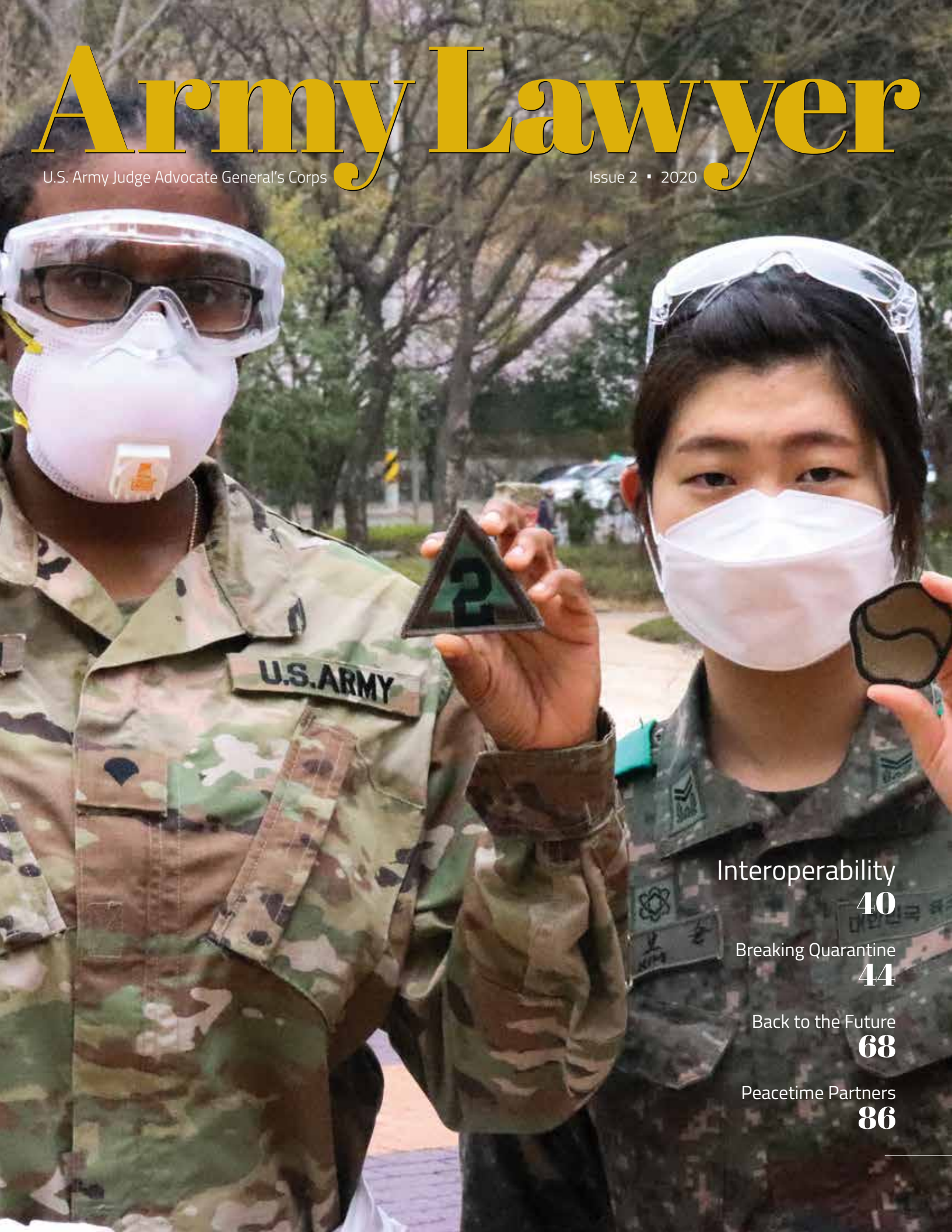
Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 2 ▪ 2020



AROUND THE CORPS

U.S. Army SGT Tykisha Teal, a transport operator with the 1229th Transportation Company, Maryland Army National Guard, speaks to a JAG Corps representative at the MDNG's joint reception, staging, onward movement and integration station at the Dundalk Readiness Center in Dundalk, Maryland. (Credit: SGT Elizabeth Scott/U.S. Army National Guard)

Army Lawyer

Editorial Board

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

On the cover: U.S. and Republic of Korea Army Soldiers pose with each other's unit patches during a patch exchange in Daegu, Republic of Korea, in March. The Soldiers were supporting a joint disinfecting operation in the midst of the COVID-19 outbreak. (Credit: SPC Hayden Hallman, 20th Public Affairs Detachment)

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LTG Charles Pede, The Judge Advocate General, and his British counterpart, Maj Gen Alexander Taylor, dine together at the Military Formal event during the WWCLE in September 2019.

Court Is Assembled

Transatlantic Partnership

British Army Legal Services and the U.S. Army Judge Advocate General's Corps

By Major General Alexander Taylor

It is a tremendous honor to be asked to pen this article for this edition of the ***Army Lawyer***. As Director-General, British Army Legal Services, I am hugely grateful for the opportunity to reflect upon the extraordinarily close relationship enjoyed between the Army Legal Services (ALS) and the United States (U.S.) Army Judge Advocate General's (JAG) Corps. It is a relationship which is incredibly precious to me; from a personal and professional perspective, indeed, returning to The Judge Advocate General's Legal Center and School, and Charlottesville, felt like coming home.

It was only a few months ago, on the seventy-fifth anniversary of the start of *Operation Market Garden* that I was able to offer a few brief thoughts to the JAG Corps's 2019 Worldwide Continuing Legal Education course on the question of interoperability. It is a principle as important and relevant in the twenty-first century as it was to the Soldiers of the British 1st and U.S. 82d and

101st Airborne Divisions on the morning of 17 September 1944 as they left the Airfields of Ramsbury, Membury, and Cottesmore.

It is perhaps axiomatic to suggest that coalition operations are the reality of the battlefields of the future across the globe. The principle is acknowledged in both the United Kingdom's National Security Strategy through our approach of being "international by design" and by the United States National Defence Strategy with the importance of strengthening alliances and partnership, being one of only four lines of effort in the U.S. Army Strategy. Indeed, principles of interoperability are deeply embedded in national defence strategies of many states and remain the organising principle around. It is also the principles, on which the North Atlantic Treaty Organisation (NATO) is founded, which themselves enjoyed a seventieth birthday very recently.

While, traditionally, our armies have thought about interoperability in technical terms, such as the ways in which our equipment physically operates together, I believe that true interoperability depends on much more. It must incorporate a true understanding of our international partners, their ethos, history, and culture. Perhaps the "why" behind the way they organise and operate. It is these so called "soft" interoperability considerations that are central to our ability to stand shoulder-to-shoulder on the battlefield as trusted and predictable allies and partners.

For legal officers, such understanding should be forged by first-hand experience—whether through exercise or on operations. The combat operations that marked the first decade of the twenty-first century offered an unparalleled opportunity for allied legal advisors to work closely together and to better understand the legal capabilities and nuances that each coalition partner brought to bear. As these operations have morphed into smaller commitments, our opportunities to achieve this understanding at scale have also diminished.

Recognising this challenge, I have focused one of my three overarching lines of development within ALS on finding ways to preserve and improve our ability to provide legal interoperability. I am delighted that this intent is mirrored within the JAG Corps. To turn words into action, we have initiated an ALS-JAG Corps Interoperability Committee to coordinate and cohere our bilateral interoperability efforts. The inaugural meeting held at the one-star level occurred in the resplendent surroundings of the Naval and Military Club in St. James Square, London, at the end of January. This will precipitate a pilot program that integrates ALS officers into U.S. exercises and JAG Corps officers into British Army exercises. We are also working on an exciting proposition to expand the Military Personnel Exchange Program to include an exchange of ALS and JAG Corps officers between III Corps and 3d (U.K.) Division.

Paratroopers from 1st Battalion, 508th Parachute Infantry Regiment conduct a training patrol alongside British paratroopers of 2PARA, 16 Air Assault Brigade in Kenya. (Credit: Spc. John Lytle)

My most strident hope is that we foster a culture amongst our legal officers that instinctively considers international interoperability in all that we do

Through all these efforts, my most strident hope is that we foster a culture amongst our legal officers that instinctively considers international interoperability in all that we do. In this way, I believe, ALS and JAG Corps officers can help unlock the full potential of our armies' combined efforts in barracks and on operations. In doing so, we must also be able to advise our commanders on both the legal limitations of coalition members and on the ways that allied legal frameworks might mitigate our own legal constraints.

As I hope you will read throughout this issue, interoperability remains a "Golden Thread" running through all aspects of practical operational law. It is one that legal advisors at all levels, across all our allied and partner nations, must continue to hold dear. **TAL**

Maj Gen Taylor is the Director General, Army Legal Services, United Kingdom.

News & Notes

Photo 1: Captain Chelsea Kim (second from left), an XVIII ABN Corps Legal Assistance Attorney, was a member of the All-Army Women's team that finished first in the 10k at the U.S. Track and Field Cross-Country Championship. Captain Kim ran the race in 41.07, finishing twenty-fourth overall.

Photo 2: Major General Evans, Commanding General, U.S. Army Cadet Command and Fort Knox, Mrs. Katherine Flowers, the tax center officer-in-charge, SFC Angel Tovar, tax center noncomissioned officer-in-charge, along with members of the tax center team, cut the ribbon at the Fort Knox Tax Center grand opening on 22 January 2020. Last year, the Fort Knox Tax Center prepared nearly 4,000 returns, served almost 2,000 client, generated over $4.3 million in tax refunds, and saved approximately $680k in tax preparation fees!

Photo 3: On 31 January 2020, Mr. Toland, Command Counsel, U.S. Army Materiel Command, hosted the retirement ceremony for Mr. John German. Mr. German was the primary subject matter expert on environmental compliance and restoration issues for U.S. Army Materiel Command, and was widely recognized as an environmental law expert by the Office of The Judge Advocate General and the Department of the Army. The ceremony officially recognized Mr. German's forty-year career as a judge advocate and civilian environmental law attorney, and included his wife, Janet, and many retired staff judge advocates, colleagues, and friends.

Photo 4: On 18 December 2019, the United States Army Recruiting Command Leadership (Major General Frank Muth, CW5 Troy DeGolyer, and CSM Tabitha Gavia), represented the command in publicly recognizing and thanking Ms. Kathy Veith for her forty years of service to the United States Army. Ms. Veith is a consummate professional and always brings a spark of joy to the office.

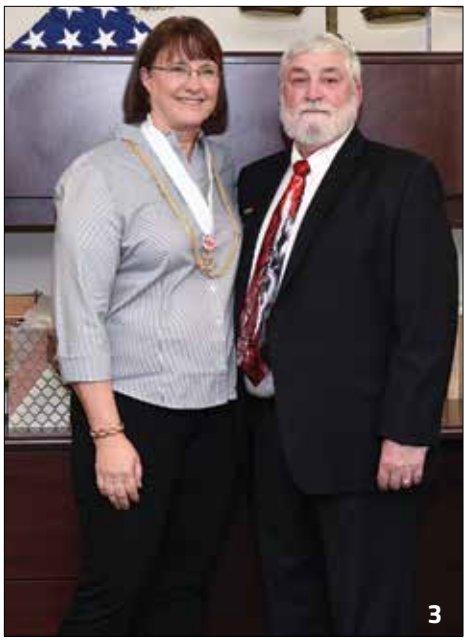


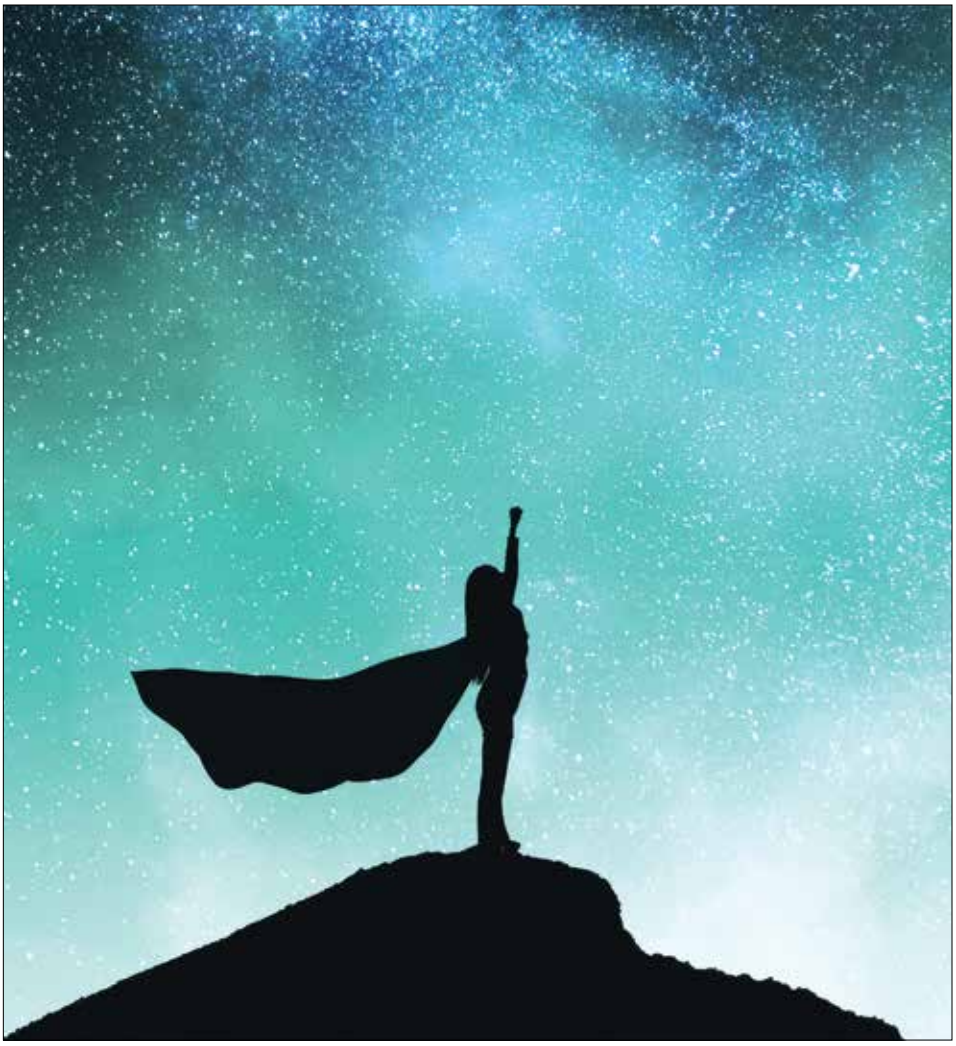
Photo 5: On 30 January 2020, SPC Djaunae Lewis, paralegal specialist for 101st Special Troops Battalion, 101st Sustainment Brigade "Lifeliners," graduated from Basic Leader Course at Fort Campbell, Kentucky. Specialist Lewis is a tremendous representative of the 101st Sustainment Brigade and the 101st Airborne Division (Air Assault).

Photo 6: From 7-9 January 2020, the 10th Mountain Division (LI) Office of the Staff Judge Advocate (OSJA) hosted the Operation Freedom's Sentinel (OFS)/Resolute Support Pre-Deployment Training. Special guests included COL Joseph Fairfield, USFOR-A SJA & RS Senior LEGAD, Col Stacey J. Vetter, incoming SOJTF-A SJA (Air Force), LTC Patrick McGrath, Chief, Ad Law, OFS OSJA, our partners from the 7th LOD, and Mr. Douglas A. Dribben, Attorney Advisor, U.S. Army Claims Service.

Photo 7: Captain Luke Webster, New Hampshire National Guard, and LTC Ruth Cresenzo, North Carolina National Guard, participated in the National Guard Bureau's Central and East Regional Biathlon Competition at Camp Ripley, Minnesota, from 13-19 January 2020. Captain Webster took third place in the novice category with the New Hampshire team, and LTC Cresenzo, who brought a team from the Virgin Islands National Guard, placed second in the women's masters category.

Photo 8: The 335th Signal Command (T)(P) Office of the Center Judge Advocate representing the Judge Advocate General's Corps during the Martin Luther King Jr. 5k at Camp Arifjan, Kuwait. From left to right: SPC Kevin Rodriguez, PFC Kadeem Gadson, LTC Rod O'Connor, CPT Joseph Colston, PV2 Aaron Richard, SFC Pamela Ayaay, SPC Justin Vanwert, PV2 Logan Harrel.

Photo 9: After much competition and demonstrating his knowledge of both Army and paralegal related topics, SPC Mark Halstead recently won the 1st Cavalry Division's Paralegal/NCO Quarter Board on 24 January 2020.



(Credit: istockphoto.com/peshkov)

Azimuth Check

The Power of Deliberate Leader Presence

By Colonel Jerrett W. Dunlap Jr.

> I firmly determined that my mannerisms and speech in public would always reflect the cheerful certainty of victory—that any pessimism and discouragement I might ever feel would be reserved for my pillow. To translate this conviction into tangible results, I adopted a policy of circulating through the whole force to the full limit imposed by physical considerations. I did my best to meet everyone from general to private with a smile, a pat on the back and a definite interest in his problems.[1]
>
> —General Dwight D. Eisenhower

Like a window to our soul, leader presence is the external display of a leader's internal attributes, like character, humility, empathy, discipline, and intellect. "Presence represents who leaders are and what they stand for."[2] Effective leader presence is essential to demonstrating how a leader expects subordinates to carry themselves. Yet, subordinates are sure to sense when a leader attempts to portray themselves as something they are not.[3]

Effective leader presence is rooted in the following attributes: military and professional bearing, fitness, confidence, and resilience.[4] These attributes are the foundation for how others perceive a leader's actions, words, demeanor, and appearance.[5] Developing an effective leader presence is not a destination to be reached, but rather a lifelong journey of continually assessing our internal attributes—who we are—and comparing it with the attributes we display externally. Self-awareness, humility,[6] and selflessness are vital for lifelong improvement in all attributes, including leader presence. By exploring examples of military and professional bearing, fitness, confidence, and resilience, we can all improve our ability to demonstrate leader presence.

Military and Professional Bearing

Military bearing has been at the foundation of leader presence in the Army since before its establishment in 1775. George Washington's military bearing made him the obvious choice to command the Continental Army. As Joseph Ellis notes in *His Excellency,* "[i]n fact . . . more delegates could agree that Washington should lead the American army than that there should be an American army at all."[7] Benjamin Rush said General Washington "had so much martial dignity in his deportment that you would distinguish him to be a general and a soldier from among ten thousand people."[8] Washington's physicality, humility, reserve, and customary silence, together with his military experience (he was the only delegate to attend in uniform), resulted in his unanimous selection.

In addition to his natural gifts, General Washington spent much of his life developing and improving his presence through careful study of subjects ranging from

his *Rules of Civility and Decent Behavior In Company and Conversation*,[9] agriculture, and of course numerous military texts. But most importantly, he subjected himself to "rigorously realistic assessments during [] intense moment[s] of self-evaluation in which he was mercilessly honest."[10] General Washington's presence, in particular his military and professional bearing, lay at the foundation in him becoming the indispensable man of the American Revolution.

Today, military and professional bearing is expected of all Army members and is necessary to build credibility. It reinforces military structure and supports good order and discipline. Military and professional bearing is an important part of demonstrating character, competence, and commitment to the Army.[11] It is also indispensable for a leader to set the example and uphold standards, by projecting a professional image of authority.

Fitness

Fit and healthy leaders are a clear source of motivation when they challenge subordinates to follow their example.[12] They are also in a better position to meet the physical demands of leadership. While physical fitness and readiness are crucial for success in battle, all members of the Army team must be ready in all environments.[13]

Long before taking command of the U.S. Army Legal Services Agency, Brigadier General Susan Escallier demonstrated the important role fitness plays in leader presence. In 1998, then-Captain (CPT) Escallier was serving as the first female trial counsel for the 505th Parachute Infantry Regiment, 82d Airborne Division. While walking through a barracks on her way to teach a class to a company of paratroopers, CPT Escallier smelled a pungent odor. She suspected the odor may have been marijuana, so she promptly investigated. Soon, she was eye-to-eye with a paratrooper who was in the act of violating Article 112a, Uniform Code of Military Justice.[14] Captain Escallier ordered the Soldier to stop, but he immediately ran. An exceptionally fit, accomplished distance runner, CPT Escallier pursued the paratrooper. After an extensive chase across Fort Bragg, the paratrooper eventually recognized that he could not shake CPT Escallier, so he raised his hands and surrendered to her. While the company was initially upset that CPT Escallier was late for the training, her credibility and presence was unrivaled once they learned she ran down a fleeing paratrooper to enforce good order and discipline.

Confidence and Resilience

The final attributes associated with leader presence are confidence and resilience.[15] The confidence of a leader can be contagious when accompanied by professional competence tempered with humility, as well as an appropriate sense of human limitations. The composure and outward calm of a confident leader reduces anxiety within a unit and promotes optimism. Just as important, resilience allows leaders and their organizations to endure and overcome adversity.[16] As leaders and their teams successfully endure hardship, they build confidence and resilience, becoming a cohesive team.

Theodore Roosevelt is an inspiring example of resilience and confidence. As a young politician in the New York State legislature in Albany, Roosevelt learned of the birth of his first child, Alice. He rushed home to learn that his wife and mother were both dying. The two most important women in his life both died on 14 February 1884, causing him to write in his journal: "The light has gone out of my life."[17] Roosevelt tried to deal with his grief by burying himself in his work. "It is a grim and evil fate, but I have never believed it did any good to flinch or yield for any blow, nor does it lighten the blow to cease from working."[18] Eventually, Roosevelt went cattle ranching in the North Dakota Badlands where he would transform himself from a New York city slicker, in relatively poor health, into a rugged cowboy, gaining thirty pounds of muscle. As remarkable as his physical transformation, his ability to overcome his depression is more noteworthy. "Black care rarely sits behind a rider whose pace is fast enough," described his approach to building resiliency.[19] His transformation into a supremely confident, resilient leader clearly demonstrated what Roosevelt stood for as he became a fearless reformer, Rough Rider, and future U.S. President.

These examples unmistakably demonstrate how military and professional bearing, fitness, confidence, and resilience are essential aspects of effective leader presence.[20] As we carefully assess and deliberately transform our presence as leaders, we can improve our ability to show effective leader presence consistent with the attributes that embody what we stand for. **TAL**

COL Dunlap is currently assigned as the Dean of The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, VA.

Notes

1. Fred Greenstein, The Presidential Difference: Leadership Style from Roosevelt to Clinton 49 (2000).

2. U.S. Dep't of Army, Doctrine Pub. 6-22, Army Leadership and the Profession para. 3-1 (25 Nov. 2019) [hereinafter ADP 6-22].

3. *Id.* para. 3-1.

4. *Id.*

5. *See id.* para. 3-3.

6. Subordinates want their leaders to be successful and do not expect perfection. When a leader is willing to risk embarrassment to learn something new or shares in a hardship, the subordinate's respect for the leader will only increase. *See id.* para. 3-1.

7. Joseph J. Ellis, His Excellency: George Washington 69 (2004).

8. *Id.*

9. George Washington, Rules of Civility & Decent Behavior in Company and Conversation: A Book of Etiquette 1 (1971).

10. Ellis, *supra* note 7, at 69.

11. *See* ADP 6-22, *supra* note 2, para. 3-3.

12. *See id.* para. 3-2.

13. *See id.*

14. UCMJ art. 112a (2018).

15. *See* ADP 6-22, *supra* note 2, paras. 3-2, 3-3.

16. *See id.* para. 3-2.

17. Doris Kearns Goodwin, Leadership in Turbulent Times 124 (2018).

18. *Id.* at 125.

19. *Id.* at 128.

20. *See* ADP 6-22, *supra* note 2, para. 3-1.

Arlington National Cemetery.

Lore of the Corps

Members of the Regiment Interred in Arlington National Cemetery

By Fred L. Borch III

Situated on a wooded hillside across the Potomac River from Washington, D.C., Arlington National Cemetery (ANC) is one of America's most revered shrines. Remains of veterans from every U.S. war from the American Revolution to the present conflicts in Afghanistan and Iraq are interred in the cemetery.

The graveyard was established in 1864 on the estate of Confederate General Robert E. Lee. Union Army Quartermaster General Montgomery Meigs chose Lee's property as the cemetery's site as retribution for Lee's "treasonous act" of resigning his U.S. Army commission and joining the Confederacy.[1] Today, more than 400,000 men, women, and children are buried in the ANC.[2] Funerals, including interments and inurnments (burial of cremated remains), average between twenty-seven to thirty daily.[3] This means that ANC carries out nearly 7,000 burials every year.

Thousands and thousands of Americans visit ANC each year to see the Tomb of the Unknown Soldier and visit President John F. Kennedy's grave (and those of his wife, Jacqueline, and his brothers, Senators Robert F. "Bobby" and Edward "Teddy" Kennedy, who are buried nearby). They also may see the headstones of 396 recipients of the Medal of Honor, like Gregory "Pappy" Boyington, the famous Marine aviator whose memoir, *Baa Baa Black Sheep*[4] later became a popular

television series. Two Operation Iraqi Freedom Medal of Honor recipients also are interred in ANC, as well as other U.S. military personnel from all branches who were killed in action in Afghanistan and Iraq.[5]

The Judge Advocate General (TJAG) and the Deputy Judge Advocate General (DJAG) visit ANC several times a month to honor those buried there—especially those men and women with connections to the Corps. What follows (in alphabetical order) are brief biographical sketches and photographs of sixteen headstones belonging to individuals who have served in the Regiment. The headstone's site location in the ANC accompanies each of the sixteen entries.

BRANNON, Ernest Michael
Section 11, Site 612-1[6]
Born in Ocoee, Florida, on 21 December 1895, "Mike" Brannon entered the U.S. Military Academy in 1917. Following an accelerated graduation from West Point in 1918, Brannon commissioned as a second lieutenant but, when the Armistice occurred just months later, he and his classmates returned to West Point for another year as student officers.

After five years as an Infantry officer, Brannon was detailed to Columbia University to pursue a course of instruction in its law school but, before he could complete his studies, Brannon was transferred to the law department at West Point to serve as an instructor. In 1930, then-Captain (CPT) Brannon was detailed to the Judge Advocate General's Department (JAGD), and returned to Columbia to resume his law studies. He obtained his LL.B. in 1931.

Brannon then served in a variety of legal assignments, including: Assistant Staff Judge Advocate (ASJA), II Corps, Governors Island, New York; Chief of Contracts, Office of The Judge Advocate General (OTJAG); Judge Advocate, First U.S. Army; Staff Judge Advocate (SJA), Fort Jackson, South Carolina; SJA, Fort Benning, Georgia; and Procurement Judge Advocate, Headquarters, Army Service Forces. Major General Mike Brannon served as TJAG from 1950 to 1954, and faced three significant challenges during this tour of duty: increased Cold War tensions in Europe; implementation of the newly enacted Uniform Code of Military Justice (UCMJ) during combat in Korea; and re-establishment of The Judge Advocate General's School, U.S. Army (TJAGSA) after its 1946 de-activation.


MG Ernest Michael Brannon.


MG Arthur Winton Brown (shown here as a colonel).

BROWN, Arthur Winton
Section 2, Site E-153-RH[7]
Born in Davenport, Iowa, on 9 November 1873, Arthur W. Brown received his LL.B. from Cornell University Law School in 1897. When the United States declared war on Spain in 1898, Brown enlisted in the Utah Light Artillery and served as a private, corporal, and sergeant in the Philippine Islands.

In January 1900, Brown commissioned as an infantry second lieutenant in the Regular Army and was still wearing crossed-rifles on his collar when he served as the acting judge advocate of the U.S. Expeditionary Forces at Vera Cruz, Mexico, in 1914. Two years later, then-CPT Brown obtained a commission as a major (MAJ) in the JAGD and, after a short time in Washington, D.C., MAJ Brown sailed for France as the judge advocate for the 78th Division.

Soon after joining Pershing's American Expeditionary Force, Colonel (COL) Brown was appointed as the Judge Advocate, Third Army. He subsequently participated in the Aisne-Marne, Oise-Aisne, and Meuse-Argonne engagements, and later served as the Chief Claims Officer, Rents, Requisitions and Claims Service in France and Germany.

Colonel Brown returned to the United States in 1920 and, after only a few weeks in OTJAG, was sent to Panama to assume duties as the Department Judge Advocate, Panama Canal Department. After three years in this position, Brown served in a variety of legal jobs until he was appointed as TJAG in February 1934. Major General Brown retired in 1937 and died on 3 January 1958 in St Petersburg, Florida.

CRAMER, Myron Cady
Section 2, Site 1220-3[8]
Major General Cramer served as TJAG from 1941 to 1945. During his tenure, the JAGD underwent an unprecedented expansion in personnel—from 190 to more than 2,162.[9] Judge advocates who served with Cramer also tackled legal and policy issues not previously faced by Army lawyers, including the imposition of martial law in the Hawaiian islands and the creation and staffing of the first-ever TJAGSA at the University of Michigan in Ann Arbor.

Born in Portland, Connecticut, on 6 November 1881, Myron Cramer obtained an undergraduate degree from Wesleyan University and his law degree from Harvard. He then practiced law in New York City before moving to Tacoma, Washington, where he engaged in the general practice of law.

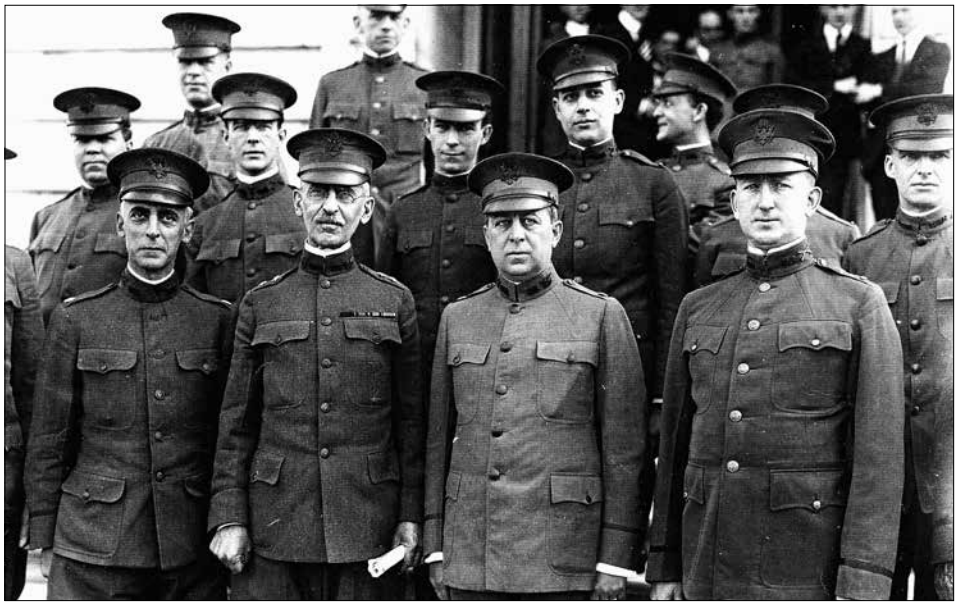
In 1911, Cramer began his Army career when he enlisted in the Washington

National Guard as a private. Shortly thereafter, he commissioned as a second lieutenant of the cavalry and, when Soldiers from his National Guard unit were mobilized for service on the border with Mexico in 1916, Cramer went with them. When the United States entered World War I in April 1917, Cramer was again federalized and went overseas in January 1918 as a captain with the 41st Division. He returned to the United States as a lieutenant colonel in July 1919.

Myron Cramer missed soldiering, and so he applied for a commission as a judge advocate. In July 1920, he was offered an appointment as a Regular Army major in the JAGD, which he quickly accepted. Major Cramer subsequently served as the judge advocate for both the 3d and 4th Divisions, then located at Fort Lewis, Washington. He also served as an assistant professor of law at West Point and as a judge advocate in the Philippine Department in Manila. Then-COL Cramer was serving as the Chief, Contracts Division, OTJAG, when he was selected to be TJAG. He made history early in his career as TJAG when, in concert with U.S. Attorney General Francis Biddle, Cramer prosecuted German U-boat saboteurs at a military commission, becoming the first TJAG since the Civil War to prosecute this type of tribunal.[10]

After retiring in 1945, Major General Cramer was recalled to active duty to serve as the lone American judge on the eleven-nation International Military Tribunal, Far East in Tokyo. He returned to civilian life in 1949 and resumed the private practice of law in Washington, D.C. Myron C. Cramer died on 25 March 1966 at the age of eighty-four years old.[11]

MG Myron Cady Cramer, circa 1941 (right).



MG Enoch Herbert Crowder (bottom row, 2nd from left).

CROWDER, Enoch Herbert
Section SPEC: 18[12]
The Army Lawyer recently published two articles with much detail about Major General Crowder's life and career;[13] thus, the information that follows is brief. Born in a log cabin in Missouri in 1859, "Bert" Crowder obtained an appointment to West Point in 1877. After graduating and commissioning into the cavalry, he served in a variety of locations and assignments. He studied law while stationed in Texas and passed the bar in 1884. Crowder did not join the JAGD until 1891. He then served in a variety of important assignments, including serving as a judge on the Philippine supreme court. Crowder was promoted to major general and assumed duties as the Judge Advocate General (tJAG) in 1911. During World War I, he also was the Army's Provost Marshal General and was in charge of implementing the newly enacted Selective Service Act, the first draft since the Civil War.

After retiring in 1923, Crowder was appointed as the first U.S. ambassador to Cuba, a post he held until 1927. Crowder died in Chicago, Illinois, in 1932.[14]

GILMORE, Cornell Winston
Section 60, Site 8131[15]
Sergeant Major Gilmore, then serving as the Regimental Sergeant Major of the Corps, was killed in action on 7 November 2003. He was participating in an Article 6 inspection with TJAG Tom Romig when the helicopter in which Gilmore was a passenger was shot down by either a

surface-to-air missile or rocket propelled grenade over Tikrit, Iraq.

A native of Baltimore, Maryland, Cornell "Gil" Gilmore graduated from the University of Maryland in 1980 with a B.S. in sociology. After enlisting in the Army in 1981, and qualifying as a legal specialist, Gilmore served in a variety of assignments and locations, including: 5th Combat Aviation Battalion, Fort Polk, Louisiana; 3d Squadron, 12th Cavalry, Germany; U.S. Disciplinary Barracks, Fort Leavenworth, Kansas; 1st Armored Division, Germany; 3d Infantry Division, Germany; 25th Infantry Division, Hawaii; and I Corps, Fort Lewis, Washington.

Sergeant Major Gilmore is the highest decorated noncommissioned officer in the history of the JAG Corps; he was awarded a posthumous Distinguished Service Medal for his exceptionally meritorious service in a position of great responsibility in November 2003.

SGM Cornell Winston Gilmore.

MG Alton H. Harvey.

HARVEY, Alton H.

Section 60, Site 813[16]

Major General "Al" Harvey served as TJAG from 1979 to 1981. Born in McComb, Mississippi, on 11 April 1932, Harvey enlisted in the Army in January 1951. He served with distinction as an infantryman during the Korean War, receiving the Bronze Star Medal with V for Valor device, Purple Heart, and Combat Infantryman Badge. He was a senior parachutist and also Ranger qualified.

After leaving active duty, Harvey earned his undergraduate and law degrees from the University of Mississippi. He then returned to active duty in the JAG Corps in 1958. He subsequently served in various judge advocate assignments, including overseas in both Thailand and Vietnam. After retiring in 1981, Major General Harvey became the Dean of the Mississippi College of Law. He retired from this position in 1991. Harvey died in Fort Myers, Florida, on 23 April 2005.

HODSON, Kenneth Joe

Section 3, Site 1374-B[17]

An immensely popular officer who served as a judge advocate in Europe in World War II, Major General Hodson was TJAG from 1967 to 1971. He was one of the principal authors of the Military Justice Act of 1968.

Born in Kansas on 27 April 1913, "Ken" Hodson earned his undergraduate and law degrees from the University of Kansas in 1935 and 1937, respectively. He then practice law in Jackson, Wyoming, until 1941, when he was ordered to active duty.

Hodson joined the Army in 1934, when he commissioned as a second lieutenant of artillery in the Officers' Reserve Corps. He subsequently served as a battery motor officer, battery commander, and assistant inspector general with various units.

In September 1942, Hodson transferred to the JAGD and assumed duties as the Assistant Judge Advocate, Trinidad Sector and Base Command. Two years later, now-MAJ Hodson was the Judge Advocate of the 52d Medium Port at Fort Hamilton, New York. The following year, he sailed for France, where he assumed duties as Assistant Judge Advocate, Normandy Base Section. Major Hodson finished World War II as the ASJA, U.S. Constabulary.

After returning to the United States in 1948, Hodson served in a number of assignments and locations. His specialty was military justice, and he wrote the procedural chapters of the 1951 *Manual for Courts-Martial* after Congress enacted the UCMJ in 1950. Hodson would later serve as the Chief of OTJAG's Military Justice Division. Due to his expertise in criminal

MG Kenneth Joe Hodson, circa 1967.

law, every year at The Judge Advocate General's Legal Center and School (TJAGLCS) there is a lecture in his honor.

After assuming duties as TJAG in July 1967, Major General Hodson was the Defense Department's congressional liaison to Senator Sam Ervin's Subcommittee on Constitutional Rights, which was developing legislation that would amend the UCMJ. The "enlightened military leadership" of General Hodson was critical to both the formulation of this legislation and its ultimate passage as the Military Justice Act of 1968.

After retiring in 1971, Hodson was immediately recalled to active duty to serve as the Chief Judge, U.S. Court of Military Review (today's Army Court of Criminal Appeals). He was the first general officer to serve in that appellate judicial capacity and, while Major General Hodson was in that position, the Corps had an unprecedented three major generals on active duty. Ken Hodson died on 11 November 1995.

Today, the American Bar Association (ABA) honors Hodson's distinguished public service career with its "Hodson Award," which recognizes sustained outstanding service or a specific extraordinary accomplishment by a government or public sector law office. Major General Hodson had previously served as the Chairman of the ABA's Committee on Criminal Justice Standards.

MG Hubert Don Hoover.

COL Edward Hunter's gravestone.

HOOVER, Hubert Donald

Section 30, Site 1093-A[18]

Born in Bedford, Iowa, on 15 October 1897, Hubert Hoover earned an LL.B. and J.D. from the University of California and, after passing the California bar in 1911, practiced law in Los Angeles as a member of the Law Firm of Manning, Thompson & Hoover.

He joined the Army in August 1917 as an infantry Reserve lieutenant and then served as the judge advocate for the 91st Division from October 1917 until the end of World War I. Having obtained a commission as a captain in the JAGD in June 1918, Hoover remained in the Army in the 1920s and 1930s.

During World War II, then-COL Hoover served first in Washington before deploying to Algeria, North Africa, in 1943 to assume duties as the Assistant Judge Advocate, Branch Office of the Judge Advocate General, Mediterranean Theater of Operations, U.S. Army. When the branch office moved from Algeria to Italy, Hoover went with it; he finished the war in Naples, Italy. Returning to Washington, he served on the War Department's clemency board before being promoted to major general and assuming duties as The Assistant Judge Advocate General (today's DJAG). Hoover retired in 1948. When he died at the age of eighty-three, he was living in Silver Spring, Maryland.

HUNTER, Edward

Section E-2, Site 1006[19]

Born in Gardiner, Maine, on 22 November 1839, COL Edward Hunter graduated from the U.S. Military Academy in 1865. He spent his early years in the 12th Infantry Regiment and took part in military operations against the Cheyenne, Arapahoe, Kiowa, Comanche, and Nez Perce.

After a promotion to captain in 1880, Hunter transferred to Fort Walla Walla, Washington, Territory (now the city of Walla Walla, Washington). After a short tour in Washington, D.C., as an examiner of claims arising out of the Civil War, CPT Hunter returned to the Department of California in San Francisco. He first served as adjutant of the 12th Infantry Regiment before transferring to the 1st Cavalry Regiment and assuming duties as its quartermaster and adjutant.

After reading law while serving in California, and passing the California bar in 1888, Hunter commissioned as a major in the JAGD. In 1895, Lieutenant Colonel (LTC) Hunter transferred to the Department of Dakota at Fort Snelling, Minnesota. When the United States declared war on Spain in 1898, Hunter deployed to Puerto Rico, where he served as the judge advocate to General John R. Brooke. A Civil War veteran who had fought at Antietam, Chancellorsville, Gettysburg, and Cold Harbor, Brooke commanded I Corps in the invasion of Puerto Rico and remained on the island as the head of the army of occupation after Spain's surrender.

In 1901, Hunter was promoted to colonel and finished his career as the judge advocate for the Department of the East at Governors Island, New York.[20] He retired at the mandatory retirement age of sixty-four and died at Mount Vernon, New York, on 12 October 1928. Colonel Hunter was eighty-eight years old.[21]

LIEBER, Guido Norman

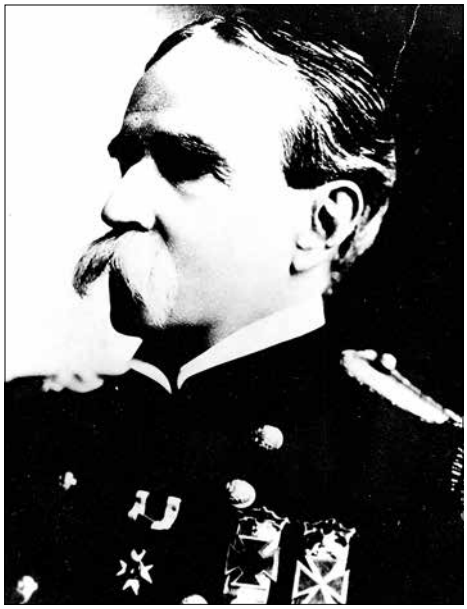
Section 1[22]

The son of Dr. Francis Lieber, the author of General Orders No. 100 (the so-called "Lieber Code"), Norman Lieber served as Acting Judge Advocate General from 1884 to 1895 and as tJAG from 1895 to 1901. Born in Columbia, South Carolina, in 1837, Lieber graduated from South Carolina College in 1856 and earned his LL.B. from Harvard Law School in 1858.

He practiced law in New York City until the start of the Civil War, when he commissioned into the Regular Army as an infantry lieutenant in the Union Army. Lieber subsequently saw combat at the Battle of Gaines Mill and the Second Battle of Bull Run.

Then-CPT Lieber was appointed as a judge advocate of Volunteers in late 1862 and finished the war as a lieutenant colonel of Volunteers. He decided to remain in

the Army and was made a Regular Army judge advocate major in 1867. Lieber was Acting Judge Advocate General after the Judge Advocate General, Brigadier General David G. Swaim, had been convicted by court-martial and sentenced to be suspended from rank and duty for twelve years. After Swaim retired in 1894 (Swaim's sentence was remitted to ten years), Lieber became tJAG. Lieber retired from active duty in 1901 and died on 23 April 1923 in Washington, D.C.



BG Norman Lieber.

LTC Sally MacDonald.

McDONALD, Sally Roe
Section 55, Site 3767 [23]
Born on 9 August 1975, LTC McDonald graduated from the 160th Judge Advocate Basic Course in 2003 and earned her LL.M. after completing the 59th Graduate Course in 2011. Sally served at III Corps and Fort Hood. She also deployed to Iraq as an administrative law attorney for 13th Corps Support Command. Additionally, she served as a senior defense counsel in Germany, professor at the Administrative and Civil Law Division at TJAGLCS, and Chief of Military Justice at XVIII Airborne Corps and Fort Bragg. Lieutenant Colonel McDonald was the Associate Dean for Students at TJAGLCS at the time of her death. She was an immensely popular officer, and her untimely death was the result of a brain aneurism suffered while she was on active duty.

PARKER, John A.
Section 7, Site 10030 [24]
Major Parker's marker is unusual because it shows only a date of death—19 March 1933. There also is no way to tell from his headstone that he was a member of the Regiment. But he was, and his demise was untimely.

"3 Army Officers Die in Plane Crash/ Hit Fog Over Virginia" screams the headline in a newspaper story. The narrative that follows says that an Army transport plane piloted by Lieutenant James A. Willis Jr. crashed near Petersburg, Virginia, on March 20, 1933. There were two passengers on the C-19, a single engine five passenger transport. One was Major Parker and the other was Major James A. Willis Sr., the father of the pilot. The three Army officers were flying from Spartanburg, South Carolina, to Washington, D.C., when they were killed.

Born in Harnett County, North Carolina, Parker graduated from the University of North Carolina in 1906. The newspaper report of Parker's death also states that "[d]uring the World War he was connected with the Judge Advocate General's office overseas and has since been stationed in Washington and for a while in Panama."

MAJ Parker's gravestone.

PRUGH Jr., George Shipley
Section 66, Grave 194 [25]
George Prugh Jr. served as TJAG from 1971 to 1975. Born in Norfolk, Virginia, on 1 June 1920, he graduated from the University of California at Berkeley in 1941 and then served as a Coast Artillery Corps officer in World War II. After leaving active duty in May 1945, Prugh entered Hastings College of the Law at the University of California, San Francisco.

In May 1948, he received his J.D. and, after admission to the California bar, reported for duty with the JAG Corps. Prugh served in various locations and positions, including: SJA, Rhine Military Post, Kaiserslautern, Germany, and SJA, U.S. Military Assistance Command, Vietnam. During his tenure in Saigon from 1964 to 1966, then-COL Prugh persuaded his South Vietnamese counterpart that applying the Geneva Prisoners of War Convention to Viet Cong captives was in South Vietnam's best interest—a key factor in that government's subsequent decision to construct prison camps for enemy captives and to ensure their humane treatment during imprisonment. Prugh also authored the first-ever directive on how violations of the law of war should be investigated and who should investigate them.

In August 1966, COL Prugh assumed duties as Legal Advisor, U.S. European Command, in St-Germain-en-Laye, France, and later Stuttgart, Germany. On 1 May 1969, he became the Judge Advocate, U.S.

MG George S. Prugh Jr.

CPT Rock's gravestone.

Army, Europe and 7th Army, Heidelberg, Germany. Later that year, he was promoted to Brigadier General. Prugh became TJAG on 1 July 1971. During his four years in office, he provided legal advice to the Army's leadership on the Calley war crimes trial and appeals. Prugh was very much an activist when it came to the law of armed conflict and, in 1972, he was a member of the U.S. delegations to two conferences of experts meeting in Switzerland to review the Geneva Conventions Relative to the Law of Armed Conflict. In 1973, he also participated in the Diplomatic Conferences on the Law of War that resulted in the two Additional Protocols to the Geneva Conventions. Due to Prugh's expertise in military legal history, there is a lecture in his name every year.

General Prugh retired from active duty in the summer of 1975 and returned to California. He subsequently taught law at the Hastings College of the Law, University of California, until retiring in 1982. General Prugh died on 6 July 2006.

ROCK, Logan Norman

Section 2, Site 4693[26]

Some months ago, Lieutenant General Charles N. Pede took a photograph of CPT Rock's headstone (which reflects an obvious connection to the Corps) and asked for information about Rock. Who was he? What did he do as a judge advocate?

Official military records obtained from the National Archives and Records Administration in St. Louis, Missouri, do not indicate that Rock was an Army lawyer. What they do show is that he went by "Logan" and not "Norman" and that he was born in Louisville, Kentucky, on 8 February 1890. Logan Rock entered the Army on 5 August 1917, when he commissioned as a National Guard infantry second lieutenant. He was twenty-seven years old and presumably had completed his education—although his records are silent on this point. Assigned to 38th Division, First Lieutenant Rock trained at Camp Shelby, Mississippi, before sailing for Europe. Rock arrived in France on 6 October 1918, only a month before the Armistice, and remained in Europe until 24 January 1920.

While there is no evidence in Rock's military records that he was a lawyer or a judge advocate, the *Journal of the Executive Proceedings of the Senate of the United States* recorded "Appointments in the Regular Army of the United States," and shows that Rock was appointed a JAGD captain in January 1921.[27] Given that the Army had drastically reduced its numbers after World War I, and that there were only 114 judge advocates in the entire Army after the enactment of the National Defense Act of 1920, Rock must have been a lawyer and have had an excellent record to obtain an appointment.[28]

Just what did CPT Rock do while serving as an Army lawyer? His military records reflect only that Rock left the JAGD on 2 January 1924, when he was honorably discharged.[29] Some information on his legal practice, however, is contained in a 27 January 1937 letter from his wife, Lillian N. Rock, to The Adjutant General. Lillian Rock wrote that her husband was in the infantry until "after the Armistice" [11 November 1918] when "he was transferred to The Judge Advocate General's Department."[30] He then "tried cases in Belgium and France until January 1920 at which time he was sent back to Washington and reported for duty in the J.A.G.D."[31]

Why would Rock join the JAGD in 1920 and leave four years later? There is no way to know. But, the 1920s and 1930s were a very tough time in the Army. Promotions were extraordinarily slow in an active force that was down to 131,000 soldiers by 1923 and never more than 190,000 men until 1940.[32] Since thirty years of active duty was the minimum amount of time required for retirement in this era, and since a Regular Army officer was not required to retire until reaching the age of sixty-four, this means that a junior officer like Rock could only advance in rank if a Regular Army judge advocate senior to him by date of rank retired or otherwise left active duty. It follows that CPT Rock may well have decided to leave the JAGD because he thought he might do better as a lawyer in the civilian world.

In any event, Rock's military records show that in the late 1920s, he and his wife (Lillian) and daughter (Sarah) were living in New York City, where International Telephone and Telegraph (IT&T) Corporation employed Rock.[33] At some point, probably in the early 1930s, IT&T transferred Rock and his family to Madrid, Spain, where he assumed duties as the Vice President and General Manager of the National Telephone Company of Spain.[34]

Rock's life abruptly ended in Madrid, Spain, when he died at his home on 20 June 1936. His death certificate records that he died of "cardiac insufficiency, the fundamental cause being agranulocytosis." Surviving him were his wife Lillian and daughter Sarah.

In July 1914, then twenty-five-year-old Rock married eighteen-year-old Lillian Nina Davis in Jacksonville, Florida. She now was a widow in her very early forties with a child, and far away from home. Moreover, it was a tumultuous time in Spain, given that a civil war had broken out. This explains why Lillian Rock wrote in a January 1937 letter to the War Department that "due to conditions in Spain at that time [her husband's death] I left everything there except my clothes."[35]

Despite the untimely death of her husband, Lillian and her daughter were fortunate, in that Rock converted his Army War Risk Insurance to a U.S. Government Life Insurance policy when he left active duty in 1924. Additionally, he had kept up the monthly $7.40 premium on it. As a result, Lillian Rock was the beneficiary of this $10,000 policy—a sizeable sum in an era when many Americans were still suffering from the effects of the Great Depression.

Rock's military records reflect that he was "buried at Arlington Cemetery July 24, 1936" and his remains are marked by the headstone photographed by Lieutenant General Pede. The JAGD branch insignia carved on his grave marker indicates that Rock's widow thought it was important that this connection be evident to all who saw his headstone. Since her husband died so unexpectedly, it seems likely that Lillian Rock made the decision to have the crossed-pen-and-sword insignia placed on her husband's grave, and the Corps must thank her for doing this. Otherwise, it probably would never be known to the Corps that Logan Rock was a member of the Regiment.

SWARTWORTH, Sharon Therese
Section 60, Site 8129 [36]
Chief Warrant Officer Five (CW5) Swartworth was serving as the Regimental Warrant Officer when the UH-60 Blackhawk helicopter in which she was a passenger was shot down near Tikrit, Iraq on 7 November 2003. She is the first and only judge advocate legal administrator to die in combat and, as the recipient of a posthumous Distinguished Service Medal, is the most highly decorated warrant officer in JAG Corps history.


CW5 Sharon T. Swartworth, circa 2003.

Born in Providence, Rhode Island, in 1959, Sharon enlisted in the Army in 1977. In 1985, she was selected to attend Warrant Officer Candidate School and become a legal administrator. During her career as a warrant officer, she served in a variety of assignments, including Training, Advising, and Counseling (TAC) officer, Warrant Officer Candidate School, Fort McCoy, Wisconsin, and Director, Operations for Legal Technology, OTJAG. On 21 July 1999, CW5 Swartworth assumed duties as the Regimental Warrant Officer of the JAG Corps, serving as the primary advisor to TJAG on the roles and responsibilities of legal administrators in the Corps.

WILLIAMS, Lawrence Harvey
Section 30, Grave 42-1 [37]
The headstone for Major General Williams has JAG Corps insignia and two stars—which speak for themselves, as he was The Assistant Judge Advocate General (TAJAG) (today's Deputy Judge Advocate General) from 1975 to 1979. Also, "Larry" Williams qualified as a navigator in World War II, and had served in North Africa, France, and Germany in World War II. Consequently, the Army Navigator Badge was carved on his marker.[38]

After World War II, Williams left active duty and obtained an undergraduate degree from the University of Minnesota and a law degree from the University of


MG Lawrence Harvey Williams.

CW5 Swartworth's gravestone.

Colorado. In 1948, he returned to active duty in the JAG Corps, and served at OTJAG in the Pentagon and on the staff and faculty in the newly established TJAGSA in Charlottesville. From 1961 to 1964, then-LTC Williams served as the SJA at the 3d Armored Division. His division commander was the celebrated Major General Creighton Abrams who, along with General George Patton, is considered by military historians to be one of the greatest tank commanders of World War II.[39] General Abrams had such confidence in

LTC Williams's abilities that when Abrams relieved the division G-1 from his duties, he chose Williams to serve as the G-1 in addition to his duties as SJA.

Major General Williams served as the SJA, III Corps, before deploying to Vietnam in 1969, where he assumed duties as the SJA, Military Assistance Command, Vietnam. After returning to OTJAG in 1970, Williams served as the Assistant Judge Advocate General for Military Law before being selected to be TAJAG in 1975. Williams retired in 1979 and died of cancer in northern Virginia on 17 May 1999. He was seventy-six years old.

Conclusion

While there are many more members of the Regiment interred among the 400,000 individuals interred in the cemetery, many of these individuals are unknown to us—because there is no database that records whether a Soldier buried in ANC was a judge advocate, legal administrator, or paralegal specialist. The grave of Logan Rock, for example, was only recently spotted and, were it not for the crossed-pen-and-sword on his headstone, there would have been no way to know that Rock had prior service as an Army lawyer.

As for the future of the ANC and the Regiment, this is an open question. Due to limited space, the Army recently proposed restrictions on eligibility for interment. The most significant change is that a Soldier who retired from active duty (and received retirement pay) is no longer eligible for an "in ground burial" in ANC.[40] Regardless of what happens in the future, however, the ANC will remain hallowed ground for the Regiment. **TAL**

Mr. Borch is the Historian, Archivist, and Professor of Legal History at TJAGLCS.

Notes

1. Find a Grave, https://www.findagrave.com/ (last visited Feb. 7, 2020) (*Find a Grave* is a popular website that lists "over 180 million memorials" and gravesites).

Don Denmark, *Arlington National Cemetery*, *in* Historical Dictionary of the U.S. Army 32 (Jerold E. Brown ed., 2001). Lee obtained the beautiful property, which belonged to General George Washington, when he married the granddaughter and heiress of Mrs. Custis, whose second husband had been Washington, but by whom she had no children. Field Marshall Viscount Wolseley, *General Lee*, *in* Lee: The Soldier 98 (Gary Gallagher ed., 1996).

2. *About*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/about (last visited Feb. 7, 2020).

3. *Id.*

4. *Baa Baa Black Sheep* (Stephen J. Cannell Productions, Universal Television broadcast 1976–1978).

5. *About*, Arlington Nat'l Cemetery, https://www.arlingtoncemetery.mil/Explore/Notable-Graves (last visited Feb. 7, 2020).

6. The following section's information is derived from Fred L. Borch, *From Infantryman to Contract Attorney to Judge Advocate General*, Lore of the Corps 109–11 (2019); The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975, at 200–02 (1975) [hereinafter The Army Lawyer].

7. The following section's information is derived from The Army Lawyer, *supra* note 6, at 153–54.

8. The following section's information is derived from The Army Lawyer, *supra* note 6, at 153–54, except for footnoted sentences 9–11.

9. This is the largest number of judge advocates ever to be on active duty in the Army; the Corps today numbers about 1,877 active duty uniformed lawyers. U.S. Army Judge Advocate General's Corps, Report of the Judge Advocate General of the Army to the American Bar Association 2 (2019).

10. Army Judge Advocate General Joseph Holt had served as the lead prosecutor in the military commission that tried the Lincoln assassination conspirators in 1865. The Army Lawyer, *supra* note 6, at 52–53.

11. Fred L. Borch, *Sitting in Judgment: Myron C. Cramer's Experiences in the Trials of German Saboteurs and Japanese War Leaders*, Prologue 34–40 (Summer 2009).

12. The following section's information is derived from The Army Lawyer, *supra* note 6, at 104–07.

13. Robert W. Runyans, *General Pershing and His JAG*, Army Law., Nov.-Dec. 2018, at 46, 46–53; Fred L. Borch, *Judge Advocates in the Great War*, Army Law., Nov.-Dec. 2018, at 10, 11–13.

14. For a comprehensive examination of Crowder, see David A. Lockmiller, Enoch H. Crowder: Soldier, Lawyer and Statesman (1955).

15. The following section's information is derived from *Cornell Winston Gilmore, Command Sergeant Major, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/cwgilmore.htm (last visited Feb. 7, 2020).

16. The following section's information is derived from *Alton H. Harvey, Major General, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/ahharvey.htm (last visited Feb. 7, 2020).

17. The following section's information is derived from The Army Lawyer, *supra* note 6, at 241–43; *Kenneth Joe Hodson, Major General, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/kjhodson.htm (last visited Feb. 7, 2020).

18. The following section's information is derived from *Gen. Hubert Hoover of Army Courts, 83*, N.Y. Times, Apr.12, 1971, at 40.

19. The following section's information is derived from *John Rutter Brooke, Major General, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/jrbrooke.htm (last visited Feb. 7, 2020), except for footnoted sentences 20–21.

20. *Edward Hunter (United States Army)*, Wikipedia, https://en.wikipedia.org/wiki/Edward_Hunter_(United_States_Army) (last visited Feb. 7, 2020).

21. *Id.*

22. The following section's information is derived from The Army Lawyer, *supra* note 6, at 84–86.

23. The following section's information is derived from Fred L. Borch, *In Memoriam*, Army Law., Iss. 1, 2019, at 14-15.

24. The following section's information is derived from *John A. Parker, Major, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/japarker.htm (last visited Feb. 7, 2020).

25. The following section's information is derived from The Army Lawyer, *supra* note 6, at 256–57.

26. Logan Norman Rock, Official Military Personnel File (1917-1936) (unpublished record) (on file with the author).

27. S. Journal, 66th Cong., 3d Sess. 203 (1921).

28. *See* The Army Lawyer, *supra* note 6, at 138.

29. Letter from Adjutant General's Office, War Department, to Lillian Davis Rock (Dec. 11, 1936) (on file with author).

30. Letter from Lillian Davis Rock to The Adjutant General, War Department (Jan. 25 1937) (on file with author).

31. *Id.*

32. The Army Lawyer, *supra* note 6, at 146.

33. International Telephone and Telegraph Corporation was a part owner of the National Telephone Company of Spain. A House of Representations 1934 "Report on Communications Companies" lists Logan N. Rock as a "Non-director general officer" of IT&T with responsibility as a director over IT&T businesses in Spain and South America. H.R. Rep. No. 1273, at 3797 (1934).

34. *Id.*

35. *Supra* note 30.

36. The following section's information is derived from *Sharon T. Swartworth, Chief Warrant Officer 5, United States Army*, Arlington Nat'l Cemetery, http://arlingtoncemetery.net/stswartworth.htm (last visited Feb. 7, 2020)

37. The following section's information is derived from *Lawrence Harvey Williams, Major General, United States Army*, Arlington Nat'l Cemetery, http://www.arlingtoncemetery.net/lhwilli.htm (last visited Feb. 7, 2020).

38. The War Department authorized a "Navigator Badge" for qualified navigators. William K. Emerson, United States Army Badges 23 (2006). The Army Air Force had 32,000 officer navigators by the end of World War II, when the badge stopped being awarded. *Id.*

39. For a superb biography of Abrams, see Lewis Sorley, Thunderbolt: General Creighton Abrams and the Army of His Times (1993).

40. Safia Samee Ali & Associated Press, *Army Proposes New Rules on Who Can be Buried at Arlington National Cemetery*, ABC News, https://www.nbcnews.com/news/military/army-proposes-new-rules-who-can-be-buried-arlington-national-n1058846 (last updated Sept. 26, 2019, 10:56 AM).

Soldiers of the 1 (German/Netherlands) Corps, a NATO High-Readiness Force Headquarters, stand in front of St. Paul's Cathedral in Muenster, Germany during a change of command ceremony. (Credit: Headquarters 1(German/Netherlands) Corps - 1GNC)

Career Notes

Advising NATO

By Lieutenant Colonel Scott McDonald & Lieutenant Colonel Keirsten Kennedy

Defender-Europe 20 is the largest military deployment to Europe in 25 years, military officials say. It is scheduled to run from April to July with operations occurring throughout parts of Germany, along with countries like Poland and the Baltic States that once were part of the Warsaw Pact. About 17,000 troops from 18 other NATO countries will take part in the U.S.-led division-level exercise.[1]

With the North Atlantic Treaty Organization (NATO) Deputy Secretary General's recent visit to Washington, D.C., Americans may have heard news of NATO's 70th anniversary when Mr. Mircea Genoa gave a rousing talk at the Hudson Institute on "NATO's relevance and effectiveness . . . amidst a rapidly changing geopolitical landscape."[2] As NATO celebrates this milestone, and as they perform legal functions in NATO, the Army Judge Advocate General's (JAG) Corps has members celebrating alongside our allies.

A truly broadening assignment, one with operational relevancy in the practice of national security law, the NATO Legal Advisor (LEGAD) is a little-known opportunity for judge advocates (JAs) to hone their skills in international and national security law. Since 2013 a terrifically helpful primer published in the *Army Lawyer* has served to guide JAs in filling these NATO LEGAD roles.[3] The Personnel, Plans, and Training Office (PPTO) tends to fill the billets with a senior major or junior lieutenant colonel judge advocate. In close coordination with the U.S. European Command (EUCOM) and the U.S. Army European (USAREUR) JA, that office routinely assesses which NATO units might most benefit from a U.S. Army attorney being assigned within that organization to work with international military lawyers on NATO missions.

Understanding what is in store for a JA assigned to a NATO billet is the key to success in this type of assignment. Educating yourself ahead of time about the organization, understanding key treaties and agreements, and having a strong grasp of NATO force structure, funding, and multinational operations doctrine will help JAs succeed as NATO LEGADs. That is not this article.[4] Though this article highlights one specific NATO position, the 1st German Netherlands Corps (1GNC) LEGAD slot, there are several such assignments throughout Europe, all with varying duty descriptions. The importance of the JAG Corps continuing to fill these slots with excellent, competent, versatile officer-attorneys—even when it makes sense to move billets at times to other NATO-designated units, depending on what is going on in the world—cannot be understated. Besides serving as an ambassador for the U.S. Army JAG Corps (and, arguably, for the United States itself as JAs work alongside international partners), a JA's breadth of learning from a NATO experience is incredibly helpful when contributing to academic discussions about the direction international law should take in any given national security law area, particularly when considering TJAG's directive to flood the zone with strategic legal messaging.[5]

Who Has Been a LEGAD at 1GNC and What Exactly Is This Job?

Colonel Jeff Thurnher served as the first American NATO LEGAD at 1GNC in Muenster, Germany, from 2013-2015. The authors followed in his footsteps over the course of the next four years (LTC Kennedy, 2015-2017; LTC McDonald, 2017-2019), and LTC Don Potts is assigned there currently.

Though, as the name suggests, 1GNC started out as a bi-national corps headquarters element, 1GNC is now a corps-level headquarters staffed by members from 12 participating NATO and partner nations, primarily consisting of Dutch and German

service members, but also including military members from the United States, the United Kingdom, Norway, Spain, Italy, Czech Republic, Belgium, France, Turkey, and Greece.[6] In cyclic fashion, the Headquarters serves either as a standby Corps Headquarters, Joint Task Force Headquarters, or NATO Rapid Deployment Force (also known as "NRF standby") prepared to provide short- or no-notice mobilization within a designated theater of operations.

The mission of 1GNC is to "direct[] any mission of up to 60,000 troops at short notice—flexible forces including land, sea, and air elements ready to move quickly to wherever needed."[7] When not preparing for one of the three primary roles as assigned, 1GNC operates as a Professional Training Platform (PTP), designing and executing exercises for other NATO units, which serve to certify those units for certain assigned missions. The LEGAD will always have a key role in those exercises,[8] which provide a wealth of operational experience for U.S. Army JAs lucky enough to be assigned to one of the NATO billets.

In addition to practicing heavily in international and national security law, the U.S. LEGAD is the primary legal representative for the Corps's Initial Command Element (ICE) and functions largely as an operational planner throughout the assignment. Intimate involvement in the crisis response planning process (the NATO version of the military decision making process), rules of engagement cells, and joint targeting working groups enhance not only NATO's (and thus U.S. partners') understanding of U.S. policies and U.S. interpretation of law with respect to international treaties, agreements, and other laws, but also the JA's own understanding of coalition partners' interpretations of the same. Mission planning also involves real life negotiation of technical arrangements and memoranda of understanding and agreement; this ensures that the force can enter the exercise or mission area and sustain and protect those forces as well. Truly, the most rewarding aspect of a joint, multinational assignment is the challenge of reconciling how to complete a coalition's mission while figuring out what laws do or do not apply, what caveats will come into play, and how to coalesce participating nations' militaries to achieve a given goal.

Does the LEGAD Perform Other Duties?

Once assigned to 1GNC, immersion into the exercise schedule (and the planning of those exercises, which serve to certify nations for NATO or other national duties/unit roles in the future) is the first step. Beyond that, the U.S. LEGAD can become involved in other NATO activities,[9] whether it is volunteering as a trainer/observer for exercises at the Joint Warfare Center (Norway) or Joint Forces Training Center (Poland), or teaching at the NATO School in Oberammergau, Germany with other partner nations. The Allied Command Transformation (ACT), headquartered in Norfolk, Virginia, is in charge of training and educating NATO LEGADs. They assigned personnel at the Staff Element Europe (SEE) of ACT in Mons, Belgium, at the Supreme Headquarters Allied Powers Europe (SHAPE). They are also in charge of LEGAD instruction in Europe.

The initial course every new NATO LEGAD must attend is the week-long instruction by the same name: the NATO LEGAD Course at the NATO School[10] in Oberammergau, Germany.[11] Following that, it is possible to teach there as well.[12] United States JAs are usually in the mix to be selected (by supervising LEGADs at ACT SEE) to teach if they express interest and have an area of expertise to share. Both authors of this article taught classes on the Law of Armed Conflict, NATO Operations, NATO Exercises, the NATO Status of Forces Agreement, as well as rules of engagement in several iterations of the NATO LEGAD Course (NATO School) and at the Swedish Armed Forces International Centre (SWEDINT, in Stockholm, Sweden, a NATO partner nation).

What Should I Do in My Free Time?

This is a difficult question (but not really): If you check out any Europe-assigned JA's Instagram or Facebook account, you'll be able to confirm that picturesque European cities, castles, and any other adventures that you may be interested in are never in short supply. The beautiful and historic city of Münster provides a lifetime of art, culture, and opportunity; essentially, by hopping in the car, riding on the train, or flying in a plane, you can be in a different country (usually within hours). Of course, your question was probably more along the lines of this: How do I contribute in a meaningful way to the JAG Corps while assigned as a NATO LEGAD? Staying in touch with traditional Offices of the Staff Judge Advocate (OSJAs) is imperative, so spending time fostering those relationships and participating in their professional development activities is essential.

You may also have time to write. Whether it's a short, practical-application-focused piece in *Operational Law Quarterly* or academic-focused contributions to the *Military Law Review*, *Army Lawyer*, or *NATO Legal Gazette*, sharing your experiences and what you've learned is important. In writing what you (now) know, you solidify that knowledge in your own mind, and you serve a helpful role for your successors: teaching future JAs about a likely little-known area of law. Of course, you also increase both your versatility and, possibly, head in the direction of mastery of the area of law you write about. Working toward—even becoming—a recognized subject-matter expert in NATO legal functions and other national security law areas simply cannot be a bad thing. Inviting OSJA members to participate in NATO functions and exercises, as well as team-writing articles after such events, would also be a positive contribution to the military legal community.

How Do I Apply?

This section header is—again, just as the "free time" header above—written a bit tongue-in-cheek. Your PPTO career coach can talk to you about NATO LEGAD assignments; these conversations are especially helpful in determining the timing of such a broadening assignment in your career. Because certain military threats still loom large and can seem to cast a shadow over Europe at times, the United States' membership in NATO will likely continue far into the future (and, thus, the NATO LEGAD billets will likely be around for a while).[13] You probably won't get there in time for Defender-Europe 20,[14] but you

The headquarters building of the 1 (German/Netherlands) Corps in Muenster, Germany. (Credit: Public Affairs Office, 1GNC)

can certainly prepare for the next exercise. Before taking on a NATO LEGAD assignment, consider garnering as much operational experience as possible. It is likely to help you be prepared to serve in NATO—where that experience and knowledge will enhance partnerships with our allies, serve to engage the international legal community in a manner that advances positions consistent with U.S. policy, and forge professional relationships and personal friendships as a result of that service in a multinational coalition. **TAL**

LTC McDonald is currently assigned as the Staff Judge Advocate at the Presidio in Monterey, California.

LTC Kennedy is currently assigned as the Chair of the Administrative and Civil Law Department at TJAGLCS.

Notes

1. Mike Glenn, *U.S., NATO allies prepare for massive military exercise as Russia watches*, Wash. Post (Feb. 4, 2020), https://www.washingtontimes.com/news/2020/feb/4/us-nato-allies-prepare-for-defender-europe-20-as-r/.

2. Hudson Institute, *NATO and the New Decade: Assessing the Transatlantic Alliance*, Hudson.org (describing the address by National Atlantic Treaty Organization (NATO) Deputy Secretary General Mircea Genoa's discussion at the Hudson Institute Headquarters in Washington, D.C., on February 7, 2020), https://www.hudson.org/events/1773-nato-and-the-new-decade-assessing-the-transatlantic-alliance22020.

3. Colonel Brian H. Brady, *The North Atlantic Treaty Organization Legal Advisor: A Primer*, Army Law. (Oct. 2013), https://www.loc.gov/rr/frd/Military_Law/pdf/10-2013.pdf. "United States judge advocates perform duty as [legal advisors (LEGADs)] and occupy key NATO crisis establishment posts, advising clients who execute NATO-led operations . . . . Additionally, judge advocates serve in NATO permanent establishment posts where they supervise other NATO legal personnel." *Id.* at 4. *See also* Major Phillip C. Maxwell, *Reflections on Multi-National Interoperability from the IHHL*, Army Law., Iss. 2 (2019) (explaining the importance of training for judge advocates advising commanders in a multi-national mission, especially emphasizing courses offered at the Institute for Humanitarian Law in San Remo, Italy).

4. *See id.* Colonel Brady's article truly is the gold standard and required reading for anyone working in, with, or around NATO to better understand a JA's role as a LEGAD.

5. *TJAG and DJAG Special Announcement 40-04, Announcement of Decisions on Strategic Initiatives*, JAGCNet (20 Apr. 2018) (on file with JAGCnet); *see also* Memorandum from The Judge Advocate General, subject: Guidance for Strategic Legal Engagements (8 Sept. 2016) (on file with authors).

6. *Introduction*, 1GNC.org, http://www.1gnc.org/introduction (last visited Feb. 10, 2020).

7. *Id. See also Headquarters, 1 (German/Netherlands) Corps – 1GNC*, Facebook, https://www.facebook.com/pg/1GNC.org/about/?ref=page_internal (last visited Feb. 10, 2020) ("1 (GE/NL) Corps is an interagency capable, multinational, rapidly deployable High Readiness Force Headquarters to deliver success on operations worldwide.").

8. LTC Keirsten Kennedy, *NATO Exercises and the LEGAD*, NATO Legal Gazette, Iss. 37 (Oct. 2016), https://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_37a.pdf (explaining the role of the NATO Legal Advisor (LEGAD) during exercises, both in the scenario as well as an operator/staff member working in the joint operations center area).

9. This includes the opportunity to participate in numerous non-mission-related events staged by member nations. For example, each country puts on celebrations for particular national holidays. Of note, the Dutch celebration in May for the King's Birthday includes a ball of royal proportions, and is an event not to be missed. But if physical fitness is more your style, each year you will be given the opportunity to earn the Norwegian Marching Badge with the Norwegian contingent. *See generally Headquarters, 1 (German/Netherlands) Corps – 1GNC*, Facebook, https://www.facebook.com/pg/1GNC.org/about/?ref=page_internal (last visited Feb. 10, 2020).

10. *NATO School Oberammergau*, NATOSchool.NATO.int (last visited Feb. 10, 2020) ("The NATO School Oberammergau (NSO) conducts education and training in support of current and developing NATO operations, strategy, policy, doctrine, and procedures.").

11. Famous for its Passion Play (performed every ten years since the 17th century—in years ending in "0"), Oberammergau is minutes away from Linderhof, one of the many castles built by King Ludwig II and a few hours from Neuschwanstein Castle, also built by Ludwig II, and sometimes called the Disney Castle. *Things to Do in Oberammergau*, Tripadvisor, https://www.tripadvisor.com/Tourism-g187301-Oberammergau_Upper_Bavaria_Bavaria-Vacations.html?fid=546bdde6-ef58-474a-b963-79e5f8237478 (last visited Feb. 10, 2020).

12. There are also a large number of teaching opportunities connected to 1GNC's Professional Training Platform (PTP) role. As exercises approach, the PTP model includes "Corps Academics" where the U.S. LEGAD is called upon to provide classes on the Law of Armed Conflict, Rules of Engagement, National Caveats, Article 5 versus Non-Article 5 conflicts, and theater- and mission-specific issues.

13. *See* Section 1241 "Sense of Congress on Support for the North Atlantic Treaty Organization" of the FY 20 NDAA, which includes the declaration that "the North Atlantic Treaty Organization (NATO) is critical to achieving United States national security interests and defense objectives around the world" and as such "the United States must remain ironclad in its commitment to uphold its obligations under the North Atlantic Treaty, including Article 5 of such Treaty." Nat'l Def. Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, Stat. 1790 (2019), https://www.congress.gov/bill/116th-congress/senate-bill/1790.

14. Or for the Passion Play 2020 in Oberammergau, Germany. PassionPlayOberammergau.com, https://www.passionplayoberammergau.com/?source=google&nlp=f&cn=tours&ag=oberammergau&gclid=EAIaIQobChMI5pDK06LI5wIVz-JyzCh3Rxg7zEAAYASAAEgLhHvD_BwE (last visited Feb. 10, 2020) (noting the nearly 400-year-old Passion Play runs from May 16 to October 4, 2020, for this decade).

On Exchange at British Army Headquarters

By Lieutenant Colonel Justin M. Marchesi

Among the best kept secrets of the Judge Advocate General's (JAG) Corps is the hidden gem of the exchange officer[1] post in the United Kingdom (U.K.). Recently relocated from the schoolhouse in Warminster,[2] this Lieutenant Colonel billet sits in the heart of the British army's strategic operational law support effort at Army Headquarters in Andover, Hampshire. This total-immersion operational law role offers an unmatched, two-year broadening opportunity in every sense of the word.

Working in a secured area directly for the British Army's one-star, Head of Operational Law, the exchange officer focuses on three major efforts as the chief of operational law policy, doctrine, and interoperability. First and foremost, the exchange officer provides legal support to the Army Headquarters directorates. This includes direct involvement in operational law policy efforts, broader capability development activities, communications and engagements, and support to the Land Operations Centre[3] legal advisors on strategic issues. Second, the exchange officer coordinates the development of land component legal doctrine within the Army and provides desk-level input into operational law policy at the Ministry of Defence and other partners across government. Often relied upon to offer feedback from both a U.K. and U.S. point of view, the exchange officer has a unique opportunity to provide input to strategic policy from a perspective that promotes interoperability with the United States and other allied forces.[4] Last, the exchange officer seeks out legal engagement opportunities and represents the JAG Corps to current and future senior leaders across the Ministry of Defence, the Army, the other "Single Services,"[5] and other nations abroad.

As noted by the highest levels of military leadership on both sides of the pond, the reality of future warfare is undoubtedly a coalition-based affair.[6] However, outside of equipment development programs, our formations tend not to instinctively consider multinational interoperability before we deploy together on operations. By identifying, coordinating, and participating in legal engagement opportunities, the exchange officer enables progress toward the strategic objective of enhancing a shared understanding of the culture, traditions, and legal frameworks at play with our closest allies.

To this end, the exchange officer is a key member of the British Army's operational law engagements team, and regular travel is the norm. When not abroad for events with the International Institute of Humanitarian Law, the International Society of Military Law and Law of War, the Geneva Centre for Security Policy, the U.S. Combatant Commands, or at a variety of other organizations, the exchange officer is regularly engaged in London at the Foreign Commonwealth Office and the Ministry of Defence, or travels across the United Kingdom to visit units across the Army.

While the level of exposure and opportunity to learn about our closest ally at this level is unmatched anywhere else in the JAG Corps, this experience is not limited only to professional development. The exchange officer is regularly invited to special events[7] and has a chance to see Europe from the international travel hub that is London. Command-sponsored family members enjoy a fully immersed experience as well. They are able to attend top-notch private British primary and secondary schools through the Non-DoD Schools Program[8] and are able to qualify for private British medical care through TRICARE Global Remote. Command-sponsored family members also benefit from unparalleled access to an immense collection of premier cultural venues and historical sites within the United Kingdom and across Europe.

While generally "off the beaten path" of assignment options, the JAG Corps exchange officer position in the United Kingdom is an incomparable broadening opportunity in the heart of our nation's closest allied army. **TAL**

LTC Marchesi is assigned as a JAGC Exchange Officer, serving as Executive Officer to the Head of Operational Law and as Chief of Operational Law, Policy, Doctrine, and Interoperability at British Army Headquarters in the United Kingdom.

Notes

1. This position is established under a reciprocal Military Personnel Exchange Program agreement, governed by Army Regulation (AR) 614-10. U.S. Dep't of Army Reg. 614-10, Army Military Personnel Exchange Program with Military Services of Other Nations (14 July 2011). The United Kingdom's 'mirror' exchange position in the Judge Advocate General's Corps is the Multinational Director at the Center for Law and Military operations at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

2. The Land Warfare Centre is located in Warminster, United Kingdom. *See generally* Gareth Davies, *On Becoming Genuine*, Military Simulation & Training (Mar. 4, 2019), https://militarysimulation.training/articles/on-becoming-genuine/.

3. The Land Operations Centre is analogous to the Army Operations Center at the Pentagon.

4. In line with the Office of the Judge Advocate General and U.S. Army Europe priorities and guidance.

5. Royal Navy and Royal Air Force.

6. *See, e.g.*, Harry Sarles, *Top British General Delivers Annual Kermit Roosevelt Lecture at CGSC*, Army.mil (Mar. 8, 2019), https://www.army.mil/article/218310/top_british_general_delivers_annual_kermit_roosevelt_lecture_at_cgsc.

7. *E.g.*, D-Day 75, Regimental Dinners, Mess Formals, United States-United Kingdom Dinner Club Events.

8. *Non-DOD Schools Program (NDSP)*, Dep't of Def. Educ. Activity, https://www.dodea.edu/nonDoD (last updated June 14, 2019).

LTG Charles N. Pede, The Judge Advocate General.

Practice Notes

Part I: Why the FM-27 Update Is Vital for Judge Advocates

By Lieutenant General Charles N. Pede

On 22 January 2020, Lieutenant General Charles N. Pede addressed members of the 68th Judge Advocate Officer Graduate Course, the Noncommissioned Officers' Academy's (NCOA) Basic Leaders Course, and the NCOA's Advanced Leaders Course to formally announced the publication of Field Manual (FM) 6-27, The Commander's Handbook on the Law of Land Warfare. *What follows is an excerpt of his remarks.*

It is a privilege to be here at our regimental home today to discuss—appropriately—a landmark publication for our Corps and Army: *The Commander's Handbook on the Law of Land Warfare.* This handbook represents nearly three decades of work updating FM 27-10, originally published in 1956.

In 1991, in a far-away place, in an operation that began as *Operation Restore Hope*, which morphed after a time to *Operation Continue Hope*, and then in classic Soldier-humor descended to *Operation No Hope*, I consulted then-current FM 27-10 daily. In the "Dish"—as we called Mogadishu, Somalia—we used it to help us identify when and how, for example, to execute leaflet drops to minimize noncombatant casualties. We used the FM to address protective markings on hospitals and blood banks. We used it for a multitude of war fighting rules—in a peacekeeping/peacemaking operation. Twelve years later, I used

it in Afghanistan in countless ground and air operations against the Taliban and al Qaeda. I am convinced that the FM's critical role for commanders—and lawyers—is no less vital today than it was for me in "the Dish" nearly thirty years ago.

So when we gather like this to mark a renewal of this powerful resource—our purpose is deliberate and direct. So let me highlight three immediate reasons this FM is important.

First, the effort. This decades-long, dual-service, multiple-author effort harnessed the intellectual and institutional energies of countless attorneys and peerless professionals. We must do more than tip our hat to their great achievement—hence this moment.

Second, the world's best warfighters and the world's best legal advisors need a handy, pragmatic, easily-understood-in-a-single-reading law of war resource. I offer you Exhibit #1—this copy of FM 6-27. Make no mistake. In the world's oldest and best law firm, which has as one of its core principles the mastery of law, your legal research only *begins* with this FM. To master the law, you must read the law—the treaty, the statute, and the binding order. But this FM is the wellspring. It answers the immediate questions clearly.

Third, this FM provides clear statements of state doctrine and state practice on the law of war—by a sovereign nation's land forces. It is not an NGO's aspiration—it is not a collection of academic theory. It clearly stakes out the law—and as a consequence—preserves our commanders' legal maneuver space on "Battlefield Next." So let me unpack these three reasons to explain their importance.

Let's start first with the effort. Why are Geoff Corn, Mike Meier, and Joe Rutigliano here today, sitting on a panel to talk about this FM? These three gentlemen are why we have a new FM. Geoff retired from the Army and at one point served as the Special Assistant for Law of War Matters—the position Mike Meier currently holds. After retirement, Geoff embarked upon a very successful academic career. He provides perspective and critical context as an outsider with inside knowledge and experience. We are grateful to have Geoff here today as a friend, colleague, and honest broker on matters of the law of armed conflict. Mike Meier and Joe Rutigliano are, respectively, the Army's and Marine Corps's intellectual muscle—our foremost experts on law of war and the primary authors of the manual. Together, they have been the muscle to get FM 6-27 over the line. And I'd be remiss if I didn't mention the herculean efforts of Colonel (Ret.) Dick Jackson, former Special Assistant for Law of War Matters to the Judge Advocate General who spent a number of yeoman years on this FM.

You have in your hands an easily-understood statement of the law. This manual is only eight chapters and weighs in at but a few ounces. Think for a moment of all of the information available about the law of armed conflict—all of the first-hand sources alone; not to mention the treatises and the commentaries; the statements of the law and the eloquent speeches, articles, and even books written about the laws that govern warfare. This immense stack of information is consistently growing; multiplying on *Lawfare*, *Lawfire*, *War on the Rocks*, and in podcasts. And with every new article, blog post, and every podcast episode, the public sphere responds with its own commentary, and there, the information available grows and grows and the cycle repeats.

What we have done in an age of "information inundation," in an age of overwhelming data, is to take everything that these learned scholars and hundreds more like them know of the law of armed conflict. We have culled that information, and we have distilled it down to a useable, digestible, portable format to put it in the hands of those who matter most—the commander on the ground. The person who has to make the decision on how to execute the battle.

This manual is at the heart of what we do as judge advocates. We take what seems complex and overwhelming, and rather than shrug our shoulders and say, "It all depends," we give clear executable advice. We do "the math of the law," and we wrestle with the facts, the assumptions, and the fog until we get to a solution for our client. And we have done that here. Clear, straight forward, and executable.

But your work does not end there. First, you must read this FM. It is not enough to scan it. You must understand it. You must be able to train it and help your commanders to train it. And, you must be able to understand the volumes of law that stand behind it. That is the unwritten charge to each of you. And then my third point: this FM helps us preserve our commanders' legal maneuver space. What do I mean by legal maneuver space? Every day, an NGO or the ICRC or an academic publishes on the law of armed conflict. We face an ever-increasing risk that because of the frequency and volume of publications, the world will see the law represented in these opinions and aspirations, not as it should be, but by state practice. For example, if a prominent academic or international organization concludes that explosive weapons may not be used in cities, and they say it repeatedly—well then, it must be true! And this aspirational drumbeat then finds its way to the battlefield, and suddenly we find that it is the new standard. Not so.

We must be ruthless in pushing back to declare what the law actually is—not what some individuals and organizations would wish it to be

We must be ruthless in pushing back to declare what the law actually is—not what some individuals and organizations would wish it to be. This is the essence of preserving commanders' legal maneuver pace. Hence, our core principle to be masters of the law. Hence this FM. It goes back to that wealth of information out there about

the state of international law and the law of armed conflict. Everyone has an opinion. The issue we now face is how those opinions—even the well-intentioned ones—operate to limit our commanders' maneuver space. The constant drumbeat of opinion and aspiration risks that it will be mistaken for law—which will—wrongly limit our maneuver space.

States, not NGOs, IGOs, or even venerable and esteemed academics, make the law. If we do not master the law, others will limit commanders by their incessant drumbeat. It is important for these groups, our allies, and the world to understand how we—the United States—interpret the law of armed conflict. And while the *DoD Law of War Manual* remains the DoD's authoritative position on the law of war, this FM reflects the Army and Marine Corps interpretation of how to lawfully, responsibly, and humanely conduct land warfare. This serves as evidence of our standard—the standard. As the foreword states, "adherence to the law of armed conflict . . . must serve as the standard that we train to and apply across the entire range of military operations." This manual represents our state practice—our values. When there is divergence, disagreement, and the inevitable confusion with ICRC interpretive guidance, or a UNAMA report on CIVCAS, for example, this FM stands watch—with clarity and our department's imprimatur. We simply cannot afford for our lawyers or leaders to be confused about the rules in warfighting. Clarity in the law and in standards is a precious commodity. Clarity in the law is exactly what this manual delivers and as a direct consequence, preserves our commanders legal maneuver space on "Battlefield Next."

And yes, the FM goes further. Winston Churchill once said, "There is only one thing worse than fighting with allies—and that is fighting without them." When we publish a manual like this, we help establish a baseline for our partners and allies. It also serves as proud notice to our enemies. This FM fuels dialogue about differences of opinions, it fuels the ability to train to one standard and, frankly, it helps to clarify decisions whether a particular State is one we want to partner with in operations. This has an impact strategically, at the national level, and can be a deciding factor on whether a state can or is willing to participate in a coalition. And of course, most fundamentally, like my memories of "the Dish"—this FM matters tactically—helping to guide when and how to employ lethal force on a battlefield. Transparency of standards builds a common legal foundation for combat operations, which in turn hastens mission accomplishment—lawfully.

We must remember, our raison d'être—our purpose as an Army and Marine Corps—is to fight and win our nations wars—swiftly and lawfully. To do that, our leaders must be decisive. They require the ability to quickly, confidently, and lawfully do what must be done. When outside influences attempt to restrict lawful means and methods of warfare, ignore context, mis-cite facts, or selectively choose favorable facts to support biased opinions or positions about the conduct of operations, we risk the confidence of our commanders and operators to make life or death decisions. This FM affirms our commitment to and our interpretation of the law of armed conflict in a clear and concise battle ready readability.

So now that we have this manual, and we are here to celebrate it. Now what? We move boldly into the future—that's why we have our second panel—Majors Collins, Liddick, Medici, and Capt. Iacobucci here, ready to present on a panel. They represent our future. Greg, Eric, Keoni, and Steph—indeed, all of you—will carry the manual forward, you will refine it (let's hope it doesn't take another sixty-three years like this one), and you will apply the words in training and on the battlefield. With that, I invite you to challenge us with your questions. I look forward to the exchange. And I charge each of you to Be Ready! **TAL**

LTG Pede is The Judge Advocate General, United States Army.

We simply cannot afford for our lawyers or leaders to be confused about the rules in warfighting. Clarity in the law and in standards is a precious commodity

Soldiers of Bravo Company assigned to the 143rd Infantry (Airborne) returns fire with the Squad Automatic Weapon (SAW) during the Joint Forcible Entry exercise at Kelly Drop Zone, San Antonio, Texas on 23 Mar. 2019. The Joint Forcible Entry Exercise is an annual large scale Airborne drop and mobility mission that simulates a contested battlefield scenario as a way of training units for dangerous situations that occur while deployed. (U.S. Army Reserve Photo by Spc. Jeffery Harris)

Part II: Combating Enemy Lawfare on the Battlefield

By Major Matthew J. Aiesi

Conflict in the twenty-first century is evolving into areas outside the traditional battlefield into new domains like cyberspace, the electromagnetic spectrum, and space. New technologies like artificial intelligence and autonomous weapon platforms are emerging and further complicate state competition and warfare. The law is also becoming an increasingly contested domain. The law plays an integral role at all levels of military operations, from decisions by the national command authority down to the Soldier in the field about to squeeze his or her trigger. To some commanders and leaders, the extent to which the law plays a role in twenty-first century conflicts is a source of frustration.[1] America's competitors and rivals use and exploit the law against the United States and its allies. However, the law is also a powerful tool for achieving strategic legitimacy. Judge advocates in the field can play an instrumental part, institutionally and operationally, in combating the enemy's use of lawfare during military operations, while ensuring that U.S. military operations maintain legal and moral legitimacy.

Recently, the National Security Law Department at the Judge Advocate General's Legal Center and School (TJAGLCS), the Foundation for the Defense of Democracies (FDD), and the North Atlantic Treaty Organization (NATO)'s Supreme Headquarters Allied Powers Europe (SHAPE) Allied Command Operations (ACO) Office of Legal Affairs, hosted a multiday workshop at TJAGLCS and in Washington D.C. This workshop brought together academics, private- and public-service lawyers, and service members, including officers and representatives from allied countries, to address malign use and misuse of the law and legal processes against the United States, NATO allies, and Israel. This was the first time that such a group of lawyers from the interagency, academia, the military, and private practice met to discuss developing governmental responses to malign lawfare targeting the United States and allies. The workshop coincided with two other significant events: the formal roll-out of Field Manual (FM) 6-27 / Marine Corps Tactical Publication (MCTP) 11-10C–The Commander's Handbook on the Law of Land Warfare; and a presentation led by Mr. Andres B. Munoz Mosquera, NATO senior legal advisor and his team on Russian lawfare in Europe against NATO. This article and its recommendations stem, in part, from these events and has benefited from the participants' collective expertise.

Field Manual 6-27 and Lawfare

The publication of FM 6-27 serves many practical and strategic purposes. Practically, it gives commanders and service members a clear and concise explanation of the international laws that govern land warfare.[2] In addition, the strategic messaging must not be overlooked. This document sends a clear message to the country, allies, and adversaries that the United States (U.S.) Armed Forces are committed to holding the moral and legal high ground during armed conflicts, even when others deliberately violate these laws. The publication of the FM 6-27 is the natural outflow of the U.S. military's commitment to a society that cherishes the rule of law in its domestic affairs and to being a responsible actor in the rules-based international order for its foreign affairs. Unfortunately, not all state and non-state actors share the United States' and NATO's commitment to the rule of law. Instead, some state and non-state actors corrupt and manipulate the law to serve their own end–that is, they engage in lawfare.

The term "lawfare" has many uses and meanings.[3] Lawfare, as it will be used in this article, adopts the definition used by Profes-

sor Orde Kittrie in the seminal book on this topic – *Lawfare: Law as a Weapon of War*.[4] Under Professor Kittrie's definition, for an action to qualify as lawfare, the action must meet two elements. First, it is used by the actor to create the same or similar effects as those traditionally sought from conventional kinetic military action.[5] Second, the action is taken with the intent to weaken or destroy an adversary against which the lawfare is being deployed.[6] Critically, this includes the use of lawfare to negatively impact key armed force decision-makers and/or the decision-making processes.[7]

Professor Kittrie identifies a distinct strand of lawfare to which the United States, other NATO countries, and Israel are particularly vulnerable. He calls this "compliance-leverage disparity lawfare."[8] This type of lawfare typically occurs on the battlefield, and it is designed to gain an advantage from the greater influence that the law of armed conflict exerts over an adversary.[9] Said another way, the enemy exploits the targeting limitations inherent in adhering to the law of armed conflict (LOAC) to gain an advantage. It is no secret that the United States prides itself in its commitment to following the LOAC,[10] thus making compliance-leverage disparity lawfare an effective tactic.

The Islamic State of Iraq and Syria's (ISIS) use of human shields[11] is an illustrative example of an enemy using compliance-leverage disparity lawfare. The use of civilians and other specially-protected persons to shield otherwise lawful military objectives from attack during armed conflict is a violation of international law. This is prohibited by the Geneva Conventions, the Hague Regulations, and customary international law.[12] The Islamic State and other terrorist groups nevertheless use human shields frequently. They do so to 1) cause commanders to self-impose restraints that will render operations less effective, 2) erode will to fight, and 3) spur anger and public outcry by generating civilian casualties designed to appear attributable to United States or allied forces.

By illegally placing civilians alongside their own fighters and preventing civilians from leaving population centers they control, ISIS prevents U.S. and partner forces from attacking them–shielding one's forces from an enemy's attack is a traditional military activity. Furthermore, ISIS achieves this military effect by leveraging U.S. compliance with the LOAC— specifically the duty to take feasible precautions to minimize civilian casualties when practically possible and to not attack otherwise lawful military targets, even if the concrete military advantage does not cause excessive loss of life.[13] Thus, ISIS's use of human shields meets both elements to qualify as a successful lawfare action. However, the systemic effects from such lawfare is greater than any single engagement.

The prolonged result of successful lawfare actions against the United States results in the greater freedom of maneuver for ISIS. While ISIS gains freedom of maneuver, the United States suffers hesitancy to attack enemy sites that may have human shields because of a genuine concern over killing civilians during military operations. There would also be concern over anticipated criticism, accusations, and investigations of U.S. operations, if (and when) pictures were published of the aftermath of such a strike. Despite the fact in this hypothetical, the United States' strike is legal, and that ISIS is violating the law of armed conflict, it is not hard to imagine the media headlines that would follow. Ultimately, the legitimacy of the United States' actions would be diminished. The next sections give judge advocates practical advice to help them train, plan, prepare, and respond effectively to this lawfare vulnerability during military operations.

Moral Legitimacy Is Inseparable from Compliance with the LOAC

At its core, enemy lawfare is effective when it attacks the legitimacy of an actor and gains public attention. Successful enemy lawfare brings scrutiny from within the U.S. Government, friends, and allies. It breeds criticism from the same by creating a false narrative that is challenging to correct. The enemy's use of propaganda, distortions, and manipulations of facts are designed to make actions appear illegal, and thus illegitimate. In turn, this causes decision-makers hesitancy to act due to the fear of an action being perceived wrongly. This invites more scrutiny and criticism, ultimately limiting the legal maneuver space available. The power of legitimacy to the success of a military mission or operation cannot be minimized. Military doctrine explicitly states that "legitimacy" can be a decisive factor in military operations, and it is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences.[14] Conducting military operations in accordance with the LOAC gives actual legitimacy to U.S. actions.

Thus, any particular military action can fall into one of three relevant categories under this "legal-legitimacy" framework. First, a military action may be legal, legitimate, and perceived as legitimate. Second, the action may in fact be legal and legitimate but is nonetheless perceived as illegal or illegitimate due to enemy lawfare and/or the inability to effectively communicate the action's lawfulness. Third, the action may be illegal and is illegitimate regardless of the perception.[15] When military actions fall into the third category, like the prisoner abuses at Abu Ghraib, the strategic and moral consequences are manifest. Likewise, when actions are legal, legitimate, and perceived as such, like fighting Al Qaeda, there is minimal risk of falling victim to enemy lawfare. Therefore, the center of gravity in the legal-legitimacy framework is the second category of actions. To maintain the advantage, the military must proactively prepare to defend lawfare attacks that attempt to portray military actions as anything but lawful and legitimate. As enemies engage in lawfare, compliance will not be sufficient to maintain U.S. maneuver space. Effectively communicating compliance with the LOAC in the face of enemy lawfare is what will allow the United States to maintain operational legitimacy.

The need for legitimacy, or at least the perception of legitimacy, for one's own cause, is also not entirely lost on the United States' enemies.[16] However, as one scholar at the workshop noted, "a lie can travel half way around the world before the truth even gets its boots on."[17] In other words, strategic legitimacy is inseparable from LOAC compliance.[18] In the race to achieving the U.S. strategic mission, the enemy's lawfare usually has a head start, and the enemy is more than willing to lie and cheat to win.[19]

Combating Lawfare in the Field

Judge advocates can play a vital role institutionally and operationally in responding to these enemy lawfare tactics. This section identifies three ways that JAs can be a force-multiplier for their commanders to defeat the enemy while maintaining legitimacy: (1) teach the law of armed conflict to commanders, staff, and Public Affairs Office (PAO) personnel; (2) develop courses of actions that allow commanders to dominate and control the narrative; and (3) train command and staff responses to these actions.

The recent publication of FM 6-27 and its emphasis on a *commander's* role in ensuring compliance with the LOAC creates a perfect opportunity for JAs to begin LOAC education for staff and commanders. Over the course of nearly twenty years of counter-insurgency warfare, commanders and staff have learned and become accustomed to the *policies* implemented to fight those conflicts. Terms like standard operating procedures (SOP), rules of engagement (ROE), tactical directives, collateral damage estimation (CDE), pattern of life (POL), positive identification (PID), and hostile intent and hostile Act (HI/HA) have become common parlance. However, none of these are actual LOAC terms of art. Even the concept of "U.S. self-defense" under the ROE is a blend of distinct areas of international law, such as *jus ad bellum*, *jus in bello*, and human rights, and is quite distinct from law-of-war self-defense.[20] While these policies serve important functions in the prosecution of an armed conflict, there are numerous reasons why these policies are ill-suited for a discussion of a challenged military in terms of lawfare.

First, many of these policies are classified and cannot be discussed in the detail necessary to respond to an accusation of an illegitimate military action. Second, the policies use terms and acronyms that have different meanings under international law (like self-defense under the ROE and *jus ad bellum*), which invites confusion when one side is talking LOAC and the other is talking U.S. policy. Next, as the LOAC is international law, its terms of art are common to all nations and non-state entities engaging in armed conflict.[21] Since the LOAC is the common language, and responsible states have the duty to enforce the LOAC, it is proper to use the language of LOAC while defending against lawfare. Legitimacy on the international stage comes from compliance with the LOAC, not from internal policies designed to implement it. Therefore, practitioners and leaders should use terms like military necessity[22], distinction[23], and proportionality[24] when discussing operations. The U.S. military has, on occasion, struggled responding to law-of-war questions with law-of-war answers, such as whether the deliberate use of white phosphorous is lawful to use directly against combatants[25] (which it is).[26] Finally, deliberate and continuous LOAC education—*not* check-the-block training—will institutionally benefit warfighters and commanders by merging the profession of arms and a deep and professional understanding of the law of armed conflict.[27]

While it is certainly a best-practice to have the lawyers review press releases and talking points for the commander and the PAO, the JA is not omnipresent. By deliberately educating and training commanders and PAO officers on the LOAC and its language, commanders, staff, and the PAO will be better suited to respond to questions and prepare accurate statements regarding the legality and legitimacy of operations when faced with a lawfare attack. It is not easy to discuss the principle of proportionality of a particular strike or operation, especially with the limits of classified intelligence and operational secrets. It is harder, still, to convey the value of the concrete military advantage gained over the enemy that was not excessive to the harm caused by knowingly (and lawfully) killing civilians. Finally, it is nearly impossible to communicate these legal and operational issues while conveying the sincere value placed on human life without a professional knowledge of the LOAC. But this is what is required to respond to the narrative set by the enemy's lawfare and prove, when challenged, that U.S. actions are lawful and legitimate.

In addition to educating commanders, staff, and the PAO on the LOAC, JAs can be instrumental in assisting the staff to pre-emptively respond to the enemy's lawfare. Thinking back to the human shields example, imagine having intelligence showing ISIS illegally moving civilians into their facilities or commandeering vehicles containing civilians to use as human shields to deter an attack against a significant military objective. Judge Advocates can anticipate the narrative that will result if the commander orders the lawful strike—commonly referred to as the "CNN factor." By working with the key staff officers in the planning phase of the strike, pre-strike full-motion videos and pictures can either be prepared in an unclassified form, or be rapidly declassified. Releasing this evidence will set the narrative factually, legally, and swiftly: that ISIS is responsible for the deaths of these civilians by violating the LOAC, and that the United States' actions were necessary, legal, and legitimate. This type of anticipatory counter-lawfare planning is essential to maintain strategic legitimacy and keep the military off of the lawfare defensive. Any time intelligence indicates the enemy is using protected facilities (like schools, medical facilities, or places of worship) for military purposes (like command and control or weapon caching), the ability to decisively demonstrate the enemy's illegal activity will put the focus on the enemy's violations of the law and will delegitimize their conduct, thus ensuring the United States continues to hold the moral and legal high ground.

Anchoring legitimacy to compliance with the LOAC is both the morally and strategically wise course of action

Education and deliberate planning are crucial for defeating the tactical uses of lawfare on the battlefield, but they are insufficient without training under stressful conditions. Between premiere training facil-

ities, the NATO training facilities, and the numerous partnered exercises that the United States conducts globally, there is ready-made infrastructure to train U.S. and allied militaries in responding to, and defeating, enemy lawfare tactics. These exercises present a chaotic environment that stresses the individuals and the units to respond. By developing "lawfare injects," commanders and staff will practice responding to these enemy tactics, making them more agile to deal with these tactics under the true chaos and stress of combat. In the long run, consistent and deliberate training, followed by critical analysis and thought, will begin to form tried and true tactics, techniques, and procedures (TTPs) for countering and defeating enemy lawfare operations. This cycle of education-stress training-assessment-TTP development will begin to form doctrine to counter the enemy's compliance-leverage disparity lawfare to which the United States is most vulnerable.

Enemy lawfare is a fact of both the modern battlefield and the great-power competition between the United States and Russia, China, and others. By understanding how the law is used to undermine legitimacy, particularly the compliance-leverage disparity in the LOAC, the military and legal community can start to proactively help commanders defeat it. Legitimacy, and the perception of legitimacy, for military actions is so easily chipped away in the interconnected digital world. Anchoring legitimacy to compliance with the LOAC is both the morally and strategically wise course of action. Although the United States holds the moral and legal high ground, not all are proficient in effectively communicating the language of the LOAC. This requires a professional understanding of the LOAC and its terminology by commanders, staff, and PAO; FM 6-27 makes this clear. Judge advocates can, and must, serve that critical role in every formation. By consistent and deliberate planning and training, as individual units and with partners, the U.S. military can develop effective tactics to counter enemy lawfare and defeat the enemy in the legal domain. **TAL**

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Notes

1. Charles J. Dunlap Jr., *Lawfare 101: A Primer*, 97 Mil. Rev. 8-17 (May-June 2017), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6434&context=-faculty_scholarship.

2. Michael W. Meier, *Updated Law of Land Warfare a Vital Tool for Judge Advocates*, Army Law., Nov. 2019, at 4.

3. *See generally About Lawfare: A Brief History of the Term and the Site*, Lawfare, https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site (last visited Feb. 1, 2020). The most popular understanding of "lawfare" was articulated by then-Air Force Colonel (and later Major General) Charles Dunlap in 2001 in an article called *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper, 2001), https://people.duke.edu/~pfeaver/dunlap.pdf.

4. Orde F. Kittrie, Lawfare: Law as a Weapon of War (2016).

5. *Id.* at 8.

6. *Id.* at 8.

7. *Id.*

8. *Id.* at 11.

9. *Id.*

10. Dunlap, *supra* note 1, at 8-17.

11. Luis Martinez, *Islamic State use of human shields slows final assault on ISIS-held town in Syria,* ABC News (Mar. 4, 2019), https://abcnews.go.com/Politics/islamic-state-human-shields-slows-final-assault-isis/story?id=61456501.

12. See generally U.S. Dep't of Def., DoD Law of War Manual, para. 5.12.3.4 (May 2016) [hereinafter Law of War Manual].

13. *See*, e.g., *Photos Show IS Militants Fleeing Manbij with 'Human Shields'*, BBC News (Aug. 19, 2016,) https://www.bbc.com/news/world-middle-east-37129408; Ben Kesling, *ISIS Herds Civilians to Mosul as Human Shields*, Wall St. J. (Oct. 28, 2016), https://www.wsj.com/articles/isis-herds-civilians-to-mosul-as-human-shields-1477675640.

14. Joint Chiefs of Staff, Joint Pub. 3-0, app. A, para. L [hereinafter JP 1-04], https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_0ch1.pdf?ver=2018-11-27-160457-910.

15. This article is focused on the legitimacy for military actions that derives from compliance with the *jus in bello* rules during an armed conflict. Whether a state's use of force in a particular circumstance can be "illegal but legitimate" from a *jus ad bellum* perspective is beyond the scope of this article, but *see generally, Kosovo Report: Conflict, International Response, Lessons Learned*, Indep. Int'l Comm'n on Kos. (2000)*; see also* Roberts, Anthea, *Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified? in* Human Rights, Intervention and the Use of Force (P. Alston et al. eds., 2008), https://ssrn.com/abstract=1518290.

16. Yousuf Basil and Catherine E. Shoichet, *Al Qaeda: We're sorry about Yemen hospital attack*, CNN (Dec 12, 2013), https://www.cnn.com/2013/12/22/world/meast/yemen-al-qaeda-apology/index.html.

17. The workshop operated under Chatham House Rules to encourage open discourse. However the original sentiment of the quote, and the quote itself likely began in the late 1700's. Niraj Chokshi, *That Wasn't Mark Twain: How a Misquotation is Born,* N. Y. Times (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/books/famous-misquotations.html.

18. Douglas A. Johnson, et. al., *The Strategic Costs of Torture*, Foreign Aff. (Sept./Oct. 2018), https://www.foreignaffairs.com/articles/united-states/strategic-costs-torture.

19. Andrew DeGrandpre, *These Marines were falsely accused of war crimes. Twelve years later, they have vindication,* Wash. Post (Jan. 31, 2019), https://www.washingtonpost.com/world/national-security/these-marines-were-falsely-accused-of-war-crimes-twelve-years-later-they-have-vindication/2019/01/31/4fa98b9c-1386-11e9-b6ad-9cfd62dbb0a8_story.html.

20. Generally, "self-defense" under the law of armed conflict is limited to the circumstance when the person claiming self-defense has no combatant immunity, but have a recognized protection under the law of war that is being violated. For example, a medic, displaying the Red Cross, who is exclusively engaged in humanitarian relief, but is unlawfully targeted. Self-defense for soldiers with combatant immunity is often limited to situations involving a threat to life that is not related to the armed conflict, such as a civilian who attempts to rob a soldier. While a full discussion on the nuances of this topic are beyond the scope of this article, an analysis of some of the problems of self-defense under the rules of engagement can be found here. *See* Randall Bagwell and Molly Kovite, *It is Not Self-Defense: Direct Participation in Hostilities Authority at the Tactical Level*, 224 Mil. L. Rev. 1 (2016), https://www.loc.gov/rr/frd/Military_Law/Military_Law_Review/pdf-files/224-issue1-2016.pdf.

21. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2 1995).

22. Law of War Manual, *supra* note 12, para. 2.2; U.S. Dep't of Army, Field Manual 6-27, *The Commander's Handbook on the Law of Land Warfare*, para. 1-23 (Aug. 2019) [hereinafter FM 6-27].

23. Law of War Manual, *supra* note 12, para. 2.5; FM 6-27, *supra* note 21, para. 1-34.

24. Law of War Manual, *supra* note 12, para. 2.4; FM 6-27, *supra* note 21, para. 1-44.

25. Anne Barnard, *U.S.-Led Forces Said to Have Used White Phosphorus in Syria*- N.Y.Times (June 10, 2017), https://www.nytimes.com/2017/06/10/world/middleeast/raqqa-syria-white-phosphorus.html.

26. Law of War Manual, *supra* note 12, para. 6.14.1.3.

27. *See generally* Sean Watts, *Law of War Perfidy*, 219 Mil. L. Rev. 106, 127 (Spring 2014).

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When Iran Sanctions Collided with Contingency Contracting

By Major Nolan Koon

On 19 December 2018, Army judge advocates (JA) huddled in video teleconference rooms spread across multiple time zones and locations throughout Kuwait, Iraq, Qatar, South Carolina, Alabama, and Washington, D.C. During the roll-call, they identified their respective commands and organizations—U.S. Army Central Command (ARCENT); Combined Joint Task Force–Operation Inherent Resolve (CJTF-OIR); U.S. Central Command (CENTCOM), Vendor Vetting Division; U.S. Army Contracting Command; Office of The Judge Advocate General (OTJAG), Procurement Fraud Division; and the 408th Contracting Support Brigade (CSB). They patiently waited for attorneys from the U.S. Department of State (DoS) and the U.S. Department of Treasury Office of Financial Asset Control (OFAC), who specialized in sanctions law, to dial in. Approximately two weeks earlier, the U.S. Embassy-Baghdad had informed the 408th CSB that the Flower of the Palace (FoP), an Iraqi military contractor, transshipped through Iran 133 non-tactical vehicles (NTVs), which were purchased in United Arab Emirates (UAE) and destined for the Iraqi Security Forces (ISF).

Determining whether this transshipment violated the recently re-imposed Iran sanctions would require judge advocates to work across multiple commands, while leveraging the inter-agency process as part of a whole-of-government approach. A major takeaway from this situation was the ability of judge advocates to enhance their respective commands' decision-making cycles by communicating directly with one another to accelerate the sharing and processing of critical information and resources.

Background

On 14 July 2015, Iran, the five permanent members of the United Nations Security Council, Germany, and the European Union agreed to the Joint Comprehensive Plan of Action (JCPOA or Iran Nuclear Deal). As part of the JCPOA framework, Iran agreed to the elimination of its stockpile of medium-enriched uranium and a reduction in its gas centrifuges, for a period of thirteen years. In exchange, the U.S. Government agreed to relax certain economic sanctions beginning on 16 January 2016. This agreement, however, would be short-lived. On 8 May 2018, the United States announced its withdrawal from the JCPOA, resulting in the reinstatement of numerous Iran sanctions, effective 5 November 2018.

Meanwhile, by 2014, the Islamic State of Iraq and the Levant (ISIS) had spread like a contagion across the Middle East. From its capital in Raqqa, ISIS controlled a massive land area stretching from central Syria, to Mosul, Iraq, and the outskirts of Baghdad.[1] After its leader, Abu Bakr al-Baghdadi, declared a global caliphate, the United States intervened, leading a military coalition drawn from sixty nations.[2] As part of the U.S. military strategy to degrade, dismantle, and defeat ISIS, Congress appropriated to the U.S. Department of Defense (DoD) and CENTCOM the Counter-ISIS Train and Equip Fund (CTEF). Combined Joint Task Force – Operation Inherent Resolve used this funding source to train, equip, and sustain ISF and Vetted Syrian Opposition (VSO) forces in order to build partner capacity as part of its fight against ISIS.[3]

Counter-ISIS Train and Equip Fund Non-Tactical Vehicles Contract Awarded to Flower of the Palace

On 5 September 2018, the 408th CSB competitively awarded a $13 million CTEF contract to FoP for the purchase of sixty armored NTVs and 183 standard NTVs.[4] As part of the contract and host nation law, FoP was required to obtain approval from the U.S. Embassy-Baghdad and the Iraq Prime Minister National Operations Center (PMNOC)[5] prior to delivering the NTVs to the Taji Military Complex (Camp Taji). Under the CTEF program, after the contracting officer inspected and accepted the NTVs, CJTF-OIR would take possession, then divest them to the ISF.

On 2 October 2018, FoP purchased all 243 NTVs in Dubai, UAE. It transported

sixty NTVs across Saudi Arabia to Jordan, where a subcontractor installed the ballistic plating and armor. On 16 October 2018, FoP placed 133 standard NTVs on a freighter and transported them across the Gulf of Hormuz to Iran. On 11 November 2018, after transiting the length of Iran, the NTVs crossed over into Iraq.[6]

On 6 December 2018, the U.S. Embassy-Baghdad notified the 408th CSB that it had denied FoP's request to deliver the initial shipment of 133 standard NTVs to Camp Taji, on the grounds that FoP had violated the Iran sanctions by shipping the NTVs through the landmass of Iran. Flower of the Palace then attempted to circumvent the embassy's decision by improperly going directly to PMNOC and "paying for" PMNOC approval. The embassy officials cautioned the 408th CSB that the contractor was attempting to deliver the 133 NTVs to Camp Taji, after obtaining PMNOC approval under dubious circumstances.

The 408th CSB immediately issued a ten-day show cause notice to FoP, which directed the contractor to provide assurances that it had not violated any Iran sanction or applicable contract clause concerning the same. Absent a satisfactory explanation, FoP's CTEF contract would be terminated for cause based on the Federal Acquisition Regulation (FAR) 52.225-13, which was incorporated into the CTEF contract. It provides the following: "Except as authorized by OFAC, most transactions involving . . . Iran are prohibited[.]"[7]

In response to the show cause notice, FoP provided hundreds of pages of import/export certificates, shipping manifests, and invoices, which were in Arabic and required translation.[8] The gist of FoP's argument was two-fold. First, the CTEF contract was awarded on 5 September 2018, and prior to the snap-back of Iran sanctions, i.e. 5 November 2018. Second, the NTVs were manufactured in Japan and purchased in Dubai, UAE.

Law and Analysis

The legal framework surrounding Iran sanctions is vast and serpentine. Sanctions were initially levied in 1979, as a result of the Iran hostage crisis.[9] The United States later imposed a host of sanctions over the succeeding years in response to Iran's support of regional terror groups, involvement in the bombing of the U.S. Marines barracks in Lebanon, its designation as a state sponsor of terrorism, military arms exports, efforts to destabilize the region, and human rights violations.[10] Presently, there are more than fifty U.S. statutes, regulations, and United Nations Security Resolutions related to Iran sanctions.[11] Further complicating matters is that many of these sanctions only apply to U.S. persons.[12]

The legal framework surrounding Iran sanctions is vast and serpentine

As the legal advisor to the Army Service Component Command, the ARCENT Office of the Staff Judge Advocate (OSJA) coordinated with the relevant stakeholder commands, the DoS, and, most importantly, OFAC, the U.S. governmental entity responsible for enforcing U.S. trade sanctions. Although this *ad hoc* inter-agency working group initially convened on 19 December 2018, its progress was frustrated by a thirty-five-day federal government shutdown from 22 December 2018 to 25 January 2019. On 24 January 2019, a furloughed OFAC attorney, working from a shuttered and empty office, provided OFAC's legal assessment of the situation. Flower of the Palace, as a non-U.S. person, did not violate the Iran sanctions. But because the 133 NTVs were deemed of Iranian origin, CJTF-OIR and the 408th CSB could not take possession of the same without violating the Iranian Transactions and Sanctions Regulations (ITSR).[13]

United States persons, wherever they may be located, are prohibited from engaging in any transaction dealing with goods of Iranian origin.[14] In accordance with 31 C.F.R. § 560.306(a)(2), goods of Iranian origin include items "that have entered into Iranian commerce." The U.S. Department of Justice and OFAC have consistently held that the mere transshipment of goods through the landmass of Iran make them of Iranian origin— irrespective of their point of origin or manufacture.

The indictment in *United States v. Farouki*, is instructive on this point.[15] On 22 June 2012, the Government awarded defendants, who were U.S. persons, an eight billion-dollar contract to provide contract services, food, and supplies to the U.S. military in Afghanistan.[16] Similar to the FoP CTEF contract, the Government incorporated FAR 52.225-13 into the *Farouki* contract.[17] According to the indictment, the defendants improperly shipped their goods through Iran to reduce their transportation costs.[18] The Government indicted the defendants, averring that they "knowingly engaged in, and directed others to engage in, the practice of shipping goods and materials across Iran, in violation of the OFAC regulations including the ITSR," while concealing their scheme from the Government.[19]

Here, unlike the *Farouki* defendants, FoP was a non-U.S. person and, thus, was not subject to the ITSR,[20] though it still breached its contract by violating FAR 52.225-13. More importantly, once the 133 NTVs were transshipped through Iran, they became "tainted", i.e. considered of Iranian origin. Consequently, CJTF-OIR and the 408th CSB could not accept their delivery and possession without violating the applicable Iran sanctions.

The 408th CSB set out to minimize the operational impact and the litigation risk of terminating FoP's contract. They conferred with the CJTF-OIR OSJA, as the legal advisor to the requiring activity and the customer, regarding how it and the ISF would like to proceed. According to the CJTF-OIR CTEF program manager, who liaised with the ISF, the Iraqi Army still badly needed the 183 standard and sixty up-armored NTVs. So, the 408th CSB decided to only partially terminate the contract for default, accepting delivery of the fifty standard and sixty up-armored NTVs that were still in the UAE and Jordan, respectively, and had not been transshipped through Iran. The contracting officer (KO) also worked with CJTF-OIR to release a new solicitation for

quotes from vendors to purchase another 133 standard NTVs for the ISF. Because FoP was terminated for default, the original prior year funds remained available, even though the replacement contract would be awarded in a subsequent fiscal year.[21] Finally, as part of the contract file, the 408th CSB ensured that the KO's written determination and findings included a detailed recounting of the facts, all of the applicable translated shipping manifests, import/export certificates, and a written statement by OFAC officials that FoP was not authorized to ship the NTVs through Iran. Thus, the KO's termination action based on a material breach of FAR 52.225-13 would be unassailable, if FoP appealed the final decision to the Armed Services Board of Contract Appeals and/or the U.S. Court of Federal Claims.

Conclusion

Since the Global War on Terror, the Army has gained considerable experience in the area of contingency contracting. Nevertheless, the interplay of contingency contracting with Iran sanctions law was an issue of first impression for the JAs at ARCENT, CENTCOM, CJTF-OIR, and the 408th CSB. Fortunately, they were able to work across multiple commands, while leveraging the inter-agency process to collaborate and craft a legal way forward that minimized any disruption to ongoing military operations against ISIS. The legal issues generated from this episode were discrete and limited to sanctions and contract and fiscal law, but the major lesson learned has universal application for JAs. Judge advocates should work together to create synergy, thereby amplifying their value to their respective commands. **TAL**

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Notes

1. Jason Burke, *Rise and Fall of ISIS: Its Dream of a Caliphate is Over, so What Now?*, The Guardian (Oct. 21, 2017), https://www.theguardian.com/world/2017/oct/21/isis-caliphate-islamic-state-raqqa-iraq-islamist.

2. Sebastian Payne, *What the 60-Plus Members of the Anti-Islamic State Coalition are Doing*, The Wash. Post (Sept. 25, 2014), https://www.washingtonpost.com/news/checkpoint/wp/2014/09/25/what-the-60-members-of-the-anti-islamic-state-coalition-are-doing/.

3. U.S. Dep't of Def., *Fiscal Year (FY) 2020 President's Budget: Justification for Security Cooperation Program and Activity Funding* 3 (2019) https://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2020/FY2020_Security_Cooperation_Book_FINAL.pdf.

4. Based at Shaw Air Force Base, South Carolina and Camp Arifjan, Kuwait, the 408th Contracting Support Brigade (CSB) provides operational and theater contract support to United States Army Central (USARCENT), and serves as the lead contracting agency for all Title 10 Army forces operating in the Central Command (CENTCOM) Area of Responsibility in support of Operations Inherent Resolve, Freedom Sentinel, and Spartan Shield. Like all Outside Continental United States (OCONUS) CSBs, the 408th is assigned to U.S. Army Contracting Command (ACC) at Redstone Arsenal, Alabama, but regionally aligned to an Army Service Component Command (ASCC) — here, USARCENT — in a direct support relationship.

5. Iraqi Prime Minister National Operations Center (PMNOC) is analogous to the U.S. Department of Transportation and Internal Revenue Service. Iraqi vendors are required to get PMNOC approval for the ground movement of cargo. As part of the approval process, PMNOC assesses a tax.

6. Flower of the Palace (FoP) provided no explanation regarding why it took twenty-six days to transport the non-tactical vehicles (NTV) through Iran. According to the shipping manifests and import/export certificates, the distance traveled in Iran was approximately 900 miles.

7. Federal Acquisition Regulation (FAR), 48 C.F.R. § § 52.225-13 (2008). The FAR clause required the contractor to incorporate this prohibition into any subcontracts.

8. The 408th CSB did not have any translation or geospatial capabilities. However, the Combined Joint Task Force – Operation Inherent Resolve (CJTF-OIR) Office of the Staff Judge Advocate (OSJA) provided critical support to the 408th CSB, translating the vast mountain of Arabic documents and mapping the probable route of the 133 NTVs from the UAE to Iraq via Iran.

9. Ashish Kumar Sen, *A Brief History of Sanctions on Iran,* Atlantic Council (May 8, 2018), https://atlanticcouncil.org/blogs/new-atlanticist/a-brief-history-of-sanctions-on-iran/.

10. Erin Blakemore, *U.S.-Iran Tensions: From Political Coup to Hostage Crisis to Drone Strikes*, History (Jan. 8, 2020), https://www.history.com/news/iran-nuclear-deal-sanctions-facts-hostage-crisis.

11. *See e.g., Resource Center: OFAC FAQs: Iran Sanctions*, U.S. Dep't of the Treasury, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx (last visited Nov. 4, 2019). This is the FAQ section about Iran Sanctions from the U.S. Department of the Treasury.

12. *See, e.g.,* U *Resource Center: OFAC FAQs: Iran Sanctions*, U.S. Department of the Treasury https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_iran.aspx#diplomatic (last visited Nov. 4, 2019). This section of the FAQs discusses the provision of routine goods and services by non-U.S. persons to diplomatic missions of the Government of Iran.

13. *See* 31 C.F.R. §§ 560.204-206, 560.208, and 560.403 (2011). Iran sanctions "apply to export, re-export or supply transactions which require a *transshipment* or transit of goods or technology through Iran to third countries." 31 C.F.R. § 560.403 (2011) (emphasis added).

14. 31 C.F.R. § 560.206(a) (1) (2011).

15. Indictment, at 10, United States v. Farouki (No. 1:18-cr-00346) (D.C. Dist. Ct. 2018).

16. Press Release, Off. of Pub. Aff., Three Senior Executives at Defense Contracting Firms Charged with Scheme to Defraud the U.S. Military in Connection with $8 Billion Troop Supply Contract and with Violating the Iran Sanctions Regime (Nov. 29, 2018), https://www.justice.gov/opa/pr/three-senior-executives-defense-contracting-firms-charged-scheme-defraud-us-military.

17. *Id.*

18. *Id.*

19. Faarouki, *supra* note 15.

20. The 408th CSB examined FoP's corporate disclosures to confirm that none of its principles or officers were U.S. persons.

21. Funding of Replacement Contracts, B-198074, 1981 CPD ¶ 33 (Comp. Gen. Dec. Jul. 15, 1981); Bureau of Prisons-Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 1983 CPD ¶ 91 (Comp. Gen. Dec. Sept. 28, 1983).

Judge Advocates and German Attorneys in Nuremberg

By Lieutenant Colonel Ryan Kerwin and Ms. Mechthild C. Benkert

On the night of 19 October 2019, a standing-room-only crowd watched as members of the Office of the Staff Judge Advocate (OSJA), 7th Army Training Command (7ATC), and Trial Defense Services (TDS), entered the famed Courtroom 600 in Nuremberg's Palace of Justice and began trying a court-martial. They were part of a city-wide, biennial exhibition called "The Long Night of Science" that officials in Nuremberg, Germany, billed as one of the most prestigious educational events in the region.[1] Members of the 7ATC OSJA—headquartered in Grafenwoehr, Germany, and stationed throughout Bavaria alongside their TDS counterparts—participated in back-to-back mock trials, juxtaposed beside German attorneys and judges trying the same case. The courtroom, which was the setting of the historic Nuremberg International Military Tribunal held immediately following World War II, was filled beyond capacity with a crowd of mostly local German civilians; they watched the proceedings intently. The event was designed to showcase the similarities of, and noticeable differences between, the American military and German justice systems. It also further solidified the strong bond between the 7ATC OSJA and the Bavarian legal community.

When you enter Courtroom 600, there is a feeling of eerie familiarity. For judge advocates and any practitioner of national security or international law, this courtroom is instantly recognizable and akin to hallowed ground. The Nuremberg trials—particularly the tribunal held immediately following World War II from November 1945 until October 1946—would prove to be one of the most critical events in modern legal history.[2] Due to the Nuremberg trials' key place in the study of international law, Courtroom 600's appearance evokes an immediate sense of recognition. The dark, carved wood, and the massive, ornate marble sculptures above the doorways still appear just as they did during the successful tribunals that prosecuted notorious Nazis—such as Hermann Göring and Rudolf Hess—among many others.[3] The fact that the trials were also the subject of the classic film *Judgment at Nuremberg* ensures that even non-practitioners view the courtroom with a sense of immediate acknowledgement and reverence.

The legal and historical legacy of the Nuremburg trials cannot be overstated. "For the first time in history, states ruled by entirely different forms of government and constitutional systems joined forces to prosecute a defeated enemy in court."[4] In what could be considered a culmination of thousands of years and attempts to perfect the application of justice at the conclusion of an armed conflict, the allies "sought to conduct a judicial proceeding in accordance with the rule of law," rather than "arbitrarily exacting revenge."[5] As lead prosecutor Justice Robert H. Jackson eloquently remarked in his opening statement:

That four great nations (Great Britain, France, the United States, and the former Soviet Union), flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.[6]

Critically, these trials also introduced a series of revolutionary legal concepts that continue to have significant influence on international law. These included the idea of personal accountability for crimes committed as a result of an order from a government or a superior.[7] The defense of "I was just following orders" would forever be viewed as unsatisfactory and linked to the Nuremberg trials.[8] Additionally, the concept of "crimes against humanity" as an enumerated criminal charge appeared for the first time.[9] These, and other legal developments in the Nuremberg trials, would go on to influence a variety of the most significant documents in international law that were enacted for the remainder of the 20th Century.[10] Former Nuremberg prosecutor Henry T. King, Jr. later remarked: "Nuremberg was the foundation stone of a better world for all of mankind. It endeavored to replace law of force with the force of law."[11]

Since the conclusion of subsequent tribunals in 1949, the courtroom has continued to be used in a variety of ways. Beginning in 1961, the city of Nuremberg used the courtroom for criminal trials and daily hearings.[12] In addition, on the night of 19 October 2019, it also played host to one of the most unique events in the region.

Every other year, the city of Nuremberg hosts an event called "The Long Night of Science." In essence, it is an open-house-style educational experience designed to expose residents and visitors to a variety of intellectual endeavors. Universities, museums, scientific labs, and a number of cultural institutions across Nuremberg open their doors to the public for one Saturday evening, attracting an estimated 30,000 people to a wide variety of exhibits and presentations throughout the city.[13] With the encouragement and planning of the German judiciary and 7ATC OSJA Host-Nation German attorneys, the 2017 program included a mock court-martial conducted by United States (U.S.) Army judge advocates and paralegals and a mock trial conducted by German civilian attorneys and judges. In a nod to the long-standing role that the U.S. military, including judge advocates, have played in Nuremberg, the trial was held in historic Courtroom 600. Advertised as a side-by-side comparison of the German civilian and U.S. military justice systems, the mock trials relied on an identical fact-pattern; but, very different avenues in which justice is adjudicated. This event was an immediate success.[14] As a result, on 19 October 2019, members of the 7ATC OSJA, TDS, and their German legal co-participants continued this newly established tradition by reprising their roles in "The Long Night of Science" mock trial.

The 2019 event was planned and coordinated by 7ATC OSJA Host Nation attorney (and co-author of this article) Mechthild "Meggy" Benkert (Senior Civil-

ian Attorney & Chief of Client Services), Lieutanant Colonel (LTC) (Ret.) Bradley Huestis, Captain (CPT) James Walston, and German Judge Waltraut Bayerlein (the Vice President of the Higher Regional Court in Nuremberg). Filling the role of trial judge for the court-martial was LTC John J. Merriam, 7ATC Staff Judge Advocate. Operating from an identical fact-pattern concerning an alleged aggravated assault with a knife, German attorneys first presented a mock trial in accordance with their own justice system. In order to show both similarities and differences, the German trial was immediately followed by Judge Advocate General's (JAG) Corps members presenting their respective cases. Each trial included periodic stoppages for narration by members of the German judiciary, as well as Mr. Huestis, in order to teach the public about each system. Both trials concluded with questions from the predominantly civilian German audience. Each trial—German and American—was performed twice to two new audiences. The demand to attend each proceeding was so significant that the line to enter the Palace of Justice extended far beyond the entrance and into the street.

The differences in both procedure and tone of the trials were immediately apparent. The German legal system is inquisitorial, based on civil law, and therefore driven by the judges' roles as lead investigators. While the German trial was presented in typical subdued fashion, the military court-martial began with the dramatic flair associated with impassioned opening statements so often seen in American courts. The German trial consisted of a series of judge-led questions aimed at fact-finding and executed in workman-like fashion. Conversely, the questioning during the court-martial, particularly during cross examination, offered the audience a taste of our adversarial system. Interestingly, the German court found the defendant guilty on all charges in both trials. On the other hand, the U.S. Army panel gave a mixed verdict: a finding of guilt on one specification and not guilty on two others.

In addition to the "The Long Night of Science," the 7ATC OSJA is engaged in a number of collaborative training events held throughout the year between the OSJA and members of the German legal community. This continued relationship is consistent with an overall focus on interoperability within 7ATC and U.S. Army Europe writ-large. "Interoperability greatly enhances multinational operations through the ability to operate in the execution of assigned tasks."[15] While this is particularly true in military justice, German justice requires regular coordination and cooperation between members of the JAG Corps and the German Bar. It also impacts every core competency of the 7ATC OSJA.

The 7ATC OSJA's initiatives also include a training program, designed to expose the U.S. military justice system to new German attorneys, as well as periodic engagements with senior German district attorneys to continue dialogue and mutual understanding. In November 2019, fifteen 7ATC judge advocates and paralegals accompanied Ms. Benkert to teach new German prosecutors in five cities throughout Bavaria about the U.S. military justice system. Now, in its twenty-ninth year, this teaching program facilitates understanding and coordination between German prosecutors and the OSJA. This has proven to be critical in the event that Soldiers are charged with crimes off-post. Similarly, in early 2020, the 7ATC OSJA will welcome senior German district attorneys from across Bavaria for additional training and dialogue.

As "The Long Night of Science" drew to a close in Courtroom 600, it was clear that the program had made a significant impression on both participants and onlookers alike. Questions and comments, particularly from the German crowd, focused on some of the obvious differences in each trial. Judge Bayerlein expressed that the event "offers an excellent forum to bring the justice system and the principle of the rule of law closer to the general public," adding that it "illustrate[d] the differences between the German and U.S. legal system." Judge Bayerlein also pointed out that "justice can indeed be achieved in very different ways."[16] However, the consistent theme of the evening was that, despite the numerous differences, the goals of each system, ultimately, were completely consistent with each other. While the German and U.S. trials "seem so different from each other . . . the purpose of both is the same: to find the truth."[17] **TAL**

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Notes

1. *See, e.g.*, Die Lange Nacht der Wissenschaften, https://www.nacht-der-wissenschaften.de/ (last visited Jan. 20, 2020). This website is the original German homepage of "The Long Night of Science."

2. *See, e.g.*, Nuremberg Trials Memorium and Museum, https://museums.nuernberg.de/memorium-nuremberg-trials/ (last visited Jan. 20, 2020). This website is available in English translation.

3. *Id.*

4. *Birth of International Criminal Law*, The Nuremberg Memorium and Museum, https://museums.nuernberg.de/memorium-nuremberg-trials/the-legacy-of-nuremberg/birth-of-international-criminal-law/ (last visited Jan. 20, 2020).

5. *Id.*

6. T. Marion Beckerink, *Justice Jackson Delivers Opening Statement at Nuremberg, November 21, 1945,* Robert H. Jackson Center (Jan. 8, 2016), https://www.robertjackson.org/article/justice-jackson-delivers-opening-statement-at-nuremberg-november-21-1945/.

7. *See Birth of International Criminal Law, supra* note 4.

8. *Id.*

9. *Id.*

10. *See generally*, Henry T. King, Jr., *The Legacy of Nuremberg*, 34 Case W. Res J. Int'l L. 335 (2002) https://scholarlycommons.law.case.edu/jil/vol34/iss3/4.

11. *Id.* at 353.

12. *See Birth of International Criminal Law, supra* note 4.

13. *See* Die Lange Nacht der Wissenschaften, *supra* note 1.

14. Staff Sergeant Kathleen V. Polanco, *7ATC Legal, German Lawyers, Partners for Justice*, U.S. Dep't of the Army (24 Oct. 2017), https://www.army.mil/article/195787/7atc_legal_german_lawyers_partners_for_justice.

15. Joint Chiefs of Staff, Joint Pub. 3-16, Multinational Operations, I-10 (1 Mar. 2019).

16. Email from Judge Waltraut Bayerlein to Mechthild C. Benkert (Dec. 12, 2019, 10:31) (on file with author).

17. Martin Egnash, *Soldiers Take Part in Judicial Exhibit in Nuremberg Court*, Stars and Stripes (Oct. 20, 2019), https://www.stripes.com/soldiers-take-part-in-judicial-exhibit-in-nuremberg-court-1.603851.

(Credit: istockphoto.com/Roman Stavila)

The Spoof Is in the Evidence

Obtaining Electronic Records to Corroborate Text Message Screenshots

By Lieutenant Colonel Eric A. Catto

"Don't like your buddy's girlfriend? Well, break them up. Just send a fake text message! www.spoofmytextmessage.com"[1]

Most modern courts-martial include text/chat message evidence from a cell phone. Digital evidence, like all evidence, is susceptible to fraud, alteration, and fabrication. A common method of fabricating text messages is "spoofing."[2] Using a spoofing application (app), an individual can falsify a text message and send the message from any phone number they choose. Thus, an alleged victim can enter the accused's phone number and send a message—in which the accused appears to admit his guilt—to the alleged victim's phone. Or, a witness could use a spoofing app to create an entire fake conversation on the user's phone, allowing the user to take a screenshot of the spoofed conversation and represent it as a genuine conversation.

Access to spoofing has become so prolific that law enforcement should no longer assume the genuineness of a screenshot depicting a digital communication.[3] Using the search term "spoof" in the Apple App store, the author scrolled through over 100 spoofing apps that enable the spoofing of text messages, phone calls, Global Positioning System location, email, and/or social media messages.[4]

Recognizing that electronic communications are susceptible to "spoofing" or fraud, courts have found it is insufficient to merely argue that, on its face, a message purports to be from a person's messaging system.[5] The availability and ease of modern spoofing technology makes such an assumption naive.

Fraudulent text message services are becoming increasingly prevalent. It is important for military justice practitioners to understand the primary ways to fabricate a text message, how to authenticate text message evidence using the "digital footprint" of electronic communications, and how recent changes to the Stored Communications Act (SCA)[6] make compelling disclosure of the "digital footprint" from service providers much easier for military investigators. In response to the SCA changes, law enforcement should obtain SCA court orders or warrants[7] for data recovery as a matter of course in all cases involving text/chat message digital evidence. Even when the physical communication device is secured and forensically analyzed, investigators should still secure the SCA records to ensure the forensic examination collected all the messages on the phone.[8] Taking the steps to secure this data creates a minimal burden on law enforcement. However, obtaining this data provides corroboration when authenticating digital evidence at trial and may be the difference between obtaining a conviction or a not guilty finding. A blueprint for law enforcement to gather and litigators to analyze text or chat message evidence, placing particular importance on situations in which the cell phone is unavailable for forensic examination, will be helpful to judge advocates navigating this realm.

Spoofing Services Are Abundant, Affordable, and Easy to Use

As mentioned above, there are hundreds of companies providing spoofing services for relatively low costs. There are two main ways to spoof a text message. This article will refer to the first spoofing technique as the Fake-Text Transmission method. In this method, a user (the spoofer) accesses a spoofing website or app to send an actual text message to the recipient's phone (spoofing recipient), appearing as though the message originated from a phone number of the spoofer's choosing. The spoofer creates the content of the text message and chooses the phone number of the "sender" of the text message.[9] The website or app then sends the text message to the spoofing recipient, appearing to originate from the "sender" selected by the spoofer.[10] If the spoofing recipient takes a screenshot of the

spoofed text message that they received, the screenshot would depict a picture of an actual text message received by the spoofing recipient, even though the "sender" identified on the screenshot had never actually sent that message to the spoofing recipient from their own phone.

This article will refer to the second spoofing technique as the No Transmission, Fake Conversation method. Here, the spoofer accesses a spoofing website or app and creates either a single fake text message[11] or an entire fake conversation between any two (real or fictional) individuals on the spoofer's own phone.[12] No actual communication is sent or received by either phone. The spoofer inputs the names (or phone numbers) of both the sender and recipient of the spoofed message and creates the content of the messages. The spoofer inputs the date and time of each message.[13] Using this method, the spoofer can take a screenshot of the fake text message conversation on their phone. That screenshot looks identical to the screenshot of an authentic text message conversation taken from a phone.[14] This technology allows the presenter of the screenshot to present this spoofed text message conversation to law enforcement, even though the conversation never occurred.[15]

Both of these spoofing methods are user-friendly and readily available to anyone with access to internet websites[16] or digital apps.[17] Anyone with the smallest amount of comfort using cell phone apps could effectively use this spoofing technology. Law enforcement and litigators must be aware of this new technological reality to accurately investigate and litigate cases that include digital evidence of electronic communications. An accurate investigation requires pursuing a method to verify the genuineness of the text message.

Methods to Authenticate a Text/Chat Message

Traditional methods of authenticating digital evidence include testimony from the sender or recipient asserting the text messages are genuine or from a witness who saw the message being sent. When the purported "sender" denies sending the message and there were no witness to the transmission, the best evidence that a text message is what it purports to be is the "digital footprint" found through data recovery on the cell phone itself or in records stored by the service provider.

Text/chat messages, like all electronic communications, leave a digital footprint that is tracked in the records maintained by the service provider. Text messages produce transactional records[18] that memorialize the date/time of when a text message was sent or received by a user's account.[19] Of note, some telecommunication service providers keep records of the content of text messages for a short period of time.[20]

Ideally, in a case involving text/chat message evidence, law enforcement will secure the physical device from the alleged victim and the accused and conduct forensic analysis to obtain the digital footprint of the messages. However, there are situations where the cell phone is unavailable.[21] In these situations, it is crucial for law enforcement to obtain information regarding the witnesses' smartphone or tablet brand, cellular service provider (e.g., Verizon, Sprint), and chat application service provider (e.g., Apple iMessage, Facebook Messenger); that information informs law enforcement of which service providers to contact.

Even when a cell phone is available for forensic examination, obtaining data from the service provider will corroborate the authenticity of the digital evidence and ensure the forensic examination captured all the message history associated with the phone's user. As discussed in the next section, military investigators and litigators can easily request this data pursuant to a SCA search warrant or court order.

Military Judges Are Now Competent Authorities to Issue SCA Warrants/Orders

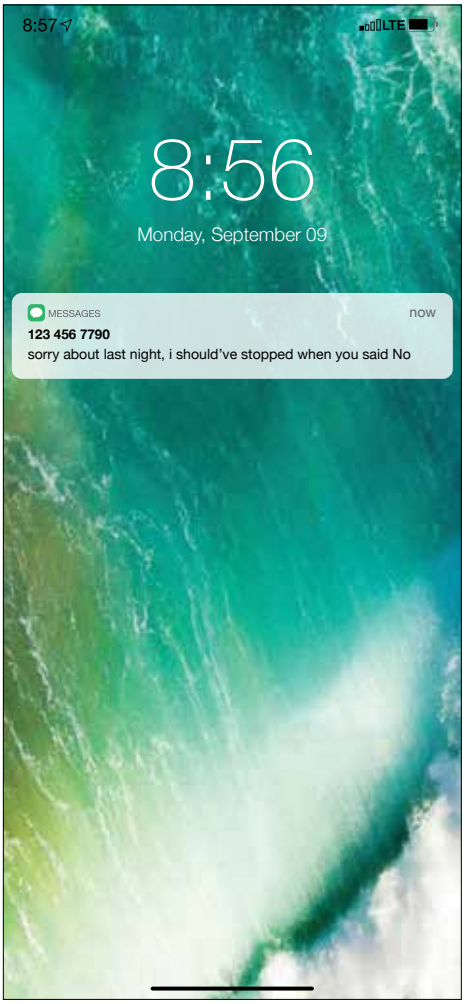
Prior to 1 January 2019, military investigators were limited in their ability to use the SCA to compel disclosure of electronic records from service providers. Since the SCA did not include military courts in its definition of a "court of competent jurisdiction," military judges did not have the power to compel civilian service providers to disclose electronic communication records. Rather, law enforcement had to go through a lengthy process of working with a United States Attorney's office to request a SCA order or warrant from a Federal Magistrate.[22]

As of 1 January 2019,[23] military judges[24] gained the authority to issue SCA court orders and warrants,[25] compelling civilian service providers to produce these electronic records to military law enforcement.[26] This removes a major hurdle for military investigators and supports the argument that trial counsel should obtain a SCA order or warrant for data recovery *as a matter of course in all cases* involving text/chat message digital evidence. The following section describes the consequences for litigators at trial should a SCA court order or warrant not be obtained.

Law enforcement and litigators must be aware of this new technological reality to accurately investigate and litigate cases that include digital evidence of electronic communications

Consequences of Spoofing for Litigators at Trial

As discussed above, law enforcement should be taking the additional investigative steps to pursue corroboration for screenshots of electronic communications. Trial counsel need the digital records to help prove their case[27] and authenticate a screenshot at



Example 1
No Transmission, Fake Conversation
Example of a fake message created on your own phone. Cannot cause this text message to appear on another phone, but it appears as though the user received a text from any number (or name) the user selects.

Example 2
No Transmission, Fake Conversation
Example of a fake text message conversation created on your own phone. Taking a screenshot of this spoof looks like you received a series of texts, and responded to the sender. The green box signifies a text message sent via SMS or MMS. Created on iPhone using the App "Fake Text Me" by Kiran Devi.

Example 3
No Transmission, Fake Conversation
Can also create a fake iMessage conversation on your own phone. Taking a screenshot of this spoof looks like you received a series of texts, and responded to the sender. The blue (rather than green) box signifies a message sent via Apple iMessage (rather than a text via SMS or MMS). Created on iPhone using the App "Fake Text Me" by Kiran Devi.

trial.[28] Even if the military judge admits the screenshot into evidence without the SCA records, once they learn from the defense counsel how easy it is to spoof a text message, the finder of fact may determine the screenshot is unpersuasive evidence.[29]

Defense counsel need to understand the technology to properly evaluate the case and to make the proper arguments at trial. Defense counsel should highlight the shortcomings of the investigation by showing that law enforcement could have easily secured electronic records that would have verified the genuineness of the messages and corroborated the alleged victim's claim, but they chose not to collect that evidence.[30]

Special victim counsel (SVCs) also need to understand this spoofing issue in order to effectively advise their clients. An alleged victim may want to report a crime but does not want to turn over their phone to law enforcement for forensic examination. The SVC could help preserve their client's privacy interests by advising law enforcement to seek the SCA records for corroboration of the screenshot, thereby reducing the likelihood that Criminal Investigation Command (CID) would need to seize the client's phone for corroboration. Additionally, the SVC should advise their client about CID's investigative capabilities, to deter a client who may have considered spoofing a communication. The final section below provides a blueprint for military law enforcement and trial counsel to request electronic communication records from service providers.

Steps to Follow to Secure SCA Records

Freeze the Evidence Immediately by Sending Preservation Letters.
As soon as the allegation arrives, the CID agent should ask the alleged victim how she communicated with the accused,[31] then

Example 4
Fake-Text Transmission
Actual spoofed text message sent from a website to the author's phone number. The sender can pick the phone number (or name) to appear on the received text. Only text messages (sent by SMS or MMS) can be spoofed by actually sending a message to a phone. (iMessage are not susceptible to Fake-Text Transmission but can be spoofed using No Transmission, Fake Conversation method.)

Fake-Text Transmission spoofed texts will always appear as a new conversation on the recipient's phone (they will never be added as a continuation to a previous text message conversation). Recipients can respond to these spoofed texts. Created on iPhone using the website "www.spoofmytextmessage.com".

Example 5
Real Text Message (Not Spoofed)
This is screenshot of a real text message (not spoofed) from iPhone. You cannot add a spoofed text message to an existing message chain. (Cannot add the message received on 5 Aug at 9:50am via Fake Text Transmission.) But you could create the entire (fake) conversation on your own phone, using the No Transmission, Fake Conversation method. (But you cannot cause this message to appear on someone else's phone using that method.)

send preservation letters[32] to the appropriate service providers[33] as a way to freeze the evidence and prevent its destruction. Service providers will preserve the requested content and transactional records for ninety days. Under the SCA, CID may ask for an additional ninety days of preservation, but no more than the total of 180 days.[34] If the defense counsel is aware of potential exculpatory evidence, they may send the trial counsel a request for law enforcement to send preservation letters to service providers. Now that the data is preserved, the next step is to categorize the desired information.

Categorize the Information to Determine Scope of Judicial Process Request.
Law enforcement must categorize the information sought as either content records, transactional records, or basic subscriber information. Content records are less frequently available, whereas transactional records and basic subscriber information is readily available and require a much lower standard of proof.

Content records (i.e., the text of the written message) are only available from a cellular service provider, not a chat application service provider.[35] Not all cellular service providers store content records and, if they do store content records, they do so usually only for three to five days before deleting the records.[36] Courts require a showing of probable cause to obtain a search warrant for content records.[37] So, if law enforcement is seeking the content of the text message on the screenshot, they will need a SCA search warrant based upon probable cause.

Transactional records (date/time of when messages were sent, the internet protocol (IP) addresses the request was made from, etc.,[38]) and records of a user's basic subscriber information[39] are available from any service provider— both cellular providers and chat application providers.[40] For transactional records (not including historic cell site location information[41]), and basic subscriber information, a petitioner must secure a court order from a judge after demonstrating the desired records were relevant and material to an ongoing criminal investigation.[42]

Obtain the Proper Process in a Pre-Referral Judicial Hearing.
Once law enforcement has categorized the information it seeks and determined which provider to get it from, they must seek an audience from a judge for the appropriate judicial process. Law enforcement may seek this hearing as soon as the investigation begins. Hearings will usually be conducted ex parte,[43] and the military judge may review the evidence in camera.[44] Trial counsel request the pre-referral hearing with the military judge.[45] The ideal process is to send the affidavit and administer the entire process over email, culminating in the military judge signing the warrant or court order and emailing the process back to the trial counsel. A hearing with the military judge is available, if necessary; in this case, a court reporter would record the hearing. Trial counsel is responsible to keep the

records of the proceedings and must attach the entire correspondence to the record of trial if the case is eventually referred to court-martial.[46]

To obtain basic subscriber info or transactional records, petition the military judge for a SCA court order.[47] To obtain content records or historic cell site location information, petition the military judge for a warrant. Despite the plain language in SCA and Rule for Court-Martial 703A, a warrant based upon probable cause is required for content, regardless of the length or location of storage.[48] Law enforcement may also seek SCA warrants for items located in "the cloud."[49]

Seek Non-Disclosure Orders, If Appropriate, and Follow Notification Requirements. The Government may request non-disclosure orders (NDO) for court orders that prohibit the service provider from notifying the subscriber that the Government requested electronic records.[50] Judges will issue NDOs when the Government demonstrates that one or more of five adverse results (set out in the statute) may occur due to notification of the judicial process.[51] NDOs may last for up to ninety days and extensions are permissible.[52] Neither the Government, nor the service provider, is required to notify the subscriber of process seeking basic subscriber info. However, the service provider may choose to notify the subscriber. To prevent or delay that notification, law enforcement may obtain an NDO in the court order. Once the NDO notification delay period expires, the Government serves or mails the subscriber a copy of the process.[53]

Conclusion

Given the proliferation of spoofing, courts may no longer accept screenshots of text messages as trustworthy evidence. Investigators and litigators must understand the capabilities of spoofing technologies and have a basic understanding of the digital footprint found in these records.

As of 1 January 2019, the SCA provides an efficient method for obtaining the digital records of communications conducted through civilian service providers, like Verizon or Facebook. Due diligence should include pursuing these records (or exploiting at trial the lack of these records). These investigative actions, or lack thereof, provide arguments for the litigators at court-martial that may be the difference between a conviction and a not guilty finding. **TAL**

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Notes

1. *See* Spoof My Text, https://www.spoofmytextmessage.com (last visited Oct. 20, 2019).

2. The Federal Communications Commission defines spoofing as, "when a caller [texter] deliberately falsifies the information transmitted to your caller ID display to disguise their identity." *See Caller ID Spoofing*, FCC.gov, https://www.fcc.gov/consumers/guides/spoofing-and-caller-id?from=home (last updated July 15, 2019).

3. United States (U.S.) consumers received nearly four billion unwanted robocalls per month in 2018. *See The FCC's Push to Combat Robocalls and Spoofing*, FCC.gov, https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing (last visited Sept. 7, 2019). Advancements in technology enable cheap and easy access to a massive number of robocalls and to "spoof" caller ID information to hide a caller's true identity. *Id.* This same spoofing technology applies to text messages, emails, and social media posts. *See Evidence Collection Series: Spoofing Calls and Messages*, techsafety.org, https://www.techsafety.org/spoofing-evidence (last visited Oct. 20, 2019) [hereinafter *Evidence Collection Series]*.

4. The author conducted a search on 9 Sept. 2019 in the Apple app store by using the search term "spoof." The author saw both Fake-Message Transmissions and No Transmission, Fake Conversation spoofing apps. Some of the apps were free. None of the apps were cost prohibitive. All of the apps accessed were easy to use.

5. *See* Campbell v. State, 382 S.W.3d 545, 547 (Tex. Ct. App. 2012). *See also* Major Scott A. McDonald, *Authenticating Digital Evidence from the Cloud*, Army Law., Jun. 2014, at 47. The court recognized that "anyone can establish a fictitious profile under any name" and "a person may gain access to another person's account by obtaining the user's name and password." *Campbell*, 382 S.W.3d at 549.

6. *See* Stored Wire and Electronic Communications and Transactional Records Access, 18 U.S.C. §§ 2703-2711 (2018).

7. A military judge may compel civilian service providers to disclose records of electronic communications by issuing warrants or court orders. *See* 18 U.S.C § 2703(a)-(c) (2018); UCMJ art. 46(d)(3) (2019); and Manual for Courts-Martial, United States, Rules for Courts-Martial (R.C.M.)703A(a) (2019) [hereinafter MCM].

8. Sometimes the message history from the forensic examination contains garbled text that does not provide usable information to law enforcement. Additionally, not all message communication is always retained on the phone. Furthermore, it is possible to send data chat messages from more than one device. Person X may be able to send iMessages from their cell phone, as well as their iPad. An examination of the cell phone would not contain the iMessage that Person X sent from their iPad.

9. *See* Spoof My Text, *supra* note 1. *See* Example 4, appendix, as an example of a Fake-Message Transmission created by the author on 9 Sept. 2019 by accessing www.spoofmytextmessage.com and paying $5.00 to send five spoofed text messages.

10. Interview with Special Agent Patrick Eller, United States Army Criminal Investigation Command Forensic Examiner, in Charlottesville, VA (May 2, 2019). Spoofed text messages created through the Fake-Text Transmission method produce data in the transactional records of the recipient's service provider, but the data does not show a text message from the purported "sender" identified in the spoofed text message. The records show a garbled transmission from an unclear sender. *Id.*

11. *See* Example 1, appendix, as an example of a spoofed text messages created by the author using the No Transmission, Fake Conversation method.

12. *See* Examples 2 and 3, appendix, as examples of spoofed text messages created by the author using the No Transmission, Fake Conversation method.

13. The No Transmission, Fake Conversation method allows the user to create fake messages that appeared to have been transmitted in the past, rather than the real-time transmissions of the Fake-Text Transmission method where the user cannot manipulate the date/time of the message.

14. *See* Examples 1, 2 and 3, appendix, as examples of spoofed text messages created by the author using the No Transmission, Fake Conversation method.

15. *Id.*

16. *See* Spoof My Text, *supra* note 1. *See also How to Fake an Instagram DM [Direct Message]*, techjunkie, https://www.techjunkie.com/fake-instagram-dm-direct-message/ (last visited on 7 Sept. 2019).

17. *See Evidence Collection Series, supra* note 3.

18. In addition to texts and chat apps, the following electronic communications also create transactional records maintained by the service provider: phone calls, social media posts, and email. Apple keeps a log of which users have tried to contact, or been contacted by, via iMessages (transactional data). *See* Jacob Kastrenakes, *Apple Keeps Track of Everyone You Try to Chat with on iMessage*, The Verge (Sept. 28, 2016, 1:01pm), https://www.theverge.com/2016/9/28/13090930/imessage-records-contact-info-lookup-logs.

19. Transactional records do not contain the content of the message. While the content of the message may have been erased, the record of whether a text was sent or received will be preserved (in most cases) for at least twelve months. *See* U.S. Dep't of Just. Retention Periods of Major Cellular Service Providers chart (Aug. 2010), ACLU, https://www.aclu.org/cell-phone-location-tracking-request-response-cell-phone-company-data-retention-chart. *See also* Wired.com, https://www.wired.com/images_blogs/threatlevel/2011/09/retentionpolicy.pdf (last visited Oct. 18, 2019) [hereinafter Retention Policy].

20. Some service providers keep message content for 3-5 days before deleting the data. Retention Policy, *supra* note 19. Law enforcement has updated charts with data retention information, but they are classified as For Law Enforcement Use only.

21. The allegation may have been a delayed report and the alleged victim may have since lost or replaced their cellular phone (but saved as a screenshot of the text), or perhaps the alleged victim values their privacy and refuses to turn over her phone for forensic examination.

22. For a civilian judge to issue a Stored Communications Act (SCA) warrant or court order, the accused must have violated a law in that civilian jurisdiction. Therefore, the SCA process was not available to investigate uniquely military offenses such as orders violations or UCMJ Article 134 offenses. *See* Major Sam C. Kidd, *Military Courts Declared Incompetent: What Practitioners (Including Defense Counsel) Need to Know about the Stored Communications Act*, 40 Reporter no. 3, 2013, at17, 22, (explaining the process for military investigators to secure a SCA warrant or order through a civilian judge). *Id.*

23. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 (2017).

24. Military judges detailed to courts-martial or pre-referral hearings are deemed competent authorities to issue SCA court orders or warrants. *See* 18 U.S.C. § 2711 (2018); UCMJ art. 26(a), art. 30a (2019); MCM, *supra* note 7, R.C.M. 703A(a).

25. *See* 18 U.S.C. § 2711; UCMJ, *supra* note 7; MCM, *supra* note 7.

26. *See supra* note 7.

27. A court considered whether records of electronic communications were produced, when considering the reliability of the message. *See* United States v. Wolford, 656 Fed. Appx. 59, 64 (6th Cir. 2016).

28. To authenticate an exhibit, the proponent of the evidence must convince the military judge that a fact-finder could determine, by a preponderance of evidence, that the exhibit actually is what the proponent claims it is. Manual for Courts-Martial, United States, Mil. R. Evid. 901(a) (2019) [hereinafter MCM]. To authenticate the screenshot, trial counsel must convince the judge that a fact-finder could determine that the screenshot is a picture of a real communication, rather than a screenshot of an easily spoofed conversation. The SCA records provide corroboration for the testimony of the witness attempting to authenticate the message.

29. Defense counsel will highlight the realities of spoofing during cross examination of the law enforcement agent, or potentially through the testimony of an expert witness.

30. Defense counsel will probably wait until trial to make these arguments, rather than raise them during a pre-trial suppression motion, to ensure the Government does not have time to take corrective action and seek the SCA records after the issue has been highlighted.

31. It is crucial for law enforcement to obtain information regarding the smartphone or tablet brand, cellular service provider (e.g., Verizon, Sprint) and chat application service provider (e.g., Apple iMessage, Facebook Messenger), so they know which service providers to contact.

32. *See Yahoo! Compliance Guide for Law Enforcement*, EFF.org, https://www.eff.org/files/filenode/social_network/yahoo_sn_leg-doj.pdf (last visited on Oct. 22, 2019) (providing a sample preservation request letter for Yahoo in app. A).

33. List of points of contact for service providers' legal process (current as of 18 Oct. 2019):
Apple legal process guidelines: https://www.apple.com/legal/privacy/law-enforcement-guidelines-us.pdf

Facebook law enforcement online request portal: https://www.facebook.com/records/login/

Facebook law enforcement guidelines: https://www.facebook.com/safety/groups/law/guidelines

Google: https://support.google.com/transparencyreport/answer/7381738?hl=en&ref_topic=7380433 and https://www.rexxfield.com/how-to-contact-google-legal-department-to-serve-subpoenas-or-court-orders/

Yahoo: https://www.eff.org/files/filenode/social_network/yahoo_sn_leg-doj.pdf

Verizon legal process contact page: https://www.verizon.com/support/residential/account/manage-account/security/security-assist-team

AT&T: https://www.dms.myflorida.com/content/download/69972/295441/AT&T_Mobility_exigent_form.pdf

Sprint: https://zetx.com/sprint-info/ and https://www.dms.myflorida.com/content/download/69691/294290/Blank_Exigent_-_3_31_10.pdf

T-Mobile: https://zetx.com/t-mobile-info/0

34. *See* 18 U.S.C. § 2703(f); MCM, *supra* note 7, R.C.M. 703A(f)(2).

35. Since chat apps do not save message content, SCA records will not produce content from chat messages. *See* Jacob Kastrenakes, *Apple Keeps Track of Everyone You Try to Chat with on iMessage,* The Verge (Sept. 28, 2016, 1:01pm), https://www.theverge.com/2016/9/28/13090930/imessage-records-contact-info-lookup-logs.

36. *See* Retention Policy, *supra* note 19.

37. Stored content includes: messages, photos, videos, timelines posts, and location information. *See* 18 U.S.C. § 2703(a)-(c); MCM, *supra* note 7, R.C.M. 703A(a)-(b).

38. A court order issued under 18 U.S.C. § 2703(d) or R.C.M. 703A(c) is required to compel the disclosure of certain records pertaining to the account, not including contents of the communications, which may include message headers and IP addresses. *See Information for Law Enforcement Authorities,* Facebook, https://www.facebook.com/safety/groups/law/guidelines/ (last visited Oct. 22, 2019).

39. Basic subscriber information includes: subscriber's name, length of service, credit card information, email address(es), and recent login/logout IP address(es). *See* 18 U.S.C. § 2703(c)(2); MCM, *supra* note 7, R.C.M. 703A(a)(4).

40. However, Apple's iMessage transactional records consist of a log showing who the user attempted to send an iMessage. When a user attempts to contact someone else through iMessage, the app automatically pings Apple's servers to see if that person has an iMessage account. Apple records the date/time the request was made and the IP address from which the request was made. These records do not contain the content of the message. Apple saves these logs for 30 days, then deletes that data. *See* Jacob Kastrenakes, *Apple Keeps Track of Everyone You Try to Chat with on iMessage,* The Verge (Sept. 28, 2016, 1:01pm), https://www.theverge.com/2016/9/28/13090930/imessage-records-contact-info-lookup-logs.

41. A search warrant is required when seeking at least seven days of historical cell site location information data, despite the plain language of the SCA and R.C.M. 703A. *See* Carpenter v. United States, 138 S. Ct. 2206 (2018).

42. Basic subscriber information is available via a court order from a military judge, or via investigative subpoena issued by a trial counsel (with the authorization of a general court-martial convening authority). *See* MCM, *supra* note 7, R.C.M. 703A(a)(4), 703(g)(3)(C).

43. In this hearing, only the government counsel is present. *See* MCM, *supra* note 7, R.C.M. 309(b)(2); U.S. Dep't of Army, Interim Reg. 27-10, Legal Services Military Justice para. 5-17 (Jan. 1, 2019) [hereinafter AR 27-10].

44. *See* UCMJ art. 30a(a)(1)(B); MCM, R.C.M. 309(b)(2); AR 27-10, para. 5-17.

45. *See supra* note 44.

46. *Id.*

47. The standard of proof is relevant and material to an ongoing criminal investigation. *See* UCMJ art. 46(d)(3); and MCM, R.C.M. 703A(c)(1)(A).

48. *See* United States v. Warshak, 631 F.3d 266 (6th Cir. 2010); AR 27-10, para. 5-17.

49. The SCA also permits military judges to issue warrants for content stored in the cloud. The SCA adopted the broad definition of "electronic communication" from the definition in the Wiretap Act, 18 U.S.C. § 2512 (2018).

50. *See* 18 U.S.C. § 2705(a)(1)(A)-(B) (2018); MCM, R.C.M. 703A(d)(1)-(2).

51. The following five adverse results (stemming from notification) justify the military judge to delay notification of the court order or warrant: A) endangering the life or physical safety of an individual, B) flight from prosecution, C) destruction of or tampering with evidence, D) intimidation of potential witnesses, or E) otherwise seriously jeopardizing an investigation or unduly delaying a trial. *See* 18 U.S.C. § 2705(a)(2); MCM, R.C.M. 703A(d)(4).

52 *See supra* note 50.

53. *See* MCM, R.C.M. 703A(d)(3).

(Credit: istockphoto.com/NiroDesign)

A Foreign Perspective on Legal Interoperability

By Lieutenant Colonel Paddy Larkin and Mr. Jan Bartels

With apologies to Sun Tzu,"Know your [allies] and yourself; in a hundred battles you will never be in peril."[1] Bottom line up front: no two states have identical national laws; even our understanding and application of the laws of International Humanitarian Law (IHL) (Geneva and Hague being the cornerstones) are not uniform. As judge advocates (JA) and legal advisors (LEGADs), we have a central role in identifying and understanding the relevant national positions within combined forces, the implications for the force, and advising how to minimize the operational or tactical impact, in order to ensure mission accomplishment.

What Is Legal Interoperability?

The North Atlantic Treaty Organization (NATO) and national doctrines concentrate on interoperability in terms of the ability of equipment, processes, and systems to work together. For example, the ability of a German fuel supply unit to refuel a United States (U.S.) armored fighting vehicle on deployment in Estonia, where the issue may be identified when trying to fit a 1-inch imperial hose to a 2.5-centimeter metric coupling. Enabling interoperability in this context begins with identifying an issue (different diameters) and understanding the extent of deviations involved. Identifying the differences between national positions does not automatically identify a problem. In some cases, the fact that we have a different position with respect to the relevant law does not mean that we do not reach the same conclusion. The United States may not have accepted the 1977 additional protocols to the Geneva Conventions; the impact, however, is reduced where they are regarded as customary international law. The end result is often very similar, if not the same. Standardization Agreements (STANAG) require knowledge on the part of each party to enable adjustments to ensure that they can work together. In physical matters, that may be as simple as creating a flow controller on a fuel delivery system or as complex as creating an interface that can accommodate different hose diameters to refuel multiple pieces of equipment. This has been reflected in numerous NATO STANAG over the past seventy years. There is no STANAG for the application of law within NATO. There is, however, a STANAG on IHL and Law of Armed Conflict (LOAC) training, setting out common standards to achieve and measure performance.[2] In addition to this, NATO member states have adopted the extensive STANAG 2597 on NATO rules of engagement (ROE) training.

Those with experience in multinational operations, whether within the NATO alliance, bilateral alliances, or ad hoc coalitions, will appreciate the difficulty of trying to achieve the same in the legal sphere. In the same way that it is unrealistic to expect all alliance members—let alone coalition partners—to use a single brand of small arms ammunition, it is unrealistic to expect them to adopt a single interpretation of international law. That said, it is suggested that the vital ground in maximizing interoperability in the legal sphere is still in identifying and then understanding what each nation cannot, or more importantly *can*, do in a given operational structure or situation. It is, perhaps, relatively easy for the NATO nations to agree by consensus on the common or essential characteristics of small arms ammunition. A consensus among twenty-eight nations on use of force, defensive or offensive, is more difficult. The twenty-eight NATO nations are not all party to the same international obligations and, even in those cases where there are interpretations, are not uniform. As a consequence, the application of the law will not be uniform. As an alliance, NATO needs consensus to operate; difficult areas may, therefore, be left unresolved or unrefined.

Carl von Clausewitz (he gets everywhere) referred to frictions in war. While he may not have had the law in mind when writing *On War*, there are legal frictions in war. These frictions and their impacts are magnified by the addition of other states to your plan. One of the JA's roles is to understand this and to minimize the operational impact of such friction on the commander's plan. It is overly optimistic to suggest that the JA can entirely remove such friction. While it is unrealistic to expect the JA to have a Harry Potter wand or spell with which to remove the frictions or to know all of the applicable international law positions and the domestic laws of partner nations, it is realistic to expect them to know

that allies will have differences in the legal world. Acknowledging this is the first step toward achieving legal interoperability.

Why Is Interoperability Important in the Legal Sphere?

In simple terms, no alliance or coalition commander can order a national component to execute an order that exceeds that nation's legal authorities. It is for this reason that you should expect to see a Senior National Representative or National Contingent Commander for each nation within a multi-national operation. If your command seeks to ask a nation to go outside national law/legal interpretations, you should expect to see a "red card" on the operation.[3] Put another way, there is little or no utility in developing a plan that cannot succeed because a key element is legally unachievable by the nation tasked to support or achieve it. This is not the place to recite the examples of where such situations have risen.

As JAs and LEGADs, we are the commander's, and by extension, the staff branches' principal advisor on what can be lawfully achieved and by whom. It is important to note that a particular legal interpretation or policy may relate to either a specific legal prohibition or to a political position; both need to be considered in order to appreciate the potential for flexibility. If national legislation specifically prohibits a change in action, it is unlikely to happen in the short term. Conversely, a policy limitation on the application of the law, for example, a specified minimum approach limit in respect to an international boundary, could be changed with appropriate planning and engagement. The latter is an area where the current operations, future operations, and legal teams need to work collaboratively to ensure that the force has the authorities that it needs on the ground. One of the products of that collaboration should be a caveats matrix. In simple terms, this is a matrix setting out formal national limitations, restrictions, constraints, or deviations (legal or policy) within the consensus framework for the operation, which do not permit a multinational commander to deploy or employ national assets fully in line with the approved operational plan (OPLAN). Particularly, limitations on or interpretation of multinational ROE may directly impact the ability of national forces to perform assigned tasks.

The identification of differences and related impacts is not just about law and policy interpretations; it also includes consideration of how we use JAs and LEGADs. When considering how the U.K. armed forces use LEGADs, it would help to consider U.K. Joint Doctrine Publication 3-46 Operations.[4] This publication is aimed at both the LEGAD and the commander/staff in setting out relationships and responsibilities.

How Do We Collectively Improve Legal Interoperability?

There are two streams through which we can improve legal interoperability without becoming engaged in the complexity of altering national legislation. The two streams are (1) individual actions and (2) collective actions. The former is simple in that it requires the individual to learn about how allied or coalition partners apply law on operations. To start, there are various resources available, such as the U.K. Joint Service Manual of the Law of Armed Conflict, the German manual, and the NATO legal desk book. The NATO Allied Joint Publications (AJP) cover a wide array of inter-operational topics: AJP 3, the Conduct of Operations; AJP 5, the Operational Level Planning; and AJP 13, the Coalition Operations Handbook. In terms of developing practical knowledge, you may consider requesting to attend courses, such as the U.K. Brigade Legal Officers Course or the NATO schools at Oberammergau or Chievres (for Special Operations Forces) or the International Institute of Humanitarian Law (those already in Europe may have a logistical advantage). International exercises also provide many opportunities.

The collective element is more in the way of what can the relevant Staff Judge Advocate (SJA) do to enable the proactive subordinate to exploit opportunities for identification of issues and understanding impacts. How does a SJA respond when a subordinate presents a properly articulated request to observe an exercise, attend a school of instruction, or acquire a manual/text book? If you can't afford to support the request ahead of time, will you be able provide support when called on to deploy at short notice?

In closing, consider the following from Major General Walter E. Piatt in 2014:

> Building trust and understanding each other's capabilities and procedures are key to coalition operations – from disaster response to full out war. . . .You don't want to meet the team on the ground for the first time. We saw this many times in Afghanistan, where you would be meeting forces from other nations for the first time when you have a real operational demand. We're doing that now so the relationships and trust are in place before deployment.[5]

One observation from personal experience is that there is no substitute for already knowing a name and face when you arrive in a foreign theatre of operations. If nothing else, they can tell you where to get a cup of coffee to help you through late night reading. **TAL**

The views expressed in this article are entirely and solely those of the author and do not necessarily reflect official thinking or policy either of Her Majesty's Government or of the Ministry of Defence. This article is a reprint of a previously published version.

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Notes

1. The original quote from the Art of War reads, "Know the enemy and know yourself; in a hundred battles you will never be in peril." *See* Sun Tzu, The Art of War (Thomas Cleary trans., Shambhala ed. 2005).

2. Allied Training Pub., Training in the Law of Armed Conflict (20 Mar. 2013) [hereinafter STANAG 2449].

3. A "Red Card" may be described as a national commander (the Red Card Holder) highlighting an action or activity that the particular nation is unable to comply with.

4. Joint Doctrine Publication (JDP) 3-46, *Legal Support to Joint Operations* (3d ed. 2018).

5. *See* Jim Garamone, *Reassurance, Interoperability Key for U.S. Army Europe*, U.S. ARMY (22 Oct. 2014), https://www.army.mil/article/136479/Reassurance__interoperability_key_for_U_S__Army_Europe.

AROUND THE CORPS

Soldiers at Fort Campbell, Kentucky, including members of the OSJA, conduct a wall ball exercise during circuit training behind the Olive Gym last year. The circuit training was designed to ready Soldiers for the upcoming Army Combat Fitness Test. (Credit: PFC Lynnwood Thomas, 40th Public Affairs Detachment)

(Credit: istockphoto.com/Man_Half-tube)

No. 1

Breaking Quarantine

Using Article 84 to Combat COVID-19

By Lieutenant Colonel Alexander Douvas, Major Gregg Curley, Major Nicholas Henry, Captain Jeffrey Amell, Captain Johnathon Turner, First Lieutenant Garrett Adcock, Gunnery Sergeant James Marczika, and Staff Sergeant Johnathan Starks

Anyone that thinks one person is incapable of changing the world has clearly never eaten an undercooked bat.[1]

Coronavirus Disease 2019 (COVID-19) is caused by the virus Severe Acute Respiratory Syndrome-Coronavirus-2 (SARS-CoV-2).[2] This virus is highly contagious,[3] with an estimated average incubation period of five days prior to symptoms,[4] during which time it can still be transmitted.[5] Within three months of its discovery in late 2019, the rapidly spreading SARS-CoV-2 reached global pandemic status.[6] The current national strategy to combat COVID-19—"social distancing"—is designed to slow the spread of the virus and enable the medical community to treat the most severe cases without exceeding hospital capacity.[7] The military is neither immune to this pandemic nor exempt from the efforts to combat its spread. Instead, it is currently working to strike a balance between operational readiness and restrictive personnel policies.[8] While the ultimate impact of COVID-19 on military operations and service policies remains uncertain, one thing is clear: with an estimated 1.3 million active duty service members subject to some form of COVID-19 restrictions, the newly re-designated Article 84, Uniform Code of Military Justice (UCMJ) (Breach of Medical Quarantine), is about to be field tested.[9]

As the population of young men and women restricted to close quarters gets idle hands, the significant limitations placed on service members during this crisis will challenge good order and discipline in the ranks. In certain situations, commanders will need to rely on punitive action under the UCMJ to enforce good order and discipline. Staff Judge Advocates (SJAs), military justice practitioners, and policymakers must all have a solid understanding of Article 84, its limitations, and its charging alternatives. In the absence of significant military case precedent, and to the extent possible, this article seeks to provide guidance on charging Article 84 in order to support commanders and their legal advisors during this crisis.

Article 84

While the current pandemic is the result of a "novel" (or "new") virus, military laws to help limit the spread of infectious diseases have existed for over a century. The *Manual for Courts Martial* (MCM) has recognized the conceptual distinction between punitive restriction and quarantines since 1917.[10] Breach of Medical Quarantine was added to Article 134 in 1949.[11] Despite the long existence of a quarantine offense in the UCMJ, military precedent is scarce; this supports the inference that charges under this article have been rare.[12] Nevertheless, the Military Justice Act of 2016[13] migrated the offense of Breach of Medical Quarantine from a presidentially-prescribed Article 134 violation—that required the terminal element[14]—to its own punitive article—re-designated as Article 84.[15] Congress enacted this change primarily because

Breach of Medical Quarantine is a well-recognized concept in criminal law.[16]

Analysis of Article 84 in the context of the current pandemic will start from the following hypothetical model specification, broken down by element:

In that Private John R. Doe, having been placed in [1] *medical quarantine* by a [2] *person authorized* to order the accused into medical quarantine, for a [3] *quarantinable communicable disease as defined by C.F.R. § 70.1*, to wit: COVID-19, [4] *having knowledge of the quarantine and the limits of the quarantine*, did, at or near Marine Corps Base Hawaii, on or about 1 April 2020, [5] *break said medical quarantine*.[17]

Medical Quarantine

While the term "medical quarantine" is indispensable to Article 84, Congress did not define the term "quarantine" in the statute, nor has the president defined it within the language of the MCM. *Black's Law Dictionary* defines quarantine as "[t]he isolation of a person or animal afflicted with a communicable disease or the prevention of such a person or animal from coming into a particular area, the purpose being to prevent the spread of disease."[18] This definition is problematic because it requires the person to have already been afflicted by the disease. The U.S. Code uses a slightly broader definition: "apprehension and examination of any individual believed to be infected with a communicable disease. . . ."[19] The Code of Federal Regulations (C.F.R.) uses a more expansive definition of quarantine: "the separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease."[20]

The Department of Defense (DoD) has adopted the C.F.R. definition in the context of public health emergency management;[21] accordingly, this article will utilize the C.F.R./DoD definition. In the context of Article 84, the definition of "quarantine" implies that an individual must have at least been exposed (or that the commander had a reasonable basis for believing the service member was exposed) to COVID-19.

Consequently, most military orders and policies that broadly restrict service members' movement to mitigate the spread of COVID-19 will not meet this definition, limiting the applicability of Article 84. As a result, violations of orders and policies that do not meet the requirements for a quarantine may still be cognizable under Article 87b (Breach of Administrative Restriction), Article 92(1) (Failure to Obey a Lawful General Order or Regulation), or Article 92(3) (Dereliction of Duty). On the other hand, an order that specifically articulates that it is for medical quarantine, provides instructions regarding the parameters of the quarantine, and identifies the individuals subject to the quarantine would be cognizable under Article 84.[22]

Person Authorized

There are two classes of individuals authorized to issue quarantine orders. The first class consists of installation commanders authorized to issue a mass medical quarantine order under emergency health powers granted to them in DoD Instruction (DoDI) 6200.03, *Public Health Emergency Management*.[23] The second class consists of those authorized to issue an "other lawful order" under Article 92.[24] The scarce precedent available regarding military quarantines implies that a quarantine is simply an order directing one or more service members to administrative restriction for a specific purpose, putting it in line with administrative restraint under Rule for Courts-Martial (RCM) 304(h).[25] Therefore, in order to determine who may impose an administrative restraint on a service member, we also look to Article 92.[26]

Class 1: Installation Commanders

Department of Defense Instruction 6200.03 addresses large-scale public health emergency situations.[27] Under this instruction, authority to declare a public health emergency—which can include installation-wide restrictions of movement (ROM) and the authority to coordinate with state, local, tribal, and territorial (SLTT) governments—rests with the installation commander as defined by DoDI 5200.08.[28] Under DoDI 6200.03, the military installation commander is the single decision-maker with regard to blanket force-protection actions applicable to service members on an installation during a pandemic.[29] There is no requirement for the installation commander to work in conjunction with the SLTT governments, as an installation commander can make a public health emergency declaration absent an SLTT emergency declaration.[30] State and local policies, laws, and rules are not applicable on the installation unless ratified or incorporated by the installation commander.[31]

One of the enumerated emergency health powers of an installation commander is aROM order, which is an order that limits service members' personal liberty to ensure the public's health, safety, and welfare.[32] There are five general types of ROM that can be ordered, based on the type of health emergency, as well as the installation commander's assessment of impacts on the command and mission: (1) orders to restrict travel, (2) orders to restrict certain activities, (3) orders for medical quarantine,[33] (4) administrative restrictions to a specific location, and (5) orders to remain together with a unit.[34]

It is important to note that violations of Article 84 may be charged in response to a mass quarantine issued by an installation commander as part of a declared public health emergency.[35] But, while an installation commander may have the ability to order an enforceable mass quarantine under the instruction, to be punishable under Article 84, the action must be taken to separate individuals exposed or reasonably believed to have been exposed to the contagion from those that have not been exposed.[36] As discussed earlier, broad ROM orders or policies (such as "social distancing") do not meet this requirement.[37]

Class 2: Individuals Authorized Under Article 92[38]

Rule for Courts-Martial 103(5) defines a commander as "a commissioned officer in command or an officer in charge."[39] Under both DoDI 6200.03 and the RCM,[40] a commander can issue a quarantine order. While DoDI 6200.03 gives an installation commander plenary power to make public health emergency declarations, the instruction does not restrict the ability of lower-level commanders to issue medical quarantine orders or ROMs for service

members in their command.[41] In addition to commanders, Article 92 provides authority to superiors and certain individuals who hold billet authority to issue orders.[42] For example, a medical provider holds the billet authority to issue a medical quarantine order even if the individual receiving the order outranks the medical provider.[43] Article 92 also authorizes anyone senior to an individual to issue a quarantine order.[44]

As a best practice, a commander should issue a quarantine order on the advice of a medical provider, in consultation with a judge advocate. The technical requirements to establish a medical quarantine are complex, and failure to meet them may necessitate use of the lesser charge of Article 87b (Breach of Administrative Restriction). Accordingly, any individual who believes a quarantine is warranted should immediately seek an order from the commander. In the context of the exigent circumstances presented by a potential COVID-19 case, a temporary administrative restraint should provide enough time to obtain a properly instituted and vetted quarantine order from a commander.[45]

Quarantinable Communicable Disease

"Quarantinable communicable disease" means any of the communicable diseases incorporated under §361 of the Public Health Service Act by an Executive Order.[46] Thus, COVID-19 falls under "severe acute respiratory syndrome" as specified in Executive Order 1329 of 4 April 2003, and amended by Executive Orders 13375 of 1 April 2005 and Executive Order 13674 of 31 July 2014.[47]

Knowledge of the Quarantine and the Limits of the Quarantine

An accused must have knowledge of the medical quarantine order and the limits of that order to violate Article 84.[48] In *United States v. Dixon*, the Navy-Marine Corps Court of Criminal Appeals held that an *ex post facto* understanding of specified restriction limits was insufficient to demonstrate guilt vis-a-vis restriction breaking.[49] Additionally, the accused must understand that the restriction is for quarantine and not some other purpose.

An installation commander with general court-martial convening authority (GCMCA) has the authority to issue a general order.[50] Since DoDI 6200.03 requires an installation commander or higher to declare a public health emergency,[51] it is a general order so long as the installation commander has been designated a GCMCA;[52] the knowledge of which is imputed to service members.[53] Additionally, DoDI 6200.03 requires the widest possible distribution of any public health emergency declaration.[54] Therefore, if an installation commander with GCMCA declares a public health emergency that contains a properly articulated quarantine order under DoDI 6200.03, such an order would be a lawful general order. Knowledge of that order and the restrictions therein will be imputed to any service member subject to that order; note however that if the facts require imputing knowledge of the charge, the proper article is 92(1), not 84. If the installation commander does not have GCMCA, then the government must prove actual knowledge of the quarantine order and its restrictions or allege dereliction of duty under Article 92(3).[55]

Goes Beyond the Limits of the Quarantine

Breaking the specified geographic and contact limitations of a valid quarantine order without justification or excuse would clearly constitute a violation of Article 84. However, current COVID-19 mitigation measures (e.g., face masks, shelter-in-place orders, liberty restrictions, etc.) are more complex than black-and-white geographic and social restrictions. Commanders should narrowly tailor medical quarantine orders to specific limitations designed to mitigate health risks while also clearly communicating those limitations to quarantined service members.[56] At a minimum, a medical quarantine order should be in writing and state that the purpose is for medical quarantine.[57] The quarantine order should include instructions such as: conditions for the termination or modification of the order; the place or area of the quarantine; any specific rules for the quarantine; precautions to prevent the spread of the subject disease; requirements for contact with non-quarantined individuals; disposal of personal property; and, procedures to request temporary release from quarantine to conduct essential professional or personal tasks.[58] As DoDI 6200.3 makes clear, "the needs of persons quarantined or isolated should be addressed in a systematic and competent fashion."[59] A medical quarantine order should therefore take a comprehensive and holistic approach to the welfare of the service member ordered to quarantine.

Charging Considerations

Drafting and preferral of charges is one of the most consequential parts of any case. As a notice-pleading jurisdiction, the government must place the accused on notice of what he or she must defend against.[60] Additionally, under RCM 603, "major changes" cannot be made to the charges after the referral of charges.[61] As a result, it is vital to consider and, where appropriate, charge, all viable charging options.

The prudent course of action is to draft specifications for all reasonable contingencies of proof based on the facts presented. Since violations of ROM orders related to COVID-19 (whether medical quarantine orders or other lesser restrictions) necessarily involve *orders,* a cluster of charging contingencies emerges: (1) Article 90 (Willfully Disobeying Superior Commissioned Officer); (2) Article 92(1) (Violation of a Lawful General Order); (3) Article 92(2) (Violation of an Other Lawful Order); and (4) Article 92(3) (Dereliction of Duty). Because Article 87b (Breach of Restriction) is a lesser included offense of Article 84, it need not be separately charged as a contingency of proof where Article 84 is charged.[62]

Article 87b (Breach of Restriction)[63]

"Restriction" is the moral restraint of a person imposed by an order directing a person to remain within certain specified limits.[64] Restriction may be imposed in the interest of "training, operations, security, or safety."[65] Violations of quarantine orders that do not satisfy Article 84's requirements may be charged under this article, as well as violations of other restriction-related ROM orders. However, the maximum authorized confinement for a specification under this charge is only one month.[66]

Article 90 (Willfully Disobeying Superior Commissioned Officer)[67]

In situations where a service member violates a quarantine order or other ROM

issued by a superior commissioned officer, charging Article 90 may be warranted. This charge requires that the order be directed specifically to the subordinate; violations of regulations and standing orders cannot be charged under Article 90.[68] Unlike Article 84, charging Article 90 does not carry the stringent requirements of establishing the existence of a valid quarantine; only that a service member willfully (i.e., intentionally) violated an order issued by a superior commissioned officer for a valid military purpose (e.g., maintaining the health, welfare, and morale of the command).[69] Awareness of this potential charging theory is particularly important for commanders and SJAs to ensure that, to the extent possible, quarantine orders and other similar ROMs are issued directly by superior commissioned officers to their intended recipients.

Article 92(1) (Violation of or Failure to Obey a Lawful General Order)[70]

As stated earlier, DoDI 6200.03 gives installation commanders a great deal of authority to declare and respond to a public health emergency. In almost all the services, an installation commander will either be a flag or general officer or otherwise possess GCMCA, vesting them with authority to issue general orders. In situations where a service member violates or fails to obey a quarantine order or other ROM order issued by an installation commander with the authority to issue general orders, charging a violation of Article 92(1) eliminates the government's requirement to prove the accused's knowledge of order.[71] Instead, practitioners should focus on ensuring that the contents of the order were published or otherwise disseminated,[72] the signatory possessed the proper authority to sign the order, the order was in effect when the offense was committed, and the order was punitive in nature.[73] Meeting these criteria ensures not only a strong charging position, but also a strong case for judicial notice of the order's existence and contents.

Article 92(2) (Violation of or Failure to Obey Other Lawful Order)[74]

In many cases, a quarantine order does not come directly from the installation commander or medical professional to the service member; instead, it is relayed through the chain of command. In this situation, deviations in what was conveyed may cause reasonable doubt as to whether the accused was on notice that the order was for medical quarantine as required by Article 84. However, even if it cannot be proven that the accused knew the order was for medical quarantine, if the order, as relayed, contains a ROM that the service member later violates, the accused may be liable for violating a lawful order under Article 92(2). Here, practitioners should focus on establishing the accused's knowledge of the order's specific restrictions on liberty or movement, as well as the accused's duty to obey the order based on the status of the person issuing it.

Article 92(3) (Dereliction in the Performance of Duties)[75]

While not the most powerful tool in the array of charging options, a specification alleging dereliction of duty under Article 92(3) has the broadest application in situations where proof may be lacking as to an order's form, contents, or transmittal. Like Article 92(2), a charge of Article 92(3) remains solvent even in situations where a quarantine order is lacking in certain particulars (e.g., the service member was specifically placed in medical quarantine by a medical professional, commander, or other authorized person in response to a reasonable belief of exposure to a communicable disease). In addition, a dereliction charge may prevail even where actual knowledge of an order's terms cannot be proven. All that the government is required to prove is that the accused had a duty, which he knew or should have known, and willfully or negligently failed to perform it. In the current COVID-19 crisis, establishing a service member's duty to limit contact or proximity with others to avoid the risk of infection can be achieved through evidence of changes to work routines, standard operating procedures (e.g. morning formations), or changes to service customs (e.g., face coverings). Similarly, knowledge of this duty can be proven by circumstantial evidence such as base media, command briefs, and informational emails. A dereliction charge may serve as a reliable safety net for a charge of Article 84, 90, 92(1), or 92(2) that is found to be deficient.

Sentencing[76]

The relative punishments authorized for the above offenses vary considerably. For example, the maximum authorized confinement for each (in ascending order) is one month for Article 87b; six months for Articles 84, 92(2), and 92(3); twelve months for Article 84 (for a listed communicable disease); twenty-four months for Article 92(1) and 92(3) resulting in death; and sixty months for Article 90.[77] In terms of discharge, where the authorized confinement is less than six months, no discharge is authorized; where authorized confinement ranges from six to twenty-four months, a bad-conduct discharge is authorized; and where the authorized confinement is twenty-four or more months, a dishonorable discharge is authorized.[78]

Even with these authorized punishments, the punitive landscape for the various charges relating to breaching medical quarantine is not as flexible as it may appear. Despite the availability of numerous charging alternatives to Article 84 in the cluster of orders violation offenses, these options also come with hard limits on sentencing exposure based on the "ultimate offense doctrine," as set forth in *United States v. Bratcher*.[79]

The ultimate offense doctrine prohibits escalating the punitive severity of minor offenses by charging them as an orders violation or willful disobedience of a superior.[80] Put differently, a commander cannot charge a service member with a violation of Article 90 or 92 simply to increase the maximum punishment for the underlying violation. While the maximum punishments set out in MCM, part IV, section 18.e. include a dishonorable discharge and confinement for two years for violation of a general order, and a bad-conduct discharge and confinement for six months for disobedience of other lawful orders,[81] under the ultimate offense doctrine, these punishments are not applicable when the accused could otherwise be convicted of another specific offense for which a lesser punishment is prescribed or when the violation is for a breach of restraint imposed as a result of an order.[82] Therefore, while charging Article 90 or 92 for a breach of medical quarantine-type offense will dictate what elements must be proven, the punishment

will be limited to the maximum punishment for a breach of medical quarantine—the ultimate offense.[83]

As a result, it may be more practical to charge Article 92(1) when the government may have difficulty in meeting its burden to prove knowledge of a quarantine order; however, the punishment will not exceed that authorized by Article 84 under the same facts. Similarly—if the government does not admit evidence that COVID-19 is a communicable disease under the C.F.R., Public Health Services Act (PHSA), and applicable executive orders—Article 92(2) will subject the accused to the same punishment as a violation of Article 84 without the fifth element. Since COVID-19 is incorporated via the C.F.R., PHSA, and applicable executive orders, Article 92(2) will expose the accused to six months' *less* punishment than Article 84 with the fifth element. The punitive exposure for a charge of Article 90 would also likely be limited by the ultimate offense doctrine, since the gravamen of the offense is a breach of restraint imposed by an order.

Unlike Articles 90, 92(1), and 92(2), Article 92(3) is not subject to the ultimate offense doctrine.[84] There may be circumstances where a charge of Article 92(3) (Willful Dereliction of Duty) or Article 92(3) (Willful Dereliction of Duty Resulting in Death) is appropriate, given the fact pattern surrounding a breach of medical quarantine. The punitive landscape would not be appreciably different for a willful dereliction; however, a willful dereliction resulting in death carries two years of punitive exposure. Except for Article 92(3), prosecutors charging Article 90 or 92 should be aware of the risk that presentencing litigation may limit the maximum punishment to that authorized by Article 84 under the same facts.[85]

Other Charging Considerations

Lesser Included Offenses

Article 79 defines a lesser included offense (LIO) in two ways: (1) an offense that is necessarily included in the offense charged, and (2) any LIO so designated by regulation prescribed by the president.[86] The president promulgates LIOs in accordance with the limitations established by Article 79(c).[87] Pursuant to this statutory authority, the president established a list of LIOs via executive order in Appendix 12A of the MCM. In Executive Order 13825[88] the president established Article 87b (Breach of Restriction) as a LIO that is "reasonably included" within Article 84.[89] As a result, an accused is formally put on notice of an Article 87b violation upon service of an Article 84 charge. In practice, this provides practitioners with a safety net until Article 84 jurisprudence is more thoroughly vetted, especially with a rapidly changing legal landscape as public health officials and commanders distribute new and sometimes conflicting directives. While this "fog of war" may create hesitation to charge Article 84, practitioners can take solace in the fact that, even if the fact-finder believes a quarantine order was defective, there is still a second, well-settled, option available as an LIO.[90] However, a guilty finding on this LIO forfeits significant punitive exposure, including months of confinement and a punitive discharge.[91]

Judicial Notice

Prosecutors must request that the military judge take judicial notice of all readily verifiable facts under MRE 201 and MRE 202. Judicial notice should include the substance of any applicable ROM orders, public health emergency declarations, guidelines, laws (foreign or domestic, depending on location), and executive orders. At a minimum, counsel should request the military judge take notice of 42 C.F.R. §70.1, §361 of the PHSA, and the applicable executive orders listing severe acute respiratory syndrome as a "quarantinable communicable disease." Judicial notice is a simple step that ensures the government can meet its burden of proof on the fifth element of Article 84 and access the increased sentencing exposure for COVID-19-related breaches of quarantine.

Preemption

The concept of preemption "prohibits application of Article 134 to conduct covered by Articles 80 to 132."[92] Put differently, where Congress has occupied the field for a given type of misconduct by addressing it in one of the enumerated punitive articles of the UCMJ, a like offense may not be created and punished under Article 134 by simply deleting a vital element.[93] However, preemption is not automatically triggered simply because the offense charged under Article 134 embraces all but one element of an enumerated punitive article; it must also be shown that Congress intended the other punitive article to cover a class of offenses in a complete way.[94] Generally, the conduct related to violations of medical quarantine or other ROM orders is adequately addressed by the punitive articles discussed earlier. Therefore, use of Article 134 as a charging contingency in this context should be rare and based on highly specialized fact patterns, such as violations of foreign or state orders restricting movement.

Scenarios

The following scenarios illustrate the above concepts as applied to possible situations raised by the military's efforts to combat COVID-19. For each scenario, assume COVID-19 is a quarantinable communicable disease as defined under 42 C.F.R. 70.1.

Social Distancing Fail

The Governor of New York declares a state of emergency in response to COVID-19. In coordination with the State of New York, the commander of Fort Hamilton in Brooklyn—a GCMCA—declares a public health emergency. Reasonably believing that base personnel had been exposed to COVID-19, he issues a medical quarantine order preventing Fort Hamilton Soldiers from leaving Brooklyn. The order is sent to the tenant commands, labeled "for widest dissemination possible," and posted to the installation's public Facebook page. Sergeant First Class (SFC) I. M. Contagious completed COVID-19 mitigation training that included a complete copy of the order. Several days after the order was issued, SFC Contagious was seen pier side in the crowd welcoming the U.S. Naval Ship *Comfort* to Manhattan and providing an interview with a local news station.

The above scenario supports a charge of Article 84. Key to the analysis is the installation commander's declaration of a public health emergency, his issuing a specific medical quarantine order that was widely disseminated (including to SFC Contagious), and the breach of the medical quarantine by SFC Contagious. It is also important to note that it is not a requirement

that SFC Contagious is infected or presenting as symptomatic, only that the commander reasonably believed SFC Contagious was exposed to a communicable disease. To the extent evidence of the accused's actual knowledge of the quarantine order is lacking (e.g., buried in hundreds of pages of training material), trial counsel should also consider charging Article 92(1) as a contingency of proof since the quarantine order was issued by a GCMCA.

Rights Infringement?

The State of Pennsylvania has issued a shelter-in-place order for all non-essential personnel. In response, the commandant of Carlisle Barracks (the installation commander)[95] issues a ROM order in conjunction with a public health emergency declaration, applicable to all students and personnel, which was posted on the school's website. While the installation commander does not have a reason to believe any students or personnel had been exposed to COVID-19, the ROM order nonetheless restricts them to county limits and orders them to not leave their houses except for food and essential items. The order also contains punitive language. The students have been working from home, and the school's internet portal banner has been changed to include a copy of the ROM order. A student, Lieutenant Colonel (LTC) W.K. Holic, without seeking authorization from his command, drives to New Jersey to pick up his children in accordance with his joint custody agreement. When he arrives at the state border, New Jersey police execute a traffic stop due to LTC Holic's Pennsylvania license plates, take him into custody when he blows a .10 on a breathalyzer, and notify his command.

This scenario presents a wrinkle—a potential justification or excuse for violating the ROM order in the form of the joint custody agreement. However, the presence of this wrinkle does not impact the charging scheme. Article 84 would not be an appropriate charge, since the ROM order does not meet the criteria of a medical quarantine due to the absence of a reasonable belief that the individuals subject to the order were exposed to the disease. Nevertheless, LTC Holic violated a lawful general order by leaving the county for a non-essential reason without first seeking authorization. Since the purposes served by the administrative restriction or condition on liberty must be reasonably related to a legitimate governmental interest,[96] which includes protecting the safety of the unit,[97] LTC Holic's child custody agreement does not override the otherwise lawful order.[98] Accordingly, Article 92(1) (Violation of a Lawful General Order), Article 113 (Drunken Operation of a Vehicle), and Article 133 (Conduct Unbecoming an Officer) are appropriate charges to consider in this scenario.

Surf's Up

The commanding officer of Marine Corps Base Hawaii (MCBH) does not declare a public health emergency in response to COVID-19. He does, however, issue a ROM order restricting all personnel to base or residence except to obtain food and essential items. The order also articulates that no sponsored guests are permitted aboard MCBH. The order is not explicitly punitive. Corporal (Cpl) C.W. Bunga is present at a safety brief where his battalion commander relays the ROM order, but the commander mistakenly refers to the guidance as a "quarantine" without a reasonable belief that any members of his command had been exposed to COVID-19. Three days later, Cpl Bunga has a surfing accident on an off-base reef that requires medical attention and three days of convalescent leave. A subsequent line of duty investigation finds that the injuries occurred while he was surfing with his high-school best friend who had flown in the day prior and was staying in Cpl Bunga's on-base residence.

This scenario illustrates the fluidity of the military's response to the COVID-19 situation as it evolves. Installation commanders issue, update, and relax specific guidance based on the conditions on and in the vicinity of their installations. This practice ensures ROM orders are only as restrictive as necessary based on the conditions, while still enabling tenant commanders to hold ROM violators accountable. In Cpl Bunga's case, an Article 84 charge is not supported by the facts, since a quarantine order was not actually issued. Article 92(1) and 92(2) charges, while permissible, are subject to the ultimate offense doctrine since the gravamen of the orders violation is restriction breaking. Article 87b and 92(3) charges are therefore best suited to capture Cpl Bunga's misconduct under these facts.

This scenario is meant to reinforce the importance of closely scrutinizing the source and content of multiple orders that may be issued by commanders in response to an evolving public health crisis. It is imperative for military justice practitioners to resist the temptation to view every restriction violation during a pandemic as a violation of a quarantine. Instead, practitioners should utilize the panoply of charging options in the MCM to ensure the charges are well-matched to the surrounding facts.

Skylined at the Post Exchange (PX)

The State of Alaska has not issued a stay-at-home order, and the Fort Wainwright installation commander has not declared a public health emergency. However, due to the "high morbidity epidemic" of COVID-19, the installation has instituted Health Protection Condition (HPCON) Charlie in accordance with DoDI 6200.03—including shelter-in-place policies and social distancing guidance.[99] Specific local guidance restricts Soldiers to base, requires minimal manning of all workspaces, and limits PX shopping to food and essential items only; however, this guidance is not in the form of an order. First Lieutenant (1LT) B.O. Red's commander spots 1LT Red at the PX arguing with the cashier who will not sell him a Playstation 4, nine bottles of wine, beer pong cups, ping pong balls, or chips and salsa. Additionally, 1LT Red flagrantly disregards social distancing guidance by loudly yelling expletives in the face of the PX cashier after the cashier reminds 1LT Red of the installation's shelter-in-place and social distancing policies, which are posted at the register.

While these facts present a difficult charging landscape with respect to Articles 84, 87, 92(1), and 92(2), enough facts exist to enable accountability through a charge of Article 92(3) (Dereliction of Duty). Despite the absence of a clear order from the installation commander, , 1LT Red appears to be flouting guidance to limit purchases to "food and essential items" with the products

he is attempting to purchase at the PX (in addition to not adhering to social distancing guidance). First Lieutenant Red's verbal and physical response to the PX cashier also supports a charge of Article 133, conduct unbecoming an officer.

Conclusion

The practical impact of COVID-19 is without precedent and, unfortunately, so is Article 84. Amidst this practical and legal uncertainty, military justice advisors and practitioners must take care to understand the specific requirements and limitations of Article 84, which requires far more nuanced analysis than "pandemic-plus-restriction-equals-quarantine."

When faced with a situation that may implicate Article 84, utilizing a deliberate process will yield optimal results. First, gather all the facts of the suspected violation. Second, define the operating environment (all applicable orders, directives, guidance, etc.). Third, balance the practical and legal equities in the specific case to determine the range of appropriate charges. Fourth, where possible, buttress charges in areas of relatively undeveloped law (e.g., Article 84) by charging in the alternative using more well-established charging theories (e.g., Article 92)—which will also safeguard charges against contingencies of proof at trial. Finally, determine the true sentencing exposure applicable to your charging scheme, which may differ from the maximum punishment listed based on the ultimate offense doctrine.

Commanders and legal advisors should utilize these considerations in order to issue effective and defensible orders for quarantine, ROM, and other similar restrictions. Carefully evaluating and charging quarantine-related offenses is one way judge advocates can help commanders use the UCMJ to accomplish its stated goals of preserving good order and discipline and, thereby, strengthening national security in the current crisis.[100] **TAL**

Maj Nicholas Henry (Senior Trial Counsel), Maj Gregg Curley (Complex Trial Counsel), Capt Jeffery Amell (Trial Counsel), Capt Johnathan Turner (Trial Counsel), 1stLt Garret Adcock (Trial Counsel), GySgt James Marczika (Regional Trial Investigator), and SSgt Johnathan Starks are currently assigned to the Marine Corps Base Hawaii Trial Services Office. LtCol Alexander Douvas is currently assigned as an Associate Professor of Criminal Law at TJAGLCS.

Notes

1. Rainbow in the Dark (@SadiedogLauren), Twitter (Mar. 20, 2020, 3:54 AM), https://twitter.com/SadiedogLauren/status/1241000131631222784.

2. *Naming the Coronavirus Disease (COVID-19) and the Virus That Causes It,* WHO https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last visited Mar. 28, 2020).

3. *See Why Flattening the Curve is Overrated*, Pensford.com (Mar. 23, 2020), https://www.pensford.com/why-flattening-the-curve-is-overrated/?fbclid=IwAR0XJjIawpVZXrFm—3Iu4ZHMyjDrgDd1y08ldDF0B3de686uxmLEvKVCKQ (There is an estimated reproduction rate of 2 to 2.5 infections per person.).

4. *Q&A on Coronaviruses (COVID-19)*, WHO (Apr. 8, 2020), https://www.who.int/news-room/q-a-detail/q-a-coronaviruses.

5. *How Coronavirus Spreads*, Center for Disease Control, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html, (last visited Apr. 2, 2020).

6. *Rolling Updates on Coronavirus Disease (COVID-19),* WHO (Apr. 8, 2020), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen, (last updated Apr. 9, 2020).

7. *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, Center for Disease Control (Mar. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf.

8. *See, e.g.*, Memorandum from Sec'y of Def. to Chief Mgmt. Off. of the Dep't of Def. et al., subject: Travel Restrictions for DoD Components in Response to Coronavirus Disease 2019 (11 Mar. 2020) (on file with author); Marine Administrative (MARADMIN) Message, 150/20, 070130Z Mar 20, Deputy Commandant, Plans, Policies, and Operations, subject: Update #1: U.S. Marine Corps Disease Containment Preparedness Planning Guidance for 2019 Novel Coronavirus (COVID-19): Commanders' Risk-Based Measured Responses; Memorandum from Off. of the Under Sec'y of Def. to Chief Mgmt. Off. of the Dept. of Def. et al., subject: Force Health Protections Guidance (Supp. 3)—Department of Defense Guidance for the Use of Personal Protective Equipment and Non-Pharmaceutical Interventions during the Coronavirus Disease 2019 Outbreak (10 Mar. 2020) (on file with author); Memorandum from Off. of the Under Sec'y of Def. to Chief Mgmt. Off. of the Dept. of Def. et al., subject: Force Health Protection Guidance (Supplement 4)—Department of Defense Guidance for Personnel Traveling During the Novel Coronavirus Outbreak (11 Mar. 2020) (on file with author); MARADMIN Message, 082/20, 112111Z Feb 20, Assistant Deputy Commandant, Plans, Policies and Operations (Security), subject: U.S. Marine Corps Disease Containment Preparedness Planning Guidance for 2019 Novel Coronavirus; Memorandum from Off. of the Under Sec'y of Def. to Chief Mgmt. Off. of the Dept. of Def. et al., subject: Force Health Protections Guidance (Supp. 2)—Department of Defense Guidance for Military Installation Commanders' Risk-Based Measured Responses to the Novel Coronavirus Outbreak (25 Feb. 2020) (on file with author);U.S. Dep't of Def., Instr. 6200.03, Public Health Emergency Management (PHEM) Within the DoD (28 Mar. 2019) [hereinafter DoDI 6200.03];U.S. Marine Corps, Order 6220.2, Disease Containment Planning Guidance (4 Dec. 2017); All Navy (ALNAV) Message, 025/20, 121914Z Mar. 20, Acting Secretary of the Navy, subject: Vector 15 Force Health Protection Guidance for Department of the Navy; MARADMIN Message, 162/20, 130130Z Mar 20, Deputy Commandant, Plans, Policies, and Operations, subject: Update #2: U.S Marine Corps Disease Containment Preparedness Planning Guidance for 2019 Novel Coronavirus (COVID-19), Travel Restrictions And Personnel Guidance For Travel (on file with author).

9. UCMJ art. 84 (2018).

10. *See* Manual for Courts-Martial, United States ch. XIII sec. VI (1917), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1917.pdf (including President Woodrow Wilson's Executive Order signed 15 Dec. 1916).

11. *See* Manual for Courts-Martial, United States, Table of Maximum Punishments ¶ 117c, sec. A (1949).

12. A LexisNexis search of the word "quarantine" under Military Courts conducted on 31 March 2020 produced sixteen cases that included the word and four cases that substantively addressed Breach of Medical Quarantine.

13. Off. Of the Judge Advocate General, *Military Justice Act of 2016: Overview*, Army.mil (10 Jan. 2019), https://www.army.mil/standto/archive_2019-01-10/.The Military Justice Act of 2016 was passed as part of the National Defense Authorization Act of 2017. *Id. See also* National Defense Authorization Act for Fiscal year 2017, Pub. L. No. 114-328 § 5405, 130 Stat. 2000, 2940 (2016) (codified at 10 U.S.C. § 884 (2018)).

14. Military Justice Review Group, *Military Justice Act of 2016: Section-by-Section Analysis*, Judicial Proceedings Panel, sec. 1005, https://jpp.whs.mil/public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf (last visited Apr. 6, 2020) [hereinafter Judicial Proceedings Panel] (explaining that the offense of breaking medical quarantine is a well-recognized concept in criminal law and therefore should not have to rely on the "terminal element" of Article 134).

15. UCMJ art. 134 (2018).

16. *See* Judicial Proceedings Panel, *supra* note 14.

17. Manual for Court-Martial, United States, pt. IV, ¶ 8.e (2019) [hereinafter MCM].

18. *Quarantine,* Black's Law Dictionary (9th ed. 2009).

19. Regulations to Control Communicable Diseases, 42 U.S.C. § 264(d)(1) (2018).

20. General Definitions, 42 C.F.R. § 70.1 (2019).

21. DoDI 6200.03, *supra* note 8.

22. Refer to Appendix A for a ROM Order template.

23. DoDI 6200.03, *supra* note 8.

24. UCMJ art. 92 (2018).

25. MCM, *supra* note 17, R.C.M. 304(h).

26. UCMJ art. 92 (2018); MCM, *supra* note 17, app. 17 ¶ 8.

27. DoDI 6200.03, *supra* note 8.

28. *Id.* ¶ 1.2(b); U.S. Dep't of Def., Instr 5200.08, Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB) encl. 1 (10 Dec. 2005) [hereinafter DoDI 5200.08].

29. DoDI 6200.03, *supra* note 8, ¶ 1.2(b).

30. *Id.*

31. U.S. Navy Judge Advocate General's Corps Criminal Law Division (Code 20 Sidebar), *Covid-19 Pandemic, Restriction of Movement Orders (ROM) & Their Enforceability* (Mar. 2020), https://www.hqmc.marines.mil/Portals/135/Docs/JAM/Code%2020%20Sidebar%20-%20COVID-19%20ROM%20Orders%20&%20Enforcement%20-%20Final.pdf [hereinafter Code 20 Sidebar.].

32. *Id.*

33. Refer to Appendix B for a medical quarantine order template.

34. Code 20 Sidebar, *supra* note 31.

35. DODI 6200.03, *supra* note 8, ¶ 3.1(e).

36. *Id.;* UCMJ art. 84 (2018).

37. UCMJ art. 84 (2018).

38. *Id.* art. 92.

39. MCM, *supra* note 17, R.C.M. 103(5).

40. *Id.* R.C.M. 103(5), 304(h).

41. DODI 6200.03, *supra* note 8.

42. UCMJ art. 92(2)(c) (2018).

43. *Id.* art. 84.

44. *Id.* art. 92(2)(c)(i).

45. MCM, *supra* note 17, R.C.M. 304(h).

46. 42 C.F.R. § 70.1 (2019).

47. Revised List of Quarantinable Communicable Diseases, Exec. Order No. 13295, 68 Fed. Reg. 17255 (Apr. 4, 2003); Amendment to Executive Order 13295 Relating to Certain Influenza Viruses and Quarantinable Communicable Diseases, Exec. Order No. 13375, 70 Fed. Reg. 17299 (Apr. 1, 2005); Revised List of Quarantinable Communicable Disease, Exec. Order No. 13674, 79 Fed. Reg. 45671 (July 31, 2014).

48. UCMJ art. 87b (2018); MCM, *supra* note 17, pt. IV, ¶ 18c(2)(b); United States v. Shelly, 19 M.J. 325 (C.M.A. 1985) (directive by battery commander); United States v. Curtin, 26 C.M.R. 207 (C.M.A. 1958) (instruction on constructive knowledge was erroneous); United States v. Henderson, 32 M.J. 941 (N.M.C.M.R. 1991) (district order governing use of government vehicles by Marine recruiters), *aff'd*, 34 M.J. 174 (C.M.A. 1992); United States v. Jack, 10 M.J. 572 (A.F.C.M.R. 1980) (conviction set aside where accused violated local regulation concerning visiting hours in female barracks where sign posted at building's entrance did not designate issuing authority).

49. United States v. Dixon, No. NMCM 97 00125, 1998 CCA LEXIS 251, at *1 (N-M. Ct. Crim. App. June 15, 1998).

50. United States v. Tinker, 27 C.M.R. 366, 368 (C.M.A. 1959); UCMJ art. 92(c)(1)(a)(i) (2018).

51.DODI 6200.03, *supra* note 8, ¶ 1.2(b); DODI 5200.08, *supra* note 28.

52. DODI 6200.03, *supra* note 8, ¶ 1.2(b); DODI 5200.08, *supra* note 28; *Tinker*, 27 C.M.R. at 366-68.

53. *Tinker*, 27 C.M.R. at 366-67.

54.DODI 6200.03, *supra* note 8, ¶ 3.1(h).

55. *See supra* note 47.

56. Code 20 Sidebar, *supra* note 31.

57. *Id.*

58. *Id.*

59. DODI 6200.03, *supra* note 8, ¶ 3.2.c.(5).

60. MCM, *supra* note 17, R.C.M. 307(c)(3).

61. "*Major Changes:* A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the charge offense." *Id.* R.C.M. 603 (2019).

62. MCM, *supra* note 17, app. 12A.

63. UCMJ art. 87b (2018).

64. MCM, *supra* note 17, R.C.M. 304(a); *see also* Code 20 Sidebar, *supra* note 31.

65. MCM, *supra* note 17, pt. IV, ¶ 13c(4).

66. *Id.* app. 12

67. UCMJ art. 90 (2018).

68. *Id.* art. 90(c)(2)(d).

69. *Id. art.* 90(c)(2)(a).

70. *Id.* art. 92.

71. *Id.* art. 92(c)(1)(c).

72. DoDI 6200.03, *supra* note 8, para. 3.1.f.

73. UCMJ art. 92(c)(1) (2018).

74. *Id.* art. 92.

75. *Id.*

76. *See* Appendix C (comparing offenses related to Breaking a Medical Quarantine and the impact of the ultimate offense doctrine on sentencing).

77. MCM, *supra* note 17, app. 12, A12-1 to A12-2.

78. *See* MCM, *supra* note 17, app. 12.

79. United States v. Bratcher, 39 C.M.R. 125, 128 (C.M.A. 1969).

80. United States v. Hargrove, 51 M.J. 408, 409 (C.A.A.F. 1999).

81. Criminal Law Dep't, The Judge Advocate Gen.'s Legal Ctr & Sch., U.S. Army, Criminal Law Deskbook 2019 (Jan. 2, 2019) [hereinafter Crim. Law Deskbook].

82. MCM, *supra* note 17, pt. IV ¶ 18d (note).

83. Crim. Law Deskbook, *supra* note 81; Manual for Courts-Martial, United States pt. IV, ¶ 16e(1) to (2) (2016).

84. *See* MCM, *supra* note 17, pt. IV, ¶ 18.d ("Note: For (1) and (2) of this rule, the punishment set forth does not apply in the following cases: if, in the absence of the order or regulation which was violated or not obeyed, the accused would on the same facts be subject to conviction for another specific offense for which a lesser punishment is prescribed; or if the violation or failure to obey is a breach of restraint imposed as a result of an order. In these instances, the maximum punishment is that specifically prescribed elsewhere for that particular offense.").

85. Additional discussion of other potentially applicable charges (e.g., negligent homicide) is outside the scope of this article.

86. UCMJ art. 79(b) (2018).

87. *Id.* art. 79(c). "Regulatory Authority. Any designation of a lesser included offense in a regulation referred to in subsection (b) shall be reasonably included in the greater offense." *Id.*

88. 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13825, 83 Fed. Reg. 46 (Mar. 1, 2018).

89. *Id.*

90. Article 87b was created by the Military Justice Act of 2016, section 1007. Judicial Proceedings Panel, *supra* note 14, sec. 1007. Considering the novelty of the article, there is not much case law behind it. A LexisNexis search on 2 April 2020 utilizing the phrase "'breaking restriction' w/s 134" yielded 435 cases. This indicates the popularity of breaking restriction as charged under the previous iteration. *See* David A. Schlueter et al., Military Crimes and Defenses § 5.8[2] (Matthew Bender & Co. 3d. ed. 2018) ("[The offense of breaking restriction] is a charge frequently used in courts-martial.").

91. MCM, *supra* note 17, app. 12.

92. MCM, *supra* note 17, pt. IV, para. 91.c.(5)(a).

93. United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979).

94. *Id.*

95. *See* DoDI 6200.03, *supra* note 8.

96. United States v. Reyesesquer, No. 201700342, 2018 CCA LEXIS 255, at *x (N-M. Ct. Crim. App. May 29, 2018)

97. *Id. See also* United States v. Mack, 65 M.J. 108, 109 (C.A.A.F. 2007).

98. While the child custody agreement does not override the lawful order, it would likely serve as extenuation and mitigation. When administratively restricting individuals pursuant to a health condition, the least restrictive means should be utilized. Additionally, a process to obtain a waiver or exception to policy should be included in the order— this type of restriction is not punitive in nature.

99. DODI 6200.03, *supra* note 8.

100. MCM, *supra* note 17, pt. I, ¶ 3.

101. DoDI 6200.03, *supra* note 8, fig. 2.

102. *Id.* fig. 3.

103. For the reasons set forth in this Declaration, the individual listed in this order additionally meets the standards for quarantine under 42 C.F.R. § 70.6 because the subject person is reasonably believed to be in a qualifying stage of the disease. And if released from the place of quarantine the subject person would be moving from one State into another or constitute a probable source of infection to others who may be moving from one State into another. Qualifying stage is defined under 42 U.S.C. § 264(d)(2) and 42 C.F.R. § 70.1 to mean:

(1) The communicable stage of the of a quarantinable communicable disease; or

(2) The precommunicable stage of the quarantinable communicable disease, but only if the quarantinable communicable disease would be likely to cause a public health emergency if transmitted to other individuals.

104. Quarantine means separation of an individual or group reasonably believed to have been exposed to a quarantinable communicable disease, but who is/are not yet ill, from others who have not been so exposed, to prevent the possible spread of the quarantinable communicable disease.

105. Both for quarantine under the reference and federal quarantine under 42 U.S.C. § 264 and 42 C.F.R. §§ 70.14, 71.37.

106. When a commander issues a personalized medical quarantine order, coordination with installation law enforcement will facilitate enforcement of the order and protection of public health.

Appendix A

Suggested Wording for a Written Declaration of a Public Health Emergency[101]

Subject: Declaration of a Public Health Emergency on [Installation Name]

I have been notified by my Public Health Emergency Officer (PHEO) of a possible public health situation on our installation involving {agent/disease name or description of the qualifying incident} that requires immediate action. Based on the PHEO's recommendations and the results of a preliminary investigation, I am declaring a public health emergency in accordance with DoD Instruction (DoDI) 6200.03, "Public Health Emergency Management (PHEM) Within the DoD," and {applicable Service Instruction}. This declaration will terminate automatically 30 days from the date of this memorandum unless it is renewed and re-reported or terminated sooner by me or a senior commander in the chain of command.

The installation PHEO {and public health personnel} are hereby directed to identify, confirm, and control this public health emergency utilizing all the necessary means outlined in DoDI 6200.03 and {applicable Service Instruction}. To implement my direction, the PHEO may issue guidance that affects installation personnel and property, and other individuals working, residing, or visiting this installation (e.g., steps to protect personnel health, closing base facilities, restricting movement, or implementing quarantine for select individuals). We will establish the Health Protection Condition (HPCON) level framework that will provide specific actions specific to this emergency that each person should take to protect his or her health.

The installation command and the PHEO will coordinate activities and share information with {list which of the following are applicable to the current situation: federal, State, local, tribal, territorial, and/or host nation. For overseas commands, replace "Federal, State, and local" with "host nation"} officials responsible for public health and public safety to ensure our response is appropriate for the public health emergency. Shared information may include personally identifiable health information only to the extent necessary to protect the public health and safety.

Any person who refuses to obey or otherwise violates an order during this declared public health emergency may be detained. Those not subject to military law may be detained until civil authorities can respond. Violators of procedures, protocols, provisions, or orders issued in conjunction with this public health emergency may be charged with a crime under the Uniform Code of Military Justice and under Section 271 of Title 42, United States Code (U.S.C.). Pursuant to Section 271 of Title 42, U.S.C., violators are subject to a fine up to $1,000 or imprisonment for not more than one year, or both.

Appendix B

Order for Quarantine[102] Example

1. Based on the enclosure, I find:

a. Based on the scientific evidence collected concerning COVID-19, the disease meets the definition of "severe acute respiratory syndrome" as specified under Executive Order 13295, as amended by Executive Orders 13375 and13674.
b. The Director General of the World Health Organization has declared that the 2019-nCoV/COVID-19 constitutes a public health emergency of International Concern. The Secretary of the U.S. Department of Health and Human Services has declared that 2019-nCoV/COVID-19 constitutes a public health emergency.
c. I have determined, pursuant to reference (a), that a public health emergency exists aboard [Marine Corps Base Hawaii] as established by reference (b).
d. I reasonably believe that the subject person is infected with or has been exposed to COVID-19.[103]
e. COVID-19 is a quarantinable communicable disease in the United States, meaning that, if necessary, to preserve good order and discipline and to provide for and safeguard my command, I may order you into quarantine.
f. Quarantine[104] is authorized by reference (a). The facts listed in the enclosure support the conclusion that quarantine is appropriate. This order meets the requirements of reference (a).
g. Based on these reasonable beliefs, I find that the subject person meets the standards applicable for a quarantine order.[105]
h. Military authorities may legally detain you until you are no longer at risk of becoming ill and spreading the disease to others or this order expires, whichever comes first. The incubation period for COVID-19 is currently believed to be up to 14 days. You will be reassessed in 14 days. This order expires at the conclusion of that assessment unless extended on the recommendation of a licensed medical provider.
i. This order will take effect immediately.

2. Your place of quarantine shall be [Barracks room] [Branch Health Clinic] [Restricted to Marine Corps Base Hawaii]

3. During your time in quarantine, you shall:

a. Take precautions, as directed by healthcare staff and applicable policies, to prevent the possible spread of COVID-19 to others.
b. Cooperate with the efforts of health authorities to contact other exposed people to prevent the possible spread of the quarantinable communicable disease. This includes providing information regarding people you had

contact with, places you visited or traveled to, and your medical history.

4. You have the following legal rights:

a. Legal Authority: I have ordered that you be quarantined because I reasonably believe that you have been infected with or exposed to [COVID-19]. Quarantine is authorized by reference (a).
b. Conditions of Quarantine: Your command will arrange for adequate food and water, a continued place to stay on [Marine Corps Base Hawaii], medical treatment, and a way for you to communicate with a family member or another representative while you are held in quarantine.
c. Medical Examination: Per the reference (a), § 3.2(b)(1), you may be required to provide information and undergo such testing, as may be reasonably necessary, to diagnose or confirm the presence, absence, or extent of infection with COVID-19. Medical examination and other testing will be performed by authorized, licensed healthcare staff. The healthcare staff will also be responsible for your medical care. Your commander will discuss with healthcare staff your diagnosis and management, and ways to prevent spread of the disease.
d. Health Monitoring: Healthcare staff will monitor your health condition so that the time you remain under quarantine will not last longer than is needed to prevent the spread of the quarantinable communicable disease to others. You must cooperate with the instructions of healthcare staff and other authorized personnel during the time you are in quarantine.
e. Right to Contest: Per reference (a), § 3.2(c)(9) permits you to contest the reason for your restriction. You will be allowed to present information on your behalf supporting an exemption or release from quarantine. Your commander or a neutral designee will review such information and promptly provide a written decision on your need for quarantine or isolation.
f. Penalties for Violating This Order: This order is punitive. Violations may be subject to administrative or judicial action under the Uniform Code of Military Justice.

I. M. TOUGH
Commanding Officer
[Marine Corps Base Hawaii]

Copy to:
Installation Law Enforcement[106]

Appendix C

Table 1 conceptualizes criminal quarantine-related offenses by group. It is helpful for understanding the punitive landscape.

Table 1

	Punitive Article*	Authorized Punishment (Discharge, Confinement, Forfeitures)	Maximum Punishment After Factoring in the Ultimate Offense Doctrine
Group 1	87b Breaking Restriction	None; 1 mo.; 2/3 1 mo.	None, 1 mo.; 2/3 1 mo.
	Disease not Defined as Communicable		
Group 2	84 Breaking Quarantine	BCD; 6 mos., 2/3 6 mos.	BCD; 6 mos., 2/3 6 mos.
	90 Willfully disobeying superior Commissioned Officer	DD, BCD; 5yrs., TF	None, 1 mo.; 2/3 1 mo.
	92(1) Violation of or failure to obey general order or regulation	DD, BCD; 2rs., TF	BCD; 6 mos., 2/3 6 mos.
	92(2) Violation of or failure Other Lawful Order	BCD; 6 mos.; TF	BCD; 6 mos., 2/3 6 mos.
	92(3) Willful derelection in the performance of duties	BCD; 6 mos.; TF	BCD; 6 mos., 2/3 6 mos.
	Disease Defined as Communicable **		
Group 3	84 Breach of medical quarantine involving a quarantineable communicable disease defined by 42 C.F. R. 70.1	DD, BCD, 1 yr.; TF	DD, BCD, 1 yr.; TF
	90 Willfully disobeying superior Commissioned Officer	DD, BCD; 5 yrs., TF	DD, BCD, 1 yr.; TF
	92(1) Violation of or failure to obey general order or regulation	DD, BCD, 2 yrs.; TF	DD, BCD, 1 yr.; TF
	92(2) Violation of or failure Other Lawful Order	BCD; 6 mos.; TF	BCD; 1 yr.; TF
	92(3) Willful derelection in the performance of duties	BCD; 6 mos.; TF	BCD; 1 yr.; TF
	92(3) Through Neglect or Culpable Inefficiency resulting in death or greivious bodily harm	BCD; 18 mos.; TF	BCD; 1 yr.; TF
Group 4	92(3) Willful derelection of duty resulting in death or grievous bodily harm	DD, BCD, 2 yrs.; TF	DD, BCD, 2 yrs.; TF

* While outlying circumstances may warrant other crimes (e.g., negligent homicide) those offenses are outside the scope of this article
** Mustr prove this by admitting Executive Order to get the maximum sentence

AROUND THE CORPS

Members of the 211th Judge Advocate Officer Basic Course – in face masks required because of the COVID-19 pandemic – graduate from the Direct Commissioned Officer's Course. (Credit: COL Jackie Thompson, Staff Judge Advocate, U.S. Army Maneuver Center of Excellence and Fort Benning)

A wooden engraving depicting the view from the Potomac River in Washington, D.C. as the city was under attack by British forces. (Credit: Library of Congress).

No. 2

The Past Is the Present

What Two 19th Century Trials Tell Us About Court-Martialing Senior Leaders Today

By Captain Sean K. Price

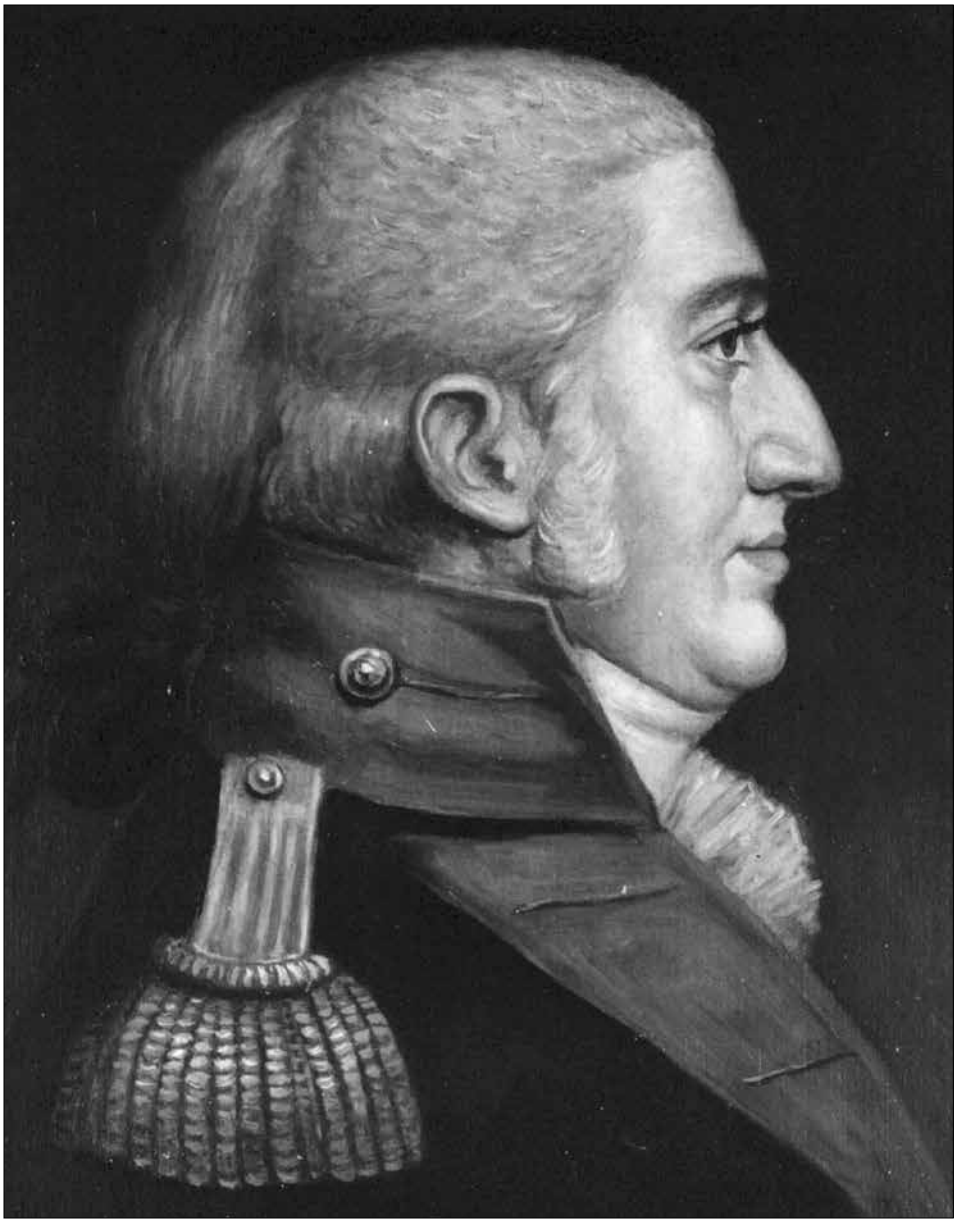
Specification 3d. In declaring, in the open street, in front of the marine barracks, on or about the 1st of September, instant, in the presence of a number of his officers, that he did not care a damn for the president, Jesus Christ, or God Almighty.[1]

Misconduct by senior leaders in the U.S. armed forces always makes the news—invariably accompanied by a discussion of whether senior leaders receive more lenient treatment than the junior members of their services.[2] It might be surprising, then, to learn that both the third and fourth[3] Commandants of the Marine Corps were court-martialed while in office. The charges against the third commandant, Lieutenant Colonel (LTC) Franklin Wharton, arose from his leadership during the War of 1812, specifically, his failure to personally lead Marines against the British force advancing on Washington in 1814. The charges against the fourth commandant, LTC Anthony Gale, involved personal misconduct, namely public drunkenness. Wharton was acquitted, and Gale was convicted and dismissed.

The man who would succeed Gale, Archibald Henderson, known as the "Grand Old Man of the Marine Corps" because he served as commandant for thirty-nine years, played an instrumental role in bringing about Wharton's court-martial. In his quest to become commandant, Henderson preferred the charges against Wharton and served as prosecutor at his court-martial. He also did his best to undermine Gale, but failed to prevent Gale's appointment.

Wharton did not deserve to be court-martialed. Gale did. Today, the prospect of a Service's highest-ranking officer being court-martialed, much less dismissed as Gale was, is unlikely. There are good reasons for this. For instance, it is doubtful an officer such as Gale would survive the modern selection and confirmation process for general and flag officer.[4] Also, courts-martial of senior officers used to be more common, and were not necessarily career-ending.[5] On the other hand, there is some validity to the critique that the modern military justice system loses its potency when the accused wears stars.[6]

Despite two centuries of reform to military law, the trials of Franklin Wharton and Anthony Gale still have lessons to teach today's judge advocate about court-martialing general and flag officers. First, convening authorities in such cases should consider selecting members from other services. Both Wharton's and Gale's panels consisted primarily of Army officers who were senior to the accused.[7] Second, a court-martial should be convened if—and only if—the charges and evidence warrant one, regardless of the political consequences of prosecution. The Marine Corps's very existence was far less secure in the early nineteenth century than it is today.[8] Yet, it managed to survive the dismissal of one of its earliest commandants and, indeed, was better for it.



Lieutenant Colonel Franklin Wharton was only 36-years old when he became Commandant of the United States Marine Corps. He led the Corps during the War of 1812.

The Old Corps

In 1798, the Marine Corps was born into an ambiguous administrative position that plagued its leaders and formed the backdrop of the courts-martial of two of its commandants. The Continental Navy and Marines had not survived America's victory in the Revolutionary War.[9] Tensions with Great Britain and France soon convinced the new republic it needed a Navy once again and, following the British model, Marines to go with it.[10] The Department of the Navy was established on 30 April 1798[11] and the Marine Corps shortly thereafter, on 11 July.[12] Congress authorized a Corps of 881 Marines,[13] who would serve on ship and shore, and be subject to the Articles of War or the Rules for the Government of the Navy, depending on "the nature of the service in which they shall be employed."[14]

The Corps was neither formally part of the Department of War nor the new Department of the Navy.[15] Moreover, the commandant had little statutory authority. Aside from authorizing him to organize a headquarters staff, the law was silent on what the commandant could or should do and how, if at all, he would exercise command over Marines not on his staff.[16] For his leadership of this Corps—small in size, serving with both the Navy and Army, subject to two different codes of military justice, and administered by a commandant with unspecified powers—Wharton would find himself put on trial.

Franklin Wharton

Background and the War of 1812

Born in 1767 and a native of Philadelphia, Franklin Wharton received his commission in 1798.[17] He was the next senior officer in the Corps when Lieutenant Colonel William Ward Burrows resigned in March 1804.[18] So, just six years after becoming a Marine, Wharton became commandant.[19] As the nation headed into the War of 1812, its Marines (about 1,000 in number) were distributed throughout its newly vast territory, from Louisiana to New England, and served as shipboard guards on some sixty vessels.[20]

In June 1812, Congress declared war on Great Britain, apparently more out of a sense of honor than confidence that the United States could win.[21] The British—still fighting Napoleon—did not deploy significant forces to America until the defeat of the French Empire in the spring of 1814.[22] On 19 August, a British force landed in Maryland and began to march on Washington.[23]

For his part, Wharton had previously carved a "battalion" of a little over 100 men out of the 150 to 200 Marines under his personal command in Washington, and placed it under the command of his adjutant, Captain Samuel Miller.[24] These Marines fought as part of the American Army at Bladensburg, Maryland, on 24 August, just a few miles away from Washington.[25] They fought well, but the Marines could not change the battle's course: principally a militia force, most American troops at Bladensburg fled on contact with their professional British counterparts,[26] who were in Washington that evening.[27]

The federal government had already evacuated.[28] Before making his escape, Wharton offered the commander of the Washington Navy Yard assistance, which he declined.[29] British troops famously

burned the capital,[30] but the two countries, realizing they had more to lose than gain from the war,[31] reached a peace agreement the following winter.[32]

Marines had done well in the war, though they were too few in number to have made much of a difference.[33] One Marine, however, was particularly dissatisfied with the commandant's performance: Major Archibald Henderson, an intensely ambitious man chafing against a strictly seniority-based promotion system.[34] Henderson, who had been in neither Washington nor Bladensburg,[35] believed Wharton should have taken the field to fight the British personally. That such a gesture would have achieved nothing was beside the point—to Henderson, it was a matter of honor and perhaps "the chance to maneuver into Wharton's job."[36] So, in 1817, he preferred charges against his commandant.[37]

The Wharton Court-Martial

The court-martial assembled in Washington on 10 September 1817.[38] The panel consisted of eleven members—nine Army officers, two Marines—with an Army colonel presiding.[39] Remarkably, one of the Marines detailed to the court, Captain Wainwright, was a prosecution witness and named in two of the specifications.[40] Pointing this out, he sensibly requested to withdraw, but the court-martial retained him as a member anyway.[41]

Henderson himself served as the prosecutor.[42] He charged Wharton with five specifications of neglect of duty and three specifications of conduct unbecoming an officer and a gentleman.[43] Each charge had one specification concerning Wharton's leadership during the War of 1812. One specification alleged neglect of duty for not having "taken command in the field."[44] The other alleged conduct unbecoming for not defending his "military character," which had been "assailed in its tenderest point, in consequence of the course he pursued at the time of the capture of the city of Washington."[45] In other words, even if Wharton had not been wrong to flee the capital, he had wrongfully failed to defend that decision, presumably by way of a duel, which would have violated the Articles of War.[46]

Two specifications under neglect of duty related to Wharton's management of the Corps in general, alleging he had not "taken command of any parade," nor while "in the uniform of the corps, reviewed or inspected any part of the [M]arine [C]orps."[47] The last two specifications under neglect of duty alleged that he had mismanaged the cases of three enlisted Marines.[48] Finally, the two remaining specifications of conduct unbecoming alleged Wharton had "use[d] harsh and ungentlemanlike language towards [Major] John Hall" by calling him a liar and that Wharton had then "refuse[d] to make satisfactory reparation."[49]

These charges could be seen not only as an expression of Archibald Henderson's ambition and dissatisfaction with Wharton's leadership, but also as a symptom of a personnel system under strain. Wharton had the unenviable task of downsizing the Corps pursuant to the Peace Establishment Act, which required the involuntary separation of many of the Service's officers, including the aforementioned John Hall.[50] For those who survived the downsizing, like Henderson, it seemed the only chance at promotion was by way of the removal of higher-ranking officers. Wharton pleaded not guilty to the charges.[51]

There being no such thing as a military judge, courts-martial of the time resolved questions or issues arising at trial through majority vote.[52] Likely, it was fortunate for Wharton that most of the members on his court-martial were Army officers with little reason to care about Marine Corps politics. The court effectively dismissed the charge of conduct unbecoming by deciding not to hear any evidence on its specifications. Calling Major Hall a liar, the court reasoned, was not a crime under the Articles of War, and the other specifications were "too general."[53] Consequently, the court only heard evidence concerning Wharton's alleged neglect of duty.

The members cut to the heart of the matter of Wharton's alleged failures to take command in the field, preside over parades, or conduct inspections. They asked the prosecution's first witness, Major Samuel Miller, who had led the Marines at Bladensburg, whether there "was any regulation or order in existence requiring the [commandant] to attend parades, to command the corps in the field, or to inspect or review it."[54] The answer: "none."[55] In short, he could not have neglected a duty he did not have.

Wharton did not rely solely on this defense, however. He argued that he had, in fact, gone out to Navy yards to inspect Marines and was present at parades; if not in the manner Henderson thought he should have.[56] Wharton simply was not "in full uniform" for the parades, reviews, and inspections.[57] Moreover, the Service's shortage of manpower meant that there were often not enough Marines off guard duty for ceremonies.[58]

Much of the prosecution's case consisted of testimony by one of the members, Captain Wainwright, about Wharton's alleged failure to properly exercise his duties as a court-martial convening authority. Two Marines were convicted in Boston, but the officer ordered to execute their sentences, Wainwright, did not receive their sentences.[59] It was a post-trial paperwork mix-up. The most interesting detail is that the president of the court-martial, who had ordered Wainwright to execute the sentences, was the prosecutor.[60] On cross, and in his closing argument, Wharton blamed Henderson for the mess, which could have been averted had Henderson not left Boston before "the dissolution of the court-martial."[61] The final specification concerned a deserter who was confined in Boston without charges for about four months.[62] There was little testimony on the matter, but Wharton claimed he had not known of the prisoner and the charge would not have warranted a court-martial anyway.[63]

The trial concluded with Wharton recalling Miller as a character witness. Miller testified that Wharton's "character as commandant of the corps has been marked for promptness and humanity."[64] When asked if the Service suffered due to Wharton's failure "to command parades in person, and to review and inspect the troops," Miller answered: "In no instance."[65] There it was. Henderson had failed to make his case. The court fully acquitted Wharton on 22 September 1817.[66]

There had been no testimony specifically about Wharton's absence from Bladensburg or his decision to flee Washington, but it is difficult to fault him

for either. Miller had ably commanded the Marines at Bladensburg. It would have made about as much sense for Wharton to take command as it would for a lieutenant colonel today to take command of a company. Once the battle had been lost, remaining in the capital would have done nothing to alter the consequences of the British victory at Bladensburg: Washington would burn, whether Wharton was in it or not.

Overall, the charges and the evidence given at trial combined to give the impression that Henderson accused Wharton of not running the Corps how Henderson would run it. That, of course, is no crime, but once Henderson preferred charges, the matter had to be resolved through a court-martial, as was customary at the time.[67] Henderson had failed. Because there was no retirement system to incentivize officers to leave,[68] Wharton could be expected to stay on as commandant for the rest of his life. That turned out not to be a long time; he died the following year on 1 September 1818.[69]

So, despite his failed prosecution, Henderson became commandant anyway, if only temporarily. He was the acting commandant until the appointment of a replacement.[70] Even with Wharton out of the way, there was one man, and therefore one resignation, death, or court-martial, between Henderson and seniority. That man was Major Anthony Gale.

Anthony Gale

A native of Dublin, Ireland, Anthony Gale immigrated to the United States in 1793 and commissioned as a Second Lieutenant of Marines in 1798, shortly after the Service's creation.[71] Thus, by the time of Wharton's death, Gale was the senior Marine in the Corps. He had, by then, a mixed reputation. His most noteworthy accomplishment as a company grade officer was to kill a Navy officer in a duel for mistreating one of his Marines.[72] As a major, his alleged mismanagement of the barracks in Philadelphia prompted Wharton to convene a court of inquiry, which cleared him of wrongdoing.[73]

While acting commandant, Henderson lobbied to make his position permanent by supplying a succession of Secretaries of the Navy—there were three during this five-month span—with adverse information about Gale,[74] who was then serving in New Orleans.[75] Finally, Secretary Smith Thompson convened another court of inquiry to take a second look at Gale's command in Philadelphia and to investigate his reputation for drunkenness in New Orleans.[76] Once again, Gale was cleared and became commandant on 3 March 1819.[77] For the second time, Henderson had failed. Gale subsequently banished him to New Orleans, where he could influence little that happened in Washington.[78]

Nevertheless, Gale's time in office would be short. He had inherited Wharton's problems—namely, the Corps's awkward administrative position within the government, and the Commandant's unspecified command authority.[79] The latter problem particularly bedeviled Gale. Wharton had reached something of an accommodation with civilian leadership concerning his authority.[80] Gale, by contrast, had to contend with a President and a new Secretary of the Navy who were receptive to officers applying to them directly for leave or assignments.[81] At wit's end, Gale wrote to the Secretary in August 1820 to define the limits of his authority.[82] At the same time, he and his wife separated.[83]

With both his professional and personal life in disarray, Gale spent most of August 1820 drunk.[84] Eventually, the second-ranking Marine in the capital, Samuel Miller, convinced the Secretary of the Navy to put Gale under arrest.[85] When Miller informed Gale of his arrest, Gale guessed another Marine, First Lieutenant Richard Desha, was somehow behind his predicament.[86] Gale insulted Desha, challenged him to a duel, and declared "that he did not care a damn for the president, Jesus Christ, or God Almighty" in the street outside Marine Barracks, Washington.[87] Apparently not content he had sufficiently damaged his case, Gale violated the terms of his arrest.[88] He would wait for his court-martial confined to his quarters.[89]

The Gale Court-Martial

The trial began on 18 September 1820, at Marine Barracks, Washington.[90] As in Wharton's court-martial, the members were principally Army officers, with a few Marines.[91] Remarkably, Lieutenant Desha, who was named in the charges, had been assigned as an alternate.[92] When other members failed to show up, Desha had to sit on the panel.[93] Like Captain Wainwright in Wharton's trial, Desha objected to sitting on a court-martial in which he would have to testify.[94] And, like Wainwright, Desha became a member anyway. When asked, Gale declined to challenge Desha, so he stayed.[95]

The prosecutor, Major Miller, had preferred four charges against Gale.[96] The two specifications under the charge of habitual drunkenness alleged he was "disgracefully intoxicated" to the point of not being able to perform his duties for much of August.[97] The three specifications of conduct unbecoming alleged he had "visit[ed] a house of ill-fame, near the Marine Barracks, in an open and disgraceful manner," insulted and challenged Desha to a duel, and made the aforementioned declaration concerning the President, Jesus, and God.[98] The third charge was for making a false claim, but Miller abandoned it when new evidence came to light during the trial.[99] Finally, the fourth charge alleged Gale had broken or violated his arrest.[100]

The record of proceedings depicts a man who, less than eighteen months after ascending to the highest office in the Marine Corps, had plummeted to the lowest point in his personal life. The prosecution's case was straightforward. Miller called a series of witnesses to testify to Gale's persistent drunkenness throughout the month of August. The first witness's testimony was representative: "[H]e could as well designate the days when the prisoner was not drunk as he could those days on which he was under the influence."[101] That is, Gale was drunk as often as not, "and seemed generally too much stupefied to know what he was about, or to perform any duty properly."[102]

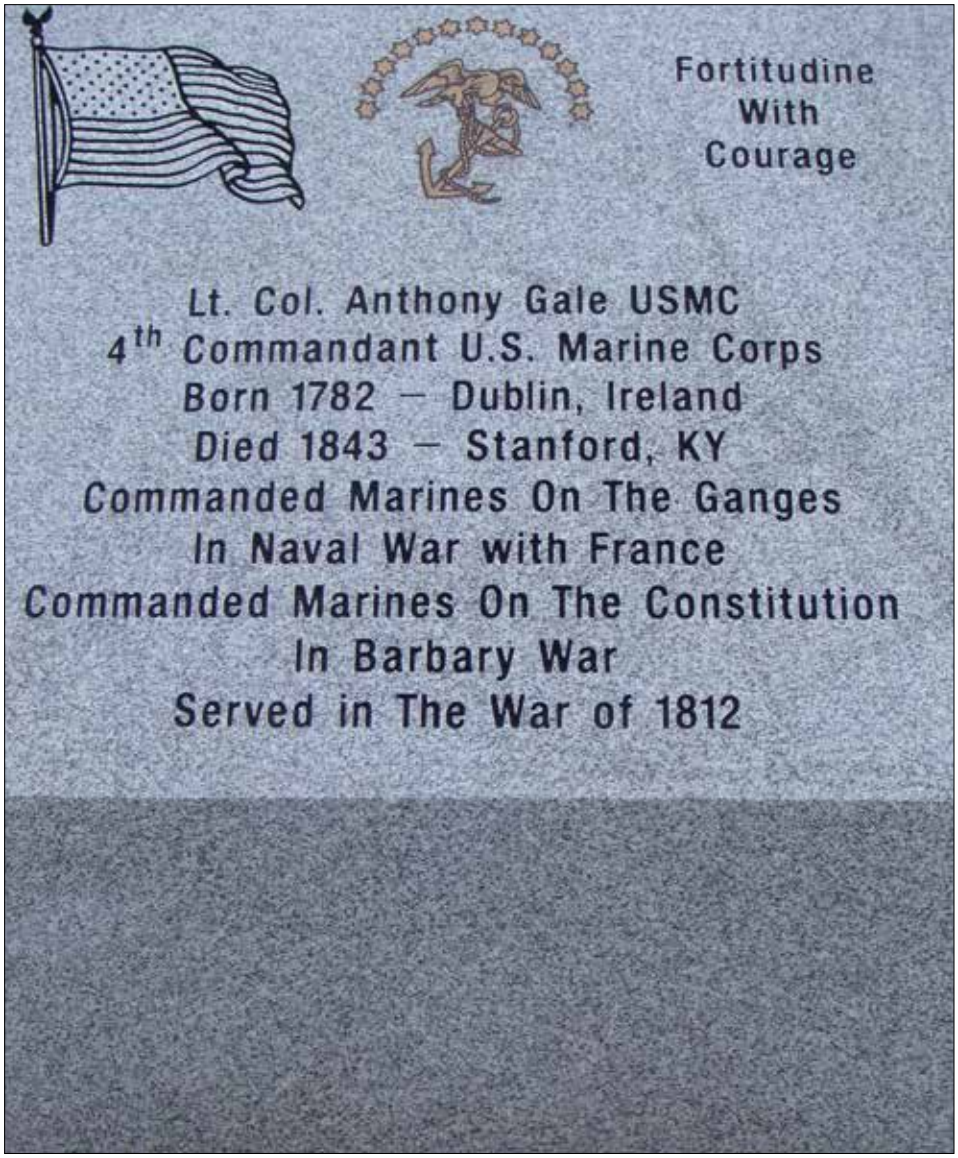
Gale's defense was that he had been ill, not drunk, that the alleged conduct unbecoming was not sufficiently serious to warrant a court-martial, and that Major Miller had exceeded his authority in confining him to his quarters, rather than placing him under arrest as the Secretary had ordered.[103] Gale claimed to suffer "frequent and sudden propulsions of blood

into the head, which produce[d] temporary giddiness and prostration of strength."[104] He asked the witnesses whether they had seen him drinking excessively, rather than just seen him in a state they believed to be drunkenness.[105] He also asked the witnesses whether they knew he suffered from "giddiness" and dizzy spells.[106]

This was not an effective line of questioning. Many of the witnesses had, in fact, observed the commandant drink too much.[107] For instance, Lieutenant Desha testified that he saw Gale, already drunk, at a tavern between noon and 3 p.m., "take four or five glasses, perhaps more, in that time of punch, whisky and water, and . . . wine bitters."[108] When asked about his mental condition, the witnesses invariably testified the only evidence they had of Gale's affliction was that Gale had told them about it.[109]

However, one witness did relate he had seen Gale have what appeared to be a "fit, from the rolling up on his eyes."[110] And another witness, called by the defense, testified he had observed Gale undergo a dramatic change in behavior in the preceding two or three months from "correct" to "that of a drunkard or a madman—or rather that of a man partially deranged."[111] This witness, a doctor, also testified Gale had told him he suffered from "vertigo proceeding from fullness of blood," which, naturally, was treated by bleeding.[112] Unhelpfully for Gale, the doctor concluded his testimony with his opinion that Gale only suffered "that kind of derangement which accompanies intoxication."[113] In other words, Gale was not acting drunk because he was crazy, he was acting crazy because he was drunk.

In his closing argument, Gale conceded the facts underlying the charges of conduct unbecoming and violating the terms of his arrest. Though he had insulted Desha and declared his contempt for the President, he argued that he had retracted the insults and did not intend any disrespect to the President.[114] He also admitted to having visited a brothel, but contended that did not rise to the level of "disgraceful turpitude and meanness" required—according to him—to be considered conduct unbecoming.[115] Finally, he did not deny having gone outside the limits of his arrest, as specified

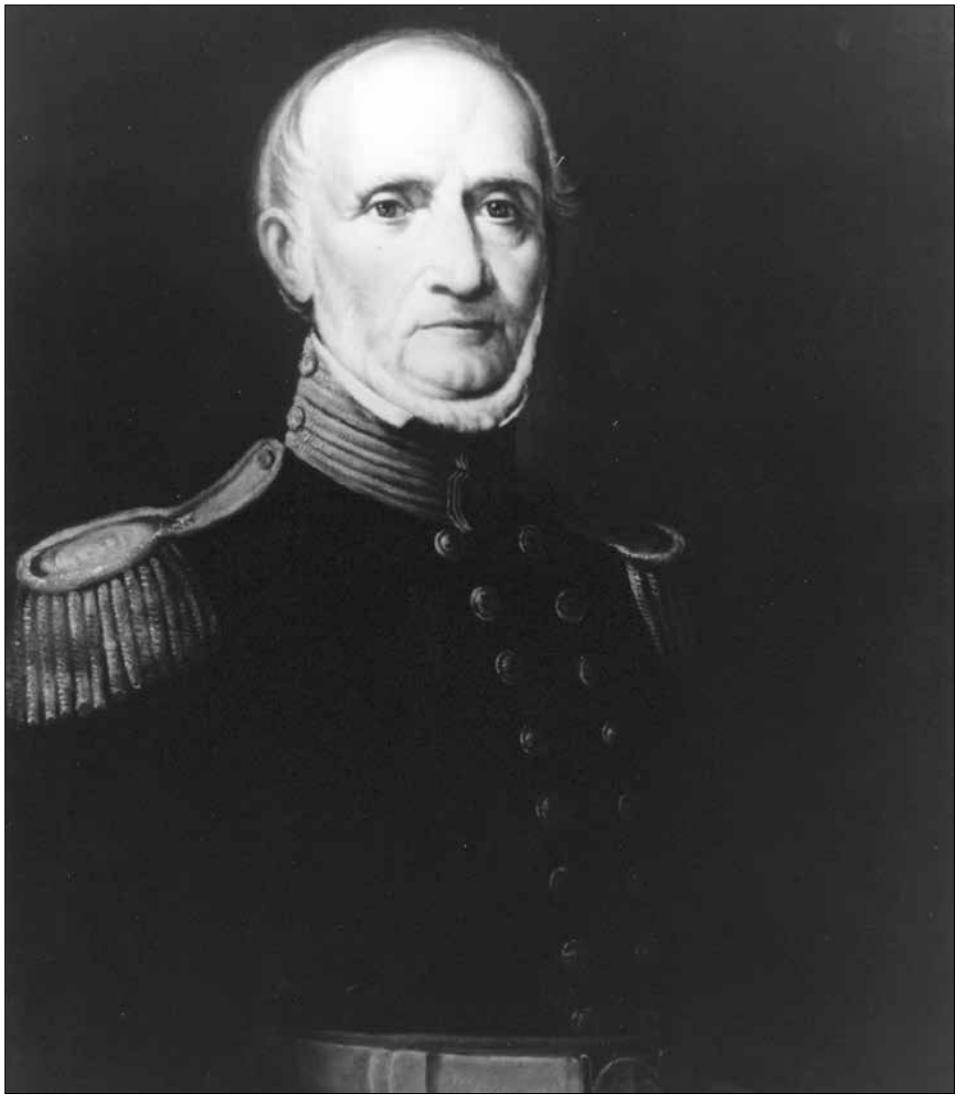


Lieutenant Colonel Anthony Gale, the fourth Commandant of the United States Marine Corps, was fired just two years into the job. He is the only Commandant who served in which no portrait of him was ever made, and it is unknown where he was buried. This memorial, located at the Lincoln County Courthouse in Stanford, Kentucky, was erected by the Marine Corps League, Department of Kentucky.

to him by Major Miller, but argued, apparently without any factual basis, those limits were more restrictive than had been authorized by the Secretary of the Navy.[116]

Generally speaking, the proceedings were fair, at least by the standards of the day. Gale was represented by counsel, who sometimes cross-examined witnesses rather than the accused doing it himself.[117] This was a privilege the accused did not often enjoy in courts-martial at the time.[118] When Gale complained that his confinement impaired his ability to prepare a defense, the court granted him liberty within Washington, subject to a curfew.[119] When Gale took advantage of this shortly before resting his case in order to talk with some witnesses who might be helpful for his case, he was arrested for a private debt and was consequently absent from court when it came to order.[120] It was an ignominious conclusion to the defense case. The court recessed until Gale returned, at which time his counsel read aloud to the members the closing argument Gale had prepared.[121]

The court found Gale guilty of one specification of habitual drunkenness, the three specifications of conduct unbecoming,



Archibald Henderson, known as the Grand Old Man of the Marine Corps, served for 39 years as the Marine Corps Commandant, the longest tenure of any officer in that position.

and the sole specification of violating the terms of his arrest.[122] The court found him not guilty of the charge of submitting a false certificate, which the prosecutor had attempted to withdraw, and the other specification of habitual drunkenness.[123] In view of the weight of the evidence, these were reasonable findings.

The next day, 29 September, the court concluded by sentencing Gale to be "cashiered"—that is, dismissed.[124] It was the minimum sentence the court could adjudge. The Articles of War required dismissal for conviction of conduct unbecoming.[125] President Monroe approved the sentence the following month, thereby ending Gale's twenty-two-year career.[126] While the sentence might seem harsh today, it should be kept in mind that his dismissal did not deprive him of retirement benefits. Today's military retirement system did not exist, though the Department of the Navy did eventually grant him a modest pension.[127] And, regardless of whether Gale's behavior was attributable to some undiagnosed illness, he simply had no business being a commissioned officer any longer, much less the commandant.

The rule of seniority now benefitted Henderson, whom the Secretary of the Navy quickly picked to replace Gale.[128] Henderson would go on to become the second most famous commandant (after John A. Lejeune). Gale would die in obscurity, without even an official portrait to commemorate his brief time as the Corps's senior officer.[129]

What We Can Learn from These Trials

Aside from their historical interest, it might seem at first that the trials of Wharton and Gale have little to offer to today's military justice practitioners and convening authorities. Neither trial was presided over by a judge. Both trials had a member called as a prosecution witness. And, not only were the prosecutors not attorneys, they both stood to benefit directly from victory at trial because they were leading candidates to become the next commandant. Nevertheless, there are two key lessons to be learned from these cases. First, convening authorities should draw on other Services for members when the accused is a general or flag officer. Second, such an officer should be court-martialed if—but only if—the charges and evidence warrant a trial.

In both trials, the panels were made up mostly of officers not in the accused's Service. This was essential to justice in each case, both in fact and in appearance. The accused's status as the senior officer in the Marine Corps made it both unlikely that other Marine officers could evaluate the evidence objectively and, as happened in both cases, more likely that Marine members would have personal knowledge of the facts. In today's legal terms, any Marine available to sit on these cases would probably be subject to challenge for actual or implied bias.[130]

By contrast, the Army officers who heard these cases had nothing to lose or gain from either Wharton's acquittal or Gale's dismissal. Had the panels been comprised solely of Marines, one might suspect the case outcomes were more expressions of intra-Service politics than justice. But because a decisive proportion of the panels were Army officers, one could be confident that the verdicts were reached in the right way.

Selecting members who could be objective does not appear to have been a motivating factor behind the selection of members in either Wharton or Gale's trials. Indeed, the President detailed Marine members to Wharton's trial after the court objected to their absence. Nevertheless, convening authorities for senior leader cases should consider following the example

set in these trials with respect to the selection of members.

A recent case that might have benefitted from having members from other Services was the general court-martial of Army Brigadier General Jeffrey Sinclair in 2013. Due to his rank, finding members who were both senior to the accused and unbiased proved tremendously difficult—out of the twenty-four Army general officers originally detailed to hear the case, only two survived the first round of voir dire.[131] The military judge even advised the prosecution "that upper-ranked personnel from other branches of the military [could] serve on the panel."[132] That ultimately proved unnecessary. Five major generals survived a voir dire process that churned through more than forty general officers, most of whom "were rejected because they knew Sinclair or other key potential witnesses."[133] Were Sinclair higher-ranking than a brigadier general, or if today's rule requiring eight members for a general court-martial applied, it is possible the convening authority would have had no other choice but to use members from other Services.

This article does not contend that members from other Services are—or should be—per se required in the courts-martial of general or flag officers. However, convening authorities should consider selecting members from other Services anyway, and the Department of Defense should facilitate, perhaps by requiring the Services to make general and flag officers available for court-martial duty. The pool of eligible members is extremely small in such cases, not only because of the member seniority requirement, but also because most generals and admirals develop personal relationships, friendly or not, with other such officers in their respective Services over the course of the three decades or so it takes to attain their rank.

Moreover, eligible members from the accused's Service will typically be more keenly attuned to their Service's political interests and correspondingly sensitive to the impact the case outcome will have on them. Accordingly, convening authorities should consider obtaining members from other Services as a structural safeguard against that political sensitivity, even if it does not rise to the level of implied bias that would justify excusal from the panel. Members from other Services should be more objective due to their lack of personal knowledge of the accused and their lack of concern with the parochial Service interests implicated by the court-martial of such a senior officer. Thus, as in the trials of Wharton and Gale, the members will be better able to render a verdict based on justice, whichever way it leans.[134]

The second lesson of these trials is that the decision to court-martial a general or flag officer should be based on the charges and evidence, and nothing else. The ideal number of senior leader courts-martial is, of course, zero, or something very close to it. But how the Services reach that number makes all the difference. Is it because those promoted to general or flag rank are adequately screened? Or is it because their cases are resolved under a different set of rules dependent on rank?

The courts-martial of Franklin Wharton and Anthony Gale should not be dismissed as mere relics of a time when courts-martial were used to vindicate the accused's honor. The resolution of Gale's case seems severe by today's standards, but it showed the man was not afforded more lenient treatment on the basis of his rank. While Wharton's alleged failings would today be more appropriately handled through an administrative investigation,[135] his trial by court-martial brought a public and transparent end to accusations concerning his leadership during and after the War of 1812.

Wharton's trial also demonstrates the importance of avoiding a court-martial unless the evidence warrants one. Henderson's charges were arguably made in bad faith. Wharton was fortunate, then, to have been judged by a panel made up mostly of officers who did not care whether he, or Gale, or Henderson, would be commandant of the Marine Corps.

Conclusion

Holding generals and admirals accountable can be difficult. Court-martialing can be a cumbersome process. Nevertheless, when a general or flag officer commits serious misconduct, a court-martial is an option, regardless of administrative difficulty or public embarrassment. Though the trials of Franklin Wharton and Anthony Gale show how it should be done—with members from other Services. The military justice system has changed a great deal since the early nineteenth century; the principles of justice, discipline, and accountability have not, no matter the accused's rank. **TAL**

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Notes

1. Charge II, Specification 3 of the charges referred to general court-martial against Lieutenant Colonel Anthony Gale, fourth Commandant of the Marine Corps. Adjutant and Inspector Gen.'s Office, *Court Martial* [sic], 19 Niles' Wkly. Reg. 129, 132 (1820).

2. *See* Craig Whitlock, *In Rare Spectacle, Army Court-Martials a Retired General*, Wash. Post (Aug. 25, 2017), https://www.washingtonpost.com/world/national-security/in-rare-spectacle-army-court-martials-a-retired-general/2017/08/25/473fc440-89ac-11e7-a50f-e0d4e6ec070a_story.html ("It is extremely rare for senior military officers to face court-martial proceedings. The Air Force has never court-martialed a general. The Navy has court-martialed just one admiral since the end of World War II.").

3. By convention, Samuel Nicholas, the ranking officer of the Continental Marines, is considered the first Commandant of the Marine Corps even though, strictly speaking, he never held that title. *Preface* to Commandants of the Marine Corps vii (Allan R. Millett & Jack Shulimson eds., 2004). Technically, Wharton and Gale were the second and third Commandants. This article follows the Marine Corps conventional numbering, under which Wharton and Gale were the third and fourth Commandants, respectively.

4. *See* 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. 2, para. 2.b. (3 Jan. 2014) (requiring the secretaries of the military department to "[c]ertify that officers identified in [General/Flag Officer] personnel actions are mentally, physically, morally, and professionally qualified for promotion or appointment").

5. *See* Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 188 Mil. L. Rev. 1, 7 (1987) (In the context of the American Revolution, "[m]any general and senior officers were subjected to court-martial—it was one method by which the good name of an officer could be vindicated.").

6. *E.g.*, Craig Whitlock, *Pentagon Investigations Point to Military System That Promotes Abusive Leaders*, Wash. Post (Jan. 28, 2014), https://www.washingtonpost.com/world/national-security/pentagon-investigations-point-to-military-system-that-promotes-abusive-leaders/2014/01/28/3e1be1f0-8799-11e3-916e-e01534b1e132_story.html ("Most military commanders are upstanding and

well-respected . . . [b]ut in recent months, the armed forces have been shaken by an embarrassing number of generals and admirals who have gotten into trouble for . . . ethical lapses."); Tom Vanden Brook, *Senior Military Officials Sanctioned for Cases of Serious Misconduct*, USA TODAY (last updated Oct. 25, 2017, 1:48 PM), https://www.usatoday.com/story/news/politics/ 2017/10/24generals-sex-misconduct-pentagon-army-sanctions-hagel-gillibrand/794770001/ (discussing "500 cases of serious misconduct among its [the Department of Defense's] generals, admirals, and senior civilians" from 2013–17); Stephen Losey, *'Different Spanks for Different Ranks': Lawmaker Questions Lack of Courts-Martial for Air Force Generals*, A.F. TIMES (Feb. 21, 2018), https://www.airforcetimes.com/news/your-air-force/2018/02/21/different-spanks-for-different-ranks-lawmaker-questions-lack-of-courts-martial-for-air-force-generals/ (discussing fact that the Air Force has never court-martialed a general officer). For a more nuanced perspective, *see* James Joyner & Butch Bracknell, *Why 'Different Spanks for Different Ranks' Are Often Justified*, DEF. ONE (Mar. 6, 2018), https://www.defenseone.com/ideas/2018/03/officer-misconduct-military-justice/146423/.

7. U.S. Dep't of Navy, *Trial of Franklin Wharton, Lieutenant Colonel of Marines* (Apr. 4, 1818), *in* 1 AMERICAN STATE PAPERS: CLASS VI: NAVAL AFFAIRS 505 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter *Trial of Franklin Wharton*]; United States v. Anthony Gale, at 4 (President of the United States, Washington, Sept. 18, 1820).

8. In 1830, Congress considered President Andrew Jackson's proposal to abolish the Marine Corps. ROBERT DEBS HEINL JR., SOLDIERS OF THE SEA: THE UNITED STATES MARINE CORPS, 1775–1962, at 39 (2d ed. 1991).

9. *Id.* at 8-10.

10. ALLAN R. MILLETT, SEMPER FIDELIS: THE HISTORY OF THE UNITED STATES MARINE CORPS 32 (rev. and expanded ed. 1991).

11. Act to Establish an Executive Department, to be Denominated the Department of the Navy, ch. 35, 1 Stat. 553 (1798). Prior to this legislation, the Department of War was responsible for the country's naval affairs. Three frigates had already been constructed pursuant to legislation passed in 1794. MILLETT, *supra* note 10, at 27–29.

12. Act for the Establishing and Organizing a Marine Corps, ch. 72, 1 Stat. 594 (1798).

13. *Id.* § 1. This was only the Corps's authorized strength. In reality, the Corps had difficulty maintaining even half this number. MILLETT, *supra* note 10, at 31.

14. Act for the Establishing and Organizing a Marine Corps, ch. 72, §§ 2–4, 1 Stat. 594, 595 (1798).

15. MILLETT, *supra* note 10, at 30. Indeed, the Corps would not be assigned to the Department of the Navy until 1834. Act for the Better Organization of the United States Marine Corps, ch. 132, 4 Stat. 712 (1834); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 74 (2d ed. 1920) ("The Act of June 30, 1834 . . . while assimilating [the Corps] to the army in respect to organization, discipline, and pay, permanently attached it to the naval establishment for administrative and jurisdictional purposes.").

16. *See* Act for the Establishing and Organizing a Marine Corps, ch. 72, § 2, 1 Stat. 594, 595 (1798). The Act specifies the President as the authority for how Marines would be employed. *Id.* § 3. In practice, the Commandant's job was not unlike what it is today: recruit and train Marines for service with the operating forces. HEINL, *supra* note 8, at 10.

17. Gerald C. Thomas Jr., *Franklin Wharton: 1804–1818, in* COMMANDANTS OF THE MARINE CORPS, *supra* note 3, at 36, 36.

18. Brendan P. Ryan, *William Ward Burrows: 1798–1805, in* COMMANDANTS OF THE MARINE CORPS, *supra* note 3, at 27, 34.

19. MILLETT, *supra* note 10, at 38.

20. *Id.* at 46–48.

21. To be sure, America's grievances against Britain were substantial, and valid. They included "impressment [that is, conscription] of American sailors, provocation of Indian unrest on its frontiers, and the outright seizure of its commercial ships." WALTER R. BORNEMAN, 1812: THE WAR THAT FORGED A NATION 45 (2005). Nevertheless, the nation was "militarily unprepared" for conflict with the British Empire. *Id.*

22. *Id.* at 177.

23. *Id.* at 222.

24. MILLETT, *supra* note 10, at 48.

25. *Id.* at 49.

26. BORNEMAN, *supra* note 21, at 227.

27. *Id.* at 229.

28. MILLETT, *supra* note 10, at 49.

29. *Id.*

30. BORNEMAN, *supra* note 21, at 230–32.

31. *Id.* at 268–70.

32. Id. at 296.

33. MILLETT, *supra* note 10, at 50.

34. Joseph G. Dawson, *With Fidelity and Effectiveness: Archibald Henderson's Lasting Legacy to the U.S. Marine Corps*, 62 J. MIL. HISTORY 727, 729–30 (1998).

35. Henderson spent the war at the Boston Navy Yard and aboard the *U.S.S. Constitution. Id.* at 730.

36. *Id.* at 731.

37. *Id.*; *Trial of Franklin Wharton, supra* note 7, at 503, 505–06.

38. *Id.*

39. *Id.* at 505. Initially, the members were all Army officers who, before arraignment, questioned whether the Articles of War required Marine representation on the panel. *Id.* at 504. Article 68 of the Articles of War required officer(s) of the same Service as the accused "[w]henever it may be found convenient and necessary." Articles of War, art. 68, 2 Stat. 359 (1806), *reprinted in* WINTHROP, *supra* note 15, at 976, 982 [hereinafter Articles of War]. Though the Attorney General and President Monroe believed Marine representation was not required, the President detailed Marine members anyway. *Trial of Franklin Wharton, supra* note 7, at 504–05.

40. *Trial of Franklin Wharton, supra* note 7, at 505. The Articles of War expressed a strong preference for members to outrank the accused, but did not require it. Articles of War, *supra* note 39, at 983 (art. 75). Winthrop wrote that this provision was "directory only upon the convening commander"—that is, the accused could not object on the basis of being tried by officers junior to him. WINTHROP, *supra* note 15, at 72.

41. *Trial of Franklin Wharton, supra* note 7, at 505.

42. Thomas Jr., *supra* note 17, at 44.

43. *Trial of Franklin Wharton, supra* note 7, at 505–06.

44. *Id.* at 505.

45. *Id.* at 505–06.

46. Thomas Jr., *supra* note 17, at 44; Articles of War, *supra* note 39, at 978 (art. 25).

47. *Trial of Franklin Wharton, supra* note 7, at 505.

48. *Id.*

49. *Id.* at 506.

50. Thomas Jr., *supra* note 17, at 43.

51. *Trial of Franklin Wharton, supra* note 7, at 506.

52. WINTHROP, *supra* note 15, at 172.

53. *Trial of Franklin Wharton, supra* note 7, at 506–07.

54. *Id.* at 506.

55. *Id.*

56. *Id.* at 509.

57. *Id.* at 506.

58. *Id.*

59. The record does not specify what the Marines were convicted of, or their sentences. *Id.* at 506–07.

60. *Id.* at 507.

61. *Id.* at 507, 509.

62. *Id.* at 507.

63. *Id.* at 507, 509–10.

64. *Id.* at 507.

65. *Id.*

66. *Id.*

67. Many matters were referred to court-martial in the 19th century that would be handled through administrative measures today. Thomas Jr., *supra* note 17, at 44. For instance, a militia colonel was court-martialed twice for not cutting off his queue—that is, the traditional British hairstyle whereby the hair is grown out and pulled back in a single braid. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 18 (1958).

68. Dawson, *supra* note 34, at 748.

69. Thomas Jr., *supra* note 17, at 44.

70. Dawson, *supra* note 34, at 731.

71. Merrill L. Bartlett, *Anthony Gale: 1819–1820, in* COMMANDANTS OF THE MARINE CORPS, *supra* note 3, at 45, 45.

72. *Id.* at 46. Unlike the Articles of War, the rules for the government of the navy, to which Gale was subject at the time because he was serving aboard a ship, did not explicitly prohibit duels, though Article 27 prohibited "quarreling or fighting between ship mates." Act for the Government of the Navy of the United States, ch. 24, 1 Stat. 709, 712 (1799). In any event, dueling was an unfortunately prominent aspect of U.S. naval tradition at the time. Ross Drake, *Duel!*, SMITHSONIAN MAG. (Mar. 2004), https://www.smithsonianmag.com/history/duel-104161025/ (The antebellum "Navy lost two-thirds as many officers to dueling as it did to more than 60 years of combat at sea."). It is therefore not surprising that Gale was not punished for killing a naval officer, but instead commended by the Commandant at the time, William Ward Burrows. Bartlett, *supra* note 71, at 46.

73. *Id.* at 47.

74. Dawson, *supra* note 34, at 731.

75. Bartlett, *supra* note 71, at 48.

76. *Id.*

77. *Id.* at 48–49.

78. Joseph H. Alexander, *Archibald Henderson: 1820–1859, in* COMMANDANTS OF THE MARINE CORPS, *supra* note 3, at 54, 59.

79. MILLETT, *supra* note 10, at 54–55.

80. *See* Thomas Jr., *supra* note 17, at 41 ("[E]ach of the four secretaries under whom Wharton served in his fourteen years as commandant extended him respect.").

81. Bartlett, *supra* note 71, at 50.

82. *Id.*

83. United States v. Anthony Gale 77 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

84. United States v. Anthony Gale 11 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

85. Letter from Samuel Miller to Smith Thompson, Sec'y of the Navy (Aug. 23, 1820) (on file with author).

86. United States v. Anthony Gale 40 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

87. *Id.* at 42.

88. *Id.* at 50–51.

89. Samuel Miller wrote to Gale: "I am now compelled therefore, unless you lock the front door of your present residence and send the key to me, to place a sentinel at the front of the house." Letter from Samuel Miller to Anthony Gale (Sept. 14, 1820) (on file with author).

90. United States v. Anthony Gale, (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

91. *Id.* at 4.

92. *Id.* at 2.

93. *Id.* at 5.

94. *Id.*

95. *Id.* The court overruled Desha because the accused had no objection, and Desha maintained that he had no "undue bias." *Id.*

96. *Id.* at 6-9.

97. *Id.* at 6-7. The first specification alleged specific dates in August on which he had been intoxicated, the second that he had been intoxicated to the point of not being able to perform his duties "at various other times" during the month. *Id.* It may be that the second specification, being more general in terms of dates, was charged in the alternative in case the members were uncertain of the days on which the accused was too drunk.

98. *Id.* at 7-8.

99. *Id.* at 47-48. The court refused to allow the prosecutor to withdraw the charge so that the trial could resolve the allegation definitively. *Id.* at 48.

100. *Id.* at 9.

101. *Id.* at 11.

102. *Id.*

103. *Id.* at 79, 82-84.

104. *Id.* at 79.

105. *E.g., id.* at 12, 14-15, 16-18.

106. *E.g., id.* at 12, 24-27.

107. *E.g., id.* at 17-18.

108. *Id.* at 18.

109. *E.g., id.* at 25-26, 57.

110. *Id.* at 52.

111. *Id.* at 57.

112. *Id.* at 59.

113. *Id.* at 61.

114. *Id.* at 81.

115. *Id.* at 82–83. The testimony was that Gale had been wearing nothing but a shirt and "possibly" slippers and had actually been denied entry to the brothel, presumably because he was too drunk. *Id.* at 28. Alexander Macomb, who had served as the judge advocate for courts-martial in the early nineteenth century (and would go on to become the Commanding General of the U.S. Army), observed that conduct unbecoming "is a crime of great latitude of interpretation, and admitting both of an infinite variety of the acts from which such misbehavior may be inferred, and possibly often of a difference of opinion with regard to the degree of guilt that may be attached to such acts." ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS-MARTIAL; AS PRACTISED [sic] IN THE UNITED STATES OF AMERICA 63 (1809). In other words, whether a specific act constituted conduct unbecoming was largely a matter for the members' judgment. For what it's worth, Gale's conduct would not be out of place in Winthrop's list of "instances of offences charged" as conduct unbecoming. WINTHROP, *supra* note 15, at 713-18.

116. United States v. Anthony Gale 83–84 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

117. *See e.g., id.* at 26.

118. Fred L. Borch, *Lore of the Corps: Defending Soldiers at Early Courts-Martial*, ARMY LAW., May 2017, at 1, 1. In his treatise, Alexander Macomb wrote that lawyers were not, and should not be, allowed to personally participate in court-martial proceedings, though the accused could have an attorney's assistance in preparing his case. MACOMB, *supra* note 115, at 93-95.

119. United States v. Anthony Gale 45-46 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

120. *Id.* at 66-69.

121. *Id.* at 68-70.

122. United States v. Anthony Gale 87–88 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author). The panel convicted Gale of the specification of habitual drunkenness, which had specific dates. *See supra* text accompanying note 98. The panel also excepted some language from the specification concerning Gale's visit to a brothel. United States v. Anthony Gale 87 (President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

123. United States v. Anthony Gale 87 President of the United States, Washington, Sept. 18, 1820) (unpublished court-martial record) (on file with author).

124. *Id.* at 89–90. The terms "cashier" and "dismiss" were used interchangeably in American military law. WINTHROP, *supra* note 15, at 405-06. *See also* MACOMB, *supra* note 115, at 147 ("*cashiering*, that is, depriving an officer of his commission") (emphasis in original).

125. Articles of War, *supra* note 39, at 983 (art. 83).

126. Letter from Samuel Miller to Anthony Gale (Oct. 19 1820) (on file with author). Article 65 of the Articles of War required Presidential approval for the dismissal of a commissioned officer. Articles of War, *supra* note 39, at 982.

127. S. COMM. ON NAVAL AFFAIRS, 28TH CONG., REP. ON PETITION OF CATHARINE GALE, *reprinted in* 5 PUBLIC DOCUMENTS PRINTED BY ORDER OF THE SENATE OF THE UNITED STATES, FIRST SESSION OF THE TWENTY-EIGHTH CONGRESS pt. 323, at 1 (1844). The Senate Committee on Naval Affairs concluded that Gale had been granted his pension illegally. *Id.* at 2.

128. Dawson, *supra* note 34, at 732.

129. Bartlett, *supra* note 71, at 45, 52.

130. *See* United States. v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (distinguishing between actual and implied bias).

131. Paul Woolverton, *Jury Selection for Brig. Gen. Jeffrey Sinclair's Court-Martial Set to Resume*, FAYETTEVILLE OBSERVER (last updated Aug. 6, 2013, 6:59 AM), https://www.fayobserver.com/764f1e92-4b86-5eca-820a-8259e3aeedc5.html.

132. Paul Woolverton, *More Potential Jurors Dismissed in Brig. Gen. Jeffrey Sinclair's Court-Martial*, FAYETTEVILLE OBSERVER (last updated July 19, 2013, 7:54 AM), https://www.fayobserver.com/article/20130719/news/307199816.

133. Craig Whitlock, *Sordid Details Spill Out in Rare Court-Martial of a General*, WASH. POST (Aug. 14, 2013), https://www.washingtonpost.com/world/national-security/sordid-details-spill-out-in-rare-court-martial-of-a-general/2013/08/14/f6c89c68-008d-11e3-a661-06a2955a5531_story.html. Sinclair ultimately pleaded guilty pursuant to a pre-trial agreement. Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Receives Fine, No Jail Time*, WASH. POST (Mar. 20, 2014), https://www.washingtonpost.com/world/national-security/ disgraced-army-general-jeffrey-a-sinclair-receives-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html.

134. Similar considerations apparently motivated the Court of Appeals for the Armed Forces to order a military judge from outside the Navy and Marine Corps to conduct a *Dubay* hearing in a Navy case that implicated the Judge Advocate General (TJAG) of the Navy in an allegation of unlawful command influence. United States v. Barry, 78 M.J. 70, 74 (C.A.A.F. 2018). As a result, the *Dubay* judge's career would not be affected by finding the TJAG committed unlawful command influence, which is what he did. *Id.* at 76.

135. *See, e.g.*, Kate Brannen, *2 Marine Generals Out After Probe*, POLITICO (Sept. 30, 2013, 5:38 PM), https://www.politico.com/story/2013/09/marine-generals-attack-investigation-097583 (discussing the investigation and consequent retirement of two Marine major generals in the aftermath of the Camp Bastion attack).

(Credit: istockphoto.com/tomeng)

No. 3

Back to the Future

Evaluating U.S. Army Futures Command's Modernization Efforts

By Lieutenant Colonel Jeffrey S. Dietz

Are you telling me you built a time machine, out of a DeLorean?[1]

In the time travel classic *Back to the Future*, Dr. Emmett Brown (Doc Brown) converts a DeLorean sports car into a time machine. As Doc Brown explains the DeLorean's features, he tells his friend Marty McFly, "This is what makes time travel possible: the flux capacitor!"[2] After first traveling to the past, Doc Brown and Marty harness 1.21 gigawatts of electricity from a lightning strike to power the flux capacitor and send the souped-up DeLorean speeding at eighty-eight miles per hour back to the future.

In July 2018, the Army established U.S. Army Futures Command (AFC) to transform Army modernization and ensure future Soldiers have what they need to fight and win on a future battlefield. Is the establishment of AFC more than just a reshuffling of organizations and a reassignment of acquisition-related responsibilities? Or does it bring something innovative and new to Army modernization, such that the Army can bring its industrial age system into the modern information age? This article will use the movie, *Back to the Future* as a metaphor in order to evaluate and explain what AFC may contribute to the transformation of Army modernization. In particular, this article will discuss *the remodeled DeLorean*: the reassignment of modernization organizations to AFC; and *the flux capacitor*: the innovative combination of AFC responsibilities and relationships. With these components, will AFC put the Army on the road to future military success?

History

In 1986, Congress passed the Goldwater-Nichols Department of Defense Reorganization Act (P.L. 99-433), enacting sweeping reforms of the organization of the services and the way they performed acquisition. "The Goldwater-Nichols Act sought to streamline the acquisition system by reducing the number of management layers separating program managers from the civilian acquisition executives, and removing the Services' uniformed leaders from the acquisition chain of command."[3] Because of Goldwater-Nichols, the U.S. military now routinely fights as an integrated joint team.[4] The law also implemented the important American principle of civilian control over the military.[5] While Goldwater-Nichols brought reform, the results contributed to concerns of "a growing divide between a military-run requirements process and a civilian-run acquisition process."[6]

Review and reform of defense acquisition has been an ongoing effort. In 2010, then-Army Secretary John McHugh commissioned a study of the Army's acquisition system, seeking "a blueprint for actions . . . to improve the efficiency and effectiveness of the Army acquisition process."[7] The commission realized "[t]he Army continues to need modern equipment for [S]oldiers to be decisive on the unpredictable, asymmetric battlefield of today

and tomorrow." Among other things, the commission noted,

> The Army has been quick in dealing with urgent needs, bypassing the laborious acquisition process. However, the 'normal' process is anything but rapid. The current process is not collaborative, but sequential with multiple opportunities for oversight staffs to question and challenge requirements. The mean time to approve an Acquisition Category (ACAT) I[8] system requirement is 15 months with an ACAT II taking 22 months and an ACAT III taking 18. When these requirement approvals and their associated acquisition milestones are not synchronized with the Program Objective Memorandum and budget cycles, program starts can occur two and three years after the operational need was identified.[9]

More recently, Army senior leaders determined that the establishment of a four-star Army Command would help "reform of our industrial-age Acquisition system,"[10] with the idea that AFC "will bring all acquisition activities under a single responsible commander. This will bring unity of effort to acquisitions, speeding [up] the process, producing better materials and weapons, and saving money."[11] Before it established AFC, the Army began a pilot program involving Cross-Functional Teams (CFTs) in October 2017 as "an innovative organizational construct to integrate and synchronize processes across multiple stakeholders," expecting the CFTs to "develop capabilities faster and in a less costly manner to enable our Soldiers to fight and win."[12] Then in November 2017, the Army established a task force led by a three-star general to "explore all options to establish unity of command and unity of effort that consolidates the Army's modernization process under one roof," with the idea that reform would require "establishment of a new Army Command."[13]

Thus, then-Secretary of the Army, Dr. Mark Esper, established AFC, effective 1 July 2018, as the Army's fourth Army Command,[14] standing on equal footing with U.S. Army Forces Command (FORSCOM); U.S. Army Training and Doctrine Command (TRADOC); and U.S. Army Materiel Command (AMC). In his testimony before the House Armed Services Committee on 20 March 2018, Dr. Esper characterized the establishment of AFC as "the most significant organizational change to the Army's structure since 1973." In setting out the basis for establishing the new four-star headquarters, he stated,

> Over the past decade, the Army made necessary but difficult choices to defer modernization in order to support combat operations. We upgraded current weapons systems rather than acquire new or next generation technologies. However, we can no longer afford to delay modernization without risking overmatch on future battlefields. . . . [W]e will establish the Army Futures Command to reform our acquisition process through unity of command, unity of effort, and increased accountability. . . . The Army must adapt quicker than our adversaries to maintain our competitive advantage. This is the rationale for the Army Futures Command. . . . The new command will consolidate the Acquisition process under one organization with a mission to deliver integrated solutions for increased lethality and capabilities to the Soldier when and where they are needed.[15]

The Army has been quick in dealing with urgent needs, bypassing the laborious acquisition process. However, the 'normal' process is anything but rapid

With the foundational documents establishing AFC,[16] Dr. Esper asserted that "[t]he establishment of AFC marks a fundamental change in the Army's approach to modernization."[17] He directed AFC to lead the future force modernization enterprise[18] with responsibility to "assess[] and integrate[] the future operational environment, emerging threats, and technologies to develop and deliver concepts, requirements, future force designs, and support[] the delivery of modernization solutions."[19] As part of this mission, he directed AFC to "posture[] the Army for the future by setting strategic direction, integrating the Army's future force modernization enterprise, aligning resources to priorities, and maintaining accountability for modernization solutions."[20] Dr. Esper further clarified, "The purpose of AFC is to improve future readiness by ensuring Soldiers have the weapons, equipment, and tools they need, when they need them, to deploy, fight, and win future conflicts."[21]

In order for the AFC commander to lead and integrate the future force modernization enterprise (hereafter "the enterprise"),[22] Dr. Esper reassigned certain modernization organizations to AFC that were previously assigned to TRADOC and AMC; and permanently established and assigned to AFC the eight CFTs previously established as pilot organizations.[23] While program executive officers[24] and program managers[25] are an essential component of the enterprise, the Secretary specifically did not assign them to AFC. Instead, he created a framework to set organizational relationships between AFC and program executive officers and program managers "on a case-by-case basis as the mission and situation requires."[26]

Terminology

In addition to the history, it is also important to understand the difference between two uses of the term "acquisition": the conduct of the function of acquisition, which is sometimes referred to as "little a" acquisition; as compared with the defense acquisition system process, which is sometimes called "Big A" acquisition. The conduct of the function of acquisition, "little a" acquisition, generally refers to the management of a program to achieve specified cost, schedule, and performance parameters using a business approach.[27] We generally look to officials who are specially trained and certified in business, contracting, and procurement to conduct the function of acquisition.

In contrast, "Big A" acquisition generally covers the entire defense acquisition process and involves the collaboration of warfighters, scientists, engineers, and the acquisition professionals. The defense acquisition process, "Big A" acquisition, "starts with development of requirements, continues through development, procurement and fielding of systems and products that meet approved requirements, sustainment of fielded systems and products, and the ultimate disposition of systems and products that have become obsolete."[28] The warfighters identify capability gaps in their ability to conduct military operations, and that feeds the requirements process. The scientists and engineers mature the concepts to develop refined materiel requirements. These refined materiel requirements feed the program executive officers, "who are charged with the development and procurement of systems in response to the [warfighter] user's needs."[29] The program managers, supervised by the program executive officers, manage the cost of the program, the timeline or schedule of the delivery of the materiel solution, and the responsiveness or performance of the solution as measured against the requirements. The acquisition professionals then deliver the materiel solution to the force.

Current Statutory and Regulatory Framework

With this reorganization of the Army and the establishment of AFC, the Army has effectively named the collective of organizations that participate in the "Big A" acquisition process, the "future force modernization enterprise." The enterprise is focused on the Army Acquisition System, the Army's "Big A" acquisition.

As a part of that enterprise, the program managers, program executive officers, and the Army Acquisition Executive, perform the technical function of acquisition—"little a" acquisition. In the Army, the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)) is designated as the Army Acquisition Executive.[30] "The chain of management responsibilities for acquisition programs runs upward from the [program manager], through the [program executive officer] to the [Army Acquisition Executive]. The responsibility and authority for program management, including program planning beginning at the materiel development decision and life-cycle execution, is vested in these individuals."[31]

This technical function of acquisition is the specialized management of programs where the program managers are responsible for ensuring the cost of the programs is appropriate, the programs are kept on a timely schedule, and the program performs according to the requirements established by the warfighters that need the weapon system. For major defense acquisition programs, the Army Acquisition Executive (AAE) has the authority to make decisions at the established milestones, and is thus the statutory Milestone Decision Authority.[32] With this decision authority, the AAE provides guidance and direction regarding the technical performance of acquisition ("little a" acquisition) to program executive officers and program managers. While others in "Big A" acquisition may influence the program managers and program executive officers pursuant to their acquisition-related functions and responsibilities, this is still limited to "Big A" acquisition performance. On the other hand, only the AAE, the program executive officer, and the program manager provide technical guidance, decisions, or direction related to the specific and technical performance of the function of acquisition, the "little a" acquisition.

The program is a bus, and the program manager is the bus driver. The driver has the steering wheel and controls the gas pedal and brakes. The problem is, the bus is filled with too many passengers

Additionally, other members of the enterprise, like engineers and scientists, contribute to and support the program managers and program executive officers as they perform "little a" acquisition, but the engineers, scientists, and others are part of "Big A" acquisition. The entire enterprise, as part of "Big A" acquisition, delivers the materiel solution for fielding to the force. In this system, the principal duty of the ASA (ALT) is the overall supervision of the Army's "Big A" acquisition.[33]

In the "Big A" acquisition process, the program managers drive their programs forward, but their success has been limited by other actors and stake holders in the process. In one common metaphor used to describe the acquisition system, not perfectly related to *Back to the Future*, the program is a bus, and the program manager is the bus driver. The driver has the steering wheel and controls the gas pedal and brakes. The problem is, the bus is filled with too many passengers without program accountability, but with their own brakes and steering wheels and who can delay, stop, or get a program off course. As noted by the 2010 Army study,

> [t]he pre-[milestone] B process has become bloated with numerous reviews and deliverables appealing to a growing collection of interests that add little value. This hampers thoughtful trade studies, trustworthy cost and risk analyses, sound analysis of alternatives and sound [milestone] A and B decisions. There are too many staffers issuing 'guidance' or 'direction' who are not accountable for the impact they have on a program.[34]

In the Back to the Future metaphor, the CFTs are the modification to the DeLorean seen at the end of the first movie that allows the car to fly

Although the ASA (ALT) has the statutory authority to conduct the function of acquisition, Congress has extended responsibility for acquisition-related functions to the Army Chief of Staff (CSA). Pursuant to 10 U.S.C. § 2547, the CSA "assist[s] the Secretary of the [Army] in the performance of [certain specified] acquisition-related functions."[35] This includes the development of requirements for equipping the Army and decisions regarding trade-offs, requirements creep, termination of programs, and career paths for Soldiers in the acquisition field and serving as contracting officer representatives. Further, the ASA (ALT), acting as the AAE, may not grant approval at Milestones A, B, or C without the CSA's concurrence.[36]

Additionally, the ASA (ALT) is statutorily vested with "sole responsibility . . . for the function of *research and development,*" and that function may not be assigned outside the Office of the Secretary of the Army.[37] The Secretary of the Army, however, "may assign to the Army Staff responsibility for those *aspects* of the function of *research and development* that relate to military requirements and test and evaluation."[38] Thus, current statutory authorities allow for acquisition-related functions and *aspects* of research and development to be assigned outside the Office of the Secretary of the Army, but not the *conduct* of the acquisition function (not "little a" acquisition).

Unique Authorities, Responsibilities, and Relationships

"The way I see it, if you're going to build a time machine into a car, why not do it with some style?"[39] The establishment of AFC brings three transformational elements to Army modernization. First, it brings unity of command over certain enterprise organizations. Second, it allows for the AFC commander to exercise unique acquisition-related authorities. Third, it establishes a mutually beneficial supporting relationship between AFC and the program executive officers and program managers to generate unity of effort, essential to the commander's responsibility to integrate and lead the enterprise.

The DeLorean

Reassigning modernization organizations from two of the other Army Commands to AFC is the remodeling of the DeLorean. The reassignment of Futures and Concepts Center (formerly Army Capabilities Integration Center) from TRADOC to AFC; the reassignment of U.S. Army Combat Capabilities Development Command (CCDC) (formerly Research, Development, and Engineering Command) from AMC to AFC; and the assignment of the CFTs to AFC bring several important pieces of the Army's "Big A" acquisition system under the command of AFC. Although this reassignment does not bring the program executive officers or program managers under the command of AFC, it does contribute to Futures and Concepts Center and CCDC working in concert, with both responding to one single Army Command commander. It also creates unity of effort in that the program managers can focus on one functional customer, the AFC commander, rather than two different four-star commanders with missions beyond just future force modernization.[40]

The CFTs bring collaboration and focus to eight modernization priorities, and provide their own efficiency to the system. They are each collocated with their corresponding program executive office, tying together the important stakeholders from start to finish of a project, concept, or program. In the *Back to the Future* metaphor, the CFTs are the modification to the DeLorean seen at the end of the first movie that allows the car to fly. While a fast, fancy car is nice, it will be sitting in rush hour traffic the same as an old clunker. The CFTs, each focused on a modernization priority, give their associated programs the ability to fly out of "Big A" acquisition traffic.

Thus, what AFC offers is an opportunity to remodel the bus as a DeLorean. This DeLorean then combines other organizations of the enterprise under one command authority, and gives the program manager the ability to respond to one functional customer. With this unity of command, the AFC commander, in coordination with the ASA (ALT), has the ability to remove the extraneous bureaucratic brakes.

The Flux Capacitor

Doc Brown, however, did not just build a time machine out of a DeLorean so he could "do it with some style." He chose the DeLorean for the design because "the stainless steel construction made the flux dispersal"[41] possible; the design of the machine as a DeLorean was critical to the flux capacitor. In this case, AFC's flux capacitor is the careful construction and assemblage of already existing authorities within the responsibility of a single four-star commander, combined with the unique structured relationship with the program executive officers and program managers. This careful construction capitalizes on the speed and style of the DeLorean—the unity of command over Futures and Concepts

Center and CCDC; and provides a means to focus and concentrate the 1.21 gigawatts of electricity—the structured and mutually supporting relationships, that will propel the DeLorean into the future, transforming Army modernization and achieving unity of effort for the Army's enterprise.

The construction of the AFC flux capacitor begins with the ability of the commander to exercise the acquisition-related authorities previously reserved to the CSA. While the statutory framework of Goldwater-Nichols and the DoD acquisition policy limits the ability of a military commander to order and direct the day-to-day "little a" acquisition functions of program managers, the Secretary of the Army has allowed for the AFC commander to exercise certain acquisition-related functions, when delegated by the CSA. With these acquisition-related responsibilities, the commander will have the ability to influence the progress of programs and contribute to unity of effort.

In the General Orders establishing AFC, the Secretary of the Army specifically directed that the AFC commander will have responsibility and authority related to the performance of acquisition; the commander "will coordinate with the [ASA (ALT)] on all matters pertaining to research, development, and acquisition."[42] While the ASA (ALT) continues to have statutory responsibility for the overall supervision of acquisition ("Big A"), and is responsible for the performance of the function of acquisition ("little a"), the Secretary of the Army has carved out a role for the AFC commander, provided he coordinates with the ASA (ALT).

In Army Directive 2018-15, defining the AFC relationship with the office of the ASA (ALT), the Secretary of the Army permitted the CSA to delegate the acquisition-related functions to the AFC commander, and designated the AFC commander the Army's chief futures modernization investment officer (CFMIO).[43] Then, in Army Directive 2019-35, describing the funding flow in the enterprise, the Secretary of the Army specifically assigned to the AFC commander the "responsibility for those aspects of the function of research and development that relate to military requirements and test and evaluation,"[44] pursuant to 10 U.S.C. § 7014(d)(2). The directive further provides that, "[i]n consultation with the ASA (ALT), the [AFC commander] as the CFMIO will prioritize, direct, integrate, and synchronize the execution of science and technology efforts, operations, and organizations across the Army."[45] In describing the funding flow, the directive establishes that "for all science and technology efforts, the ASA (ALT) and [AFC commander] will jointly conduct project reviews before submission of the Program Objective Memorandum.[46] Thus, the commander has responsibility for acquisition-related functions, when delegated; and has specific responsibilities for science and technology, and aspects of research and development, in coordination and consultation with the ASA (ALT). These authorities and responsibilities are essential to the commander's responsibility to lead and integrate the future force modernization enterprise.

The next critical component of the AFC flux capacitor is the structured relationship with the program executive officers and program managers. As noted above, the commander does not command these acquisition professionals, but relies on their success in managing programs critical to the future force. While the commander may have tools to influence acquisition decisions as the customer, the framework of Army Directive 2018-15 is to establish a formal relationship with the program executive officers and program managers who complete construction of the flux capacitor and make it capable of capturing and channeling the 1.21 gigawatts of electricity when lightning strikes.

The process established by Army Directive 2018-15 requires the commander to first identify to the ASA (ALT) what program executive officer or program manager support AFC requires in order to accomplish its mission.[47] The commander and ASA (ALT) then jointly recommend to the Secretary of the Army the organizational relationship and structure of the support on a case-by-case basis. The directive suggests the nature of the support could be "operational control, direct support, general support, or other relationships."[48] These terms, however, are commonly used to describe operational command relationships, useful in relating two or more operational units, but may not adequately apply to the business functions of the Army. Instead, the Army should recognize that the relationship will likely be mutually supporting. The commander relies on input and status updates from the program managers in order to be able to see the enterprise and effectively lead and integrate the enterprise. Additionally, the program executive officers and program managers rely on touchpoints, feedback, and guidance from the commander as the customer with acquisition-related authorities to ensure their decisions on cost, schedule, technical feasibility, and performance will earn the commander's concurrence at the milestone decisions.

Army Directive 2018-15 also designates that an officer in the office of the ASA (ALT) "will have additional duty as the AFC Director [of] Combat Systems and will advise the [AFC commander]."[49] Importantly though, this officer "will also ensure that [program executive officers and program managers] in support of AFC prioritize Army modernization efforts and maximize cooperation, urgency, and unity of effort."[50] The directive further makes clear that even when program executive officers or program managers have been designated for a special relationship with AFC, they will continue to be assigned to the ASA (ALT) and that program managers "remain responsible for, and have authority to accomplish, program management and the ability to deliver materiel capabilities and solutions to meet the Army's operational needs."[51] With the roles and responsibilities clear, the Army has created a nuanced and intricate web of responsibility and authority to achieve unity of command and unity of effort in the delivery of materiel solutions. Thus, the mutually supporting relationship, the commander's acquisition-related authorities, and the connectivity of the AFC Director of Combat Systems closes the circuit, and comprises a functioning AFC flux capacitor ready to receive the jolt of power.

One counter argument to the AFC solution is that the end result is just a fancy, fast sports car; the commander may just be exercising the acquisition-related functions previously performed by the CSA or other members of the Army Staff. Also, the sports car is not even new, it is vintage; the Army has done it before, and there is no reason to believe fancy packaging will yield a different

result. The program executive officers and program managers have always been responsive to the customer and have always sought input from the user. If that is the case, then this new structure may merely provide efficiencies for modernization, but it is not innovative.

On the other hand, the concentration of responsibility and authority in a four-star commander focused on leading and integrating the enterprise, provides its own method of harnessing 1.21 gigawatts. The CSA and the Army Staff have other responsibilities beyond modernizing the Army. The CSA's involvement in the requirements process, and in contributing to decisions on trade-offs, termination of programs, or concurring with milestone decisions was always necessarily in competition with the multitude of other responsibilities of the CSA, the highest-ranking military position in the Department of the Army. Also, formalizing the relationships between the single four-star commander leading the requirements and development community with the technical experts responsible for procurement generates tremendous power. The commander does not need to command every aspect of the enterprise, and does not need to be the milestone decision authority to exercise leadership of the enterprise. As designed, the commander's authority and responsibility to integrate the requirements, acquisition, and resourcing communities is substantial enough to ensure he is able to exercise unity of effort over the Army's "Big A" acquisition. Accordingly, the commander will effectively lead and integrate the future force modernization enterprise to deliver modernization solutions to the Army.

Going Forward

"Hey Doc, we'd better back up. We don't have enough road to get up to eighty-eight."[52] The establishment of AFC represents the Army's all-in best effort to transform Army modernization. The Army senior leaders have made clear they do not merely intend to stand-up a new four-star Army Command; they intend to take the Army's industrial-age modernization process into the information age.

With the re-design in place, the AFC commander, in coordination and consultation with the ASA (ALT), has the opportunity and responsibility to lead and integrate the modernization enterprise. Achieving the full potential for modernization depends on the CSA clearly delegating acquisition-related functions to the AFC commander, and depends on the Army establishing the relationships between AFC and the program executive officers and program managers. Until then, AFC is no more than the remodeled DeLorean, with unused blue-prints for a flux capacitor.

Achieving the full potential for modernization depends on the CSA clearly delegating acquisition-related functions to the AFC commander

Once the authorities and relationships come together, the success of AFC and the Army to modernize depends on receiving the appropriate focus and resourcing from senior Army leaders, as well as support from Congress. Earning the trust of Congress will likely require more than demonstrating a more rapid delivery of materiel solutions to meet operational needs; it will require an ongoing demonstration of the responsible and fair use of public resources. The commander must then synchronize the enterprise's efforts so AFC is up to speed, traveling eighty-eight miles per hour, right as lightning strikes the clock tower. With its flux capacitor of authorities and relationships the hope is that it will be able to harness the 1.21 gigawatts and propel the Army into the future with the next generation of weapons, vehicles, and equipment it will need to fight and win on future battlefields. With leadership, the right approach, and enough space, AFC will put the Army on the road to future military success. But, then again, it may be that, "Where we're going, we don't need roads!"[53] **TAL**

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Notes

1. Back to the Future (Universal Pictures, Amblin Entertainment 1985) (quoting Marty McFly). Doc Brown responds, "The way I see it, if you're going to build a time machine into a car, why not do it with some style?" *Id.*

2. *Id.*

3. Sec'y of Army, Army Strong: Equipped, Trained and Ready, Final Report of the 2010 Army Acquisition Review 25 (Jan. 2011) [hereinafter 2010 Army Acquisition Review Final Report].

4. Clark A. Murdock et al., Beyond Goldwater-Nichols: U.S. Government and Defense Reform for a New Strategic Era, Phase II Report 14 (2005).

5. The reform of Goldwater-Nichols was in response to recommendations of the Packard Commission: "to establish civilian control over a fragmented military system (particularly by using civilians with business experience); to provide clear, direct chains of command between program managers and senior officials; to centralize and standardize acquisition procedures; and to create a system that could catch mistakes in order to minimize political embarrassment." *Id.* at 90.

6. Charles Nemfakos et al., The Perfect Storm: The Goldwater-Nichols Act and Its Effect on Navy Acquisition iii (2010).

7. Murdock et al., *supra* note 4, at vii (quoting then-Secretary of the Army McHugh).

8. An Acquisition Cateory (ACAT) I is generally also a major defense acquisition program (MDAP), and ACAT II and below are generally non-major defense acquisition programs. *See* U.S. Dep't of Def., Instr. 5000.02, Operation of the Adaptive Acquisition Framework para. 5a(3) (23 Jan. 2020) [hereinafter DoDI 5000.02] (discussion of the program acquisition categories and types). "All defense acquisition programs are designated by an ACAT (i.e., ACAT I through III) and type (e.g., MDAP, (Major Automated Information System) (MAIS), or Major System)." *Id.*

9. Nemfakos et al., *supra* note 6, at iii.

10. *Statement by the Honorable Mark T. Esper, Secretary of the Army Before the S. Comm. on Armed Services*, 115th Cong. 1 (2017), https://api.army.mil/e2/c/downloads/500971.pdf.

11. *Posture of the United States Army, Hearing Before the H. Comm.on Armed Services*, 115th Cong. (2018) [hereinafter *Hearings*] (statement of Mark. T. Esper, Secretary of the Army), https://docs.house.gov/meetings/AS/AS00/20180320/108047/HHRG-115-AS00-Wstate-EsperM-20180320.pdf .

12. U.S. Dep't of Army, Dir. 2017-24 Cross-Functional Team Pilot in Support of Materiel Development 1 (6 Oct. 2017).

13. U.S. Dep't of Army, Dir. 2017-33 Enabling the Army Modernization Task Force 1 (7 Nov. 2017).

14. An Army Command is the highest level of command, designated by the Secretary of the Army. U.S. Dep't of Army, Reg. 10-87 Army Commands, Army Service Component Commands, and Direct Reporting Units (11 Dec. 2017).

15. *Hearings, supra* note 11, at 4.

16. *See* Headquarters, U.S. Dep't of Army, Gen. Order No. 2018-10 (4 June 2018) [hereinafter DA GO 2018-10]; U.S. Dep't of Army, Dir. 2018-15 U.S. Army Futures Command Relationship With the Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology) (27 Aug. 2018) [hereinafter AD 2018-15]; Headquarters, U.S. Dep't of Army, Execution Order No. 176-18 Establishment of United States Army Command (6 Sept. 2018) [hereinafter HQDA EXORD 176-18].

17. AD 2018-15, *supra* note 16, para. 3.

18. See HQDA EXORD 176-18, *supra* note 16, definitions

> The Future Force Modernization Enterprise (FFME) encompasses all Army entities with missions to assess the future operational environment and threats, identify and prioritize problems in future warfighting, conceptualize and prioritize solutions to those problems, allocate modernization resources according to priorities, and develop solutions through experimentation, prototyping and acquisition, and field innovative solutions that deliver the overmatching lethality necessary to sustain our competitive advantage in ground combat against current and potential adversaries.

Id.

19. DA GO 2018-10, *supra* note 16, para. 1b.

20. *Id.*

21. AD 2018-15, *supra* note 16, para. 3.

22. *See supra* note 18. *See* HQDA EXORD 176-18, *supra* note 16.

23. DA GO 2018-10, *supra* note 19, para. 2.

24. A program executive officer is "[a] military or civilian official assigned program responsibilities for Acquisition Category (ACAT) I and IA and sensitive classified programs, or for any other program determined by the Component Acquisition Executive (CAE) to require dedicated executive management." DoDI 5000.02, *supra* note 8, glossary.

25. Program managers, under the supervision of program executive officers and the Army Acquisition Executive, are, among other things, "expected to design acquisition programs, prepare programs for decisions, and execute program plans." DoDI 5000.02, *supra* note 8, para. 5a(4)(c).

26. AD 2018-15, *supra* note 16, para. 6.

27. *See* DoDI 5000.02, *supra* note 8, encl. 2, para. 6.

28. 2010 Army Acquisition Review Final Report, *supra* note 3, at 6.

29. *Id.* at iii.

30. Headquarters, U.S. Dep't of Army, Gen. Order No. 2019-01 para. 13 (15 May 2019) [hereinafter AGO 2019-01]. Pursuant to 10 U.S.C. § 101, the Army Acquisition Executive is a "civilian official." 10 U.S.C. § 101 (2018). Pursuant to 10 U.S.C. § 2546, the Army Acquisition Executive "shall be responsible for the management of elements of the defense acquisition system in [the Army] and shall exercise such control of the system and perform such duties as are necessary to ensure the successful and efficient operation of such elements of the defense acquisition system." 10 U.S.C. § 2546 (2018). Pursuant to 10 U.S.C. § 7014(c)(2), "The Secretary of the Army shall establish or designate a single office or other entity within the Office of the Secretary of the Army to conduct [the] function [of acquisition]." 10 U.S.C. § 7014(c)(2) (2018). Further, "[n] o office or other entity may be established or designated within the Army Staff to conduct [acquisition]." *Id.*

31. AD 2018-15, *supra* note 16, para. 5b (paraphrasing DoDI 5000.02, encl. 2, para. 2). In Department of Defense (DoD) policy, this "chain of management responsibility" is referred to as the "acquisition chain of command" and "Program Management." *See* DoDI 5000.02, *supra* note 8, encl. 2, para. 2.

32. See 10 U.S.C. § 2430(d)(1) (2018).

33. "The principal responsibility of the Assistant Secretary [of the Army for Acquisition, Logistics, and Technology] shall be the overall supervision of acquisition, technology, and logistics matters of the Department of the Army." 10 U.S.C. § 7016(b)(5)(A) (2018) (note the statute uses "Acquisition, Technology, and Logistics" whereas the Army documents use "Acquisition, Logistics, and Technology"); AGO 2019-01, *supra* note 29, para. 13.

34. 2010 Army Acquisition Review Final Report, *supra* note 3, at xv.

35. 10 U.S.C. § 2547 (2018).

36. 10 U.S.C. § 2547(a) (2018).

37. 10 U.S.C. § 7014(d) (2018) (emphasis added).

38. 10 U.S.C. § 7014(d) (emphasis added).

39. Back to the Future, *supra* note 1.

40. Pursuant to 10 U.S.C. § 2546a, the Secretary of the Army and the Chief of Staff of the Army are the customers of Army MDAPs. 10. U.S.C. § 2546a. "The customer of a major defense acquisition program shall be responsible for balancing resources against priorities on the acquisition program and ensuring that appropriate trade-offs are made among cost, schedule, technical feasibility, and performance on a continuing basis throughout the life of the acquisition program." *Id.*

41. Back to the Future, *supra* note 1.

42. DA GO 2018-10, *supra* note 15. The General Orders use language similar to the statute for the Army for Acquisition, Logistics, and Technology's (ASA (ALT)) Navy counterpart who is responsible for "research, development, acquisition, and sustainment" (*See* 10 U.S.C. § 8016(b)(4)(A) (2018)). In contrast, the statute for the Air Force counterpart, like the Army, uses "acquisition, technology and logistics" (*Compare* 10 U.S.C. § 7016(b)(5)(A) (2018) *with* 10 U.S.C. § 9016(b)(4)(A) (2018)).

43. AD 2018-15, *supra* note 16.

44. U.S. Dep't of Army, Dir. 2019-35 Funding Flow for Future Force Modernization Enterprise (20 Nov. 2019) (implementing 10 U.S.C. § 7014(d)(2) (2018)).

45. *Id.*

46. *Id.* Consider also that this consolidation of authority and responsibility responds to one of the issues identified by the Final Report of the 2010 Army Acquisition Review regarding the broken requirements process. 2010 Army Acquisition Review Final Report, *supra* note 3. "When these requirement approvals and their associated acquisition milestones are not synchronized with the Program Objective Memorandum and budget cycles, program starts can occur two and three years after the operational need was identified." *Id.* at iii.

47. AD 2018-15, *supra* note 16.

48. *Id.*

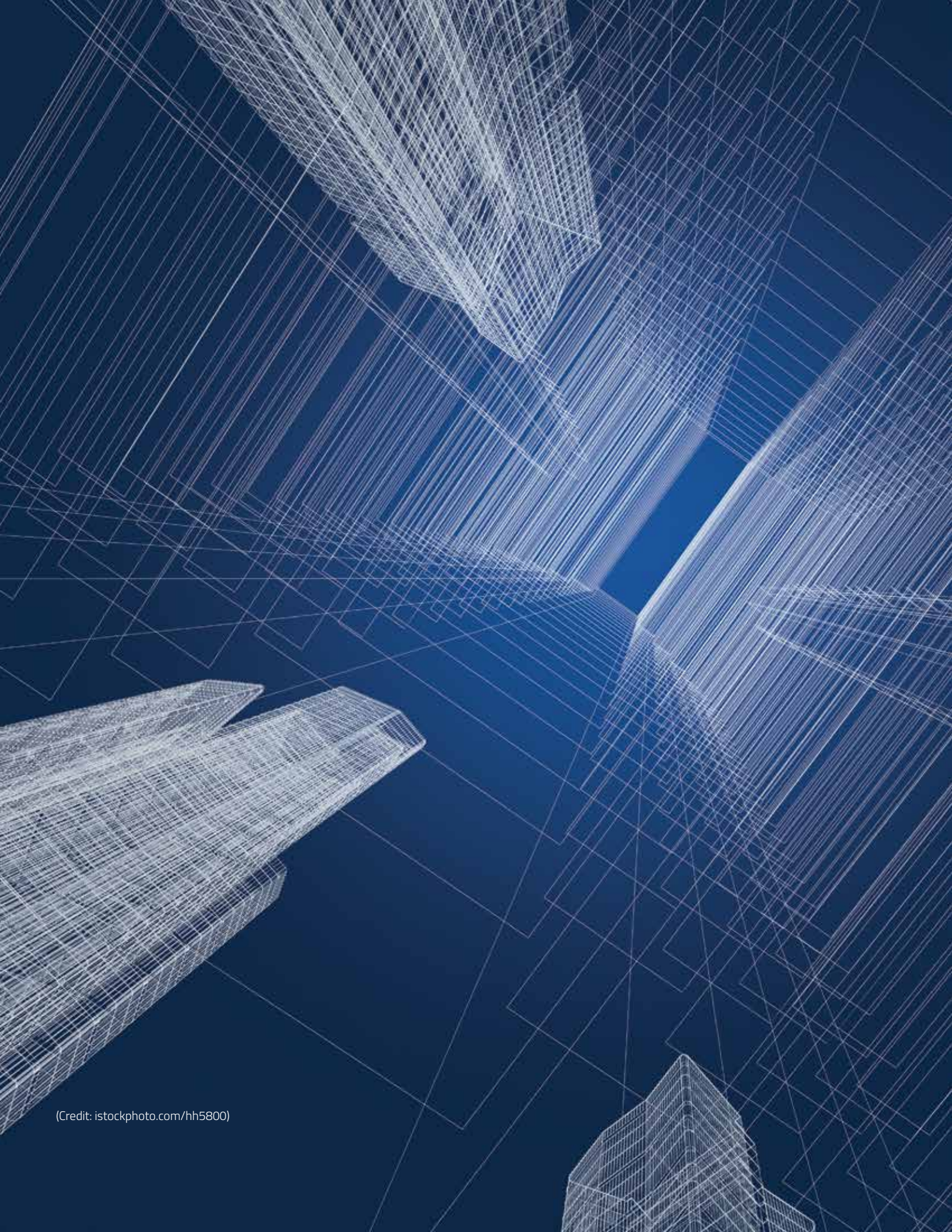
49. *Id.*

50. *Id.* For this position, Army Directive 2018-15 identifies the Principal Military Deputy to the ASA (ALT), a lieutenant general position established in 10 U.S.C. § 7016(b)(5)(B), nominated by the President, and confirmed by the Senate. *Id.* The Army, however, has instead assigned a two-star acquisition corps officer to this dual-hatted position of Director, Combat Systems. *Id.*

51. *Id.*

52. Back to the Future, *supra* note 1.

53. *Id.*



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No. 4

DoD's Artificial Intelligence Problem

Where to Begin

By Colonel Paul E. Golden

Some believe the emergence and proliferation of Artificial Intelligence (AI) represents humanity's "fourth industrial revolution" and that it will drive evolutionary and revolutionary innovation — i.e., make us better at what we do (the things we know) and shape what we do in the future and how we do it (what has yet to be done).[1] The breadth of AI possibilities is not easy to conceptualize, but there is great interest in understanding AI and how it can be effectively and responsibly leveraged.

In 2017, for example, the United States (U.S.) Congress issued a joint resolution that captured what could be fairly described through its title as the sentiment of most. The Fundamentally Understanding the Usability and Realistic Evolution of Artificial Intelligence Act of 2017 ("FUTURE Act") in part, directed a study focused on better understanding of current AI applications, the potential of AI, its current and expected impacts across society, options for increased government support for AI development, and legal and policy shortfalls.[2]

More significantly, the 2019 National Defense and Authorization Act tasked the Department of Defense (DoD) to "establish a set of activities within the Department of Defense to coordinate the efforts of the Department to develop, mature, and transition artificial intelligence technologies into operational use."[3] Congress's zeal for understanding AI and promoting AI-related activity is apparent, and so too is their recognition that effective incorporation of AI across our society will require significant funding and changes to our legal and policy framework.

With its speedy establishment of the Joint Artificial Intelligence Center (JAIC), the Army Artificial Intelligence Task Force, and a commitment of up to two billion dollars expected investment over the next five years, the DoD has demonstrated a healthy focus on current and future AI requirements.[4] However, the mandate is now clear; additional funding and other institutional changes are required if the DoD intends to build a meaningful capacity for developing and fielding relevant AI applications. Despite the best of intentions, human attempts to place limits on AI and AI applications will be tested. As machine learning and AI capabilities compound, humans will need to be proficient in the design principles and development of responsible AI tools.

Artificial intelligence will manifest in almost every form because it holds promise for greater precision and capacity in almost every DoD task, from logistics, intelligence gathering and major weapon's systems, to medical and legal services and personnel management. Artificial intelligence will undoubtedly make us

faster; but it will also evolve rapidly in ways that will challenge the DoD's models for funding, development, fielding, and use of new technologies.. So, where should this begin?

The DoD has already taken significant steps to promulgate clear principles to guide AI integration and use, but additional funding and acquisition tools that provide flexibility for the development, production, and implementation of AI applications and systems, and development of a competent AI workforce capable of competently participating in that process, is required for the DoD to meaningfully compete in the AI race.

The National Defense Authorization Act for Fiscal Year 2019

There was little concrete law or policy related to AI development and integration that the DoD could exploit to further the AI discipline prior to 2018, but the National Defense Authorization Act (NDAA) for Fiscal Year 2019 (FY 2019) contained significant authority and requirements for the DoD to explore, develop, and field AI capabilities across the force. Section 238, titled "Joint Artificial Intelligence Research, Development, and Transition Activities," specifically tasked the Secretary of Defense to "apply artificial intelligence and machine learning solutions to operational problems and coordinate activities involving artificial intelligence and artificial intelligence enabled capabilities within the Department." [5] The NDAA also required the Secretary to designate a senior official within the Department to aid in the following: lead all AI development activities, devise a DoD strategy, accelerate fielding of capabilities using every flexible acquisition authority available, develop AI capabilities for operational requirements through regular engagement with industry, experts and academia, build and maintain a competent workforce, leverage the private sector, and develop legal and ethical policies to govern AI development and employment.[6]

This senior official was also tasked with conducting a year-long study to review "advances in artificial intelligence, machine learning, and associated technologies relevant to the needs of the Department and Armed Forces, and the competitiveness of the Department in artificial intelligence, machine learning, and such technologies,"[7] and to make recommendations for securing and growing the DoD's technological advantage in AI, leveraging private technological advancements and commercial AI options, re-organizing the Department to meet AI requirements, training and educating an AI capable workforce, devising a framework for better funding for the DoD, and pursuingrequired changes to existing authorities that were "relat[ed] to artificial intelligence, machine learning, and associated technologies."[8]

From a legal and policy standpoint, this was a watershed moment for the DoD. The NDAA requirements will prove a massive undertaking, but the mandate is clear and, if exploited, will further facilitate effective AI development and fielding. Despite the breadth of these requirements, meaningful compliance will chiefly hinge on four key factors:

1. an ethical foundation for all AI development and use;
2. increased funding so that the DoD and the U.S. can keep pace in the AI race;
3. more acquisition flexibility for AI research and development and fielding; and
4. work force reform focused on attracting, developing, and exploiting a capable AI work force.

Whether all four factors are completely achievable is unknown, but the DoD has taken some significant steps to advance the cause.

AI Strategies

On 11 February 2019, the President released his AI strategy, which was intended to serve as a guidepost for government, industry, and academia in the great pursuit of AI capabilities.[9] This so-called "American AI Initiative (Initiative)"[10] is built around five "guiding principles" and six "strategic objectives"[11] that are intended to foster a coordinated effort for AI development and fielding among the government, industry, academia, and to articulate the United States' vision for leading the AI race in:

1. development of technology across the "Federal Government, industry, and academia;"
2. adoption of standards and the reduction of "barriers to safe testing and deployment of AI technologies" to promote growth of AI industry and their use of AI;
3. development of an AI-competent workforce;
4. protection of "civil liberties, privacy, and American values;" and
5. setting conditions internationally that "support[ ] American AI research and innovation . . . , markets for American AI industries," and the protection of our AI advantage and capabilities from "acquisition by strategic competitors and adversarial nations."[12]

Similar to current efforts in the DoD to attract cyber professionals, the Initiative highlights direct commissioning of AI talent as a priority program—which, if implemented and exploited, could attract some significant talent into the AI ranks.[13] The Initiative also tasks the Office of Management and Budget to issue agency-informed guidance for regulating AI in ways that protects innovation, civil liberties and American values, and access to AI technology,[14] which provides a window of opportunity for the DoD and other agencies to shape required changes to the regulatory framework that could hamper effective AI integration.

The Department of Defense quickly followed suit on 12 February 2019 and released its own strategy (DoD Strategy) to articulate, in part, its commitment to "lead [the] responsible use and development of AI" and its "vision and guiding principles for using AI in a lawful and ethical manner."[15] Their strategic approach for development and fielding of AI capabilities focuses on:

1. rapid, responsible fielding of AI capabilities for key missions;
2. decentralized development and experimentation, and scalability across the force;
3. development of a "leading AI workforce" through focused partnering, training for existing employees, and recruitment;

4. partnering with industry, academia and international allies and partners, to address "global challenges of significant societal importance," ensuring appreciation of defense challenges and investment in AI research and development, and training and development of the next generation of AI talent; and
5. responsible leadership in "military ethics and AI safety" through, in part, development of standards for testing and verification of reliable systems, and development of AI applications focused on reducing collateral damage and harm to civilians on the battlefield.[16]

Consistent with the requirements of the NDAA, the DoD Strategy highlights the JAIC as the "focal point of the DoD AI Strategy" and tasks them to deliver AI solutions for key missions; foster focused research and development; manage scalability of AI applications across the DoD; set data use and acquisition standards; lead AI planning efforts, governance, ethics, and coordination; and develop and maintain an AI-capable workforce through recruitment and training.[17]

Both the Initiative and the DoD Strategy offer more than a glimpse into U.S. and DoD intentions for the development, integration and fielding of AI. It also offers worthwhile, responsible policy decisions on some of the obvious concerns that many have at the mere mention of AI. For example, like the FY 2019 NDAA, both the Initiative and DoD Strategy highlight ethics as a critical component of AI development and employment. Adopting and institutionalizing an ethical framework for all AI initiatives is vital to the DoD's continued compliance with domestic and international legal obligations and preservation of trust with industry, academia, and other enablers necessary for the DoD to compete effectively.

Ethics

"[T]he inclusion of artificial intelligence ethics and safety in the NDAA is the first step for the United States to become a global worldwide leader in AI ethics and governance."[18] Thanks to the NDAA, fostering and articulating an ethical foundation in the DoD for AI integration is now required by law. This is not novel to the DoD, and makes sense for a number of other reasons. In 2012, the DoD issued guidance requiring "autonomous and semi-autonomous weapon systems [ ] be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force."[19] Weapons represent one small piece of AI's potential, but they are not the only types of AI applications that may worry skeptics. The 2012 policy was an important first step to address "killer-robot" concerns the public or the DoD enablers harbored.

That policy statement, however, was certainly not the cure-all to conflict with important industry partners. In 2018, Google decided to forego renewal of a contract with the DoD for its Project Raven venture—a project designed to use AI to analyze full motion video for use in any number of applications, including lethal targeting.

> About 4,000 Google employees signed a petition demanding 'a clear policy stating that neither Google nor its contractors will ever build warfare technology.' A handful of employees also resigned in protest, while some were openly advocating the company to cancel the Maven contract.[20]

Other contractors and academic institutions could, obviously, follow Google's path and there is probably little the DoD could do to change their course. Despite this, and the negative outcome for the DoD, "[t]he Maven episode represents a rare role reversal for a contractor and the Pentagon, with the Defense Department being more open—or at least consistent—in their messaging than the contractor they were paying."[21] This is an important posture the DoD has to maintain to ensure future credibility with all stakeholders in AI development.

To advance the ethical cause, and consistent with the FY2019 NDAA requirements, President's Initiative, and the DoD Strategy, the DoD tasked the Defense Innovation Board (DIB) to devise a list of ethical principles for the use of artificial intelligence "to guide a military whose interest in AI is accelerating . . . and to reassure potential partners . . . about how their products will be used."[22] This ethical transparency is critical and must extend as well to the data and algorithms used to prevent, to the greatest extent possible, biased AI systems. The most pervasive aspect of AI is machine learning, which applies algorithms to data sets that then learn from that data.[23]

This ethical transparency is critical and must extend as well to the data and algorithms used to prevent, to the greatest extent possible, biased AI systems

> The real safety question . . . is that if [ ] [the DoD] give[s] these [AI] systems biased data, they will be biased."[24] The same holds true for the algorithms used. In fact, "[s]ome experts warn that algorithmic bias is already pervasive is many industries, and that almost no one is making an effort to identify or correct it.[25]

In the DoD context, employing biased systems could not only be lethal,[26] whether via other forms of targeting, intelligence gathering, and even employment actions within the Department, but also lead to unintended violations of civil liberties and

other legal obligations. On 21 February 2020, the DoD adopted the following five principles, consistent with the DIB's recommendations, "for the design, development, deployment, and use of AI capabilities:

1. Responsible: DoD personnel will exercise appropriate levels of human judgment and care, while remaining responsible for the development, deployment, and use of AI capabilities.
2. Equitable: The Department will take deliberate steps to minimize unintended bia in AI capabilities.
3. Traceable: The Department's AI capabilities will be developed and deployed such that relevant personnel possess an appropriate understanding of the technology, development processes, and operational methods applicable to AI capabilities, including with transparent and auditable methodologies, data sources, and design procedure and documentation.
4. Reliable: The Department's AI capabilities will have explicit, well-defined uses, and the safety, security and effectiveness of such capabilities will be subject to testing and assurance within those defined uses across their entire life-cycles.
5. Governable: The Department will design and engineer AI capabilities to fulfill their intended functions while possessing the ability to detect and avoid unintended consequences, and the ability to disengage or deactivate deployed systems that demonstrate unintended behavior."[27]

Addressing these ethical aspects of AI and forcing an ethical transparency in the development and employment of AI systems is critical for setting expectations within the Department, ensuring development and use of certain systems remains within acceptable boundaries, and protecting continued access to private sector resources that will be critical for the DoD to remain competitive in the AI realm.

Institutionalizing these ethical principles will not be easy, and the DoD's steadfastness will likely be challenged significantly as AI capabilities expand around the world—most notably from peer and near-peer competitors like China and Russia. For example, the United States and other western countries have exercised a healthy degree of transparency and advertised their policies on certain aspects of AI, particularly the possibility of future autonomous weapons but, Russia has not, and remains generally closed off from the discussion. Likewise, China has been obscure in their public position and may have "fewer moral qualms about developing lethal autonomous weapons systems."[28] The lack of any public position from China and Russia leads some to think we "could very well be at the starting blocks" of an "autonomous weapons race,"[29] which could significantly test the United States and DoD's current blueprint.. Nonetheless, there is value in the effort. Articulating a strong ethical position on autonomous weapons, and other potentially controversial AI applications, will serve as a vital backstop in AI development and use, and will also protect the DoD and the United States from going down objectionable paths that could alienate critical AI enablers.

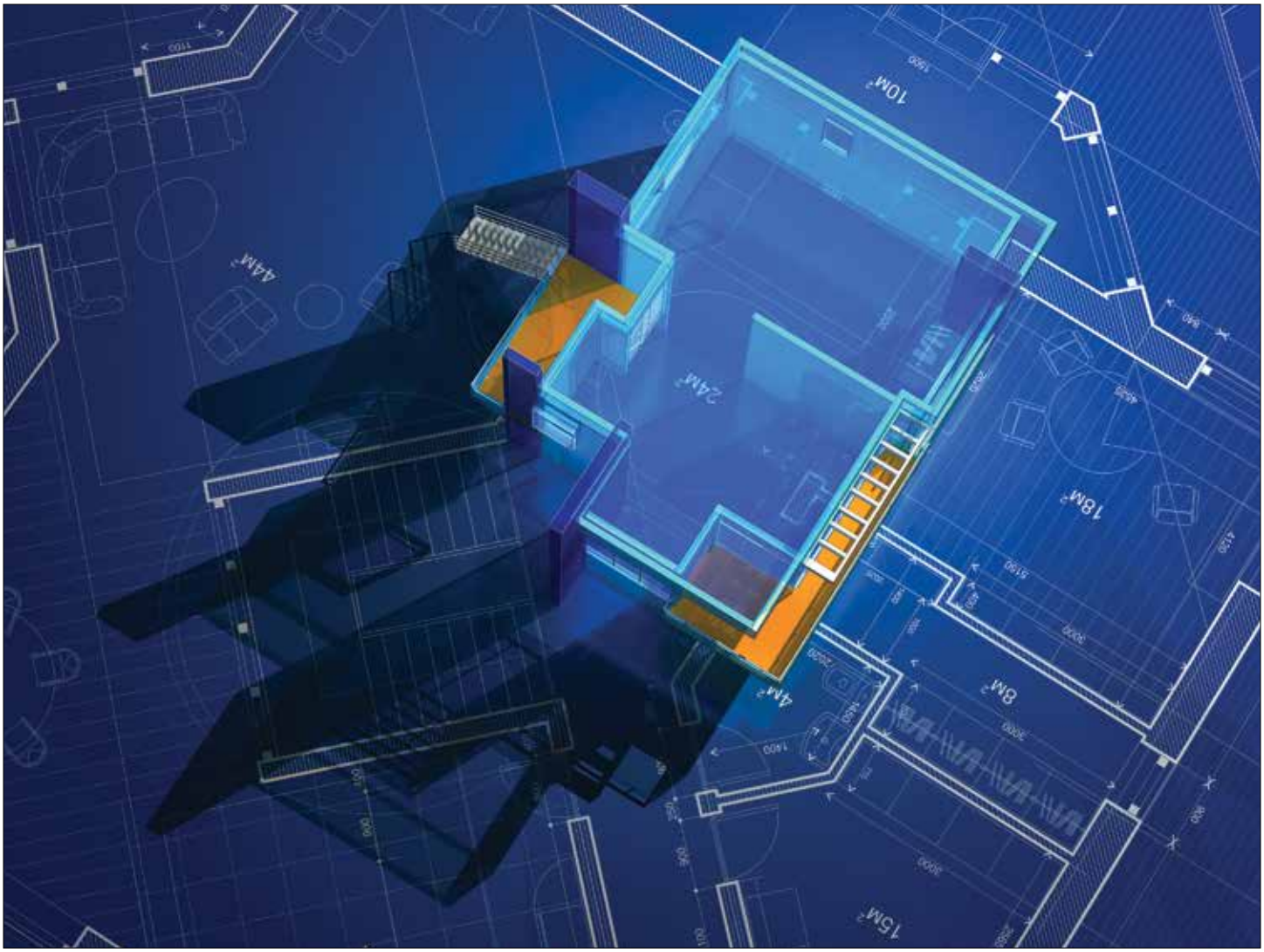
Addressing these ethical aspects of AI and forcing an ethical transparency in the development and employment of AI systems is critical for setting expectations within the Department

Funding

The United States and China currently outpace the rest of the world in AI investment by a considerable margin. At current prospective rates of investment, however, China could own roughly half of the expected worldwide investment—a whopping $15.7 trillion—in AI technologies over the next decade. By 2030 they aspire to reach over $150 billion in government AI investment which would, in their view, place them as the world's leader in AI technologies.[30] China currently outpaces the United States in other AI metrics, such as patent applications, research, and scholarly papers.[31] They are also exploiting "lower barriers to data collection" and building massive sets of training data for AI applications that have the potential to grow to 30 perecent ownership of all worldwide data by 2030.[32] Whether their efforts ultimately translate into more patents and products remains to be seen, but the operating space China enjoys, with massive amounts of available data, fewer restrictions on the use of that data, supportive laws, and an innovative, start-up culture, should be a warning sign for U.S. policymakers and appropriators.[33]

One good example of China's ambition to grow is their zeal for big data, exhibited in part through their plan to add 400 million surveillance cameras to the 170 million that currently exist across the country.[34] In 2017, the DoD reportedly spent $7.4 billion on AI compared with China's total investment of $12 billion. China, however, has plans to increase that budget to $20 billion by 2020.[35]

For the DoD, current AI funding levels are questionably inadequate. In fact, while China and Russia have exponentially expanded their investments in AI technologies, the United States has remained relatively stagnant.[36] There has been much publicity over the Defense Advanced Research Projects Agency's (DARPA's) pledge to spend $2 billion over the next five years and an additional unplanned $1.75 billion for the JAIC, butthe DoD's total investment remains elusive.[37] Then-Undersecretary of Defense Patrick Shanahan confirmed as much in October



(Credit: istockphoto.com/teekid)

2018 when he indicated that the Pentagon does not know how much it is spending on AI because "it's such a broad definition," which should be step one for the JAIC as it attacks the FY 2019 NDAA requirements to define AI and craft a plan for coordinating all AI activities in the Department.[38] Distributing AI investment outside of clearly labeled AI programs is untenable for the DoD, especially when credibility is such a key component to continued support from Congress, the American people, and private institutions and enablers. The FY 2019 NDAA mandate to the DoD is clear, and provides them the space to work with enablers to define short and long term requirements, budget appropriately, and advocate for necessary AI-specific funding lines and resources.

AI Development and Acquisition

A common theme across the FY 2019 NDAA, the President's Initiative, and the DoD Strategy is the requirement for speed in the development and fielding of AI capabilities. The fundamental question, though, is whether current acquisition tools and authorities are sufficient to meet that requirement or—as the FY 2019 NDAA recognizes—whether further tailored fixes are required for AI acquisition? "Challenges persist, in part, because decades of legislation and policy initiatives that governed, and often attempted to reform, the acquisition system continue to rely on unique terms, conditions, and processes better suited to the industrial age, not the information age, much less the rapidly approaching artificial intelligence age."[39]

In January 2019, the DoD's so-called Section 809 Panel (the Panel) concluded its nearly two-year effort to help transition DoD acquisition "to a more streamlined, agile system able to evolve in sync with the speed of technology innovation."[40] The Panel arose from a FY 2016 NDAA (Section 809) requirement tasking the DoD to convene experts to study the acquisition system and make recommendations for streamlining processes while still protecting the DoD's technological advantage.[41] The panel's work was extensive, resulting in a number of worthwhile administrative and substantive recommendations.[42] Congress, likewise, has been active in acquisition reform and, from 2016 to 2018, passed an average of eighty-two provisions each year related to acquisition compared toan

average of forty-seven provisions per year over the preceding decade.[43]

Section 8 of the 2016 National Defense Authorization Act,[44] and the DoD's statutory "other transaction authority (OTA),"[45] are exceptions available to rapidly develop, fund, and field AI capabilities. As exceptions, however, they serve to highlight a core conflict—i.e., our law and policy remain anchored to the ideal of competitive acquisition processes. Competition drives innovation which, in theory, gets us the best products.[46] Competition also promotes the worthwhile goal of socioeconomic development across various sectors through government spending.[47] Sections 804 and 806 of the 2016 NDAA are focused authorities that "permit[ ] rapid acquisition and rapid fielding for middle tier programs intended to be completed in two to five years, and . . .allow [ ] the Secretary of Defense to waive any provision of acquisition law or regulation if the acquisition of the capability is in the vital national security interest of the United States."[48] Section 804 is limited to projects lasting two to five years in duration and focuses on rapid prototyping and fielding. Rapid prototypes under Section 804 need to be operationally capable within a five year window. Rapid fielding requires no more than six months to initial production and five years to fielding.[49] Flexible authority, no doubt, but considering this limited scope, Section 804 does not provide the strongest of foundations for developing and fielding long-term and enduring revolutionary and evolutionary applications across the DoD's footprint.

Section 806 expands the DoD's OTA flexibility for prototyping and production. These OTA transactions provide a tangible alternative to traditional acquisition models and have proven a valuable tool for both developing and fielding AI applications across the force.[50] Thus, OTAs provide a streamlined option for AI prototyping and development, namely because there is no prescribed format or other requirement for instruments or processes used; they are flexible and can be sole-sourced or competed. They can also be used for acquisition of final products after prototyping.[51] "From FY 2016 through FY 2018, the combined total estimated [potential] value for [ ] [OTAs] was around $40 billion . . . [with] only 10 percent of that value, or about $4.2 billion [ ] spent."[52]

Building the right DoD workforce to develop, field, and use AI applications will be critical to effective and responsible employment of AI capabilities

Some, including the Panel, argue OTAs should be "embraced and expanded" for AI development and fielding,[53] citing the NDAA provisions expanding OTA as indicative of Congress's permissiveness.[54] There is merit to that argument, particularly in the short-run, but OTAs are not the institutional cure-all for the bureaucracy and inefficiency that plagues our current acquisition workforce and processes.[55] In fact, as of 2016, OTAs remained a less-than-favored option across the DoD and most federal agencies for a number of reasons. Chiefly, as a recent Congressional Research Service study noted, because many intra-agency policies require justification for their use—even when technically not required.[56] The lack of any prescribed format or other guidance for executing OTAs makes them more challenging to process than traditional Federal Acquisition Regulation-based contract options for government acquisition personnel which, in the recent past, directly contributed to their underutilization. Unfortunately, this highlights a significant competence gap across the federal acquisition workforce.[57] Moreover, OTAs can require OSD-level approval—which dilutes some of the claimed efficiency—and regular notification to Congress—which implies a certain uneasiness with deviations from competition.[58] Other transaction authorities also carry risk, namely with "transparency and accountability,"[59] in the process and run somewhat counter to the socioeconomic goals achieved through competitive acquisition procedures. None of this is to suggest OTAs are bad and should not be exploited. But, with elevated approval levels and oversight, lack of transparency, and exemption from competition requirements, OTAs alone are likely not sufficient to meet DoD requirements. There is a balance between speed and competition the DoD can adopt that protects the integrity of the process and supports acquisition of the best possible products. Thus, OTA authority could be modified to restructure approval levels and oversight, include provisions favoring or requiring competition, albeit streamlined, and add reasonable levels of internal checks to ensure transparency. Another, at least partial, solution would be to modify the Competition in Contracting Act and Federal Acquisition Regulation Part 6 requirements by stripping out time or other constraints that could serve to stymie speedy acquisition.[60]

Another significant change in recent NDAAs is found in Section 879 of the FY 2017 NDAA, which authorized the Commercial Solutions Opening (CSO) pilot program, giving the DoD authority to use streamlined acquisition procedures for commercial technology contracts valued up to $100 million and award within 60 days. The program was based on processes used successfully "by the Defense Innovation Unit (DIU) and Defense Information Systems Agency in using broad agency announcements (BAAs) to solicit technical proposals.[61] One example of DIU's success has been Project Maven, where they were able to award contracts within a matter of weeks using competitive procedures.[62] With its $100 million cap, the CSO pilot program—like Section 804 authority and

OTAs—has limited applicability and—as the Section 809 Panel noted—"[i]t is still too early to comment on the current DoD initiatives that are designed to experiment with these new or expanded authorities."[63]

Transparency with Congress will remain critical regardless of which processes the DoD uses. The Panel specifically advised the DoD to maintain full transparency in its use of these authorities to protect against congressional backlash and to improve these programs through lessons learned.[64] Given the call of the FY 2019 NDAA AI provisions, and the technology focus of structured changes to acquisition authority over the last four years, the DoD seems in position to significantly influence AI acquisition solutions with Congress in the coming years, andthey should exploit the opportunity to offer focused, realistic recommendations for future legislation.

Workforce Reform

Maintaining flexibility in approaches available to develop and field AI-capabilities is, no doubt, important, but until the DoD builds an acquisition workforce comfortable exploiting that flexibility, they will likely not realize the full benefit of the latitude granted by Congress. "In an era of great power competition centered on emerging technologies and how militaries adapt to them, human capital inefficiency is a strategic risk."[65] The NDAA, President's Initiative, and DoD Strategy obviously recognize this risk, and the DoD has the opportunity to shape future decisions and authorities regarding the organization of the Department and its AI capable workforce.[66]

Building the right DoD workforce to develop, field, and use AI applications will be critical to effective and responsible employment of AI capabilities because outsourcing options are not likely to be universally suitable for AI applications for a few significant reasons. First, much of the work involved in getting these machines to learn—like the data sifting and feeding—can be inherently governmental, which greatly limits options for contracted support.[67] Inherently governmental functions are those "so intimately related to the public interest as to require performance by federal government employees."[68] Authority to perform inherently governmental functions flows from the Appointments Clause of the constitution through the executive. Despite persistent debate regarding the scope of inherently governmental functionsthis is not a restraint easily remedied through regulatory or statutory change.[69] The Panel highlighted "critical functions" as another potential limitation that could impact outsourcing options. Critical functions are those "…necessary to the agency being able to effectively perform and maintain control of its mission and operations."[70] These critical functions are not necessarily inherently governmental, but the Panel cautioned the DoD to determine which need to be performed by DoD employees and to "ensure [DoD employees] have appropriate training, experience, and expertise to understand the agency's requirements, formulate alternatives, manage work product, and monitor any contractors used to support the federal workforce."[71]

Second, there is no doubt that we have willing partners in industry; but, the Project Maven experience with Google[72] serves to highlight the real friction and negative impacts that can arise with certain types of development and reinforces the notion that internal expertise will be essential to ensure the DoD maintains adequate momentum in the development and fielding of AI applications.

Third, security for AI applications will be paramount. The DoD obviously maintains significant leverage over contractors in matters related to security, but undeniably loses some level of control over those things they outsource. In the AI world, algorithms that drive machine learning are still very fragile and vulnerable to manipulation, which—depending on the application—could have catastrophic and very lethal consequences.[73] The DoD could never effectively internalize everything, nor should they, because the private sector will drive AI innovation. There is an imperative need, however, in maintaining a capable internal capacity for those things too risky to outsource and to serve as a competent check and balance for AI development and acquisition.

Without significant training investment, the DoD's current civilian workforce will not be able to keep up with the speed, precision, and expertise AI development and acquisition will require, and, due to the nature of uniformed service, only a small number of military personnel will likely have any long-term impact on AI innovation. Training and recruitment of an AI workforce will need to maintain pace with innovation, which will require radical change across the various levels of our labor and employment authorities. Incentivizing a long-term, capable, workforce will require additional tools—like competitive, adaptive pay structures, faster, more responsive hiring and firing authority, and exceptions from union coverage and rules—to attract and retain AI talent. The concept is not overly radical, and could be easily addressed with a few focused statutory and policy changes to labor-management relations rules (union)[74] and the GS classification and pay framework.[75] And, there is relevant precedent. The DoD has implemented a pilot of the Acquisition Demonstration Project (AcqDemo), a performance-based

Without significant training investment, the DoD's current civilian workforce will not be able to keep up with the speed, precision, and expertise AI development and acquisition will require

incentive program for acquisition personnel. The program provides incentive and pay flexibility not found in the GS classification system, but over time tends to even out with the GS levels of pay.[76] While a similar system applied across the civilian workforce could buttress recruitment, it would be flat on retention, particularly-considering the DoD will need to compete for talent against high-paying technology giants, where median pay can and does far exceed the highest levels of GS compensation.[77] The President has some authority to exclude, and has excluded, many agencies and subdivisions from labor relations rules (union) coverage andcan, and has, adjusted pay rates within the statutory pay grades.[78] Applying the same focus to an AI workforce—and tailoring relevant statutory and policy changes to create an incentive heavy, at-will-like system to hire, fire, and pay for talent—is required if the DoD wants to maintain meaningful internal capacity for driving AI development and fielding.

Another hindrance to workforce development is the DoD's current byzantine hiring process, described by current Secretary of Defense and former Secretary of the Army Mark Esper as "a fundamentally flawed system."[79] In the competition for talent, the DoD will be greatly disadvantaged without radical change. Whereas a technology firm could realistically bring a new hire onboard in a matter of days, the DoD is not so fortunate, averaging a reported 100 days for new hires. Additional administrative burdens, like the paperwork burden for a clearance background investigation, can also serve to drive potential candidates away. The DoD has reportedly committed to reducing hiring timelines to no more than 80 days. Secretary Esper does not think that is ambitious enough and is targeting a process to support a thirty-to-forty-five-day hiring window. He has also advocated for transfer of control for all DoD civilian employees from the Office of Personnel Management to the DoD. Whether sufficient to attract the AI software engineer who has the private sector option to start on Monday is yet to be seen, but Secretary Esper is right to push an aggressive approach for reforming the system.[80]

Conclusion

Not long before he passed away, Stephen Hawking warned that "[s]uccess in creating effective AI, could be the biggest event in the history of our civilization. Or the worst."[81] AI is here, and will proliferate rapidly. Congress and the President have given the DoD some daunting tasks, but also an effective roadmap to get where they need to be—i.e., understand, control, field, and develop ethical but effective AI and maintain dominance and leadership in the AI realm. Achieving those tasks will require significant changes in the way the DoD does business, both internally and with those critical enablers across industry, academia, and the international community. Of course, these proposed reforms could be similarly applied across the spectrum of the DoD's technological challenges (e.g., cyber), but sweeping change, at least in the relative short-run, is far less likely to succeed. Harnessing the collective talent required to increase the speed, flexibility, and precision of responsible AI development and integration needs a focused effort. The DoD has much work to do, but they have an open door to set conditions for continued relevance in the AI world. **TAL**

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(Credit: istockphoto.com/dikobraziy)

No. 5

Peacetime Partnerships in the Indo-Pacific

By Captain Benjamin A. Asare

There are three types of people: Those who wonder what happened; those who watched what happened; and those who know what happened. [1]

Indo-Pacific Operational Environment

United States Army leaders have recognized the importance of developing regional intelligence among the Joint Force. Regional intelligence includes understanding one's unified combatant command (UCC) mission and the organizational architecture of their UCC; understanding the military capabilities of our allies, partners, and regional adversaries; studying the history of our allies, partners, and regional adversaries to develop an informed perspective and better understanding; and, perhaps most importantly, intentionally building strong personal relationships with sister services, and allies and partners who operate within an assigned area of responsibility (AOR).

As warfighters and judge advocates, developing an understanding of another nation's history and paying attention to current events are skills that continue to prove beneficial as our nation engages in conflicts in the Middle East, especially peacetime relationships become increasingly complex. The complexity of peace-time relationships is ever truer in the Indo-Pacific region as nations attempt to disrupt U.S. national security objectives. United States Indo-Pacific Command (INDOPACOM) is the geographic combatant command assigned the responsibility of achieving national security objectives in the Indo-Pacific region—spanning from the western shores of India through the Pacific Ocean. "The 36 nations comprising the [Indo]-Pacific region are home to more than 50% of the world's population, 3,000 different languages, several of the world's largest militaries, and five nations allied with the United States through mutual defense treaties (Australia, Japan, the Philippines, the Republic of South Korea, and Thailand)."[2]

Beyond the demographic makeup of the Indo-Pacific region, nations today are striving to revise long-standing international norms upheld by the United States. The National Security Strategy underlines China and Russia's goals,

> China and Russia want to shape a world antithetical to U.S. values and interests. China seeks to displace the United States in the Indo-Pacific region, expand the reaches of its state-driven economic model, and reorder the region in its favor. Russia seeks to restore its great power status and establish spheres of influence near its borders.[3]

Throughout China's history, China has been actively involved in the maritime land territory in the South China Sea. Today, China has been actively militarizing outposts and constructing

Retired General Robert Brown speaks to RLDP's 19-03 cohort. (Courtesy: CPT Asare)

airstrips on man-made islands within the South China Sea under the doctrine of sovereignty, while disregarding the Permanent Court of Arbitration's ruling to the contrary.[4] China has no qualms in expressing they will react in what their leaders deem is a necessary response to the provocative actions of others toward their claim to the land territory in the South China Sea.[5] Indeed, China's recent military modernization program lends credence to their strong stance regarding the maritime lands in the South China Sea. The People's Liberations Army (PLA) maintains the ability to execute joint operations, such as amphibious landings and joint fire strikes, all the while restructuring their military organizational command similar to the U.S. UCC structure. Such military modernization allows China to quickly respond in the Indo-Pacific region, all the while creating the ability to efficiently counteract U.S. involvement in the Indo-Pacific.[6]

Russia attempts to restore its power and establish its sphere of influence in the Indo-Pacific by selling arms and equipment to countries in the region, undermining U.S. alliances and partnerships in the Indo-Pacific. Indeed, of the thirty-six nations comprising the Indo-Pacific, the United States does not have a formal union that articulates a shared defense arrangement with thirty-one of such nations.[7] This lack of structured relationships allows Russia operating space to leverage their own influence while limiting U.S. influence in the region. Russia's interactions with the Philippines, a longtime U.S. ally, evidences that point: in 2017 Russia and the Philippines signed a defense agreement consisting of a bilateral defense cooperation and the sales of Russian weapons.[8] National strategic guidance from the National Security Strategy (2017), National Defense Strategy (2018), and INDO-PACIFIC Strategy Report (2019) articulate the growing influence of China and Russia in the region; various U.S. command echelons are acting in accordance with this guidance to respond to such growing influence.

Leaders Act

To that end, General (Retired) Robert B. Brown, while Commander of United States Army Pacific (USARPAC), the Army Service Component Command of INDOPACOM, created the Regional

Leader Development Program (RLDP) in 2017.[9] The RLDP's goal is to train from all Department of Defense (DoD) branches, mid-level officers (first lieutenants to senior captains; warrant officers), senior enlisted, and Department of the Army (DA) civilians in strategic leadership, Indo-Pacific history, public speaking, and critical thinking. The program's intent is for participants to become more knowledgeable about issues facing the INDOPACOM area of responsibility, operate in ambiguous scenarios, develop the skill set of synthesizing voluminous information to succinctly communicate well thought-out options to superiors, and develop a habit of lifelong learning. Regional Leader Development Program cohorts are offered multiple times throughout the year (participants must apply or be nominated by their command), with each cohort receiving instruction on a specific focus-area, allowing participants exposure to the issues and challenges enveloped within such focus-area.

Regional Leader Development Program-Defense Urban Studies (DUS), Cohort 19-02, received instruction on the concepts of complex warfare in Dense Urban Areas (DUA), an operational environment with specific challenges currently being explored by numerous DoD and governmental organizations.[10][11] Regional Leader Development Program–Pacific, Cohort 19-01 and19-03 exposed participants to U.S. Army Command and General Staff College (CGSC) electives, where participants received lectures in Indo-Pacific military capabilities and gained in-depth insight into country-to-country and regional relationships across the Indo-Pacific. Each cohort immersed participants in operational environments they studied in the classroom allowing participants to receive practical experience in these environments while challenging the assumptions developed in the classroom. Also, RLDP cohorts visited locations such as Japan, Singapore, South Korea, and Thailand. Each cohort benefited from senior officer and senior non-commissioned officer mentorship. Former RLDP cohort mentors included: Major General (Retired) Clarence K.K. Chinn (Commander U.S. Army South, 2015-2017), Command Sergeant Major (Retired) Frank Grippe (Senior Enlisted Advisor, U.S. Central Command, 2010-2014), Colonel (Retired) Pete Curry, and Lieutenant Colonel Eric Marshall.

The importance of RLDP is such: participants are exposed to a level of strategic thinking generally reserved for instruction at the U.S. Army CGSC or Intermediate Level Education.[12] Modeled programs and RLDP assist captains and senior enlisted with the skills to think critically through issues, regardless of the subject matter, and provide well thought-out recommendations, so superiors can make better decisions. Moreover, service members build professional relationships across the joint force—a necessary relationship as the DoD continues to refine and utilize the joint force. For judge advocates, receiving strategic leadership training is invaluable: our primary clientele are commanders, a position judge advocates are detailed to advise on legal issues, and at times social and cultural issues. Having a broad awareness of the issues affecting the command provides judge advocates the background to deliver well-thought out recommendations considering second-and third-order effects so commanders can make the most informed strategic decisions.

To date, six judge advocates have participated in an RLDP cohort. These judge advocates are: Captain (CPT) Marshall J. Greenberg, CPT David W. West, CPT Aaron S. Wood, CPT Jeff M. Mock, CPT Elizabeth (Grace) Smitham, and CPT Benjamin A. Asare.[13] Each judge advocate was assigned to a USARPAC subordinate command during their cohort; currently, many of these judge advocates are assigned to different combatant commands. These judge advocates were interviewed for this article and answered questions about their cohort experience. Captain Smitham attended RLDP-Pacific (RLDP-P), Cohort 19-01—she is the first judge advocate to ever attend an RLDP variation; CPT Greenberg and CPT West attended RLDP—DUS, Cohort 19-02; and CPT Wood, CPT Mock, and CPT Asare attended RLDP-P, Cohort 19-03. While these judge advocates may have developed different perspectives from their cohort, one theme is consistent among their shared experience: it is critical that service members develop regional intelligence of their operational environment to provide insightful recommendations to commanders; and it is imperative to develop professional relationships with service members across the Joint Force.

Regional Leader Development Program–Pacific is an Indo-Pacific-centric course with the intent participants become regionally intelligent and culturally fluent in the Indo-Pacific region. However, the crux of the program—exposure to issues facing a geographical or functional mission— can be tailored to meet an OSJA's support mission.

Sharing Experiences

What was the mission of your RLDP cohort, and how long was your cohort?

CPT West: I attended RLDP-DUS, Cohort, 19-02, from 24 March 2019 to 14 April 2019. The mission of the cohort was to explore and understand: (1) the critical infrastructure and urban geography and flow of cities; (2) the technological and physical connectedness of city networks; and (3) the culture and behavior of people and their environment.

CPT Greenberg: The RLDP I attended focused on dense urban areas (DUAs). We examined military conflict in areas with large urban populations, e.g., cities. Dates were 24 March 2019 to 14 April 2019.

CPT Asare: I attended RLDP-P, Cohort 19-03. My cohort's mission was to provide participants with Indo-Pacific instruction and strategic development with the intent participants excel in positions of greater responsibility in Pacific-aligned positions. The cohort occurred from 4 August 2019 to 13 September 2019.

CPT Wood: Educate and develop leaders to thrive in complex environments associated with the Indo-Pacific Theater, and prepare them to serve in positions of greater responsibility throughout the INDOPACOM AOR.

CPT Smitham: I participated in RLDP-P, 19-01 from 9 October 2018 to 11 November 2018. If I recall correctly, the program was still in an evolving state and we didn't have a "mission," per se, beyond developing regionally-aware personnel. I know now that [RLDP planners] are now alternating between megacities/urban studies and Humanitarian Assistance and Disaster Relief (HADR) focused programs.

CPT Marshall Greenberg, left, with a fellow member of the Regional Leader Development Program. (Courtesy CPT Asare).

Our program was broadly focused on developing regional leaders and was organized into three phases. Phases 1 and 2 were conducted over three weeks in Hawaii and consisted of senior leader engagements/ self-assessments/critical thinking development, followed by two CGSC courses. Phase 3 was cultural immersion in Seoul with a megacity focus. Upon return to our units, we were required to complete a capstone project (group paper) in order to receive an additional skill identifier (6Z, Strategic Studies).

When you attended RLDP, what was your rank and duty position; what is your current duty position?

CPT West: During RLDP-DUS I was a captain, detailed as a national security law (NSL) attorney to 2d Infantry Division, ROK, U.S. Combined Division. Currently, I am detailed as an administrative law attorney to U.S. Army Africa/Southern European Task Force (SETAF).

CPT Greenberg: During RLDP-DUS I was a captain, detailed as an NSL attorney to 8th Theater Sustainment Command (TSC). Currently, I have moved into a trial counsel role to 8th Military Police Brigade, 8th TSC, Schofield Barracks, Hawaii.

CPT Asare: During RLDP-P I was a captain detailed as an administrative law judge advocate to 25th Infantry Division, Schofield Barracks, Hawaii. My current duty position is the same.

CPT Wood: While in RLDP I was detailed as a captain detailed to NSL, 8th TSC. I am currently in the same duty position.

CPT Smitham: I attended RLDP-P as a captain when I was serving as the Chief, NSL for U.S. Army Japan at Camp Zama, Japan. I was in that position from July 2017 to July 2019. I'm currently the Student Detachment Commander at The Judge Advocate General's Legal Center and School.

What was the professional demographic of your cohort?

CPT West: Mostly U.S. Army officers in the grade of O-3 to O-4; some senior nton-commissioned officers in the grade of E-7 to E-8. One Marine O-3. One or two Army Warrant Officers. One Republic of Korea Army (ROKA) Infantry O-3. Most officers were around the Company Commander level; that is, recently finished company command or soon going to be a company commander. Most officers were current staff officers at division level or higher.

CPT Asare: My cohort consisted of a diverse professional demographic of approximately 35 service members. From the Non-Commissioned Officer Corps and Warrant Officer Corps, service members came from various service component commands within INDOPACOM such as Pacific Air Forces (PACAF), the Air Force Service Component Command to INDOPACOM; and the Marine Force, Pacific (MARFOPAC), the Marine Corps Service Component Command to INDOPACOM. The Officer Corps consisted of participants from a variety of branches within the Army: logistics, aviation, infantry, armor, Army acquisition, and judge advocates, to name a few. Our cohort also consisted of two foreign officers, a Singaporean and an Australian.

CPT Smitham: My cohort consisted of thirty-eight individuals that were primarily active duty Army personnel, but also included Air Force and Coast Guard personnel, as well as an officer from Singapore. Ranks ranged from sergeant first class through captain and included four DoD Civilians (GS 12-14).

What was the importance of interacting with such a professionally diverse group?

CPT West: I believe that everyone who participated in the RLDP-DUS brought rich diversity in professional and personal experience to the table. By bringing different people with different perspectives to work together to analyze problem sets, we increased our chances of producing the most comprehensive analytic results. The diversity of the group helped increase both my critical thinking skills and my knowledge base in the specific subject matter examined in the RLDP-DUS.

With additional knowledge and more sharply honed critical thinking skills, I am now able to effect progressive change and growth in every area that I am put to work. Being a forward and progressive thinker and doer is one of the keys to effective action, leadership, and progress. As someone who aspires to one day be a division staff judge advocate, I know that participation in the RLDP is something that will help me along the path to achieving that goal

CPT Asare: RLDP-P, Cohort 19-03's diverse professional demographic, coupled with the numerous small-group projects, created a multi-faceted learning environment; that is, I was not only learning from the assigned material, but I was also learning from my classmates. In my cohort, participants were exposed to complex and open-ended problem sets. For example, my cohort participated in DisasterSim, a game-based training tool focused on international disaster relief where participants take on the role of a joint task force whose mission is to restore essential services while taking multiple stakeholders' advice into consideration.

My cohort was divided into small groups, consisting of approximately seven people per group, to participate in the game-based training tool. While participating in DisasterSim my small group shared their individual knowledge and experience to assist our group—the knowledge shared became our knowledge, and the experience shared our experience.

CPT Wood: Prior to RLDP-P, I did not have exposure to as great a variety of military professionals. But RLDP-P gave me the opportunity to learn how different military professions and ranks think through discussions and interactions with the large variety of individuals. I think I am better prepared to serve as a staff officer, as I now have some understanding of the views of the different military professions and ranks and can consider them when I interact with other staff sections and provide advice to commanders.

What were the learning objectives of your cohort?

CPT West: Understanding the complex dynamics of urban areas; special considerations for training, planning, and operating for an urban environment; building better leadership skills and enhancing connections; understanding multi-level urban operations (surface, subsurface, super-surface (high-rise buildings), and cyberspace; developing new strategic and tactical approaches to conventional warfare; and understanding neutralization of superior technology and low-technology solutions.

CPT Greenberg: The fundamental objective of the cohort was being able to think differently and develop leadership skills; DUAs are the problem set we used to achieve these objectives, and DUAs are a relevant and complex problem. There are over forty-seven megacities with populations of over 10 million in the world, thirty of which are in Asia. Today, more than half of the world's population lives in urban areas. The U.S. Army will need to operate in DUAs in the future. The RLDP-DUS course goal was to instill the cohort with the knowledge to provide better options, better decisions, and better connections for when that time comes.

CPT Asare: Approximately six weeks in length, RLD-P can be divided into three phases. Phase 1 consisted of CGSC electives taught by CGSC professors. Phase 1 learning objectives were: critically analyze U.S. military capabilities in the USINDOPACOM AOR by reviewing its component organizations, locations, missions, and forces; critically analyze strategic direction and guidance for USINDOPACOM; critically analyze historical military campaigns and battles in the Indo-Pacific; and, critically analyze the military capabilities, capacity, readiness, and modernization efforts of designated nations in the Indo-Pacific.

Phase 2 consisted of classroom instruction on red-team tools from the University of Foreign Military and Cultural Studies (UFMCS) and classroom instruction from the East-West Center Leadership Program on non-military regional dynamics affecting the Indo-Pacific. Phase 2 learning objectives were: exploring methods of decision making and techniques to improve organizational understanding and achieve better decisions, identifying techniques to avoid organizational decision-making pitfalls, such as groupthink and biases; and, examining paradigms of power, identity, knowledge, and social ties that underlie the calculations of Indo-Pacific countries.

Phase 3 consisted of a cultural immersion in Singapore and Bangkok, Thailand with the intent participants view the Indo-Pacific countries from the visited countries' perspectives, and potentially challenge participants' perspective regarding Indo-Pacific actors.

CPT Wood: RLDP-P students completed courses on the military power in INDOPACOM and in Indo-Pacific Strategic Studies. Strong emphasis was placed on the U.S. National Security Strategy, the U.S. National Defense Strategy, the INDOPACOM Posture Statement, and the importance of the Indo-Pacific to U.S. national security. Students compared these documents to similar policies and documents from countries in the Indo-Pacific region, such as those from Japan and China. Additionally, instructors taught the students to analyze the operational environment using the Diplomatic, Information, Military, and Economic (DIME) construct and the Political, Military, Economic, Social, Infrastructure, and Information (PMESII) construct.

CPT Smitham: My cohort took two CGSC classes—A551 (Asia-Pacific Strategic Studies) and A557 (Military Power in USINDOPACOM). Each class required multiple short papers and presentations and focused heavily on analysis using the DIME construct. Both courses were broadly focused on the entire INDOPACOM AOR and served to give us a strong overview of the history and geopolitics shaping the region.

Coming from an assignment in Japan where many of our day-to-day efforts were directly focused on the bilateral U.S.-Japan relationship, I could have easily completed my assignment without having any real appreciation or understanding of the intricate powers at play across the broader region, had it not been for this program. Taking a step back from daily operations to look at the region from a strategic and academic perspective was invaluable.

What activities were you required to perform during your cohort to meet the learning objectives?

CPT Greenberg: Our RLDP-DUS was presented through a combination of classroom discussion, terrain walks, and scenario analysis. Dense Urban Areas come down to three factors: people, infrastructure, and the economy. These factors vastly differentiate between each DUA. My cohort occurred in two phases. Phase 1 was held in New York City. During the first phase,

there were thirty attendees; fifteen assigned to units within the USARPAC AOR, and fifteen from other AORs.

During the second phase, the fifteen from USARPAC went to Korea, while the other fifteen went to Israel. The reason for the split was to focus on different objectives for our different missions. My cohort spent the first two weeks learning how New York City operates and having our assumptions thrown out when we went over to Korea. During the two weeks in New York, the cohort learned how the city functions. This includes how the infrastructure is designed, communities interact, and economy works.

Once we started seeing how these different systems operated in concert with each other, we started analyzing how a military operation would look in a city. Our cohort would identify problems, and we would come up with solutions using each individual member's skill set. Once the cohort got to Korea, the problems we expected to encounter were no longer there, but were replaced with a completely new set of issues.

CPT Asare: Phase 1 learning objectives were achieved through CGSC classroom instruction, daily readings of unclassified sources on current issues facing INDOPACOM, individual and group presentations, and staff-writing exercises. In Phase 1, I gave a 20-minute regional analysis presentation on Bangladesh to my class, with analysis focusing on the PMESII components of the country. Phase 1 also consisted of me delivering a twelve-minute group presentation and writing an individual paper on a historical military campaign in the Indo-Pacific region. My partner and I presented on the U.S. covert war in Laos and the Vietnamese-Khmer Rouge War, focusing on the historical background leading up to both conflicts, the strategic lessons learned, and regional relationships developed subsequent both engagements. My paper focused on the background and regional consequences of the Vietnamese-Khmer Rouge War.

Phase 2 learning objectives were achieved through an interactive classroom environment consisting of group work problem sets and personality dimension assessments; and, interactive panel-led discussions with East-West Center alumni on non-military regional dynamics and horizon trends of conflict in the Indo-Pacific region, coupled with small-group assignments and daily class reading.

Phase 3 learning objectives were achieved by our cohort immersing into countries within the Indo-Pacific. The cohort traveled to Singapore, where we visited, among other strategic sites, the Singapore Strait, a key shipping channel running adjacent to Singapore. In Singapore, our cohort was also exposed to lectures from international think tanks such as the Institute of Southeast Asian Studies, a research institute located in Singapore, and the S. Rajaratnam School of International Studies (RSIS), a leading think tank and graduate school in the field of international relations. During Phase 3, our cohort split into two groups, with one group traveling to Thailand, the other group traveling to Japan. I traveled to Thailand to participate in the Indo-Pacific Armies Chiefs Conference (IPACC XI), Indo-Pacific Armies Management Seminar (IPAMS XLIII), and Senior Enlisted Forum (SELF V), all three conferences attended by senior land power commanders and enlisted Service members from various nations to promote peace and stability in the Indo-Pacific region. Participation in this country syndication exposed me to observe and experience first-hand the interpersonal relationships of country leaders within Indo-Pacific countries, which at times served as a microcosm to regional dynamics within the region.

CPT Wood: Students were required to write several papers and give multiple briefings on the course subjects. Students were instructed to complete these assignments as if they were staff officers presenting to a general officer/ flag officer (GO/FO). Students received feedback on their writing and presentation styles to further prepare them to advise a GO/FO.

CPT Smitham: During the first phase of the course, several teams were brought in to administer different self-assessment tools. I found these to be significantly more in-depth than the standard personality tests we often take online or elsewhere. The results were broadly shared with the class, which through the next two phases were required to work together closely on a number of group projects.

Understanding the various personality traits, identifying personal strengths and weaknesses at the beginning of the program, and being able to contrast our individual styles with the leadership talks we were having with senior leaders and guest speakers was a unique opportunity.

Phase 2 (CGSC courses) provided a unique opportunity to experience a "big Army" academic environment early in my career. As a direct commissionee with fewer than four years of service when I started RLDP-P, I knew that I had (and still have) much to learn about the Army. Participating in these classes as the only Judge Advocate in my cohort put me in a position to share my legal perspective while reaping the benefits of learning from my fellow classmates and the CGSC instructors.

What did you take away from these activities?

CPT West: There were three lessons drawn from my cohort: (1) DUAs are the battlefield of the future; (2) successful warfare in DUAs will revolve around controlling critical system flows; and (3) controlling system/flows will require relationship building and integration with the civilian leadership/populace.

The Military Operation in Urban Terrain (MOUT) site training models of the late twentieth and early twenty-first centuries are no longer cutting-edge. Lessons learned in recent conflicts indicate that our most dangerous enemies have found ways to neutralize and defeat our sophisticated weapons and technology using low-tech countermeasures. In the 1980s, 1990s, and 2000s if we could see it, we could hit it. Our enemy knows this and has reduced our effectiveness by: (1) going underground; (2) using smoke/fire as an obscuring agent or weapon; and (3) hiding in plain sight within DUAs.

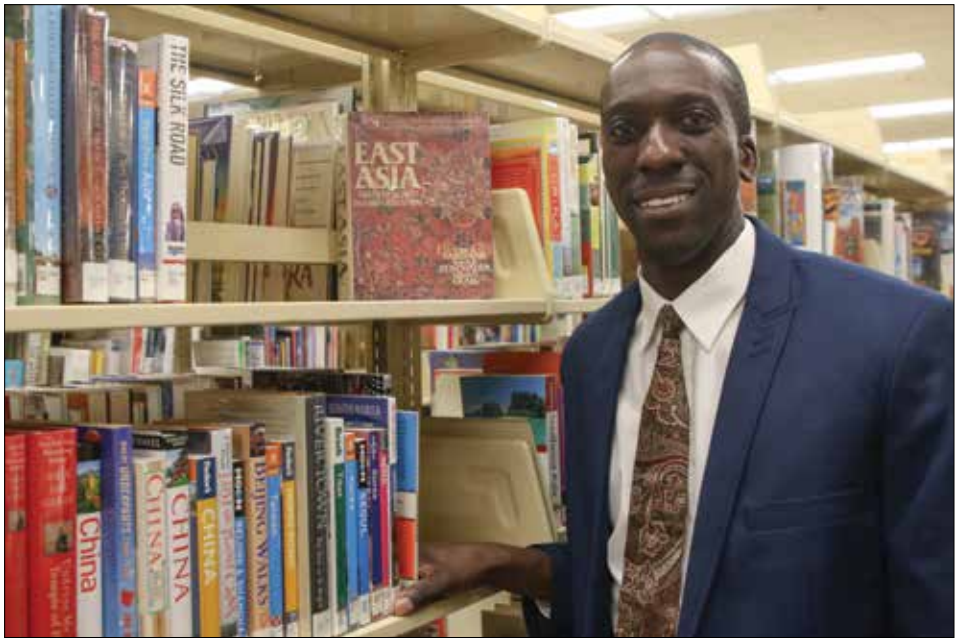
The Special Forces instructors who shared their training and operational experience highlighted the extreme inadequacy of our military's current DUA warfare training program doctrine and training facilities. The reality is that Army doctrine is not changing to meet the rapidly

changing battlefield and enemy tactics. Gone are the days of looking at DUA as terrain to be besieged and cut off. We need to start looking at DUAs as organic entities with three primary systems of organic flows. Water, power, and communications are the primary "flows" through a DUA. Many subsequent systems flow through and from these top three. Control of terrain and freedom of movement through a DUA requires: (1) an understanding of the flow, (2) relationship building with handlers of the flows (be they state or non-state actors); and (3) adaptive thinking.

Civilians on the battlefield (COB) is not a new concept, but in the context of warfare, in DUAs we must look at it differently. Most of the civilian populace will likely be unwilling or unable to evacuate during an intense conflict in a DUA. In cities with millions or tens of millions of potential COBs we must consider how to both protect and leverage the civilian element. Civilians are the formal and informal leaders and control points of the control systems within DUAs.

To control the city, we must control the flows. To control the flows, we must build relationships with the civilians who manage and run those systems. Evaluating this problem set through the legal lens, I considered the potential changes to rules of engagement (ROE) and rules for the use of force (RUF) that may need to be considered when preparing for extended warfare in DUA. One question to explore is, "How does military necessity change with respect to commandeering of civilian property and equipment in DUA?"

CPT Asare: There are three points I took from RLDP-P. First, the importance of pursuing and maintaining a holistic perspective. One question posed by Major General (Retired) Chinn, a senior mentor for our cohort, was, "Do we see things as they are, or do we see things as we are?" This question positively impacted me because in attempting to answer it, I recognized the root of my perspective, to include the resulting paradigm and the limitations I would be susceptible to if I do not challenge my perspectives with another viewpoint. This lesson can be applied to my role as a judge advocate, where I am constantly having to balance multiple priorities and positions.



CPT Benjamin Awuku Asare, a member of Cohort 19-03 of the Regional Leader Development Program's 19-03 Cohort. (Courtesy CPT Asare)

Understanding the perspectives of parties and seeing issues from their point of view assists in effective communication and better results for commanders when they consider strategic options.

Second, the importance of brevity in briefs. When leaders and supervisors are receiving information from subordinates, more often than not, they are more familiar with the information than the briefer. What leaders or supervisor want are clear and concise recommendations as opposed to a laundry list of facts and, even worse, issues without recommended solutions. This lesson learned is important because judge advocates are in the role of advising commands and Soldiers, so the skill of understanding what our audience seeks is critical.

Third, the speed in which countries within the Indo-Pacific region have reached economic and military relevance. From 2002 to 2012, China's economy quadrupled; in that same period, China grew from the world's fifth-largest exporter to the world's largest.[14] China's influence can be felt nearly across the globe, from Africa to Europe, a reality that has only become apparent in the twenty-first century.[15] India, a Major Defense Partner of the United States since 2016, continues to make advancements in their military modernization program with a concerted focus on maritime strategic orientation.

Furthermore, India continues to strengthen their geostrategic position by conducting bilateral naval exercises multiple times throughout the year. "The Indian Navy significantly strengthened its presence of warships in the Indian Ocean region, and carried out a total of thirty-five multilateral and bilateral maritime exercises in [2018]."[16] Learning about China's economic development and India's military modernization is important because it helps in understanding the operational missions of units in INDOPACOM.

CPT Wood: These courses provided me with a solid understanding of the history in the Indo-Pacific, how that history impacts current events, the current national strategies in the Indo-Pacific, and how to operate as a staff officer.

How have you grown professionally from your experience with RLDP?

CPT West: I have increased critical thinking skills and an understanding of strategic interagency military operations.

CPT Greenberg: Regional Leader Development Program has helped me become more knowledgeable in NSL, build connections with Army officers, and learn the thoughts and concerns of other staff sections concerns in military operations.

Members of the 19-03 RLDP cohort. (Courtesy CPT Asare).

CPT Asare: After RLDP-P I am more culturally empathetic with a deeper understanding of country-to-country relationships within the Indo-Pacific region, more confident in my briefing and presentation delivery, and more knowledgeable about Army strategy in INDOPACOM and organizational leadership tools. The RLDP-P exposed me to such a wide variety of learning objectives in different environments. Besides gaining more knowledge about issues facing the Indo-Pacific region, I developed professional relationships with service members across the Joint Force, which may arguably be the most rewarding takeaway from the program.

CPT Wood: The RLDP-P course was extremely useful for my development as an Army officer and leader. As a direct commission officer, my training in military leadership and decision-making was limited. The courses offered and the guidance given by the senior mentors as part of the RLDP-P has greatly increased my understanding of military leadership and has better prepared me to serve as a staff officer and advise commanders. Additionally, I made many friends with the other students, both officers and NCOs. The discussions I had with them helped me better understand how the military operates and how Soldiers think outside of the Judge Advocate General's (JAG) Corps. Consequently, I am now better prepared to interact with non-JAGs and to provide military leadership within my own OSJA. Additionally, RLDP-P sparked my interests in international relations and military and national strategy. As a result, I am enrolled in a Master of Arts program in International Relations, to further my education in this area.

CPT Smitham: Sitting in an overseas NSL position at the time of my RLDP experience, I was able to immediately take back some of the lessons learned in strategic thinking and analysis to my position. In addition to the practical application, the leadership development portion of the program continues to provide sources of self-reflection even eighteen months later, as I find myself serving in a leadership position and strive to continue the self-awareness, self-analysis, and adaptive leadership styles we studied. Additionally, seeking out a development opportunity outside of traditional JAG Corps experiences gave me new contacts and resources I would not have otherwise met, and I think ultimately made me a better and well-rounded staff member to my unit.

Why is it important for judge advocates and army officers to develop regional intelligence?

CPT West: This is a critically important skill to learn because each region has its own unique dynamics that must be intimately understood to maximize the ability of leaders and Soldiers on the ground to tap into, manipulate, and leverage/exploit those dynamics. Failure to understand and leverage these unique region-based dynamics means operational failure, period.

CPT Greenberg: Different regions operate differently. Judge advocates and army officers developing a mastery in a region makes us better prepared for our mission. The three factors I identified in DUAs (people, infrastructure, and the economy) differ vastly throughout different regions. If we spend the time to understand our operational environment better, we will have better solutions to the missions we will face in the future.

CPT Asare: Judge advocates can be detailed to advise commanders on legal issues. At times, our advisory role may touch on social and cultural issues. In developing regional intelligence, judge advocate will need to have an understanding of cultural and social norms, and their second- and third-order effects, to provide well-informed advice to commanders who need to make a strategic decision.

CPT Wood: Judge advocates and officers do not operate in a vacuum; we work in the real world and must take real-world issues into consideration when advising commanders. Additionally, our legal advice should be tailored to accomplish the United States' goals, both from our command and from national strategies. Judge advocates who understand the region in which their command operates are better prepared to offer practical, applicable legal advice that is designed to accomplish the mission. Judge advocates who do not have this knowledge run the risk of offering legal advice that has consequences in the real-world that is counter to our national plan.

CPT Smitham: As lawyers we like to look to source documents, but when operating bilaterally, the answers can't always be found in writing. I spent two years assigned to U.S. Army Japan practicing NSL, and the

learning curve was steep. I would not have been able to accomplish my job without the face-to-face discussions and ongoing dialogues that we had with our bilateral counterparts on a wide array of issues. It often took multiple meetings to come to a common understanding on any given point.

When given the time and opportunity to develop these relationships and build regional intelligence, we can finally advance the mission. If cultural fluency and past assignments to a region aren't taken into consideration, we risk falling into a cycle of new individuals rotating through and never fully developing and advancing the partnerships because they are re-learning lessons of their predecessors. At the same time, those who have served in such assignments have a duty to document and distribute the lessons learned accordingly and to continue to share knowledge even when they move on.

Although I have never been assigned in Korea, many of my colleagues in Japan had previously worked in Korea, and it was a hard paradigm shift for many to realize that two countries in such close proximity could operate in such different ways. Combine that with the broader competing interests in the region, and it's easy to see how complicated the situation becomes. Once you start to develop some competency in understanding a specific region or culture, it becomes clear how far your knowledge can be used. For example, I often was utilized to brief incoming units rotating through for exercises who have only a matter of days to get spun up on the bilateral relationship before [the start of exercise]. More recently, Japan sent a unit to the National Training Center for the first time, and I was able to liaise directly with the observer-controller trainer on the ground to facilitate a discussion on unique constitutional constraints in Japan. Once you develop some understanding of the region, the opportunities to help share the knowledge abound, which only strengthens and eases our efforts as a force.

How can judge advocates increase regional intelligence in their formations to benefit their units?

CPT West: First, understand the specific, unique, and region-based mission requirements of the units they support. Second, study and view those requirements through the operational (primarily) and the administrative legal lens. Third, develop tailor-made operational legal support to help commanders lean forward. Finally, go out to their units and teach these strategies.

CPT Greenberg: Judge advocates will need to reach out to regional local authorities as needed. Already, one of our tasks is to be familiar with local rules, but we should have open channels with local experts. This will allow us to have pinpoint knowledge of how the population will receive an action, instead of just a general sense. We can pass this along to other staff sections. Our role is to look for legality, but also good judgment.

CPT Asare: Judge advocates can create programs and learning opportunities across their formation in an OSJA that enhances regional intelligence. One method is using Leader Development Programs (LDP) that focus on the geographic or functional mission of their assigned command. The LDP can be taught through the Socratic Method by judge advocates not necessarily assigned to an NSL section. One lesson can be the legal assistance attorney providing a presentation on the organizational structure of the combatant command. The next lesson can consist of the Administrative Law Attorney presenting the historical background of nations within the geographic command or how U.S. Transportation Command is addressing cyber defense concerns.

Service members benefit from such a program because they will become developed and knowledgeable about the region or function in which they serve, potentially leading the officer to write and publish a paper on an area of interest. In addition, a formalized LDP would allow senior leaders an opportunity to share any experiences or insights they had in a region or function to help shape a service member's thinking, allowing the service member to speak competently and confidently in the subject matter.

CPT Wood: First, they must increase their own regional intelligence through self-study and through attending programs like the RLDP. Then judge advocates can offer to share this with their formation through LDPs, email updates to their OSJA on strategic news in the region, etc.

CPT Smitham: Being conscious stewards of knowledge can benefit not only your assigned unit, but your successors to your position. The Regionally Aligned Force repository is a wonderful tool for the JAG Corps that only gets better when individuals take time and effort to submit best practices/info papers/lessons learned. I also learned first-hand that sometimes taking the time to craft a concise info paper or one-pager for your fellow staff members could go a long way in cutting through the haze of complicated bilateral issues. These often served as great tools to send as read-aheads to incoming units rotating through for exercises or incoming personnel.

Being conscious stewards of knowledge can benefit not only your assigned unit, but your successors to your position

Finally, don't pigeon-hole yourself into focusing purely on what you perceive to be the legal issues—every team needs someone who is intellectually curious, ready and willing to develop a comprehensive understanding of the political, economic, and historical factors that influence any given bilateral relationship.

Any stories from the program you are willing to share?

CPT Wood: The unique perspectives offered by a judge advocate was appreciated in the RLDP-P. Multiple times, I had instructors, RLDP-P cadre, senior mentors, and other students state that they

appreciated the "legal" input into the discussions. As one example, during Phase 1 there was discussion regarding countries' strategic limitations on the use of force. One student stated that he did not understand why countries should care about limiting the use of force, when force can be used to obtain a goal. I offered some input, which led to a discussion of *jus ad bellum* and how resorting to force without a legal justification has implications on the international relations of the aggressor.

After this discussion, the course instructor, other students, and Major General (Retired) Chinn each told me that they appreciated my comments, and that they helped provide an understanding of the strategic concerns in the region. The unique perspective offered by a judge advocate with some regional expertise appeared to be valued by Soldiers of all ranks, both enlisted and senior leadership.

CPT Asare: The RLDP-P occurred on Oahu, Hawaii. The course curriculum included activities on some of the most scenic and historic parts of the island. One Friday, our class was tasked to hike Koko Head Mountain, a one-and-a-half-mile round trip hike. For anyone who has done this hike, you know this hike is no joke! Our class met up around 5 a.m. on the day of the hike at the base of Koko Head. We suffered and sweated immensely during the hike, but each student climbed and arrived at the summit. At the summit, a student provided a history of the U.S. activity on Koko Head during World War II, allowing us all to reflect. The history lesson was informative and the panoramic view of the island incredible. The shared suffering in climbing Koko Head followed by reaching the summit as a class is one story that will always stick with me.

CPT Smitham: Look for opportunities outside of the norm of typical JAG Corps career development. I got the opportunity to participate in RLDP because I was sitting in our [operations and intelligence briefings], listening to our staff brief that the command needed to send nominees up for this program, and all talk focused on potential candidates in the G3, so I asked if I could submit an application. While a unit's default isn't always to think of the lawyer when it comes to development opportunities, throwing your name in the hat for unique opportunities never hurts!

Conclusion

Regional dynamics and changing operational environments necessitate judge advocates to develop and maintain regional intelligence. Today, China and Russia engage in contentious activities to reshape the international rules-based order; the Middle East continues to pose state and non-state actor challenges, keeping the U.S. Armed Forces engaged; and the complexity and rather novel new battlefield horizon of urban areas and mega-cities posed toward the U.S. military serve as noteworthy dynamics and changes. The RLDP was created for service members (mid-level officers, senior non-commissioned officers, and DA Civilians) in strategic leadership billets with the intent participants can critically think through complex issues and provide leaders with recommendations. Currently, six judge advocates have participated in an RLDP cohort, each judge advocate attested to the importance of regional intelligence across the joint force. As the U.S. Army maintains a global presence, it only makes sense that judge advocates, whose primary mission is to advise commanders, fully understand the regional issues around the world. **TAL**

CPT Asare is currently assigned as an administrative law attorney with the 25th Infantry Division, Schofield Barracks, Hawaii.

Notes

1. Remarks from Major General (Retired) Clarence K.K. Chinn, Commander, U.S. Army South to Regional Leader Development Program–Pacific, Cohort 19-03 (2015-2017).

2. *INDOPACOM Area of Responsibility*, United States Indo-Pacific Command, https://www.pacom.mil/About-USINDOPACOM/USPACOM-Area-of-Responsibility/ (last visited Dec. 27, 2019).

3. National Security Strategy of the United States of America 25 (2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.

4. Philippines v. China, PCA Case Repository, Case No. 2013-10 (2016).

5. *China's Policies on Asia-Pacific Security Cooperation*, Ministry of Foreign Affairs of the People's Republic of China (Jan. 11, 2017), https://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1429771.shtml. China resolutely opposes certain countries' provocations of regional disputes for their selfish interests. China is forced to make necessary responses to the provocative actions which infringe on China's territorial sovereignty and maritime rights and interests, and undermine peace and stability in the South China Sea. No effort to internationalize and judicialize the South China Sea issue will be of any avail for its resolution; it will only make it harder to resolve the issue, and endanger regional peace and stability. *Id.*

6. Joel Wuthnow & Phillip C. Saunders, *Chairman Xi remakes the PLA, in* Chairman Xi remakes the PLA—Assessing Chinese Military Reforms 4 (Philip C. Saunder, et al eds., 2019).

7. *INDOPACOM Area of Responsibility*, United States Indo-Pacific Command, https://www.pacom.mil/About-USINDOPACOM/USPACOM-Area-of-Responsibility/ (last visited Dec. 27, 2019).

8. *The New Realignment Between Russia and the Philippines*, The National Interest (Oct. 25, 2019), https://nationalinterest.org/feature/new-realignment-between-russia-and-philippes-90901.

9. *Army Pilot Program Immerses Troops in Pacific Region,* Army Times (Oct. 8, 2017), https://www.armytimes.com/news/your-army/2017/10/08/army-pilot-program-immerses-troops-in-pacific-region/; *General Robert B. Brown, Commanding General, United States Army Pacific*, Ass'n. of the U.S. Army, https://www.ausa.org/people/gen-robert-b-brown-0 (last visited Mar. 2, 2020).

10. *Army Wargames Shape the Future of Urban Warfare,* U.S. Army (Jan. 3, 2019), https://www.army.mil/article/215731/army_wargames_shape_the_future_of_urban_warfare.

11. "According to the U.S. Army Chief of Staff, Gen. Mark Milley, social scientist predict that by 2050 about 90 percent of Earth's projected population of more than eight billion people will likely live in highly dense, complex urban areas." *Id.*

12. *Army Leader Development Strategy 2013* U.S. Dep't of Army, 7-9 (2013), https://usacac.army.mil/sites/default/files/documents/cal/ALDS5June%202013Record.pdf.

13. A special thank you to all who made this experience possible.

14. *Vaunting the Best, Fearing the Worst*, The Economist (Oct. 27 2012), https://www.economist.com/news/briefing/21565132-china%E2%80%99s-communist-party-preparing-its-ten-yearly-change-leadership-new-team.

15. *Id.*

16. *Significant Steps Towards Modernization of Armed Forces, but Challenges Remain*, The Economic Times (Jan. 6, 2019, 3:32 PM), https://economictimes.indiatimes.com/news/defence/significant-steps-towards-modernization-of-armed-forces-but-challenges-remain/articleshow/67405882.cms.

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Closing Argument

Preparing the JAG Corps for an Uncertain Tomorrow

The Strategic Initiatives Process

Colonel Peter Hayden, Lieutenant Colonel Josh Berry, & Major Justin Barnes

[Phone rings] "Did you see JAGCNet?! TJAG and DJAG approved reimbursement of bar dues—awesome!"[1]

The flurry of Sends, Special Announcements, and JAG Connectors is not (just) the product of the Good Idea Fairy's wand. Rather, it is a consequence of an Army in transition. After more than eighteen years of a counter-insurgency/terrorism fight, the Army is embracing a "new" paradigm. To quote the bard, "the past is prologue."[2] And, more specifically, inter-state strategic competition is back. As the Army prepares to meet that future, so, too, must the Judge Advocate General's (JAG) Corps.

Of course, as Yogi Berra observed, predictions are hard, especially about the future.[3] Yet forecasting remains essential if we are to prepare for an uncertain future. It takes ten or so years to develop a field grade officer, which means that the managers of the JAG Corps in 2030 are (mostly) already serving today. It also means that any policy affecting who we recruit, how we train and educate, and where and when we employ our officers, Soldiers, and Civilian employees is often only fully realized several years after that policy is implemented.

In short, the JAG Corps must prepare now for the challenges and opportunities of tomorrow. This means that the JAG Corps must make decisions today, about tomorrow.

The Judge Advocate General's (TJAG) Strategic Initiatives Process is the JAG Corps's mechanism to deliberately prepare for the coming future. While many in the Corps see its messages, it is important for all to understand the process that generates the decisions and their implementation.

Today's process builds upon the successes of—and lessons learned from—earlier efforts. For instance, Lieutenant General Flora D. Darpino, the thirty-ninth TJAG, instituted TJAG's Strategic Planning Process. Among other things, that process created the position of the Strategic Initiatives Officer within the Office of the Judge Advocate General (OTJAG).[4] Thanks to the efforts of many, it has evolved into its current form, which is reflected in TJAG's Strategic Initiatives Charter and Process.[5]

The Charter forms the Strategic Initiatives Office (SIO) and the Board of Directors (BoD). Overall, the SIO "is responsible for collecting legal service gaps from the field, senior leaders, and OTJAG;

conducting an initial review of the gaps; and shepherding proposed solutions to these gaps through the strategic initiatives process."[6] In other words, based on feedback from leaders, subject-matter experts, and the field, the SIO team identifies gaps between today's capabilities and tomorrow's requirements for legal support. The SIO team then works with the BoD and others throughout the Regiment and Army to develop suitable, feasible, and acceptable plans to fill those gaps.

The BoD itself is the critical mechanism. It is composed of a rotating pool of senior judge advocates from across the active component, Army Reserve, and National Guard, appointed by TJAG or the Deputy Judge Advocate General (DJAG). Composition of the BoD is based on position, representing the corporate body of the JAG Corps, and it brings together our most experienced leaders twice a year to reflect on where we are and to recommend how we get to where we need to be.

The SIO team identifies gaps between today's capabilities and tomorrow's requirements for legal support

The BoD process begins months in advance of its meetings. A variety of means identifies capability gaps, including members of the JAG Corps directly, through their staff judge advocates(SJAs), or even through the Virtual Suggestion Box. Once received, the SIO team conducts an initial analysis to determine whether the proposed topic addresses a known or emerging capability gap and, if the suggestion included a proposed solution, whether it is feasible. Through periodic meetings with the JAG Corps leadership, the SIO refines the list of possible discussion topics, ultimately receiving approval from TJAG and DJAG to further analyze the problem and proposed solutions (if any) to present to the next BoD meeting.

Leading up to the BoD meeting, the SIO works with experts to analyze the proposed problem and identify potential solutions or key facts and assumptions. The experts and SIO team develop concise discussion papers and provide them to the BoD members a few weeks before the meeting. This enables BoD members to review the topics and conduct their own analysis (including sharing with members of their offices), enabling them to arrive at the BoD fully prepared to participate in problem solving. Board of Director members consider each initiative and make recommendations to TJAG and DJAG.

For instance, over the past years, the practice of law within the Army has changed, including new requirements and areas of practice. This led to the conclusion that the JAG Corps needed to develop, systematically, more expertise within its legal functions—something that takes significant resources, including time. As a consequence, the BoD recommended, and TJAG and DJAG approved, initiatives ranging from the expert-and-versatile career model to extended tour lengths to the Military Justice Redesign (MJR).

These initiatives are all designed to further the development of that expertise—but also to maintain the versatility within the regiment, necessary to meet new, unplanned requirements. Indeed, the "hedge" against getting that future wrong is ensuring that our structure remains flexible enough to adapt to the unanticipated.

Board of Director meetings are not just about new ideas. They play a key role in evaluating ongoing efforts. As the process has evolved, the BoD now includes time dedicated to assessing previously-approved initiatives to ensure that those initiatives are implemented as planned, and to help identify any issues, additional required resources, or other refinements. Indeed, an initiative is not complete until it is fully planned, implemented, studied, and, if warranted, refined.

The future may be hard to be predict, but one prediction is certain—the future is coming, one way or another. Any policy is a bet on *a* future: even the policy to continue the status quo is a bet that tomorrow is going to be—in all material respects—like today. That may well be the case, but it also may not. The Strategic Initiatives Process is about deliberately preparing the JAG Corps for that tomorrow, so that each us is *ready* for what we may be called to do. **TAL**

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LTC Berry is currently assigned as Chief, Strategic Plans, at OTJAG.

MAJ Barnes is currently assigned as the Strategic Plans Officer at OTJAG.

Notes

1. TJAG & DJAG Sends, Vol. 40-13 (August 2019 - Bar Dues Reimbursement) (29 Aug. 2019). This is available on the JAGCNet website for authorized users.

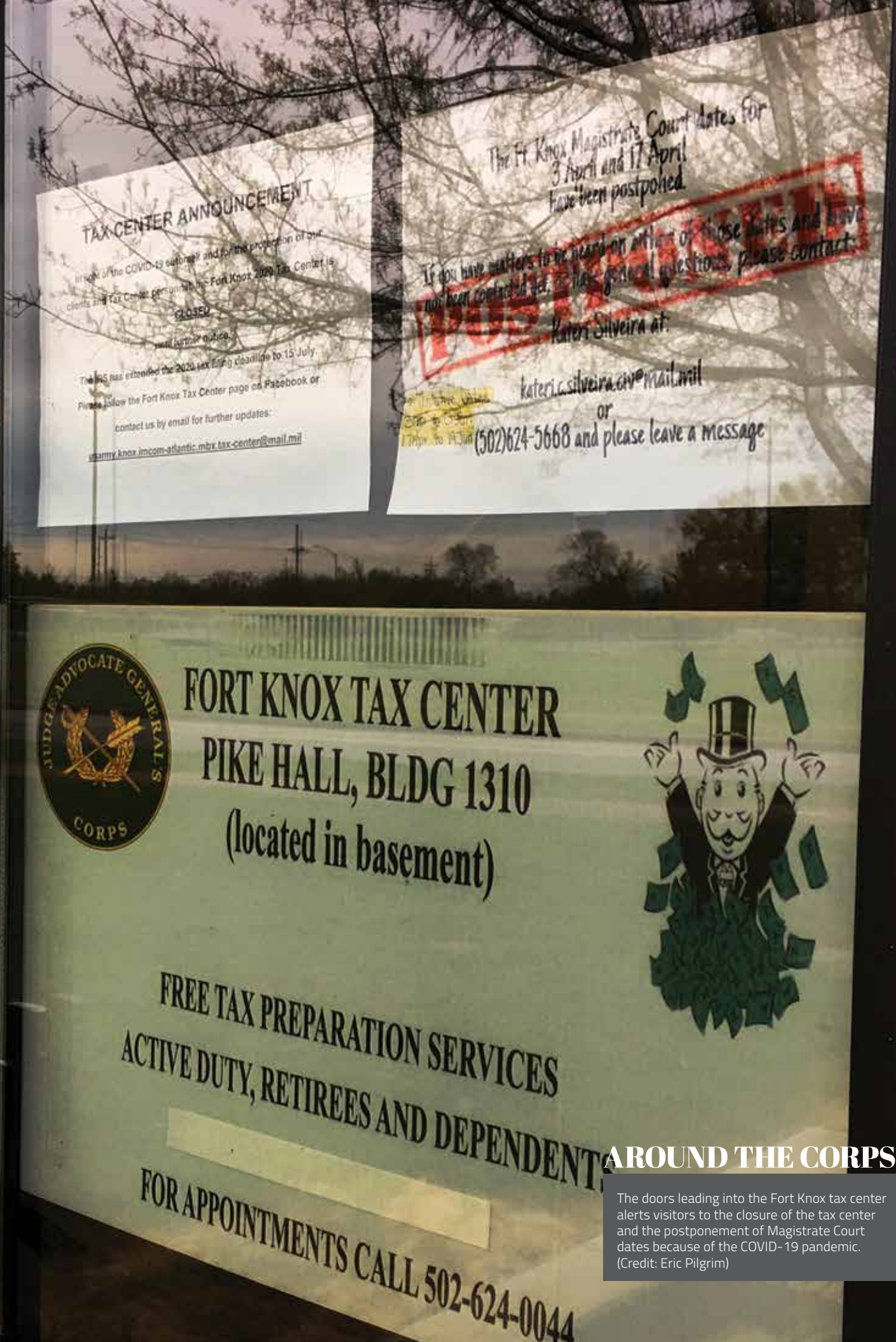
2. William Shakespear, The Tempest, Act 2, Scene I (Cambridge: Harvard Univ. Press 1958) (1611).

3. This quote is often attributed to Lawrence Peter "Yogi" Berra (1925-2015).

4. Policy Memorandum 14-07, The Judge Advocate General, subject: TJAG's Strategic Planning Process (28 Apr. 2014) (copy on file with authors).

5. Memorandum, The Judge Advocate General, subject: The Judge Advocate General's Strategic Initiatives Charter and Process (14 Mar. 2018) (copy on file with authors).

6. *Id.*



AROUND THE CORPS

The doors leading into the Fort Knox tax center alerts visitors to the closure of the tax center and the postponement of Magistrate Court dates because of the COVID-19 pandemic. (Credit: Eric Pilgrim)

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