-campus-1933-univ-djvu.txt>. Mowder would later take part in the invasion of Okinawa. Lt. Col. Allerton Cushman, *Tank Destroyers . . . Against Japan*, *FIELD ARTILLERY J.*, Feb. 1946, at 70, 73, [https://sill-www.army.mil/firesbulletin/archives/1946/FEB\\_1946/FEB\\_1946\\_FULL\\_EDITION.pdf](https://sill-www.army.mil/firesbulletin/archives/1946/FEB_1946/FEB_1946_FULL_EDITION.pdf).

123. Captain Campbell led an incredible life, being born, raised, and educated in and around the famed Tuskegee Institute in Tuskegee, Alabama. See *Services Conducted for Dr. Campbell*, *TUSKEGEE NEWS*, June 10, 1976, at 3. As the head of Pediatrics at John A. Andrew Hospital in Tuskegee, Alabama, he would retire as a Colonel in the Army Reserves in 1967. *Id.* Dr. Campbell's brother William, a U.S. Army Air

Force pilot, commanded the 99th Fighter Squadron during the war, one of the units most closely associated with the famed Tuskegee Airmen. See CHARLIE & ANN COOPER, *TUSK EGEE'S HEROES* 98 1996.

124. First Lieutenant Issac O. Hutcheson was the assistant defense counsel listed on the convening order. *Robinson Military Records*, *supra* note 8, at 2. First Lieutenant Hutcheson was excused by the appointing authority due to Robinson selecting 1LT Johnson as his Individual Counsel. *Id.*

125. Cline was a practicing attorney prior to WWII. See Barry Halvorson, *Cline Celebrates 100th Birthday*, *Wharton J. Spectator* (July 21, 2010), [http://www.journal-spectator.com/life\\_and\\_leisure/article\\_3841f142-8693-5c00-a682-e02ecd781be4.html](http://www.journal-spectator.com/life_and_leisure/article_3841f142-8693-5c00-a682-e02ecd781be4.html). His practice area before and after the war was in real estate. *Id.*

126. Second Lieutenant Cline would go on to serve as trial judge advocate and defense attorney at other courts-martial for the rest of the war, but would never deploy overseas. *Id.*

127. *ROBINSON*, *supra* note 11, at 22.

128. U.S. Dep't of Def., WD AGO Form 53-98, Report of Separation from Service—Captain Robert H. Johnson's (on file with author).

129. Cline likely recommended Johnson to Robinson to undertake his defense. First Lieutenant Johnson had some experience at courts-martial; as evident in his examination techniques and in the fact that Johnson undertook the duties of cross-examining the government's lead witness CPT Bear. Johnson also likely crafted the so-called "good Soldier" defense on Robinson's behalf.

130. 1943 MCM, *supra* note 90, at 34.

131. *Id.*

132. *United States v. Robinson* at 2 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

133. 1943 MCM, *supra* note 90, at 60.

134. *Id.*

135. Later, 2LT Campbell would be called as part of Robinson's good Soldier defense. *United States v. Robinson* at 64 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). He would state that he had known Robinson for "a year and four months." *Id.* Given that Robinson transferred to Camp Hood in April 1944, this would likely mean that 2LT Campbell served with Robinson at Fort Riley as lieutenants and possibly as enlisted Soldiers.

136. *United States v. Robinson* at 7 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).

137. The boilerplate court-martial script dictated that the very first prosecution witness identify the accused. *Id.* at 6.

138. While Mr. Herbert Reed, the civilian court reporter, did an admirable job considering that he was required to perform live transcription of the court-martial, he inexplicably spelled Bear's name as "Baer" approximately half way through the court-martial transcript and stuck with this spelling for the remainder. *Id.* at 31.

139. *United States v. Robinson* at 8 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944). Bear's testimony mentions CPT Wigginton and several enlisted MPs at the scene. *Id.* He included

- PFC Mucklerath, whom, as an infantry replacement training at Camp Hood, he would not have known prior to that evening.
140. *United States v. Robinson* at 9 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
141. *Id.* at 10.
142. *Id.* at 12.
143. *Id.*
144. *Id.* at 13.
145. *Id.* at 14.
146. *Id.*
147. *Id.* at 15.
148. *Id.* at 16.
149. *Id.* at 17.
150. Lieutenant Colonel Perman was a field artillery officer serving on active duty in 1927. *Regimental Notes*, FIELD ARTILLERY J., Jan.-Feb. 1927, at 72, [https://sill-www.army.mil/firesbulletin/archives/1927/JAN\\_FEB\\_1927/JAN\\_FEB\\_1927\\_FULL\\_EDITION.pdf](https://sill-www.army.mil/firesbulletin/archives/1927/JAN_FEB_1927/JAN_FEB_1927_FULL_EDITION.pdf). Any member of the court was permitted to object to questions by government, defense, or even another member. 1943 MCM, *supra* note 90, at 58. During the cross-examination of CPT Bear, LTC Perman made four objections to defense questions. By contrast, the prosecution made only one. Perman was often free with his legal advice, objecting at one point that the defense's line of cross-examination questioning was outside the scope of direct and that the defense could "introduce the witness as a defense witness at a later time." *United States v. Robinson* at 22 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
151. *Id.* at 30.
152. *Id.*
153. *Id.* at 21
154. *Id.* at 22.
155. *Id.*
156. Technically, the Law Member permitted the defense to limit questions about the interaction between Bear and Robinson during testimony regarding the taking of Robinson's statements, not the subject matter. *Id.* at 22-23.
157. Though panel members today may submit written questions to the military judge subject to objections by government and defense counsel, court-martial members then were permitted to address questions directly to witnesses without filter. 1943 MCM, *supra* note 90, at 34.
158. *United States v. Robinson* at 25 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
159. This information is known due to a photograph of CPT Carr and his fellow commanders in England. *See 614th TD Battalion*, TANKDESTROYER.NET, <https://www.tankdestroyer.net/units/unitphotogalleries/614th-td-battalion> (last visited Jan. 14, 2020).
160. *United States v. Robinson* at 25 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
161. *Id.* at 26.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 30.
167. *Id.*
168. *Id.* at 26.
169. *Id.* at 27. The civilian court reporter at times generously ended the Trial Judge Advocates', defense counsels', and members' statements with a question mark. *United States v. Robinson* (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
170. *Id.* at 29.
171. *Id.*
172. *Id.*
173. *Id.* at 30.
174. *Id.*
175. *Id.* at 30-41.
176. *Id.* at 31-33.
177. *Id.*
178. The defense also made a timeless, new trial advocate mistake when it objected to a response by 1LT Cribari, a response made during its own cross-examination of that witness. *Id.* at 68. After defense's objection, the government, no doubt stupefied, quickly offered that "he asked for it." *Id.*
179. *Id.* at 35.
180. *Id.* at 41.
181. *Id.* at 44.
182. *Id.*
183. *Id.* at 43.
184. *Id.*
185. *Id.* at 44.
186. *Id.*
187. *Id.* at 45.
188. *Id.*
189. *Id.*
190. *Id.* at 45
191. *Id.*
192. *Id.* at 47.
193. *Id.* at 48.
194. *Id.* at 50.
195. *Id.* at 51.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 52.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.* at 52-53.
205. *Id.* at 53.
206. *Id.* at 54.
207. *Id.*
208. *Id.* at 54-55.
209. *Id.* at 58.
210. *Id.* at 58-60.
211. *See generally* Elizabeth Lutes Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 *YALE L. J.* 879 (1999), <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7983&context=yj>.
212. *See* 1943 MCM, *supra* note 90, *MIL. R. EVID.* 112 (opinion evidence).
213. The 761st Battalion Commander who would lead his Soldiers across Europe during the war was LTC Paul L. Bates, a 35-year-old former All-American football player and high school teacher. *See* ABDUL-JABBAR & WALTON, *supra* note 12, at 29. Lieutenant Colonel Bates was well-regarded by his men for treating them with dignity and respect, something far too few white officers did. *Id.*
214. Captain Lawson was a white officer, as depicted in a photograph of all the 761st company commanders enjoying dinner together in 1944 in England. CHARLES W. SASSER, *PATTON'S PANTHERS* (2005).
215. *United States v. Robinson* at 62 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
216. *Id.* at 61.
217. *Id.* at 67.
218. *Id.*
219. *Id.*
220. *Id.* at 71.
221. *Id.*
222. *Id.* at 72.
223. *Id.* at 73.
224. *Id.* at 77.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 78.
230. *Id.*
231. The record merely states, "Closing arguments were made by the defense and prosecution." *Id.*
232. *See* TYGIEL, *supra* note 6.
233. RAMPERSAD, *supra* note 5, at 109.
234. *United States v. Robinson* at 78 (Commanding General, XXIII Corps, Camp Hood, Texas, 2 August 1944).
235. ROBINSON, *supra* note 11, at 22.
236. RAMPERSAD, *supra* note 5, at 110.
237. *Id.* at 111.
238. *Id.* at 125.
239. ROBINSON, *supra* note 11, at 32.
240. *Id.*
241. *Id.* at 34.

## AROUND THE CORPS

CPT Wesleigh Cochrane takes a break during a recent Army Combat Fitness Test the 82d Airborne Division's OSJA held at Fort Bragg. (Credit: Justin Case Konder/AP)



**ARMY**

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## No. 4

# Six Steps for Excessive Absences

*By Allison G. Marvasti and Kathryn D. Poling*

One of the many types of cases likely to come across your desk as a labor or employment counselor is removal for excessive absences due to a medical condition. Consider this scenario—which is fraught with hazards for even a seasoned labor attorney: a supervisor comes to your office and requests help in dealing with a Civilian employee who is repeatedly out of the office for two, three, or more days a week. The supervisor makes it clear that it is impossible to assign tasks to that employee because the individual cannot be depended upon to be at work on any given day, and others in the office have to cover down on the employee's work. This employee is burning through leave, or has already used all sick leave and annual leave and is asking for leave without pay. Employees in these cases range from those severely incapacitated by a serious medical condition, who can readily document their reasons for being out of the office, to those who will use any excuse to be out of the office, from a sick cat to the flu. When someone is not coming to work on a regular basis, and there is no foreseeable end to the cause of the absences, it seems like removal should be simple. However, just like any other adverse action involving a federal employee, there are important steps to follow, due process to be given, and risk to the agency for failing to adhere to the rules.<sup>1</sup>

The first step when confronted by a supervisor with an employee who is using excessive amounts of leave is to provide

counsel that this can be surprisingly challenging and requires both caution and patience. It can be helpful to note that we are all just one accident or illness away from being severely disabled. Both federal law and the Equal Employment Opportunity Commission (EEOC) provide many benefits to the disabled, and failure to properly exhaust statutory requirements, such as providing accommodations, can result in adverse findings against the agency. While the demands of work are important, we also must demonstrate compassion and sensitivity to challenges faced by our employees.

When an employee is not reporting to work on a regular basis for an extensive period and there is no foreseeable end to the absences, the agency should consider proposing removal for excessive absenteeism or for physical inability to perform duties.<sup>2</sup> While these two bases are distinct, they frequently overlap, and the process for reaching the ultimate removal is similar. There are six prerequisite steps to proposing the removal of an employee for excessive absences:

1. Allow employee to exhaust all sick and personal leave;
2. Notify employee of her/his rights under the Family and Medical Leave Act (FMLA)<sup>3</sup>;
3. Allow employee to exhaust FMLA leave;
4. Attempt to accommodate the employee's disability;

5. Attempt to reassign the employee; and
6. Provide notice requiring employee to return to work or risk adverse action being taken.<sup>4</sup>

If the basis is medical inability to perform the duties of the position, steps 1-3 are not a prerequisite to taking the action since the action is not based on leave taken, but on a disqualifying medical condition. However, the agency must proceed through steps 4-5 and will need to obtain medical documentation—discussed below—of the disqualifying medical condition.<sup>5</sup>

### **1. Exhaust All Sick and Personal Leave**

An employee facing medical issues requiring absence from the workplace may use annual leave or sick leave, as well as leave without pay (LWOP). A supervisor may ordinarily deny annual leave or LWOP if there is work that needs to be done, but the supervisor may not deny sick leave or LWOP taken because of an illness or injury that incapacitates the employee from duty.<sup>6</sup> If the use of leave is excessive or being abused, the supervisor may be able to put the employee on a leave restriction plan.<sup>7</sup> While the use of sick leave for personal medical reasons is an entitlement, so too is the agency's right to ask for documentation of the need for that sick leave, provided the basis is not readily apparent.<sup>8</sup>

When absence due to medical issues has become an issue, it is usually appropriate to ask for supporting evidence. Many times, this is done after an employee misses three consecutive workdays.<sup>9</sup> However, if the employee is regularly but intermittently absent—i.e., returning to work within three days in each absence—the supervisor may still demand supporting evidence from a medical provider.<sup>10</sup> Note too, that we cannot dictate who provides the medical documentation. To be considered administratively acceptable, the medical documentation should include the employee's name, a statement that the employee was incapacitated for duty and/or why reporting for duty was inadvisable, the nature of the incapacitation, the duration of the period of incapacitation, and the medical practitioner's typed name, title, signature, address, telephone number, date(s) of office

visit(s), and date of certificate.<sup>11</sup> When the evidence does not justify the approval of sick leave, the absence may be charged to annual leave with the employee's consent, absence without leave (AWOL) (which is a non-pay status), or LWOP.<sup>12</sup>

It is also appropriate to request medical documentation when an employee is in a position governed by medical standards, and there is some question as to whether the employee is fit for duty.<sup>13</sup> Medical standards are most commonly found in the employee's position description.<sup>14</sup> The employee should be notified in advance of a Medical Evaluation Program.<sup>15</sup> Often the employee has signed a condition of employment agreement, agreeing that employment is conditioned on meeting the medical standards of the position.<sup>16</sup>

There are limitations on when and how often we can request medical documentation. An employee who has an obvious disability does not generally require documentation. For example, we do not need medical documentation for an employee who was injured in an auto accident and is now confined to a wheelchair to document their injury. However, we may need medical documentation to address the nature of accommodations or ability to perform certain duties. Additionally, employees with chronic conditions cannot generally be required to obtain a medical statement for every absence. Consider an employee with a diagnosis of rheumatoid arthritis or migraines. These type of medical conditions are expected to have flare ups, and there is often little that a medical professional can provide to their patient. In these scenarios, it would seem unfair to require an employee to obtain redundant documentation and potentially incur unnecessary costs.

### **2. Notice and Exhaustion of FMLA Leave**

The FMLA provides twelve workweeks of unpaid leave for an employee with a serious health condition that makes the employee unable to perform any one or more of the essential functions of their position, while guaranteeing that the employee will return to the same or equivalent position with all associated benefits.<sup>17</sup> Even if an employee has not expressly requested FMLA

leave, a constructive request may be found if they provide the agency notice of the need for leave and any requested medical certification within thirty days or "as soon as practicable" prior to any foreseeable absence, and within a reasonable time for unforeseeable events.<sup>18</sup> However, an employee may not retroactively invoke his or her entitlement to family and medical leave unless the employee and their personal representative are physically or mentally incapable of invoking the employee's entitlement to FMLA leave during the entire period.<sup>19</sup> The agency can and should request medical documentation in support of a request for FMLA leave, as delineated in 5 U.S.C. § 6383.<sup>20</sup>

Family Medical Leave Act leave is only granted for the FMLA-approved serious medical conditions. A supervisor can still require that other sick leave and annual leave comply with the Office of Personnel Management (OPM) leave rules.<sup>21</sup> The supervisor can also still deny an employee unexcused absences for causes other than the medical incapacitation.<sup>22</sup> In cases where an employee is under a leave restriction letter, the leave restriction rules continue to apply to all other sick and annual leave not covered by the FMLA request.<sup>23</sup>

When an employee is close to exhausting their annual and sick leave, it is advisable to notify them of that fact and of the availability of FMLA leave.<sup>24</sup> This notice should include a brief explanation of the employee's rights to request FMLA leave.<sup>25</sup> Because the FMLA protects an employee's right to return to their position, the time spent in FMLA status cannot be used against an employee to support a charge of excessive absence.<sup>26</sup> If an employee is charged with AWOL when they would have qualified for the FMLA, this could be asserted as a basis for a claim of disability discrimination.<sup>27</sup> Because leave covered by the FMLA cannot be used against an employee to support a charge of excessive absence, all twelve weeks of FMLA leave must be exhausted before the first hour of LWOP can be used to support a removal action.

In all communications with an employee, it is important to demonstrate concern for their well-being. Consider how a U.S. District Court judge will read a memorandum from your command



years after any action has been taken. Will the memorandum be cold and harsh, or compassionate and understanding? Will options be set out in a clear manner that is understandable? The tenor of written communications can have enormous impacts both with the employee and with subsequent administrative and judicial review.

### 3. Attempt Reasonable Accommodation<sup>28</sup>

Presumably, the supervisor has been monitoring the employee's status and the cause(s) of absences throughout this process. Long before it becomes clear that the employee's medical issues are preventing regular attendance, supervisors should consider whether a reasonable accommodation would allow the employee to continue to perform the essential functions of the current position.<sup>29</sup> To initiate the reasonable accommodation process, an employee does not need to invoke the magic words of "reasonable accommodation" or fill out a specific form.<sup>30</sup> A supervisor may be able to infer the need for a reasonable accommodation based on the employee's description of an issue preventing performance of the duties of the position, or based on the observation of a disability impeding performance of a job function.<sup>31</sup> Not only is reasonable accommodation a benefit to the employee, it also benefits an agency to retain an employee in whom the agency has invested ample resources into hiring, training, and developing.

Reasonable accommodation is broadly construed, but can include modification to the duties or work environment to enable an individual with a disability to perform the essential functions of the position, or to enjoy equal benefits and privileges of employment as other similarly situated employees without disabilities.<sup>32</sup> It can include a change to the schedule of a position, to the physical aspects of the job, or some other adjustment to the job. For example, an individual who is not able to drive because of a medical condition may be offered telework. An employee who has frequent medical appointments could be placed on an alternate work schedule. Or, the agency could purchase special equipment for an employee who is physically impaired. Reasonable accommodation can

also include reassignment to a vacant position, discussed in detail below.<sup>33</sup>

The key is that the accommodation must be reasonable—an agency is not required to undertake an accommodation that would cause an undue hardship to the agency.<sup>34</sup> An undue hardship is judged based on a multitude of factors, including, but not limited to: the nature and cost of the accommodation, the financial resources of the facility, the size of the entity (including the number of employees), the type of agency operation, and the impact of the accommodation on the agency's operations.<sup>35</sup> Overall, the type of hardship must be a "significant difficulty or expense," and in the government's case, it is taken in "light of resources available to the agency as a whole," which is a high bar.<sup>36</sup>

In developing a reasonable accommodation, the agency must have a clear understanding of the essential functions of the job as described by the position description, but also in the actual performance of duties. For example, a position description might note that the employee is expected to perform temporary duty (TDY) 25% of the time, but if the employee never was on TDY travel orders in the years before their disability, the fact that they now cannot go TDY will not support any adverse action. Without understanding what must be accomplished in the position and what can be adjusted or moved to another position, it is impossible to assess what accommodations would suffice to permit the employee to succeed in the position.<sup>37</sup> At this stage, the medical provider's communications are key to develop potential accommodations. Medical information requested should be targeted to obtain the information needed to make a decision on the reasonable accommodation to include how the requested accommodation will help the employee perform the duties of the position.<sup>38</sup>

By reviewing the medical provider's documentation of the employee's limitations in relation to the essential functions of the position, the agency must decide whether the requested accommodation, or in fact, any reasonable accommodation, will resolve the issue. It is important to note that an employee is not entitled to the accommodation of their choosing, or to any accommodation at all, if it would cause

an undue hardship on the agency.<sup>39</sup> It is critical that the agency initiate an informal, interactive process with the individual with a disability in need of the accommodation.<sup>40</sup> A documented review of the essential functions of the employee's position, the individual's limitations, and a meaningful interaction with the employee regarding requested accommodations and their alternatives is needed to evidence the agency's efforts to accommodate and to defend the agency in potential future litigation.<sup>41</sup>

In some instances, the inability to accommodate the employee will become patently obvious. For example, an individual employed to be a truck driver cannot perform those duties in a telework status (at least not yet). In other cases, the supervisor is often well advised to consider the accommodation on at least a trial basis. Consider the employee who the supervisor "knows" will not be successful if allowed to telework. Providing the employee with expectations and allowing them to work in a telework status could allow them to show superlative performance of duties in a telework status or it could prove that telework is not a reasonable accommodation because of deficient work product and output. It is much easier to defend a decision to end an accommodation rather than never offering one on at least a trial basis.

The approval of leave can be a reasonable accommodation. In the case of approval of leave as a reasonable accommodation, the analysis is not whether the employee is entitled to coverage under the FMLA or not, but whether the granting of such leave is an undue hardship.<sup>42</sup> Therefore, under a reasonable accommodation analysis, an employee's request to use sick leave, annual leave, or LWOP should also be considered as a reasonable accommodation request if it is related to an employee's disability.<sup>43</sup> Supervisors are not required to provide advanced sick leave or advanced annual leave, but can elect to do so. In cases where such advanced leave is denied, the supervisor should consider granting LWOP.

When an agency proposes removal of an employee for medical inability to work or excessive absences, the agency should be prepared to demonstrate that attempts were made, or at least considered, to reasonably

accommodate the employee's medical issues to support the removal decision.<sup>44</sup> Failure to attempt to reasonably accommodate can be a violation of an agency's duty to do so, and may give rise to an allegation of discrimination if the employee is a qualified individual with a disability pursuant to Army Regulation 690-12, Appendix C, meaning the employee could perform the essential functions of the job with or without reasonable accommodation.<sup>45</sup> Failure to attempt to reasonably accommodate will also be weighed in any U.S. Merit Systems Protection Board (MSPB) assessment of the reasonableness of the penalty of removal.<sup>46</sup>

#### 4. Attempt Reassignment

Reassignment to a vacant position is one of many potential accommodations.<sup>47</sup> Reassignment is usually the reasonable accommodation of last resort.<sup>48</sup> The accommodation process generally, and the reassignment consideration in particular, is a collaborative process. It should include a cooperative interaction between the employee and the agency, and the employee has some obligation to participate in the process.<sup>49</sup> An employee should not, and cannot, be reassigned against their will as part of a reasonable accommodation.<sup>50</sup> According to the EEOC, an employee should be reassigned to a position at the same grade and responsibility.<sup>51</sup> If no such position is available, the employee can be reassigned to a lower grade position at the same rate of pay, with the employee's consent.<sup>52</sup> The employee can also be offered lower graded positions that they can voluntarily accept, with a corresponding pay reduction.<sup>53</sup>

Although the employee can suggest potential positions that would meet the employee's needs and abilities, the agency is responsible for identifying potential positions for the employee.<sup>54</sup> It is helpful to have a well-defined process for reassignment that advises the employee of the limitations of the reassignment process (e.g., a time limit on the search for equivalent positions, a limit on how many offers of reassignment will be made) and obtains the employee's limitations for what he will accept in terms of reassignment (e.g., a lower graded position, a position in another location).<sup>55</sup> If there is no reassignment

available, or soon to be available, an agency has fulfilled its obligations to reasonably attempt to accommodate the employee.<sup>56</sup> This process should be well documented.

Reassignment is particularly important in cases of medical inability. The employee may only be unfit because of strict medical standards applicable to the position, such as a requirement to run a certain distance or lift a certain amount. There are many positions in the government where such restrictions would not be a problem. For example, an agency can dictate that a firefighter must be able to lift a certain weight, but this condition of employment would not be an issue for most clerical positions. Therefore, it is necessary to survey positions for which the person is otherwise qualified. A review of the employee's resume is necessary for the personnel office to determine if the employee is otherwise qualified for vacant positions. Reassignment is to a vacant funded position.<sup>57</sup> An agency has no obligation to create a position that the employee can be reassigned or to move another employee to create a vacancy.<sup>58</sup>

#### 5. Return-to-Work Notification Prerequisite to Proposing Removal for Excessive Absences

In the event the agency has moved through these steps without either improvement in the employee's attendance or identification of a position that the employee can perform with or without accommodation, it may be time for the supervisor to consider proposing to remove the employee from federal service. When an employee has not been reporting to work on a regular basis, there are two primary charges to consider: the first is excessive absences, and the second is a physical or medical inability to perform duties.<sup>59</sup>

##### *Excessive Absences*

Generally speaking, an agency cannot penalize an employee for using approved leave.<sup>60</sup> This includes approved LWOP. While a supervisor may always deny annual leave or LWOP if there is a valid mission requirement, they may not turn down sick leave.<sup>61</sup> When an employee has excessive absences and the job needs to be performed, a supervisor may turn down unscheduled annual leave requests.<sup>62</sup> However, when an

employee is using annual leave because they are incapacitated for duty, a supervisor may be left with no choice but to approve it. If a supervisor cannot discipline an employee for the use of approved leave, and the supervisor must approve the leave based on the circumstances, it would appear that the supervisor is stuck. However, that is likely not the case.

Under the specific conditions laid out in *Cook v. Department of the Army*, and affirmed in *McCauley v. Department of the Interior*, an agency can take adverse action against an employee based on excessive use of approved leave.<sup>63</sup> *Cook* lays out the requirements for taking an adverse action based on excessive absences:

1. The employee was absent for compelling reasons beyond the employee's control so that the employee would not have been present at work, regardless of agency approval or disapproval;
2. The absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time, or part-time basis; and
3. The agency can show that the position needed to be filled by an employee available for duty on a regular, full-time or part-time basis.<sup>64</sup>

Such an action for removal should be taken only under unusual circumstances, e.g., when the employee is unable to return to duty because of the continuing effects of illness or injury.<sup>65</sup>

In order to satisfy *Cook*, the supervisor must maintain documentation of absences and the reasons given for such absences as evidence that the circumstances were beyond the employee's control.<sup>66</sup> This can include emails, calendars documenting days absent, or a record of phone calls reporting absence and the reason provided for the absence. Documentation of the cause of the absence is essential to demonstrate that agency approval or disapproval was immaterial, as the employee was unable to report to work.<sup>67</sup>



(Credit: istockphoto.com/bankrx)

As the documentation of absence is gathered, recall that an agency cannot use FMLA leave days as “excessive leave” days to support a disciplinary action based on excessive absences.<sup>68</sup> The intent behind the FMLA is to provide job security for individuals who need to be temporarily absent due to a serious medical condition (whether their own or that of a family member) and the law unambiguously promises this job security.<sup>69</sup> As a result, the use of FMLA leave in any calculation to remove an employee is inappropriate. To ensure any removal is adequately supported, an agency must maintain all time cards and leave slips as evidence. These records must indicate when FMLA leave was taken as opposed to other types of leave to prove that all 480 hours were provided.

Next, the supervisor must provide a formal letter warning the employee of potential adverse action if they fail to return to work.<sup>70</sup> This letter will order the employee to return to work or risk adverse action up to and including removal. While this may seem useless or even cruel if the employee is incapacitated and unable to return to

work, it is a necessary step. Recall the earlier advice to give this warning compassionately. Documentation of absences and the reason for such absences must continue after the employee is ordered to return to work in order to adequately prepare for any potential adverse action against the employee. Finally, the agency needs to document the need for someone to fill the employee’s position on a regular, full-time/part-time basis; this can include evidence of hardship to the agency, such as the need for hiring contractor to support the mission or require that other employees work longer hours to cover the employee’s duties.<sup>71</sup>

#### ***Physical Inability to Work***

Any removal from federal service must promote the efficiency of the service.<sup>72</sup> The MSPB has held that removal for medical inability to work is “equivalent to a charge of medical incapacity.”<sup>73</sup> In removing an employee for a physical or medical inability to work, the first question to address is whether the position is subject to medical standards or physical requirements. If the position includes such standards, the

employee may be removed if the disabling condition itself is disqualifying, its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm.<sup>74</sup> If the position description does not include medical standards, the agency must demonstrate that there exists a nexus between the employee’s condition and that employee’s inability to perform, or that the employee’s condition poses a risk of harm to the employee or others if the employee continues in the position.<sup>75</sup>

Removal on the basis of physical or medical inability to perform is not generally considered to be a disciplinary removal. Therefore, the *Douglas* factors do not apply to these decisions.<sup>76</sup> Instead, the standard for review is whether the removal action went beyond the “tolerable limits of reasonableness.”<sup>77</sup>

Finally, if there is a foreseeable end to the employee’s medical issue impeding the performance of duties, the agency must document why removal is required for the efficiency of the service, instead of waiting for the employee to recover.<sup>78</sup> This is true

even if evidence of recovery comes after the removal is proposed.<sup>79</sup> The agency will need to show the hardship endured by the employee's absence, and why the agency needed to remove and replace the employee.<sup>80</sup> Evidence that the agency allowed absences and an inability to work to continue for a long period will potentially undercut the argument that the agency urgently requires someone in the position.<sup>81</sup> This is the major risk in removal for medical inability to work: an employee may provide evidence at any time, in some cases after the issuance of the removal, to establish that their medical situation has improved, resulting in the employee being returned to their position. As a result, before advising the supervisor to take this route, it is critical to have a reasonable belief that the medical condition in question will not resolve within the foreseeable future.

## 6. Medical Retirement

Throughout this process, it may seem that the agency is adding to the employee's already difficult situation. This is important to consider also when deciding on which basis to remove an employee. For both the supervisory chain and the employee, it is worth considering the "Bruner Presumption."<sup>82</sup> In a case of removal for medical inability to perform, the Bruner Presumption assumes that the employee is entitled to disability retirement. The Bruner Presumption also shifts the burden of production to the OPM, who must disprove the employee's entitlement to disability retirement.<sup>83</sup> To overcome this presumption, the OPM must produce evidence that is sufficient to support a finding that the removed employee is not entitled to disability retirement benefits.<sup>84</sup>

In some instances, an employee will actively seek removal for physical inability to perform the duties of the position because they will then have the Bruner Presumption. An agency should only be taking adverse action for medical inability to perform when the evidence supports such an action. It is not fair to the agency, OPM, or taxpayer to direct a medical inability to perform action when the evidence does not support it. For example, an employee who suffers from carpal tunnel syndrome who has difficulty driving to

work is not generally precluded from most jobs, and if there are excessive absences, it would be more appropriate to remove on the basis of unavailability than medical inability to perform.

## Conclusion

The decision to remove an employee for physical inability to work or excessive absenteeism can be a difficult one to make, and is fraught with potential pitfalls. However, if done correctly, it can result in an outcome that benefits the agency and provides all possible benefits and protections to the employee. At each step in the process, there is an opportunity for cooperation, compassion, and giving the employee the greatest possible chance at success within the agency. **TAL**

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## Notes

1. A caveat: this article does not include a discussion of the requirements surrounding individual installation Collective Bargaining Agreements. Such an agreement may impact the implementation of this advice.
2. Linda D. Edwards v. Department of Transportation, 109 M.S.P.R. 579, 583-584 (2008) (reversed on other grounds 112 M.S.P.R. 82 (2009)). Other frequently used charges are for excessive absences are failure to maintain a regular and predictable work schedule; failure to follow established leave procedures; and, of course, absence without leave (AWOL) for unapproved absences. These charges will not be discussed in this article.
3. 5 U.S.C. §§ 6381-6387 (2020); 5 C.F.R. §§ 630.1201-630.1213 (2020).
4. This assertion is based on the authors' professional experiences in labor and employment law for a combined thirty years.
5. Though not required to as a prerequisite to taking an action for medical inability to perform the duties of the position, so long as the employee is on the rolls, management should follow steps 1-3.
6. 5 C.F.R. § 630.401(a) (2020). Annual leave may be substituted for leave without pay (LWOP) under the Family Medical Leave Act (FMLA) taken by an employee with an illness or injury that is incapacitating the employee from duty. 5 C.F.R. § 630.1206(a). If the employee qualifies under the FMLA, then the leave may not be denied.

7. Appendix A contains an example of a leave restriction notice. *Supra* note 1, the use of a leave restriction notice may be impacted by a Collective Bargaining Agreement.

8. 5 C.F.R. § 630.405(a) (2020).

9. *Supra* note 1, this is an area that can frequently be impacted by a Collective Bargaining Agreement. However, since Collective Bargaining Agreements are unique to the union/installation, this article does not address this issue.

10. 5 C.F.R. § 630.405(a).

11. *Id.*

12. 5 C.F.R. § 630, Subparts B and C; 5 C.F.R. § 630.401(a)(2) (2020); 5 C.F.R. §§ 630.405(a), 630.405(b) (2020); 5 C.F.R. § 630.1202 (2020) (leave without pay definition).

13. 5 C.F.R. § 339.301-339.304 (2020). Appendix B contains an example request for medical documentation under 5 C.F.R. § 339.303 (2020).

14. 5 C.F.R. § 339.203 (2020).

15. 5 C.F.R. § 339.205 (2020).

16. 5 C.F.R. § 339.203; 5 C.F.R. § 339.205.

17. 5 U.S.C. § 6384 (2020); 5 C.F.R. § 630.1203 (a) (2020); 5 C.F.R. § 630.1210 (2020).

18. 5 C.F.R. § 630.1207 (2020); *Ellshoff v. Dept. of the Interior*, 76 M.S.P.R. 54 (1997); *see also Somuk v. Department of the Navy*, 117 M.S.P.R. 18 (2011); *Gross v. Department of Justice*, 77 M.S.P.R. 83, 88 (1997); *Manuel v. Westlake Polymers Corporation*, 66 F.3d 758 (5th Cir. 1995).

19. 5 C.F.R. § 630.1203(b) (2020).

20. Department of Labor Form WH-380-E is the standard form of request for FMLA Medical Documentation and can be found at <http://www.dol.gov/whd/forms/wh-380-e.pdf>. Appendix C may be used in conjunction with a WH-380-E to request medical documentation in an FMLA case.

21. 5 C.F.R. § 630.1206(b)(1) (2020).

22. Employee shall claim FMLA leave for particular illness(es). 5 C.F.R. § 630.1203(a)(4) (2020).

23. See Appendix C for an example of an FMLA notice in conjunction with a leave restriction plan.

24. See Appendix D for an example of a request for documentation under the FMLA.

25. It is also recommended that the agency inform the employee of rights under the Voluntary Leave Transfer Program at the same time. 5 U.S.C. § 6331-6333 (2020); 5 C.F.R. § 630.901-630.912 (2020). See Appendix E for an example FMLA notice with information regarding the Voluntary Leave Transfer Program.

26. *McCauley v. Department of the Interior*, 116 M.S.P.R. 484 (2011).

27. *Ellshoff v. Department of Interior*, 76 M.S.P.R. 54 (1997).

28. Army Regulation 690-12, *Equal Employment Opportunity and Diversity*, Appendix C, paragraph C-1(e) defines "reasonable accommodation" as: "any change in the work environment or the way things are customarily done that would enable an individual with a disability to enjoy [equal employment opportunity]." U.S. DEP'T OF ARMY, REG. 690-12, EQUAL EMPLOYMENT

OPPORTUNITY AND DIVERSITY app. C, para. C-1(e) (12 Dec. 2019) [hereinafter AR 690-12].

29. *Id.* app. C (laying out the procedures for requesting and evaluating reasonable accommodation requests). *Id.* fig. C-2 (providing a format for a request).

30. 29 C.F.R. § 1614.203(d)(3)(i)(D) (2020); AR 690-12, *supra* note 28, app. C, para. C-2.

31. Bultemeyer v. Fort Wayne Community Sch., 100 F.3d 1281, 1285 (1996).

32. 29 C.F.R. § 1614.102(a)(8) (2020); 29 C.F.R. § 1614.203(d)(3)(i)(D)-(I) (2020); 29 C.F.R. § 1630.2(o) (2020); AR 690-12, *supra* note 28, app. C (laying out the procedures for requesting and evaluating reasonable accommodation requests).

33. 29 C.F.R. § 1614.203(d)(3)(i)(B)-(C) (2020); AR 690-12, *supra* note 28, app. C, para. C-6.

34. 29 C.F.R. § 1614.102(a)(8); 29 C.F.R. § 1630.9(a) (2020).

35. 29 C.F.R. § 1614.203(a)(10) (2020); 29 C.F.R. § 1630.2(o)(4) (2020); 29 C.F.R. § 1630.2(p) (2020).

36. 29 C.F.R. § 1614.203(a)(10); 29 C.F.R. § 1614.203(d)(3)(ii) (2020); 29 C.F.R. § 1630.2(p) (2020).

37. Ignacio v. United States Postal Service, 16 M.S.P.R. 530 (1983).

38. Army Regulation 690-12, paragraph C-5(c) states:

Medical information will be requested only to the extent reasonably necessary to establish that the requester is an individual with a disability and/or needs the requested accommodation and provide information on the nature, severity, and expected duration of the impairment (for example, functional limitations, symptoms, side effects of any treatments, and so forth); the activity or activities the impairment limits; the extent to which the impairment limits the individual's ability to perform the activity or activities; and/or why the individual requires the particular accommodation requested and how the accommodation will assist the individual to apply for a job, perform the essential functions of the job, or have the benefits of the workplace.

AR 690-12, *supra* note 28, para. C-5(c).

39. Miller v. Department of the Army, 121 M.S.P.R. 189 (2014); 29 C.F.R. 1614.203(a)(10) (referring to the definition of undue hardship in 29 C.F.R. § 1630.2(p)); AR 690-12, *supra* note 28, app. C para. C-7, fig. C-3.

40. 29 C.F.R. § 1614.203(d)(3)(i)(H) (2020); 29 C.F.R. § 1630.2(o)(3) (2020); AR 690-12, *supra* note 28, fig. C-4 (providing a template for the interactive process).

41. AR 690-12, *supra* note 28, fig. C-5-C-6 (providing a format for documenting the decision-maker's decision process).

42. 29 C.F.R. § 1614.203(d)(3)(i)(B)-(C) (2020); AR 690-12, *supra* note 28, app. C, para. C-3(d).

43. 29 C.F.R. § 1614.203(d)(3)(i)(B)-(C); AR 690-12, *supra* note 28, app. C, para. C-3(d).

44. Marshall-Carter v. Department of Veterans Affairs, 94 M.S.P.R. 518, 523-24 (2003).

45. 29 C.F.R. § 1614.203(d)(3)(i)(A) (2020); AR 690-12, *supra* note 28, app. C, para. C-1(d); Petitioner v. Johnson, 2014 EEO PUB LEXIS 1810, 115 FEOR (LRP) 22, EEOC (IHS) 320110053 (E.E.O.C. July 10, 2014) (finding that attendance is not an essential function

of a position, but rather a means by which employee performs essential functions of position); *aff'd in Reynaldo Alvara v. Department of Homeland Security*, 121 M.S.P.R. 613 (2014).

46. Marshall-Carter, 94 M.S.P.R. at 524.

47. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii) (2020); AR 690-12, *supra* note 28, para. C-6(a).

48. 29 C.F.R. § 1614.203(d)(3)(i)(B)-(C) (2020); 29 C.F.R. § 1630.2(o); AR 690-12, *supra* note 28, para. C-6(a).

49. Collins v. United States Postal Service, 100 M.S.P.R. 332 (2005); *see also* Miller v. Department of the Army, 121 M.S.P.R. 189 (2014).

50. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii); AR 690-12, *supra* note 28, para. C-6(a)-(c).

51. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii); AR 690-12, *supra* note 28, para. C-6(a)-(c).

52. 29 C.F.R. § 1630.2(o) app. (2020).

53. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii); AR 690-12, *supra* note 28, para. C-6(a).

54. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT para. 28 (Oct. 17, 2002), <https://www.eeoc.gov/policy/docs/accommodation.html>.

55. See Appendix F for a sample Counseling Checklist for reassignment.

56. Acosta v. VA, EEOC No. 0320100028 (July 20, 2010); 29 C.F.R. § 1630.2(o) app.

57. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii); AR 690-12, *supra* note 28, para. C-6(a).

58. 29 C.F.R. § 1614.203(d)(3)(i)(B); 29 C.F.R. § 1630.2(o)(2)(ii); AR 690-12, *supra* note 28, para. C-6(a).

59. Edwards v. Department of Transportation, 109 M.S.P.R. 579, 584 (2008).

60. Holderness v. Defense Commissary Agency, 75 M.S.P.R. 401 (1997).

61. 5 C.F.R. § 630.401(a) (2020).

62. Young v. United States Postal Service, 79 M.S.P.R. 25, 38-39 (1998).

63. Cook v. Department of the Army, 18 M.S.P.R. 610 (1984); *see also* McCauley v. Department of the Interior, 116 M.S.P.R. 484, 489-90 (2011) (expressly including all types of approved leave in the Cook analysis for excessive absence charges); Fox v. Department of the Army, 120 M.S.P.R. 529 (2014). Also note, in the event of unapproved absence, the appropriate charge would be absence without leave (AWOL). 5 C.F.R. § 630.1208(i)(1) (2020).

64. Cook, 18 M.S.P.R. at 611-12; *see also* Combs v. Social Security Administration, 91 M.S.P.R. 148, 154 (2002); Gaskins v. Department of the Air Force, 36 M.S.P.R. 331, 334 (1988).

65. Cook, 18 M.S.P.R. at 611-12; *see also* Combs, 91 M.S.P.R. at 154; Gaskins, 36 M.S.P.R. at 334.

66. Cook, 18 M.S.P.R. at 611-12; *see also* Combs v. Social Security Administration, 91 M.S.P.R. 148, 154 (2002); Gaskins, 36 M.S.P.R. at 334.

67. Smisson v. Department of Air Force, 85 M.S.P.R. 427 (2000).

68. McCauley v. Department of the Interior, 116 M.S.P.R. 484 (2011).

69. McCauley, 116 M.S.P.R. at 489-90.

70. See Appendix G for an example letter warning the employee of potential adverse action if they fail to return to work.

71. Cook, 18 M.S.P.R. at 611-12; *see also* Combs v. Social Security Administration, 91 M.S.P.R. 148, 154 (2002); Gaskins v. Department of the Air Force, 36 M.S.P.R. 331, 334 (1988).

72. 5 U.S.C § 7513(a) (2020); Jackson v. U.S. Postal Service, 666 F.2d 258 (5th Cir. 1982).

73. Sebald v. Department of the Air Force, 32 M.S.P.R. 164 (1987); *see also* Ellshoff v. Department of the Interior, 76 M.S.P.R. 54 (1997).

74. Brown v. Department of the Interior, 121 M.S.P.R. 205 (2014); *see also* Sanders v. Department of Homeland Security, 122 M.S.P.B. 144 (2015); Slater v. Department of Homeland Security, 108 M.S.P.R. 419 (2008). 75. Fox v. Department of the Army, 120 M.S.P.R. 529 (2014), *citing* Marshall-Carter v. Department of Veterans Affairs, 94 M.S.P.R. 518 (2003).

76. Brown, 121 M.S.P.R. at 205; *see also* Marshall-Carter, 94 M.S.P.R. at 525; *see also* Sanders, 122 M.S.P.B. at 144.

77. Marshall-Carter, 94 M.S.P.R. at 518; *see also* Miller v. Department of the Army, 121 M.S.P.R. 189 (2014).

78. Social Security Administration v. Mills, 73 M.S.P.R. 463 (1996); Edwards v. Department of Transportation, 109 M.S.P.R. 579 (2008).

79. Street v. Department of the Army, 23 M.S.P.R. 335, 342 (1984); Sanders, 122 M.S.P.R. 144 (2015).

80. Edwards, 109 M.S.P.R. at 586; *see also* Walker v. Department of the Air Force, 24 M.S.P.R. 44, 45-47 (1984).

81. Edwards, 109 M.S.P.R. at 586; *see also* Walker, 24 M.S.P.R. at 44.

82. Bruner v. Office of Personnel Management, 996 F.2d 290, 294 (Fed. Cir. 1993); *see also* McDonald v. Office of Personnel Management, 50 M.S.P.R. 164, 169 (1991).

83. Bruner, 996 F.2d at 294; *see also* McDonald, 50 M.S.P.R. at 169.

84. *Supra* note 83.

## Appendix A: Example Memorandum for Leave Restriction Notice

MEMORANDUM FOR XXX

SUBJECT: Leave Restriction

1. While I am deeply concerned about the medical issues you have presented, I find it necessary to issue this leave restriction memorandum because of your unreliable attendance. [Explain]. Accordingly, for the next six months, you must adhere to the following restrictions on your use of leave. Failure to do so will result in charging your unexcused absences to absence without leave (AWOL), which is a non-pay status and which may result in disciplinary action, including removal from the federal service. You should also be aware that your failure to maintain a regular and predictable work schedule could also result in your removal from the federal service. [You should mention prior counseling you may have given where you informed the employee of leave procedures, impact on the agency, etc.].

2. You must personally contact me at (XXX) XXX-XXXX no later than 0900 on the day of an unscheduled absence to request approval of your absence. Such unscheduled leave must be a bona fide emergency as determined by me or my designee. If I am unavailable when you call, you must leave me a message giving a telephone number where you can be reached during the day. You should then call Mr./Ms. XXX at (XXX) XXX-XXXX to let him/her know of your unscheduled absence and leave a number where you may be contacted. I or someone else in your chain of command will return your call as soon as possible. You may not assume that your absence is approved until you receive confirmation from me or someone else in your chain of command.

3. You should be prepared to provide supporting documentation for any emergency leave request. For example, if you need to stay home to care for a sick family member, you should be prepared to provide medical certification as described below showing that the family member was ill and required care at home. Failure to provide acceptable documentation for an unscheduled absence may be the basis for charging the absence to AWOL.

4. All future requests for sick leave (or annual leave or leave without pay (LWOP) in lieu of sick leave) must be supported by a medical certificate as described below before the absence will be considered for approval. You must furnish the certificate by close of business no later than three days following the sick leave absence. Pending receipt of the certificate and approval of leave, your absence will be recorded as AWOL. While I reserve the right to request additional clarifying or supplemental information, a medical certificate must contain the following minimum information to be considered acceptable:

a. Your name.

b. A statement that you were incapacitated for duty and/or why reporting for duty was inadvisable, and the medical basis for that determination (e.g., tests, examination, etc.).

c. The nature of the incapacitation and the duration of the period of incapacitation. If you (or the person for whom you are providing care) are not examined on the first day of incapacitation, the medical practitioner must explain how he/she determined the incapacitation prior to the examination.

d. The medical practitioner's typed name, title, signature, address, telephone number, date(s) of office visit(s), and date of certificate.

5. Unless you have invoked your entitlement to coverage under the Family and Medical Leave Act (FMLA) or other leave entitlement program, I will only authorize accrued leave or LWOP if your services can be spared without detriment to the work performed in this office and if you have properly requested leave. You should be prepared to provide documentation supporting any request for LWOP, since that is not an earned leave category.

6. If you have a serious health condition that makes you unable to perform the essential functions of your positions you may qualify for certain protections under the FMLA, which entitles you to a total of up to twelve workweeks of unpaid leave during any twelve-month period. Under certain conditions, an employee may use the twelve weeks of FMLA leave intermittently. An employee may elect to substitute their annual leave and/or sick leave, consistent with current laws and OPM's regulations for using annual and sick leave, for any unpaid leave under the FMLA. If you wish to claim protections under the Family and Medical Leave Act, you should notify me of your intent to take family and medical leave. Here is a website with a synopsis of the Family and Medical Leave Act: <http://www.opm.gov/oca/leave/HTML/fmlafac2.asp>. The pertinent regulations and the form are on this website.

7. All leave requests, whether they are emergencies or made in advance, must be documented by means of the Automated Time Attendance and Production System (ATAAPS). For emergency leave requests, ATAAPS requests must be submitted to me on the day you return to work following the unscheduled absence if not already provided in conjunction with one of the requirements above. In requesting approval for an absence, you must specify if you are invoking your entitlement to FMLA or other leave entitlement program, if you have accrued leave to cover the absence and wish to use it, or if any part of the absence would be LWOP not covered by a leave entitlement program.

8. Annual leave and routine medical, dental, or optical appointments must be scheduled and approved at least fourteen days in advance of the day you wish to take leave.

9. I will not grant advance leave until you have demonstrated such reliable attendance that I am reasonably confident that you will be able to earn back any leave advanced to you.

10. Inasmuch as a record of poor attendance may be an indication of underlying problems, you may wish to utilize available counseling services. The [Fort Swampy] Employee Assistance Program (EAP) offers expert guidance and counseling for employees who may need assistance in dealing with problems affecting their work. Employees will not have their job security

jeopardized by their request for assistance, and the confidential nature of the program will be strictly preserved. If you feel that these services may be beneficial, you may contact the [Fort Swampy] EAP at (XXX) XXX-XXXX for further information or for an appointment.

11. As a federal employee, you are responsible for performing the official duties of your position and for conducting yourself in an appropriate manner. You are expected to report to work ready, willing, and able to perform the duties of your position. I am available to discuss this memorandum or to answer questions you may have about leave procedures. The primary responsibility for improvement rests with you. I emphasize that failure to comply with the provisions set forth in this memorandum may result in formal disciplinary action.

12. We remain concerned for your welfare and hope for your full recovery. We have an important mission to perform and your absences have had a demonstrated impact on that mission.

13. If you have any questions about leave entitlements, discipline, or other matters covered in this memorandum, you may contact [Sam Smith], Human Resources Specialist, [Fort Swampy] CPAC at (XXX) XXX-XXXX.

Respectfully,

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date



MEMORANDUM FOR XXXXXXXXXXXXXXXX

SUBJECT: Request for Medical Documentation

1. Reference Title 5, Code of Federal Regulations, Part 339—Medical Determinations Related to Employability.
2. **[NOTE: Here are some examples of possible lead-in sentences].** We are concerned about your welfare and the impact that your medical condition(s) may have on you and your performance of duties. The purpose of this memorandum is to inform you of the impact your absenteeism has had on mission accomplishment and to formally request substantive medical documentation in support of your absences. **OR** The purpose of this memorandum is to request additional information on the current status of your medical condition and to determine if accommodations can be made. **OR** The purpose of this memorandum is to request medical documentation to determine if you are able to perform the duties of your position.
3. **[NOTE: This is the background paragraph. Provide a background summary of the employee's past attendance record, any medical excuses/documentation they have provided, etc.].**
4. **[NOTE: You can modify this paragraph to suit your purpose. All the sentences can be edited or, if not true or relevant, deleted. Just remember to make sure the last sentence of this paragraph is used as a lead in before you ask for the medical info].** I am aware of the various medical problems you have experienced in the past. While I do not doubt the existence of your medical problems, I am concerned about the adverse impact your continuing absences are having on mission accomplishment. The uncertainty of when you will be able to work on a regular, full-time [part-time] basis makes it difficult to plan for long-range accomplishment of the work. I understand that you have indicated that you may have certain medical problems that may affect your ability to perform the essential duties of your position and may require accommodation. In order to fairly evaluate your ability to perform the essential duties of your position as a \_\_\_\_\_; and to clarify the medical reason for you staying out of the workplace, you are directed to have your physician(s) respond to the following and provide an assessment based upon their findings of your physical/functional capability.
5. The medical statement must contain the following minimum information to be considered acceptable:
  - a. Your name as the individual seeking medical care.
  - b. The specific medical condition(s) and the anticipated duration of those conditions and how they impact your performance of duties. This should include both a specific diagnosis and prognosis.

c. If your physician believes that an accommodation would allow you to perform the essential functions of your position, the accommodation(s) should be identified. Additionally, you can separately identify and request accommodations. Note that any requested accommodations will be reviewed by your supervisors to determine if the request is reasonable and will allow you to perform your essential functions.

d. The medical documentation should be on letterhead stationary and/or include the medical practitioner's typed/printed name, title, signature, address, telephone number, date(s) of office visit(s), and date of certificate.

6. Please know that I am available to discuss any employment or accommodation concerns with you. I assure you that I will work with you and subject matter experts to provide you with reasonable accommodations that are supported with appropriate medical documentation.

Respectfully,

Encl  
Position Description

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

Appendix C: Example Leave Restriction Notice in Conjunction with FMLA

MEMORANDUM FOR [Employee]

SUBJECT: FMLA Leave Restriction

1. Reference Memorandum dated XX Month XXXX, subject: Notice of Leave Restriction.
2. The purpose of this memorandum is to inform you of the impact of your Family Medical Leave Act (FMLA) request on the Notice of Leave Restriction referenced in paragraph 1. You must still follow the procedures laid out in the Notice of Leave Restriction for all absences from the workplace that are not directly related to illnesses identified on the WHS-380 form (XXXXXXX) dated XX Month XXXX, which you previously submitted.
3. The Notice of Leave Restriction does not apply to qualifying FMLA leave. During the provisional FMLA period and in the event FMLA leave is approved in the future, you must answer the following questions to me in advance of requesting leave:
  - a. Is the absence FMLA related?
  - b. Which illness is causing the absence?
  - c. What is the duration of the absence?
4. You must do this because you are requesting to take FMLA leave intermittently and for several different illnesses. In order for your leave to qualify under the FMLA (should you comply with the requirement to provide adequate medical documentation), you must tell us what illness you are claiming leave for as well as your desire that it be counted as FMLA leave. It is not enough to call and say you are taking FMLA leave. If you are not capable of communicating with me, you must have someone else call me. If there is no adult present who can call me, please call as soon as you awake. Please communicate with me as soon as possible to discuss your leave status.

Respectfully,

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

Appendix D: Example Request for Documentation under FMLA

MEMORANDUM FOR [Employee]

SUBJECT: Request for Medical Documentation—Family Medical Leave Act

1. Reference Title 5, Code of Federal Regulations (C.F.R.), Part 630, Family and Medical Leave.
2. The Army supports the granting of Family and Medical Leave Act (FMLA) requests. Unfortunately, your request of (date) fails to comply with the documentation requirements of the FMLA in that it does not provide sufficient information upon which the Army may base its decision to grant your request.
3. Under 5 C.F.R. 630.1208(a), an agency may require that a request for leave under the FMLA be supported by written medical certification issued by the health care provider. 5 C.F.R. 630.1208(b) lays out the required contents of that medical certification, which can be found at <https://www.govinfo.gov/content/pkg/CFR-2002-title5-vol1/xml/CFR-2002-title5-vol1-sec630-1208.xml>. I have enclosed Form WH-380e so that you and your health care provider may more easily conform with the requirements of the FMLA. You may also find a copy at <http://www.dol.gov/whd/forms/wh-380-e.pdf>. A copy of your position description is enclosed for your health care provider to review and to assist your provider to determine how your medical condition will affect your ability to perform all aspects of your job.
4. Finally, in accordance with 5 C.F.R. 630.1208(h), I request such medical certification, signed by the health care provider, be provided no later than fifteen calendar days after the date of this request for medical certification. I am granting you provisional leave pending receipt of adequate documentation by this deadline. Failure to supply acceptable medical certification, without providing an acceptable reason for why you cannot comply and requesting an approved extension, may result in disapproval of this leave.
5. Any information received from you will be evaluated in coordination with medical personnel of the Occupational Health Department of XXXXX Army Medical Hospital, [Fort Swampy]. Access to any information provided by you and your physician(s) will be restricted to those with a need for access, and all due care will be taken to preserve your privacy.

6. If you would like to discuss this matter, you can reach me at (XXX) XXX-XXXX and [email].

Respectfully,

2 Encls

1. Form WH-380e

2. Position Description

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

Appendix E: Example of an FMLA Notice Combined with a Voluntary Leave Transfer Notice

MEMORANDUM FOR XXXXXXXXXXXXXXXX

SUBJECT: Family and Medical Leave Act/Voluntary Leave Transfer Notice

1. You have requested leave without pay because of your continuing serious health conditions. There are numerous programs that are available that can help you through a period of serious illness.
2. [State what the issue is from management's perspective]. You have been out of the office on sick leave or annual leave for the purpose of illness for \_\_\_\_\_ days in 20XX and have represented that you will need \_\_\_\_\_ (what the employee is requesting).
3. If you have a serious health condition that makes you unable to perform the essential functions of your positions, you may qualify for certain protections under the Family and Medical Leave Act of 1993 (FMLA), which entitles you to a total of up to twelve workweeks of unpaid leave during any twelve-month period. Under certain conditions, an employee may use the twelve weeks of FMLA leave intermittently. An employee may elect to substitute their annual leave and/or sick leave, consistent with current laws and OPM's regulations for using annual and sick leave, for any unpaid leave under the FMLA. If you wish to claim protections under the FMLA, you should notify me of your intent to take family and medical leave. Here is a website with a synopsis of the Family and Medical Leave Act:  
<http://www.opm.gov/oca/leave/HTML/fmlafac2.asp>. The FMLA form is enclosed and can be found at <http://www.dol.gov/whd/forms/wh-380-e.pdf>. You must complete and provide this form to XXX within fifteen days of your request.
4. Secondly, I refer you to the regulations concerning the Leave Donation Program that can be found at <https://www.govinfo.gov/content/pkg/CFR-2019-title5-vol1/xml/CFR-2019-title5-vol1-part630.xml> (5 C.F.R. 630.901-630.913). The Voluntary Leave Transfer Program allows an employee who has a medical emergency to receive transferred annual leave directly from other employees in order to avoid being placed in a leave without pay situation. This allows an employee to continue to receive pay while recuperating from an emergency (whether it is their own or a family member's). Medical emergency means a medical condition of an employee or a family member of such employee that is likely to require an employee's absence from duty for a prolonged period of time and to result in a substantial loss of income to the employee because of the unavailability of paid leave. If you wish to request to receive leave under this program, you must make a written request and provide medical documentation of the medical emergency. You may use the OPM Form 630, available at [http://www.opm.gov/FORMS/PDF\\_FILL/opm630.pdf](http://www.opm.gov/FORMS/PDF_FILL/opm630.pdf)
5. For other rights related leave, please go to <http://www.opm.gov/oca/leave/> and <http://www.opm.gov/oca/leave/HTML/formindx.asp>.

6. It is my goal to assist you where possible. Please feel free to contact me at (XXX) XXX-XXXX and [email].

Respectfully,

Encl  
Form WH-380-E

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date

Appendix F: Reasonable Accommodations Counseling Checklist for Job Search

**Name:** \_\_\_\_\_ **Position:** \_\_\_\_\_

**REQUIRED DOCUMENTS**

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- \_\_\_\_\_ DHA Form 31 Request for Reasonable Accommodation
- \_\_\_\_\_ Supervisor Response to Request
- \_\_\_\_\_ Resume
- \_\_\_\_\_ Supporting Medical Documents (as needed)

**GENERAL ACKNOWLEDGMENT**

1. \_\_ I understand that I will be considered for current vacant positions within the XXXXXX, based on my request for reasonable accommodations.
2. \_\_ I understand that a job search will be conducted for approximately thirty days, beginning\_\_\_\_\_.
3. \_\_ I understand that I will only be considered for placement in positions that I am qualified for and that I am able to perform the essential functions of the duties with or without reasonable accommodations.
4. \_\_ I understand that I will be considered for positions at my current grade. At my discretion, I may make myself available for placement consideration for positions up to one grade lower than my current grade.
5. \_\_ I (do/do not) wish to be considered for lower graded positions.
6. \_\_ I understand that if placed in a lower-graded position, I may be eligible for pay retention, IAW DoDI 1400.25, Volume 536, Para 3(c)(5), based on placement due to a medical condition.
7. \_\_ I understand that I will only receive one offer of placement. Declination of that offer will end any further job search opportunity.
8. \_\_ I understand that after the thirty-day search, if XXXXXX is unable to identify a position for placement, I may be subject to removal due to medical inability to perform the essential duties of my current position.

\_\_\_\_\_  
**Employee's Signature** **Date**

\_\_\_\_\_  
**HR Specialist Signature** **Date**



## Appendix G: Example Return to Duty Notice

Dear [Employee Name]:

1. Background. This letter is to warn you that your continued excessive absences will no longer be tolerated. Over the past several years, you have demonstrated unreliable attendance and excess use of leave (a total of \_\_\_\_\_ hours (20XX) and \_\_\_\_\_ hours (20XX)). During 20XX, your leave record indicates that you used \_\_\_\_\_ hours of sick leave, \_\_\_\_\_ hours of annual leave, and \_\_\_\_\_ hours of leave without pay (LWOP) during 20XX (excluding the XXX hours of Family and Medical Leave Act of 1993 (FMLA) granted between [date] and [date]). This continuing pattern of excessive absences is having an adverse impact on mission accomplishment and is placing your continued employment with the Army in jeopardy.

2. [Detailed procedural history].

3. Employee Programs. On (date), your supervisor notified you of the numerous programs that are available to help you through a period of serious illness or to help you to perform the essential duties of your position and maintain your employment. These programs include:

a. Family Medical Leave Act (FMLA)—You invoked your entitlement for the FMLA for the twelve-month period from [date] to [date]. It is my understanding that you have used XXX hours of FMLA leave and that your FMLA leave entitlement for this year is exhausted.

b. Voluntary Leave Donation Program—It is my understanding that you are currently enrolled.

c. Reasonable accommodation—On [date], you were notified of your right to request a reasonable accommodation if you feel that you are a qualified employee and that there is a reasonable accommodation that would allow you to perform the essential duties of your position. A reasonable accommodation is a change in your work environment or in the way things are customarily done that would allow you to perform the essential duties of your position. [History—Requested/Approved/Denied].

4. Conclusion. The [agency] has demonstrated considerable patience in allowing you to resolve your various medical conditions. Despite these efforts, you have continued to have excessive absences in 20XX. This problem is compounded by the fact that these absences are unscheduled with no foreseeable end, making it virtually impossible for your supervisor to assign tasks to you or to have any confidence that you will be able to performed assigned tasks in a timely fashion. The [agency] requires that your position as a [specify position of record with specified organization] be filled by an employee who is available for duty on a regular full-time [part-time] basis. Your pattern of excessive absences has continued well beyond a reasonable time. Therefore, you are hereby notified that adverse action (up to including removal) may be taken unless you demonstrate regular attendance and are available for duty on a regular, full-time [part-time] basis in the future.

5. If you have questions regarding this memorandum, please feel free to contact me at (XXX) XXX-XXXX and [email].

Respectfully,

[Supervisor's Signature Block]

Receipt Acknowledged:

\_\_\_\_\_  
Employee Signature

\_\_\_\_\_  
Date



## **AROUND THE CORPS**

Members of the 82d Airborne Division's OSJA at Fort Bragg give the thumbs up to the jumpmaster shortly before jumping from a helicopter during an airborne operation. (Credit: Justin Case Konder)



(Credit: istockphoto.com/Good\_Stock)

# Closing Argument

## The FLSA Team Is Working

By Riva Parker

Since 2007, Army installations have found themselves on the receiving end of Fair Labor Standards Act (FLSA) “group grievances” filed by the same small law firm in Baltimore, Maryland. The FLSA provides minimum standards for wage and compensation, including overtime compensation, for employees in the United States.<sup>1</sup> These grievances—which are identical in all substantive respects, regardless of installation or Army activity where filed—allege that the Army incorrectly designated bargaining unit employees (BUEs) as exempt from the FLSA’s overtime provisions and failed to properly compensate employees for overtime worked.

These grievances do so without asserting a single fact—not one employee named as incorrectly exempted or paid under FLSA—and are usually immediately preceded or followed by a Request for Information (RFI), a statutory mechanism for obtaining information that allows unions to obtain information from agencies upon showing of a particularized need. These RFIs—usually exceeding twenty pages in length—demand extensive

documentation purportedly in support of the grievance, and demand production of time cards, evaluations, leave records, time and attendance records, travel records, etc.—for all bargaining unit employees (BUEs) on the installation, usually for the past six or seven years, or more. The number of BUEs on installations often exceeds 1,500, making complying with the RFI astronomically burdensome. The law firm uses this burden to try to extract very large settlements, often in the \$40–80 million range.

The Army was more vulnerable to this approach than the other services. Unlike the Air Force or Navy, the Army’s labor defensive function is decentralized, with most installations serviced by a single labor counselor (or, rarely, two) in the consolidated legal office. Although the union had the benefit of the same attorneys working and refining arguments in their legal briefs, the Army’s labor counselors were almost always new to the FLSA, responsible for a caseload of over sixty-plus matters (including quick-paced litigation before administrative boards), and had neither the time nor expe-

rience to respond to the union’s burdensome demands for “class action” type litigation without the procedural protections provided in class actions. Despite this, many Army labor counselors heroically staved off FLSA multi-million dollar settlements.

This was the context for the formation of the Office of The Judge Advocate General’s (OTJAG) Fair Labor Standards Act Team (FLSA Team). Reporting to OTJAG’s Director of Civilian Personnel, Labor and Employment Law, the FLSA Team consists of five attorneys whose full-time practice is to defend the Army against FLSA group grievances. Operating as a force multiplier, the FLSA Team works closely with the OSJA and the installation labor counselors to defend FLSA actions.

### FLSA Overtime Requirements

The FLSA’s overtime provisions presumptively apply to all employees in the United States, unless those employees are exempt under either the FLSA itself or another statute.<sup>2</sup> Employees who are not covered by the FLSA are designated “FLSA Exempt.”<sup>3</sup> This exemption status has no relation to their membership in the union, so an employee may be nonexempt, i.e., covered by the FLSA, but not in the union, and exempt employees may also be BUEs. Most federal employees are covered either by Title 5, United States Code (U.S.C.), or the FLSA’s overtime provisions.

There are two key differences between Title 5, U.S.C., and the FLSA that drive these boilerplate grievance claims: first, the FLSA entitles a nonexempt employee to overtime at one-and-a-half times their hourly rate of pay for all overtime worked,<sup>4</sup> including “suffered or permitted overtime” (SPOT)—namely, the time an employee works before or after their tour of duty, and/or during an unpaid lunch, when supervisors know about it and do not prevent it.<sup>5</sup> Moreover, a nonexempt employee is entitled to overtime pay unless they request—and the agency is willing to offer—compensatory time-off on an hour-for-hour basis.<sup>6</sup> By contrast, an exempt employee who is covered by Title 5, U.S.C., is only entitled to compensation for overtime officially ordered and approved, in writing, in advance, and the agency may elect to compensate with overtime pay or

compensatory time off.<sup>7</sup> Further, as a practical matter, the overtime hourly rate of pay for exempt employees is usually the same as their regular hourly rate of pay.<sup>8</sup>

Initially applicable to the private sector only, the FLSA entitles nonexempt employees who work more than forty hours a week to overtime pay at its higher rate, and provides a cause of action when employers fail to compensate appropriately for overtime worked.<sup>9</sup> However, the FLSA itself prohibits amorphous “class grievances” by requiring individual employees opt into any grievance brought on their behalf.<sup>10</sup> Congress expressly added this provision shortly after first enacting the statute, specifically to curtail group grievances unions immediately started bringing on behalf of unwitting and perhaps unwilling bargaining unit employees.<sup>11</sup>

These legislative kinks were worked out long before Congress extended the FLSA to cover nonexempt employees in the federal sector, so perhaps it shouldn't be surprising that this early history has been forgotten—or perhaps ignored—in the current world of federal labor arbitration. What is clear is that some arbitrators—perhaps driven by union brazenness and secure in the knowledge that arbitrator orders are rarely overturned on review—permit these group grievances to proceed to arbitration instead of dismissing the grievance as not arbitrable, as the agency always requests.

Once these grievances proceed to arbitration, the allegations are so unspecific and the claims so unwieldy that the arbitration proceedings themselves seem interminable. The Army is currently defending grievances at over sixteen installations. Several of these were filed as early as 2007. The number of grievances exceed three dozen. Only one has concluded by final award of the arbitrator, and that one resulted in a victory for the Army on all counts. The others, many into their second decade now, remain ongoing.

These proceedings appear interminable because the union, having been permitted to bring its boilerplate grievance on behalf of “all bargaining unit employees,” and without alleging a single fact or naming a single employee, then sits back and demands that the agency defend itself against unknown claims. It does so by improperly claiming that the agency is required to prove that every employee in the bargain-

ing unit designated as FLSA-exempt was properly designated, or else flip those employees to FLSA nonexempt and pay them back pay. In other words, the union seeks to shift the burden of proof of its exemption claim to the agency, relying on the Office of Personnel Management regulations that guide exemption determinations. However, exemption status is not an affirmative claim. In other words, the FLSA does not entitle anyone to be correctly designated as falling under its overtime provisions. Rather, the FLSA is a pay statute. Employees are entitled to FLSA overtime pay *unless* it can be shown that FLSA does not apply. Stated differently, exemption status is an affirmative defense, not an affirmative claim. The agency chooses whether to assert it, and makes this determination only when the affirmative defense applies to any of the affirmative claims brought by the union.

Using these arguments, the agency has successfully shifted the burden back to the union to prove its claims. Inevitably, when that happens, the union's ability to find witnesses to testify to rampant agency “wage theft” is limited. Having brought a claim on behalf of hundreds and sometimes over a thousand bargaining unit employees, the union can typically muster witnesses (with dubious claims) in the single digits.

Despite its relatively short existence, the FLSA Team is already delivering results for the Army. The FLSA Team secured the first arbitration award in an Army FLSA boilerplate grievance. The award resulted in the dismissal of the grievance without award of attorneys fees, and thus constitutes a total victory for the Army. Other grievances are on going, but notably, where previously the Army drew three new boilerplate grievances annually, no new boilerplate FLSA grievances have been filed against an Army activity since the Team's formation in 2017.

### How the FLSA Team Works

Legal offices under the qualifying authority of The Judge Advocate General are required to engage the FLSA Team when an FLSA issue arises, and Army Material Command and Corps of Engineers legal offices are invited to do so as well. The optimal approach is to engage the FLSA Team at the earliest stage possible—typically, at receipt of a grievance or RFI. Staff Judge Advocates and/

or labor counselors should contact OT-JAG Labor and Employment Division and forward a copy of the grievance or RFI, as well as the collective bargaining agreement. However, although better outcomes result from the earliest engagement, the FLSA Team is willing to enter an appearance at any stage. Although the FLSA Team utilizes a collaborative approach with local attorneys, the FLSA Team's subject matter expertise and experience with opposing counsel typically results in the FLSA Team attorneys assuming first chair responsibilities in the litigation and drafting of pleadings.

### Conclusion

Anytime a FLSA issue arises, the FLSA Team is ready and able to help address the issue. The FLSA Team has attorneys with a wealth of knowledge prepared to go to battle with anyone who files any grievance. The FLSA Team has been getting strong results for the Army and hopes to continue that trend. **TAL**

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*Ms. Riva Parker served as the Chief, Labor Counselor and Litigation Branch and FLSA Team, Office of The Judge Advocate General, Washington, D.C.*

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### Notes

1. *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/flsa> (last visited Jan. 22, 2020).
2. Title 38's more generous overtime provisions preempt Fair Labor Standards Act (FLSA) for employees paid under Title 38.
3. 29 U.S.C. § 213 (2020).
4. 29 U.S.C. § 207 (2020).
5. 29 C.F.R. § 785.11 (2020).
6. 5 C.F.R. § 551.531 (2020).
7. If the employee is covered by overtime provisions in another statute, for example, Title 38, different requirements may apply to overtime entitlements.
8. Title 5 does require that employees be paid the greater of their hourly rate of pay or one-and-a-half times the hourly rate of a GS-10 Step 1. However, as a practical matter, most positions that are designated as FLSA-exempt are graded GS-13 or higher, so usually an exempt employee's overtime rate of pay is the same as their regular rate of pay.
9. 29 U.S.C. § 201 (2020).
10. 29 U.S.C. § 216(b) (2020).
11. See *Arrington v. National Broad Co.*, 531 F. Supp. 498, 500-01 (D.D.C. 1982); see also *Cameron-Grant v. Maxim Healthcare Services*, 347 F.3d 1240, 1248 (11th Cir. 2003).



## AROUND THE CORPS

Judge advocate MAJ John Policastro points to a Named Area of Interest on a map board during a training exercise in Grafenwoehr, Germany, last fall. (Credit: Stefan Hobmaier/AP)



## AROUND THE CORPS

Soldiers participating in an airborne operation at Fort Bragg, including members of the 82d Airborne Division's OSJA, head toward a helicopter. (Credit: Justin Kase Conder/AP)



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