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Should You Scrub? Can You Mine? The Ethics of Metadata in the Army

Major Brian J. Chapuran[*]

I. Introduction

Metadata is information contained in an electronic document that is not immediately visible to someone viewing the document. Metadata issues can and do frequently arise in the practice of law in the Army. For example, Client *A* visits the legal assistance office to have a separation agreement prepared. The attorney pulls up the last agreement he drafted, saves the new agreement as a new file, and begins work. A few days later, the attorney e-mails Client *A*, attaching the draft separation agreement. Client *A* opens the document and, because metadata is present, Client *A* is able to find the name of Client *B*, for whom the previous separation agreement was drafted. In this example, the previous client was a Soldier in Client *A*'s unit, thus metadata led to a breach of client confidentiality.

Problems involving metadata also arise in the administrative law division. For example, the chief of administrative law drafts an information paper on a sensitive topic. She sends the information paper by e-mail to the other attorneys in the administrative law division for their review and comment. The other attorneys add their comments to the document and e-mail it to the chief. The chief finalizes the information paper. The information paper is later posted on the installation web-site. Unbeknownst to the attorneys, anyone can now download the information paper and view the individual comments made during the drafting process.[1]

These hypothetical scenarios illustrate the dangers of metadata. Metadata can create ethical issues involving confidential information, attorney work-product, and the deliberative process privilege. Confidentiality has been described as "a fundamental aspect of the right of the effective assistance of counsel."[2] It allows the legal community to be effective in helping people solve problems. The concept of confidentiality "not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance."[3] It is difficult or impossible for attorneys serving as legal assistance attorneys or trial defense counsel to fully advise their clients if they do not have all the facts from each client, including facts that are embarrassing or damaging to the client's legal position. Clients are not likely to disclose such information if they believe the attorney may share it with other people. The duty of confidentiality provides reassurance to the client that certain information will be kept secret and will not be disclosed unless the client authorizes it or in certain circumstances when it is required by law.[4]

The concept of attorney work-product and the related deliberative process privilege[5] are also vital to the legal profession. This concept encourages the free and open discussion of legal issues among attorneys tackling a common problem. An administrative law division cannot render a thorough and well-reasoned opinion without the attorneys in the office discussing the issue openly and honestly. Similarly, a trial counsel may find it difficult to fully assess a case or prepare for trial without the opinions of fellow trial counsel, senior trial counsel, or chief of justice regarding the strengths and weaknesses of the case. These discussions may take place orally, by e-mail, or by adding comments to drafts of documents. The law encourages this free and open discussion by protecting the thoughts and opinions of the attorneys under the doctrines of attorney work-product and deliberative process privilege.

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[1] In the area of administrative law, ignorance of the dangers of metadata can also lead to problems when posting documents in a Freedom of Information Act (FOIA) Electronic Reading Room or responding electronically to a FOIA request.

[2] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

[3] U.S. DEPT. OF ARMY, REG. 27-26, RULES OF PROF'L CONDUCT FOR LAWYERS R. 1.6 cmt. (1 May 1992) [hereinafter AR 27-26].

[4] *Id.* R. 1.6.

[5] 5 U.S.C. 552(b)(5) (2006). Exemption 5 to the Freedom of Information Act allows government agencies to exempt from release to the public "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." *Id.* This exemption is commonly referred to at the deliberative process privilege. Unlike attorney work-product, there is no requirement under this exemption that the document be prepared in anticipation of litigation.

The Army lawyer is put in a unique position when it comes to metadata. Army lawyers—Active Duty, Reserve, National Guard, and civilian—are bound by both the Rules for Professional Conduct in Army Regulation (AR) 27-26[6] (Army Rules) and their licensing state's ethical rules.[7] The Army Rules have not been revised since 1992 and therefore do not specifically address metadata.[8] The American Bar Association (ABA) addressed metadata in a 2006 opinion.[9] However, this opinion is based on revisions to the ABA Model Rules[10] made in 2002 which were not adopted by the Army. Only nine jurisdictions have issued ethics opinions on metadata.[11] The Army Judge Advocate General's (JAG) Corps must follow the lead of these jurisdictions and provide guidance to its members on the issue of metadata.

This article defines metadata and how it is created in Microsoft Word. It then discusses the approaches taken by the ABA and the jurisdictions that have issued opinions on metadata.[12] Finally, it offers a proposal for effectively working with metadata in Army legal practice.

II. Metadata 101

Metadata is commonly referred to as "data about data"[13] or "data that provides information about other data."[14] When you view and send a document electronically, you are only seeing, and may think you are only sending, the document visible on the screen. In reality, what is being sent is much more. For example, in terms of paper documents, you believe you are handing over the finished document. What you are really handing over is the entire manila folder containing the work that went into the finished document. The metadata is analogized to the rest of the paperwork in the folder, including the drafts and comments added by other attorneys.[15] A Microsoft Office support document lists the type of information that may be stored in a document as metadata:

> your name, your initials, your company name or organization name, the name of your computer, the name of the network server or hard disk where you saved the document, other file properties and summary information, non-visible portions of embedded OLE [Object Linking and Embedding] objects, the names of previous document authors, document revisions, document versions, template information, hidden text, personalized views, comments.[16]

Some of this information is insignificant and its disclosure does not raise serious concerns. Other types of information, however, raise significant issues with confidentiality, attorney work-product, and deliberative process privilege.

Metadata has many important uses. Microsoft states that the purpose of metadata is to "enhance the editing, viewing, filing, and retrieval of documents."[17] In the second hypothetical at the beginning of this article, metadata can be very useful.

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[6] AR 27-26, *supra* note 3.

[7] *Id.* R. 8.5(f).

[8] AR 27-26, *supra* note 3.

[9] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006).

[10] MODEL RULES OF PROF'L CONDUCT (2008).

[11] *See* Ala. State Bar Office of the Gen. Counsel, Op. No. 2007-02 (2007); Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03 (2007); Ethics Comm. of the Colo. Bar Assoc., Ethics Op. 119 (2008); D.C. Bar, Op. 341 (2007); Fla. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-2 (2006); Me. Prof'l. Ethics Comm., Op. 196 (2008); Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007); N.Y. Comm. on Prof'l Ethics, Op. 749 (2001); N.Y. Comm. on Prof'l Ethics, Op. 782 (2004); Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2007-500 (2007).

[12] Metadata is implicated in the context of the emerging practice of electronic discovery. In that context, attorneys may be required to preserve metadata and provide it to opposing counsel. That aspect of metadata is beyond the scope of this article and will not be addressed. *See generally* Crystal Thorpe, *Metadata: The Dangers of Metadata Compel Issuing Ethical Duties to "Scrub" and Prohibit the "Mining" of Metadata*, 84 N. DAK. L. REV. 257 (2008); Philip J. Favro, *A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata*, 13 B.U. J. SCI. & TECH. L. 1 (2007).

[13] Gerald J. Hoenig, *Lawyers Beware: Metadata Is There*, 18 PROB. & PROP. 51, 51 (Sept./Oct. 2004).

[14] Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/metadata (last visited July 8, 2009). The term metadata is so new that it cannot be found in many hard-copy traditional dictionaries.

[15] David L. Brandon, *The Hidden Perils of Metadata*, LPL ADVISORY (ABA Standing Comm. on Lawyer's Prof'l Liab., Chicago, Ill.), Fall 2006, at 2.

[16] Microsoft Office Online: Find and Remove Metadata (Hidden Information) in Your Legal Documents, http://office.microsoft.com/en-us/help/HA010776461033.aspx (last visited July 8, 2009).

[17] *Id.*

When several attorneys within a military legal office collaborate on a document, metadata, such as added comments and tracked changes, aids that collaborative process. In the context of military justice, metadata can be useful when trial counsel and defense counsel are working to reach an agreement on a stipulation of fact. As both parties make changes, they may use the track changes feature, then e-mail the changed version to the other party, thus allowing the opposing counsel to see each iteration of changes.

Microsoft Word, the primary word processing software used by the Army JAG Corps, stores metadata in a variety of ways. One well-known example is a file's Properties. The "Properties" window may be opened by right-clicking on the file name and selecting Properties from the drop-down menu. A file's properties is the most general example of metadata in a Microsoft Word document. In the Properties window, the viewer is able to determine the document's author and creation date, among other information. This metadata may initially seem innocuous, but it could become more significant later in a case.[18]

In addition to the properties of a file, Microsoft Word also creates metadata through the use of several other functions. "Track Changes" is a useful way for multiple attorneys, or an attorney and support staff, to ensure that edits are incorporated into a document. All of the succeeding changes, however, are stored with the file as metadata. Another useful feature of Microsoft Word is "Fast Saves." Fast Saves "reduces the chance of losing changes to a document" and is useful in the event of hardware failure.[19] Like Track Changes, when Fast Saves is enabled, "deleted information remains hidden within the document."[20] In addition, the "Comments" feature of Microsoft Word allows multiple users to insert comments into a document. Even if those comments are not visible on a final e-mailed document draft, those comments are still embedded in the file as metadata.[21] Functions such as Fast Save, Track Changes, and Comments are all useful to the creator of Microsoft Word documents. However, the additional information saved, changed or added as a comment is all stored with the file and sent to the recipient when a file is e-mailed.

III. Should You Scrub? Current Approaches—Sender

The ethical implications created by the presence of metadata can be divided into two categories: the obligations of an attorney sending electronic documents and the limitations on the attorney receiving electronic documents.[22] The Model Rules and most jurisdictions require an attorney to take reasonable steps to protect confidential information obtained from their clients.[23] The question then becomes whether that requirement to take reasonable steps creates an obligation to remove metadata, often referred to as "scrubbing" a document,[24] anytime a document is sent?

The ABA has not issued a formal opinion regarding the obligations of attorneys to scrub documents for metadata before sending them. However, under the Model Rules' requirement to take reasonable steps to protect confidential information, such a duty could be inferred. Several jurisdictions have specifically addressed the sending attorney's duties in the context of metadata.[25] All of these jurisdictions come to the same conclusion—an attorney has a duty to take reasonable steps to ensure that metadata is removed. What remains unclear from reading the opinions is what constitutes "reasonable steps." The opinions generally state that what is reasonable will vary with the circumstances.[26]

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[18] An example of this problem would be if a chief of military justice sat second-chair in a court-martial and later authored the Staff Judge Advocate Recommendation (SJAR). If the SJAR is e-mailed to the defense counsel, metadata would allow him to discover the author of the SJAR. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(b) (2008).

[19] Toby Brown, *Special Handling: How Paper and Electronic Files Differ*, GPSOLO (ABA General Practice, Solo & Small Firm Division, Chicago, Ill.), Sept. 2004, at 23.

[20] *Id.*

[21] David Hricik, *I Can Tell When You're Telling Lies: Ethics and Embedded Confidential Information*, 30 J. LEGAL PROF. 79, 86 (2005/2006).

[22] *See* discussion *infra* Part IV.

[23] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2008).

[24] *See generally* Campbell C. Steele, *Attorneys Beware: Metadata's Impact on Privilege, Work Product, and the Ethical Rules*, 35 U. MEM. L. REV. 911 (2005); Thorpe, *supra* note 11.

[25] *See, e.g.*, Ala. State Bar Office of the Gen. Counsel, Op. 2007-02 (2007); Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03 (2007); Ethics Comm. of the Colo. Bar. Assoc., Ethics Op. 119 (2008); D.C. Bar Legal Ethics Comm., Op. 341 (2007); Me. Prof'l Ethics Comm., Op. 196 (2008); Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007); N.Y. Comm. on Prof'l Ethics, Op. 782 (2004).

[26] *See, e.g.*, N.Y. Comm. on Prof'l Ethics, Op. 782.

The majority of the opinions addressing the sender's duties set out factors to consider when determining what is reasonable. Alabama set out the following factors: "steps taken by the attorney to prevent the disclosure of metadata, the nature and scope of the metadata revealed, the subject matter of the document, and the intended recipient."[27] Arizona's opinion contains a similar list of factors to consider: "the sensitivity of the information, the potential consequences of its inadvertent disclosure, whether further disclosure is restricted by statute, protective order, or confidentiality agreement, and any special instructions given by the client."[28] New York provides a list of factors:

> the subject matter of the document, whether the document was based on a template used in another matter for another client, whether there have been multiple drafts of the document with comments from multiple sources, whether the client has commented on the document, and the identity of the intended recipients of the document.[29]

Arizona includes as a factor to consider: "any special instructions given by the client."[30] The Arizona opinion goes on to specifically address government lawyers and states that these special instructions "might include the client's informed consent to forego, for financial or other reasons, the acquisition or use of software that is designed to remove metadata . . . ."[31] Based on this language, an Army lawyer licensed in Arizona might be safe not using scrubbing software if there is evidence provided that the Army JAG Corps had considered such software and made an informed decision not to purchase it.

Arizona's opinion is unique in that it goes so far as to say that templates[32] should not be used because of the concern with metadata.[33] Specifically, the opinion states that, "[a] lawyer who prepares a pleading, contract, or other document should use a 'clean' form and not a document that was used for another client."[34] No other jurisdiction has issued an opinion on metadata that includes this caution to refrain from using templates. Given the routine use of templates in the Army, Army lawyers licensed in Arizona should pay special attention to this provision.

Colorado's recent opinion goes even further to impose an obligation on supervisory attorneys. The opinion states that supervisory attorneys have a "duty to make reasonable efforts to make sure that the lawyer's firm has appropriate technology systems in place so that subordinate lawyers and non-lawyer assistants can control the transmission of metadata."[35] Under this rule, an Army lawyer who serves as a Chief of Legal Assistance, for example, would have an obligation to put a policy in place to minimize the risk of inadvertent disclosure through metadata. The jurisdictions addressing metadata all agree that the sender must take "reasonable steps" to protect confidential information. They vary in what factors are used to determine whether the sender has taken "reasonable steps" and some set out additional obligations beyond just taking "reasonable steps."

IV. Can You Mine? Current Approaches—Receiver

Unlike the ethics opinions dealing with the obligations of the sender, no consensus exists among the opinions addressing the obligations of an attorney who receives a document containing metadata. What, if any, constraints a state places on the receiver of an e-mailed document turns on the answers to two questions. First, was the inclusion of the metadata

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[27] Ala. State Bar Office of the Gen. Counsel, Op. 2007-02.

[28] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03.

[29] N.Y. Comm. on Prof'l Ethics, Op. 782.

[30] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03.

[31] *Id.*

[32] A template is a document type in Microsoft Word that creates a copy of itself each time it is opened. Microsoft Office Online: Create a New Template, http://office.microsoft.com/en-us/word/HA100307541033.aspx (last visited July 18, 2009). This allows information that will remain the same to be used on multiple documents. It also commonly refers to a previously drafted document which can be reused by changing certain information for a new client.

[33] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03.

[34] *Id.*

[35] Ethics Comm. of the Colo. Bar. Ass'n, Ethics Op. 119 (2008).

"inadvertent," thus implicating Model Rule 4.4(b),[36] or its state equivalent? Second, does mining for metadata involve deceit or dishonesty implicating Model Rule 8.4(c),[37] or its state equivalent?

A. Mine, Baby, Mine

1. The American Bar Association

The ABA addressed the issue of how to handle metadata in a formal opinion released in 2006.[38] Before analyzing this ABA Opinion on metadata, this paper will briefly review of the history of inadvertent disclosure of confidential information under the ABA Model Rules. Prior to the 2002 amendments to the Model Rules, no Rule 4.4(b) existed, and thus, nothing that specifically addressed a situation where an attorney inadvertently discloses confidential information.[39] In 1992, the ABA released Formal Opinion 92-368 addressing inadvertent disclosure of confidential material under the then-existing Model Rules.[40] The ABA analyzed the situation by considering the importance of the concept of confidentiality, and whether any more important principle would support a rule allowing a receiving attorney to use inadvertently disclosed confidential material.[41] The ABA considered such principles as deterring or punishing carelessness on the part of the sending attorney, encouraging more care on the part of the sending attorney, as well as enforcing the obligation of the receiving attorney to zealously represent his client.[42] The ABA reached the conclusion that none of these principles were important enough to outweigh the fundamental concept of confidentiality.[43] The result was an opinion that the attorney who receives inadvertently sent confidential information must "avoid reviewing the materials, notify sending counsel if sending counsel remains ignorant of the problem and abide by sending counsel's direction as to how to treat the disposition of the confidential materials."[44]

In 2002, the ABA amended the Model Rules and by adding Rule 4.4(b), addressing inadvertent disclosure of materials.[45] Model Rule 4.4(b) is broader than Formal Opinion 92-368 because "it covers all inadvertent transmissions, not just those which involve confidential information."[46] However, the new rule is also narrower in that "the only obligation imposed . . . is notice."[47] Rule 4.4(b) does not require the receiving attorney to refrain from reviewing or using the inadvertently disclosed material.

In its 2006 opinion on metadata, the ABA found that Model Rule 4.4(b) is "the most closely applicable rule" to the situation involving disclosure of information in metadata.[48] Addressing the first relevant question regarding metadata, the ABA concluded that even if the disclosure of metadata were considered inadvertent, "Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information."[49] With respect to the second relevant question regarding metadata, whether mining for it involves deceit or dishonesty, the ABA opinion provides no analysis. Instead, the opinion merely states the conclusion that a lawyer mining for metadata would not violate either Model Rule 8.4(c) (prohibiting deceit

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[36] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.").

[37] *Id.* R. 8.4(c) (stating it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

[38] ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 06-442 (2006).

[39] MODEL RULES OF PROF'L CONDUCT R. 4.4 (2001). The Army has not adopted the 2002 amendments to the Model Rules, and Army Rule 4.4 remains unchanged.

[40] ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 92-368 (1992).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[46] David Hricik, *Mining for Embedded Data: Is It Ethical to Take Advantage of Other People's Failures?*, 8 N.C. J.L. & TECH. 231, 237 (2007).

[47] *Id.*

[48] ABA Standing Comm. on Ethics and Prof'l Resp., Formal Op. 06-442 (2006).

[49] *Id.*

or dishonesty) or 8.4(d) (prohibiting conduct prejudicial to the administration of justice).[50] The ABA concluded, therefore, that it is not a violation of the Model Rules to mine for metadata.[51]

2. Maryland

Like the ABA, the State of Maryland reached the conclusion that mining for metadata does not violate its ethical rules.[52] However, Maryland's rules, like AR 27-26, have not been amended to add Model Rule 4.4(b) dealing with the inadvertent receipt of information.[53] The Maryland opinion is based on the fact that their rules impose no obligation on an attorney who receives inadvertently sent confidential information.[54] Since the receiving attorney is under no obligation to even notify the sender that he has received confidential information, the receiving attorney is not prohibited from reviewing and using the information. The Maryland opinion fails to address the argument that mining is deceitful or dishonest and therefore violates Maryland Rule 8.4(c).[55] Maryland attorneys, therefore, are free to mine for metadata and use whatever information they find, even if it is confidential or attorney work-product.

3. Colorado

In May 2008, the State of Colorado addressed the issue of metadata when it released Formal Opinion 119.[56] This opinion states that if an attorney "knows or reasonably should know that a Sending Lawyer (or non-lawyer) has transmitted metadata that contain Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently."[57] Accordingly, Colorado Rule 4.4(b) dictates the receiver's obligations.[58] Similar to Model Rule 4.4(b), Colorado's Rule 4.4(b) simply requires the receiving attorney to notify the sending attorney.[59] Colorado's Rule 4.4(b) does not prohibit the receiving attorney from continuing to review the information or using it, even if it is confidential.[60]

Colorado concluded that "there is nothing inherently deceitful or surreptitious about searching for metadata."[61] This conclusion stems from the ease of finding some metadata, therefore it is "misleading" to consider looking for it as"mining."[62] As a result, Colorado does not analyze the possibility of mining for metadata as deceitful or dishonest and therefore possibly in violation of Rule 8.4.

B. No Mining Allowed

Five states have disagreed with the ABA and have explicitly prohibited mining for metadata.[63] Florida and Arizona deal with the problem primarily from the standpoint of inadvertently sent documents. New York, Alabama, and Maine, however, base their prohibition primarily on the view that mining is dishonest and deceitful.

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[50] *Id.*

[51] *Id.*

[52] Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007).

[53] MD. LAWYER'S RULES OF PROF'L CONDUCT R. 4.4 (2007).

[54] Md. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007).

[55] MD. LAWYER'S RULES OF PROF'L CONDUCT R. 8.4(c) (2007).

[56] Ethics Comm. of the Colo. Bar Ass'n, Ethics Op. 119 (2008).

[57] *Id.*

[58] COLO. RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *See* Ala. State Bar Office of the Gen. Counsel, Op. 2007-02 (2007); Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03 (2007); Me. Prof'l Ethics Comm., Op. 196 (2008); N.Y. Comm. on Prof'l Ethics, Op. 749 (2001); Fla. State Bar Ass'n Comm. on Ethics, Op. 2007-09 (2007).

1. It Was Inadvertently Sent—Florida and Arizona

Chronologically, Florida was the second licensing authority to issue an opinion on metadata, releasing it in 2006.[64] Florida came to the same conclusion as the state of New York—mining is prohibited[65]—but Florida's legal reasoning was substantially different. Florida approached the issue from the perspective of inadvertently sent documents and relied on its own version of Rule 4.4(b).[66] Florida took the position that any confidential information contained in metadata is to be considered as inadvertently sent by the other attorney.[67] Based on this assumption, Florida concluded that a receiving lawyer is prohibited from trying "to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient."[68]

Although it arguably reached the correct result, Florida's reasoning is flawed. Florida's Rule 4.4(b) is the same as the Model Rule 4.4(b) in that it requires the receiving attorney to simply notify the sender of the inadvertently sent information.[69] Florida's Rule 4.4(b) does not require the receiving attorney to refrain from viewing or using the information, however.[70] Florida's opinion was released just over one month after the ABA interpreted the same rule and reached a different conclusion. This timing raises the question whether Florida considered mining for metadata deceitful and dishonest, but chose not analyze it under Rule 8.4(c).

Arizona's opinion was released in 2007 and also prohibits mining for metadata.[71] Arizona briefly mentioned the premise that lawyers "should refrain from conduct that amounts to an unjustified intrusion into the client-lawyer relationship."[72] In making this assertion, the opinion cited Arizona Ethical Rules 8.4(a)–(d).[73] These rules are similar to Model Rule 8.4(a)–(d) and prohibit, among other things, conduct that involves deceit and dishonesty.[74] However, Arizona did not base its opinion on this reasoning. Arizona went on to discuss the duties of a lawyer who receives a document that is inadvertently sent.[75] The opinion concluded that "if the document as sent contains metadata that reveals confidential or privileged information, it was not sent in the form in which it was intended to be sent."[76] Accordingly, Arizona Ethical Rule 4.4(b),[77] dealing with inadvertently received documents, is applicable. Arizona's version of Rule 4.4(b) goes further than Model Rule 4.4(b)[78] in that it does not require the receiving attorney solely to notify the sender, it also requires the receiving attorney to "maintain the status quo."[79] While not stated expressly, "maintaining the status quo"[80] presumably would prohibit a receiving attorney from reviewing or otherwise using the confidential information contained in the metadata.

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[64] Fla. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-2 (2006).

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Compare* FLA. RULES OF PROF'L CONDUCT R. 4.4(b) (2006), *with* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[70] FLA. RULES OF PROF'L CONDUCT R. 4.4(b) (2006).

[71] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03 (2007).

[72] *Id.*

[73] ARIZ. RULES OF PROF'L CONDUCT R. 8.4(a)-(d) (2004).

[74] *Compare id.*, *with* MODEL RULES OF PROF'L CONDUCT R. 8.4(a)-(d).

[75] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03.

[76] *Id.*; *see also* Hricik, *supra* note 46 (analyzing whether metadata is actually inadvertently disclosed when the sender intended to send the document).

[77] ARIZ. RULES OF PROF'L CONDUCT R. 4.4(b).

[78] *Compare id.*, *with* MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

[79] Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03.

[80] ARIZ. RULES OF PROF'L CONDUCT R. 4.4(b).

2. It Is Dishonest and Deceitful—New York, Alabama, and Maine[81]

New York, the first jurisdiction to tackle the issue of metadata, released its opinion on the subject in 2001,[82] prior to the ABA opinion. New York concluded that "the use of computer technology in the manner described above [mining for metadata] constitutes an impermissible intrusion on the attorney-client relationship in violation of the Code."[83] New York opined that mining for metadata violated Disciplinary Rule 1-102(a)(4), which prohibits a lawyer from "[e]ngaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."[84] This New York Disciplinary Rule is identical to Model Rule 8.4(c)[85] and Army Rule 8.4(c).[86] New York went further than just addressing metadata that contains confidential information. The opinion also stated that mining for metadata that may be protected by "the work-product doctrine or that may otherwise constitute a 'secret' of another lawyer's client would violate the letter and spirit of these *Disciplinary Rules*."[87] New York's opinion emphasized the "strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship."[88] New York concluded that protecting confidentiality was a justified restraint on the "uncontrolled advocacy"[89] of zealous representation.

While New York based its opinion primarily on the conclusion that mining for metadata involves deceit and dishonesty, it also raised the issue of inadvertent disclosure of confidential information.[90] New York's opinion was released prior to the amendments to the Model Rules that added the current Model Rule 4.4(b).[91] New York instead looked to the 1992 ABA Opinion 92-368 addressing inadvertent disclosure.[92] Opinion 92-368 concluded that under the earlier version of the Model Rules, a lawyer who receives inadvertently sent confidential materials should not only notify the sender but also should refrain from examining the materials and abide by the sending lawyer's instructions regarding the material's disposition.[93] Because the current Army Rules virtually mirror the rules the ABA interpreted in Opinion 92-368,[94] New York's opinion is useful to an analysis of metadata under the current Army Rules.

While other jurisdictions have followed New York's lead in addressing the issue, Alabama and, more recently, Maine are the only states to adopt similar reasoning. Alabama's opinion, released in 2007, concluded that "the receiving lawyer also has an obligation to refrain from mining an electronic document."[95] The foundation for Alabama's opinion, like New York's, is that mining for metadata involves conduct that is deceitful or dishonest.[96] Alabama states that "mining metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party."[97]

Maine, the most recent state to address metadata, released Opinion 196 in October 2008.[98] Maine, like Alabama and New York, concluded that mining for metadata is unethical because it is dishonest.[99] Accordingly, the opinion is based on

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[81] North Carolina has released a proposed opinion that follows this rationale and may be next to join this group. *See* N.C. State Bar Ethics Comm., Proposed 2009 Formal Ethics Op. 1 (2009).

[82] N.Y. Comm. on Prof'l Ethics, Op. 749 (2001).

[83] *Id.*

[84] N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY D.R. 1-102(a)(4) (2002).

[85] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

[86] AR 27-26, *supra* note 3, R. 8.4(c).

[87] N.Y. Comm. on Prof'l Ethics, Op. 749.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[92] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

[93] *Id.*

[94] *Id.*

[95] Ala. State Bar Office of the Gen. Counsel, Op. 2007-02 (2007).

[96] *Id.*

[97] *Id.*

[98] Me. Prof'l Ethics Comm., Op. 196 (2008).

Maine's version of Model Rule 8.4(c).[100] Maine went further to conclude that metadata mining is prejudicial to the administration of justice because it "strikes at the foundational principles that protect attorney-client confidences."[101]

The flaw in an opinion based solely on Model Rule 8.4(c),[102] like Alabama's[103] and Maine's,[104] is that it does not address the problem of the accidental discovery of metadata.[105] In some cases, the receiving attorney may not be actively mining for metadata, but may still discover some. For example, consider an attorney who receives a document from opposing counsel and decides to insert comments into the document before sending it to his partner. When the attorney inserts comments, he may uncover hidden, unintentionally sent comments inserted by the sending attorney.[106] This metadata could reveal confidential information or work-product. However, the receiving attorney accidentally discovered the metadata and was not engaging in conduct that could be considered dishonest or deceitful. An opinion that relies solely on Model Rule 8.4(c)[107] fails to adequately address this situation. The failure to provide adequate guidance in these opinions results in a gap in the protection for confidential information which is inadvertently disclosed in metadata and accidentally discovered.

C. Pennsylvania: The Golden Rule Opinion

Pennsylvania issued an opinion on metadata in 2007.[108] Unfortunately, Pennsylvania's opinion does not provide clear guidance and can best be described as "The Golden Rule[109] Opinion." Pennsylvania's rules include a Rule 4.4(b)[110] dealing with receipt of inadvertently sent documents that is identical to the Model Rule.[111] The Pennsylvania opinion seems to treat all metadata as inadvertently sent.[112] However, it also states that none of Pennsylvania's current rules apply to metadata and fails to apply Rule 4.4(b).[113] Instead, the majority of Pennsylvania's opinion discusses the approaches taken by other jurisdictions.[114] The opinion concludes that it would be too difficult to come up with a rule applicable to all situations.[115] Instead, Pennsylvania leaves the decision of whether to mine for metadata up to each individual attorney.[116] The Pennsylvania Bar Association Committee provides factors Pennsylvania attorneys should consider in deciding whether to mine for metadata.[117] These factors include reciprocity and professional courtesy.[118] This leads to the description of Pennsylvania's approach as "The Golden Rule Opinion"—don't mine for metadata if you don't want others mining for yours.

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[99] *Id.*

[100] *See* ME. CODE OF PROF'L CONDUCT R. 3.2(f)(3) (2009).

[101] Me. Prof'l Ethics Comm., Op. 196 (2008).

[102] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

[103] Ala. State Bar Office of the Gen. Counsel, Op. 2007-02 (2007).

[104] Me. Prof'l Ethics Comm., Op. 196.

[105] *See* Bradley H. Leiber, *Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata*, 21 GEO. J. LEGAL ETHICS 893, 901 (2008); Ariz. State Bar Ass'n Comm. on Ethics and Prof'l Responsibility, Formal Op. 07-03 (2007).

[106] *See* Leiber, *supra* note 105, at 901.

[107] MODEL RULES OF PROF'L CONDUCT R. 8.4(c).

[108] Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Resp., Op. 2007-500 (2007).

[109] "Do to others as you would like them to do to you." *Luke* 6:31 (New Living Translation).

[110] PA. DISCIPLINARY RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

[111] MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

[112] Pa. Bar Assoc. Comm. on Legal Ethics and Prof'l Resp., Op. 2007-500.

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

D. A Middle Ground? The District of Columbia Weighs In

The District of Columbia (D.C.) issued an opinion on metadata in 2007[119] that appears to be an attempt to reach a middle ground on the issue.[120] The D.C. opinion requires the receiving attorney to notify the sender and to abide by the sender's instructions "when a receiving lawyer has actual knowledge that the sender inadvertently included metadata in an electronic document."[121] Rule 4.4(b) in D.C. applies to situations where an attorney "knows, before examining the writing, that it has been inadvertently sent."[122] This is unusual, compared with other jurisdictions, in requiring actual knowledge under Rule 4.4(b). Model Rule 4.4(b) sets out a broader rule, applying when the receiver "knows or should know."[123]

The D.C. opinion raises the question of when a receiving attorney will have actual knowledge that material was sent inadvertently and provides two examples. The first scenario occurs when the sender tells the receiver before the receiver reviews the document.[124] The second occurs "when a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included."[125] This second situation illustrates a "should have known" standard, which D.C.'s Rule 4.4(b) does not contain.[126] In either of these situations, the receiving attorney must notify the sender and abide by his instructions on the disposition of the material.[127] The D.C. opinion does not address the issue of whether active mining for metadata violates Rule 8.4(c) by involving deceit or dishonesty. Thus, the D.C. opinion appears to allow active mining, since it is unlikely the receiver would have actual knowledge of the inadvertent disclosure of material prior to mining for metadata. However, a footnote in the opinion states that the D.C. Bar "does not condone a situation in which a lawyer employs a system to mine all incoming electronic documents."[128] The D.C. Bar could have relied on Rules 8.4 and 4.4(b) and established a clear prohibition on mining for metadata. Instead, they attempted to reach a middle ground, resulting in an opinion that is "somewhat circular and difficult to decipher."[129]

E. The Other Jurisdictions

In the jurisdictions that have not addressed metadata, attorneys must look to existing rules and ethics opinions for guidance. Most jurisdictions that have addressed metadata approach it from the perspective of inadvertent disclosure of information.[130] Although not directly on point, the body of law addressing inadvertent disclosure is arguably applicable to metadata and is relied upon by jurisdictions that have addressed metadata.[131] While the sending attorney did not inadvertently disclose the document, the metadata was inadvertently disclosed.[132] If a jurisdiction has not released an opinion on metadata, an attorney should look to his jurisdiction's treatment of inadvertent disclosure of information.

Jurisdictions generally fall into four categories regarding inadvertent disclosure of information. The first are those that have adopted Model Rule 4.4(b).[133] These jurisdictions impose an obligation on the receiving attorney to notify the sender of

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[119] D.C. Bar Legal Ethics Comm., Op. 341 (2007).

[120] Leiber, *supra* note 105, at 905.

[121] D.C. Bar Legal Ethics Comm. Op. 341.

[122] D.C. RULES OF PROF'L CONDUCT R. 4.4(b) (2002).

[123] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[124] D.C. Bar Legal Ethics Comm. Op. 341.

[125] *Id.*

[126] D.C. RULES OF PROF'L CONDUCT R. 4.4(b).

[127] D.C. Bar Legal Ethics Comm. Op. 341.

[128] *Id.*

[129] Leiber, *supra* note 105, at 907.

[130] *See* discussion *infra* Part IV. *But see* N.C. State Bar Ethics Comm., Proposed 2009 Formal Ethics Op. 1 (2009) (taking the position that Rule 4.4(b) is not applicable because it applies to writings that were never intended for the receiving attorney).

[131] *See* discussion *infra* Parts IV.A, IV.B, IV.D.

[132] Hricik, *supra* note 21, at 99.

[133] Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 783 (2006).

the inadvertently disclosed information,[134] but do not set out an obligation to refrain from reviewing the document or using the inadvertently disclosed information. Some of these jurisdictions have modified Model Rule 4.4(b) to impose obligations to stop reading the document or to return the document.[135] The second group adopt the predecessor to Model Rule 4.4(b), ABA Opinion 92-368.[136] These jurisdictions require the receiving attorney to notify the sender, stop reviewing the document, and follow the sender's instructions on disposition of the document.[137] The third category are jurisdictions that have not specifically addressed the issue of inadvertent disclosure of information.[138] In these jurisdictions, the receiving attorney is left to make a judgment call concerning his response to receiving the information. Finally, some jurisdictions have taken completely different approaches.[139] For example, Massachusetts has said that the receiving attorney must reject the sender's request to return the document in order to zealously represent the receiving attorney's client.[140]

A jurisdiction's position on inadvertent disclosure of information and the receiving attorney's duties will provide guidance to an attorney who accidentally discovers metadata that is confidential or work product. However, these opinions do not provide much guidance to an attorney considering engaging in active mining for metadata. Those attorneys are left to determine whether their jurisdiction is likely to consider such actions dishonest and deceitful and therefore in violation of Model Rule 8.4(c)[141] or its equivalent.

V. Proposal for Army Action

The daily use of word processing software and frequent electronic mailing of documents in the Army requires the Army JAG Corps to address the issues associated with metadata. The scope of the metadata problem is difficult to determine because individuals may privately obtain and use confidential information without the knowledge of the party sending the document. However, the importance of the concepts of confidentiality, attorney work product, the deliberative process privilege; the threat posed by metadata; and the disagreements among the jurisdictions that have addressed the issue, show that a response from the Army JAG Corps is necessary. This response should include an opinion specifically addressing metadata under AR 27-26, a follow-on revision of AR 27-26, the procurement of commercial metadata scrubbing software, and training for all legal personnel on metadata.

A. Issue an Opinion on Metadata in the Army

The first step in addressing the issue of metadata in the Army JAG Corps should be the issuance of an opinion addressing metadata under AR 27-26. The Army Rules "govern the conduct of the lawyer in the performance of the lawyer's official responsibilities."[142] Lawyers subject to the Army Rules are "also subject to the rules promulgated by their licensing authority or authorities."[143] The metadata rule proposed in this article is equally or more restrictive than any state licensing authority that has addressed the topic. Therefore, an Army lawyer following the Army Rules would not be in danger of violating state ethics rules.

1. Require Senders to Scrub Documents

The Army opinion should go further than just requiring attorneys to take "reasonable steps" to protect client confidences and require attorneys to scrub documents for metadata. Army lawyers should scrub documents prior to sending them

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[134] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[135] *See*, *e.g.*, ARIZ. RULES OF PROF'L CONDUCT R. 4.4(b) (2004); LA. RULES OF PROF'L CONDUCT R. 4.4(b) (2006); N. J. RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[136] Perlman, *supra* note 133, at 783.

[137] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

[138] Perlman, *supra* note 133, at 783.

[139] *Id.*

[140] Mass. Bar Ass'n, Op. 99-4 (1999).

[141] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2008).

[142] *Id.* R 8.5(f)(1).

[143] *Id.* R. 8.5(f).

electronically outside the organization or to anyone not representing the same client as the sending attorney.[144] The opinion should also require Army lawyers to scrub documents posted to any internet site, including an office website or JAGCNet. The ABA and the jurisdictions reaching a similar conclusion have based their opinions on the obligation of attorneys to take reasonable steps to protect confidential information.[145] The comments to Model Rule 1.6 explicitly includes this obligation by stating "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[146] While the comments to Army Rule 1.6 do not contain identical language, the requirement to take reasonable steps to protect client information is implied. The comments in AR 27-26 discuss measures Army lawyers should take to protect client confidences, including having private offices and controlling access to automated data processing systems or equipment.[147] This discussion of measures that should be taken to ensure confidentiality implies an obligation to take reasonable steps to protect client confidences.

The ABA and the jurisdictions that have addressed metadata have not imposed an affirmative obligation to scrub documents for metadata. However, they uniformly require the sending attorney to take reasonable precautions to prevent the disclosure of confidential information through metadata.[148] Rather than restating this obligation and setting out factors to determine whether the attorney took reasonable steps, the Army should impose a rule that requires scrubbing documents. Such a rule would reiterate the important role that confidentiality plays in the legal profession, especially in the realm of Legal Assistance and Trial Defense Service. With advances in technology and commercially available software, such a rule is not unreasonable and could be implemented at a reasonable cost to the Government.

Army lawyers have several methods available to scrub documents prior to sending them. One option is to manually disable metadata through the word processing software, which Microsoft Word allows users to do.[149] Another option available to scrub a document is to print the document and then send it through a digital sender. A digital sender creates an image of the document that is opened with Adobe Acrobat. Digital senders are available to most Army lawyers, even in a deployed environment. Finally, Army lawyers can use commercial software that scrubs documents when they are attached to e-mail messages.

An Army opinion requiring that documents be scrubbed of metadata is preferable for several reasons. This requirement eliminates the need to analyze the factors set out in the ABA and state opinions. The requirement allows Army lawyers to know they have acted reasonably. In the event confidential metadata were still sent, a jurisdictional licensing authority would be unlikely to substantiate an ethical violation because the attorney took reasonable steps to prevent the disclosure. Finally, such an opinion provides the ultimate protection for the important concept of confidentiality by ensuring that all Army lawyers are using the best measures available to prevent disclosure of confidential information in metadata.

2. Prohibit the Mining of Metadata

The Army opinion should clearly prohibit mining for metadata as well as reviewing or using inadvertently discovered metadata. This course of action is the only result that gives the concepts of confidentiality, attorney work product, and the deliberative process privilege the protection they deserve. In addition, this approach promotes a legal profession that encourages integrity and advances the public image of attorneys. Allowing or sanctioning mining for metadata reinforces the public image of attorneys as dishonest and determined to do whatever it takes to see that their side wins rather than working to achieve justice.

However, AR 27-26, as currently stated, presents some issues with an Army opinion that prohibits mining for metadata. The best approach would be to treat mining for metadata as dishonest and deceitful, as New York,[150] Alabama,[151] and

[144] For example, a trial counsel sending a proposed stipulation of fact to his chief of military justice would not be required to scrub the document, but would be required to scrub it before sending it to defense counsel.

[145] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 (2008); ARIZ. RULES OF PROF'L CONDUCT R. 1.6 cmt. 19 &20 (2004); N.C. RULES OF PROF'L CONDUCT R. 1.6 cmt. 17 &18 (2008).

[146] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 17.

[147] AR 27-26, *supra* note 3, R. 1.6 cmt.

[148] *See* discussion *infra* Part III.

[149] *See* Lieutenant Colonel Charlotte R. Herring, Judge Advocate's IT Survival Guide, Tip #10—Hidden metadata and what to do with it! (n.d.) (attached at Appendix B).

[150] N.Y. Comm. on Prof'l Ethics, Op. 749 (2001).

Maine[152] do. If mining for metadata is considered dishonest and deceitful, it would violate Army Rule 8.4(c).[153] This rationale makes sense because mining for metadata is similar to an attorney going through another attorney's briefcase while the first attorney is briefly called away from a meeting.[154] You cannot conclude anything but that this conduct is dishonest and deceitful.

The more difficult problem for the Army Rules is their application to the issue of accidental discovery of metadata. As discussed below, AR 27-26 should be revised to include a Rule 4.4(b). Until this is done, the rules still provide a basis for imposing an obligation on a receiving attorney to refrain from reviewing or using inadvertently discovered metadata. Because of the importance of the concepts of confidentiality, attorney work product, and the deliberative process privilege, reviewing and using inadvertently discovered metadata could be determined to be prejudicial to the administration of justice and therefore violate Army Rule 8.4(d).[155] Alternatively, the Army could adopt the rationale of ABA Opinion 92-368,[156] since that opinion interpreted the same rules that are found in AR 27-26.[157] An opinion that prohibits mining for metadata, as well as prohibiting the reviewing or using of inadvertently discovered metadata, would best serve the Army legal community.

B. Revise Army Regulation 27-26

The second step the Army JAG Corps should take to effectively address the handling of metadata is to revise AR 27-26. The legal profession has changed a great deal since 1992, when AR 27-26 was last updated.[158] One of the primary changes has been the increased use of technology. Although no Army regulation could be updated frequently enough to keep pace with technology, it is time for AR 27-26 to be revised. Chief among the issues that should be addressed are two that the issue of metadata raises. First is the absence of any explicit requirement in Rule 1.6 or its comments for an attorney to exercise reasonable care to protect confidential information, as discussed earlier.

The second issue that metadata raises is the lack of a Rule 4.4(b) that deals with receipt of inadvertently sent information. Not only does this rule need to be added, but the rule should also be broader in scope than Model Rule 4.4(b).[159] Model Rule 4.4(b) only requires an attorney receiving an inadvertently sent document to notify the sender.[160] To truly protect confidentiality and illustrate its importance in the legal profession, Rule 4.4(b) should prohibit the receiving attorney from further reviewing the document or from any use of the material that was inadvertently disclosed.[161] This modification would not only better address the handling of metadata, but also provide improved protection for confidential information in whatever format it may be sent.

C. Procure Commercial Software

As a third step, the Army JAG Corps should procure commercial metadata scrubbing software. This software would facilitate the requirement to scrub documents for metadata. Although Microsoft Word users have the ability to disable metadata, the process must be done for each document. Mandating document scrubbing and training in this procedure may make the practice second nature, but a better way to ensure documents are scrubbed is through the use of commercial metadata scrubbing software. Several versions of this software are available that prevent a user from sending an unscrubbed document.[162] The software should be set up to prompt the sender to scrub any document attached to an e-mail. If the e-mail

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[151] Ala. State Bar Office of the Gen. Counsel, Op. 2007-02 (2007).

[152] Me. Prof'l. Ethics Comm., Op. 196 (2008).

[153] AR 27-26, *supra* note 3, R. 8.4(c).

[154] *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

[155] AR 27-26, *supra* note 3, R. 8.4(d).

[156] ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

[157] AR 27-26, *supra* note 3.

[158] *Id.*

[159] MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2008).

[160] *Id.*

[161] *See, e.g.*, ME. RULES OF PROF'L CONDUCT R 4.4(b) (effective Aug. 1, 2009).

[162] Commercial software being considered by the Army JAG Corps includes Esquire Innovations, Payne's Metadata Assistant, and iScrub. Telephone Interview with Erin Chisman, Info. Tech. Division, Office of The Judge Advocate General, U.S. Army, in Charlottesville, Va. (18 Dec. 08).

is being sent internally to someone representing the same client, the sender can choose not to scrub the document. Large law firms have recognized the problem of metadata and use this type of software to address the problem.[163] The Army JAG Corps, one of the largest law firms in the nation, should follow suit.

D. Institute a Training Requirement

Finally, the Army JAG Corps should require mandatory training. Many judge advocates may be unaware of metadata and the dangers it poses.[164] To address this lack of understanding, the Army JAG Corps should institute a requirement that all personnel—judge advocates, Department of the Army civilian attorneys, and paralegals—be trained on the issues associated with metadata. The Judge Advocate General's Legal Center and School could provide this training during the Basic and Graduate Courses, the Basic and Advanced Non-Commissioned Officer Courses, as well as the short courses. The training could also be accomplished during the Trial Counsel and Defense Counsel Assistance Program seminars. Finally, internal office professional development programs could cover the issue. Whatever the method, Army JAG Corps personnel need to be more aware of the implications of metadata, be trained on how to properly handle it, and be aware of their licensing jurisdiction's rules.[165]

VI. Conclusion

Recall the scenario, discussed earlier,[166] where two opposing lawyers are in a meeting and one attorney is briefly called away. While he is gone, the other attorney rifles through his briefcase looking for confidential information or attorney work product that could give him an advantage in the case.[167] All jurisdictions would agree that this behavior violated their ethical rules, yet this is akin to what happens when an attorney receives a document electronically and mines the document for metadata. Several jurisdictions have failed to give the concepts of confidentiality, attorney work product, and the deliberative process privilege the protection they deserve by improperly concluding that this conduct does not violate ethical rules. The Army needs to address this problem by taking a firm stand to protect confidentiality, attorney work product, and the deliberative process privilege, as well as to uphold the integrity of our profession. In the meantime, judge advocates must be attentive to the dangers of metadata and should take precautions to avoid the inadvertent transfer of sensitive information. Judge advocates should, at a minimum, familiarize themselves with the concept of metadata and should take prudent steps, including the scrubbing of documents, to protect client confidences and internal deliberations from undue disclosure.

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[163] E-mail from Jeff Chapuran, Partner, Stoll, Kennon & Ogden, Attorneys at Law, Lexington, Ky., to the author (Oct. 8, 2008, 11:14 EST) (on file with author); e-mail from Steve Barham, Partner, Chambliss, Bahner & Stoephl, Attorneys at Law, Chattanooga, Tenn., to the author (Dec. 19, 2008, 11:31 EST) (on file with author).

[164] Prior to writing this article, the author did not appreciate the full scope of the problem. Although familiar with the ability to right-click on a file name and view the file's properties, the author did not have a full grasp of what could be uncovered by mining for metadata. Nor did the author understand the measures that could be taken to scrub documents. The author was not alone in this level of understanding, as many other judge advocates he talked to responded with blank stares when he told them the topic of this article. This ignorance does not appear to be unique to the Army JAG Corps. In a 2006 article, Sharon Nelson and John Simek indicated that when they lecture attorneys on the topic, "about half of the average audience has no idea what metadata is." Sharon D. Nelson & John W. Simek, *Metadata: What You Can't See CAN Hurt You*, LAW PRACTICE (ABA Law Practice Mgmt. Section, Chicago, Ill.), Mar. 2006, at 28.

[165] Several jurisdictions address training in their opinions on metadata. *See, e.g.*, N.Y. Comm. on Prof'l Ethics, Op. 782 (2004) (indicating that attorneys must "stay abreast of technological advances"); Ethics Comm. of the Colo. Bar Assoc., Ethics Op. 119 (2008) (stating that attorneys "may not limit the duty [to exercise reasonable care in avoiding sending metadata] by remaining ignorant of technology relating to metadata."); Me. Prof'l Ethics Comm., Op. 196 (2008) (stating it is not reasonable "for an attorney today to be ignorant of the standard features and capabilities of word processing and other software used by that attorney, including their reasonably known capacity for transmitting certain types of data that may be confidential").

[166] *See* discussion *supra* Part V.A.2.

[167] *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).

Appendix A

State Bar Ethics Opinions on Metadata

Note—this information is current as of 23 February 2009 and was obtained by conducting searches on both Lexis and Westlaw for "metadata" in each state's ethics opinions.

State	Opinion #	Date	Summary
Alabama	2007-02	3/14/07	Sender—obligation to take reasonable steps to avoid disclosure of metadata; what is reasonable will depend on circumstances. Receiver—mining is a violation of rules, except in electronic discovery as directed by a court.
Alaska	None found		
Arizona	07-03	11/07	Sender—must take reasonable steps to prevent disclosure; what is reasonable will depend on circumstances; specifically states that you should not use templates. Receiver—may not take measures to intentionally find metadata. If some metadata is found inadvertently and knows/should know it is confidential, they must leave it alone and notify sender.
Arkansas	None found		
California	2007-174		Opinion address releasing electronic copies of records to former clients but does say when doing so an attorney has a duty to take reasonable measures to ensure no metadata containing information from another client is on the files.
Colorado	119	5/17/08	Sender—has a duty to exercise reasonable care to guard against disclosure. Receiver—can search and review but if finds metadata and knows or should know it was inadvertent, must promptly notify sender.
Connecticut	None found		
Delaware	None found		
District of Columbia	341	9/07	Sender—must take reasonable steps to avoid sending. Mining—prohibited only when attorney has actual knowledge that metadata was inadvertently sent.
Florida	06-2	9/15/06	Sender—must take reasonable steps to prevent disclosure. Receiver—prohibits mining because it is dishonest and deceitful.
Georgia	None found		
Hawaii	None found		
Idaho	None found		
Illinois	None found		
Indiana	None found		
Iowa	None found		
Kansas	None found		
Kentucky	None found		
Louisiana	None found		
Maine	Opinion 196	10/21/08	Sender—must take reasonable steps to avoid transmitting metadata. Receiver—prohibits mining as dishonest and prejudicial to the administration of justice.
Maryland	2007-09		Sender—must take reasonable measures to prevent disclosure. Receiver—no prohibition on mining based on Maryland not having added 4.4(b) to its rules.
Massachusetts.	None found		
Michigan	None found		
Minnesota	None found		
Mississippi	None found		
Missouri	None found		
Montana	None found		

Nebraska	None found		
Nevada	None found		
New Hampshire	None found		
New Jersey	None found		
New Mexico	None found		
New York	Opinion 782 and 749	12/8/04 and 12/14/01	Sender—must exercise reasonable care to prevent disclosure. Receiver—cannot use technology to discover metadata.
North Carolina	2009 Proposed Formal Opinion 1	1/22/2009	A proposed formal opinion was released in Jan 2009. The proposed opinion requires senders to exercise reasonable care and prohibits the mining of metadata.
North Dakota	None found		
Ohio	None found		
Oklahoma	None found		
Oregon	None found		
Pennsylvania	2007-500	2007	No explicit rule on mining—up to each individual attorney based on their judgment and the facts. Factors to consider include: nature of the info received, how and from whom received, attorney-client privilege and work product rules, common sense, reciprocity, and professional courtesy.
Rhode Island	None found		
South Carolina	None found		
South Dakota	None found		
Tennesse	None found		
Texas	None found		
Utah	None found		
Vermont	None found		
Virginia	None found		
Wash.	None found		
West Virginia	None found		
Wisconsin	None found		
Wyoming	None found		

Appendix B

Tip #10 - Hidden metadata and what to do with it!

Metadata is information on who created the file, when it was created/modified/accessed, what drive information was stored on, and even printed. Obviously, in our profession, this information may be confidential, or even privileged. Is there any way to stop this information from being forwarded with your Word/Powerpoint/and Excel documents? YES! In fact, it's not just text and office files. Even DVD's and camera's add their serial number in their files. This information can then be cross referenced with warranty cards to find owners or scanned on MySpace or Flickr by using the EXIF (image file format used by digital cameras) metadata on the files.

First of all, go to "My Documents." Open any document of your choice. Click on "File" menu, and chose "Properties." This is the information that I am talking about - this is metadata. More likely than not, you are looking at your name, or if it is a document someone else created, their name. But wait a minute -- it's nobody's name you recognize! Oh, then the person who sent it to you did not create it. You can look and see when it was created, if it was modified, and when. Obviously, this information may be important in many instances.

Do we as an Army agency want to forward that information on to a recipient? No. For security purposes, less is more. Therefore, what is the first step toward not forwarding metadata? Change your settings in Word! And once you change them in Word, it applies to other Office programs, as well.

If you are using Word 2003, open a new document. Click on "Tools," then "Options," and last, "Security." Under "Privacy Options," click on "Remove personal information from file properties on save," "Warn before printing, saving, or sending a file that contains tracked changes or comments," and "Store random number to improve merge accuracy." Regretfully, however, you have to do this for EVERY document you generate as the "Remove personal information from file properties on save" cannot be done to the Word template from your computer.

Also, the settings differences between Word 2003 & 2007 is substantial. To get to those same settings in Word 2007, click on the "Office" button (upper right hand corner of the screen) then the "Word Options" button. Choose "Trust Center" and then click on the "Trust Center Settings" button (lower right). Once in the settings box, select “Privacy Options” then under the "Document Specific Settings" the settings discussed above will be in that group. You will need to do this for every document you generate, just like in Word 2003.

This is just one step in the effort to protect JAGC metadata. Stand by as ITD investigates more ways to protect our information when we create it!

Charlotte R. Herring
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Chief, Information Technology Division

A Specialized Society: Speech Offenses in the Military

Major Michael C. Friess[*]

"The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[1]

I. Introduction

Most Americans believe that they have the right to speak whatever words they choose, both publicly and privately. After all, the United States is a "free country," and Americans are taught that the First Amendment to the Constitution guarantees their right to free speech.[2] From political rallies to pornographic magazines, from political talk-shows to performance art, and from private e-mails to barroom debates, Americans exercise their right to express themselves without fear of persecution from the Government. This basic freedom is the bedrock of our democracy.[3]

This right is not, however, without limits. What happens when the exercise of a citizen's free speech rights puts others at risk? If the law states you cannot shout "Fire!" in a crowded theater,[4] what does the law say about statements that put the nation at risk by weakening the military? Do Soldiers, Sailors, Airmen, and Marines have the same rights and freedoms as ordinary citizens? Does the Constitution, which servicemembers are sworn to defend, apply to them in the way it does to civilians? For example, can a white Soldier publically state racist views when he has to work, train, and potentially fight alongside African-American teammates?[5] Would the hateful comments impair the unit's ability to accomplish its mission?

The First Amendment does apply to servicemembers.[6] The protection of a citizen's right to free speech does not, however, apply with equal scope or force to a member of the armed forces.[7] Some statements that are ordinarily protected in the civilian context are forbidden in the military. Speech by a servicemember that interferes with the accomplishment of the mission or decreases responsiveness to command poses a concrete and direct threat to the national security of the United States.[8] These statements, therefore, are not protected by the First Amendment, and they can and should be prosecuted to maintain an effective fighting force.[9]

Now more than ever military prosecutors need to be sensitive to this distinction and recognize the standards by which speech is judged in the "specialized society"[10] of the military. There have been few times in the nation's history when speech

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[1] Parker v. Levy, 417 U.S. 733, 744 (1974) (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

[2] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[3] United States v. Brown, 45 M.J. 389 (C.A.A.F. 1996) ("The right to express ideas is essential to a democratic government.") (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)); Chaplinsky v. New Hampshire, 315 U.S. 568, 570–71 (1942) ("Freedom of speech . . . [is] among the fundamental personal rights and liberties which are protected . . . from invasion by state action.").

[4] Schenck v. United States, 249 U.S. 47, 52 (1919).

[5] United States v. Wilcox, 66 M.J. 442, 445–46 (C.A.A.F. 2008).

[6] *Brown*, 45 M.J. at 395 ("Both military servicemembers and civilians have the right to criticize the government and to express ideas to influence the body politic.").

[7] *Wilcox*, 66 M.J. at 446 ("The sweep of this protection is less comprehensive in the military context, given the different character of the military community and mission." (citing Parker v. Levy, 417 U.S. 733, 758 (1974); United States v. Priest, 45 C.M.R. 338, 344-346 (C.M.A. 1972); United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970)).

[8] *See Priest*, 45 C.M.R.. at 340 ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." (citing *Gray*, 42 C.M.R. at 258)).

[9] *Id.*

[10] *Parker*, 417 U.S. at 743.

issues were more relevant to the military than they are right now. Communication technology is at an all-time high.[11] Large portions of the American public disagree with a military presence in Iraq and Afghanistan, and politics in America are as divisive as ever.[12] Racial, ethnic, economic, and social issues continue to divide the country.

These sometimes incendiary issues motivate people from all walks of life to speak out, publicly and privately; military personnel are no different. Servicemembers have similar backgrounds, biases, and opinions as the general public. They come from the same families, go to the same schools, and watch the same television programs. The men and women in uniform are not immune to trends in public opinion, and many speak out about their beliefs.[13] It is not the motivation for speaking nor the content of the speech that differentiates the military speaker from the civilian, but rather the effect that speech might have. When the statements of a servicemember undermine the mission, the military has an obligation to stop it.

This article will first provide an overview of the seminal Supreme Court and military court cases regarding speech decided over the past century. The focus will be on those cases involving Article 134, the General Article, of the Uniform Code of Military Justice (UMCJ). Second, the article will examine the Court of Appeals for the Armed Forces' (CAAF) most recent test for military speech offenses as articulated in *United States v. Wilcox*.[14] Third, the article will identify those situations when the military can regulate speech for the sake of mission accomplishment or good order and discipline. Finally, it will provide helpful practice tips for trying speech cases in the military.

II. Review of the Law of Free Speech

The First Amendment to the Constitution reads in part, "Congress shall make no law . . . abridging the freedom of speech . . . [or] to petition the Government for a redress of grievances."[15] While this language appears clear and unqualified, the Supreme Court has repeatedly held that the protections afforded are not absolute.[16] In *Schenck v. United States*, the Court upheld the convictions of two men who circulated a leaflet advising young men to resist conscription during World War I.[17] Justice Oliver Wendell Holmes, writing for a unanimous Court, stated, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[18]

The Supreme Court has also held that the protections of the First Amendment may be secondary to the greater public good. In *Chaplinsky v. New Hampshire*, the Court unanimously upheld a statute outlawing the use of "fighting words," or those statements likely to "incite an immediate breach of peace."[19] In *Roth v. United States*, the Court approved prohibitions

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[11] *See, e.g.*, Pew Internet & American Life Project, Daily Internet Activities, 2000–2009, http://www.pewinternet.org/Static-Pages/Trend-Data/Daily-Internet-Activities-20002009.aspx (last visited Aug. 24, 2009).

[12] *E.g.*, Sharp Differences in Partisan Views of Economic Problems (June 26, 2009), http://www.gallup.com/poll/121262/Sharp-Differences-Partisan-Views-Economic-Problems.aspx; Constituents Divided, Highly Partisan on Healthcare Reform (Aug. 11, 2009), http://www.gallup.com/poll/122234/Constituents-Divided-Highly-Partisan-Healthcare-Reform.aspx; Partisan Politics (Aug. 14, 2009), http://www.rasmussenreports.com/public_content/politics/mood_of_america/partisan_politics.

[13] *See, e.g.*, Colby C. Buzzell, Letter to the Editor, *Return to Sender—Iraq Veteran Gets the Call Again*, S.F. CHRON., May 8, 2008, at B7 (Letter to the Editor from a disgruntled Army reservist who does not want to return to Iraq); Acute Politics, http://acutepolitics.blogspot.com (last visited Mar. 11, 2008) (blog from a U.S. Army Soldier in Iraq); ROBERT MCGOVERN, ALL AMERICAN: WHY I BELIEVE IN FOOTBALL, GOD, AND THE WAR IN IRAQ (Harper Collins 2007) (book by an active duty U.S. Army Judge Advocate chronicling his upbringing, his football career, his decision to join the Army, a high-profile murder case he prosecuted, and his thoughts on the war in Iraq).

[14] *Wilcox*, 66 M.J. 442 (C.A.A.F. 2008).

[15] U.S. CONST. amend. I.

[16] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times under all circumstances." (citations omitted)); *see also* Roth v. United States, 354 U.S. 476, 483 (1957) ("[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.").

[17] 249 U.S. 47, 49–51 (1919).

[18] *Id.* at 52.

[19] *Chaplinsky*, 315 U.S. at 569–74 The Court upheld a conviction under a New Hampshire statute where a Jehovah's Witness proselytizing on a city street told a police officer, "You are a God damned racketeer . . . [and] a damned Fascist and the whole government of [the town] are Fascists or agents of Fascists." *Id.* at 569. The Court based its holding on its decision that the statute did not hinder free expression but was narrowly tailored to prevent statements that might reasonably lead to a breach of peace. *Id.*

on obscenity.[20] In *Broadrick v. Oklahoma*, it upheld a law prohibiting state employees from openly and actively campaigning for a political candidate or party.[21] Whether maintaining community standards of decency, preventing violence in the streets, or isolating public employees from divisive political campaigns, the general needs of the community may outweigh one individual's right to free expression.

The Supreme Court has consistently favored the public good over free expression when speech threatens the national security of the United States. In *Schenck*, the Court upheld the guilt of two men who tried to obstruct the draft during World War I.[22] Justice Holmes wrote, "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[23] The *Schenck* Court held that speech which interferes with the nation's ability to defend itself is less worthy of protection.[24] Under the "clear and present danger" test, speech does not have to actually hinder national defense to be unprotected; it need only *threaten* such harm.[25]

The Court came to a similar conclusion five decades later with *Parker v. Levy*.[26] In 1966, Captain (CPT) Howard Levy, an Army doctor stationed at Fort Jackson who opposed the Vietnam War,[27] made several public statements to enlisted Soldiers advising them to refuse to go to Vietnam.[28] The Army convicted CPT Levy of violating Article 134 arguing he had done so "with design to promote disloyalty and disaffection among the troops, publicly utter[ing] [certain] statements to divers enlisted personnel at divers times."[29]

After exhausting his military appeals, Levy sought federal habeas corpus relief, challenging the constitutionality of Article 134.[30] His case made its way to the Supreme Court, which denied his habeas petition. Justice William Rehnquist wrote the opinion for the 6-3 majority.[31] His analysis begins,

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[32]

The Court found that the military was different than the rest of American society and, because of the military's unique obligation to defend the nation, the rights of its individual members could be subordinated.[33] Justice Rehnquist stressed this

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[20] 354 U.S. 476, 483–85 (1957). The Court affirmed the convictions of two proprietors of adult bookstores who possessed or distributed obscene material in violation of federal or state law. The Court held obscenity is "utterly without redeeming social importance" and therefore unprotected by the First Amendment. *Id.* at 484.

[21] 413 U.S. 601 (1973). Three Oklahoma state employees sued in federal court to enjoin the State from enforcing a prohibition against state employees from actively participating in a political campaign, arguing the statute was vague and overbroad. The Supreme Court affirmed the district court's decision denying relief. *Id.*

[22] 249 U.S. at 49–52. During World War I, members of the Socialist Party produced and distributed thousands of leaflets to young men who had been drafted and accepted for service in the armed forces. The leaflets argued that the draft was illegal and immoral and that the young men should do everything they could to "uphold [their] rights" and oppose conscription. *Id.* at 51. The Court upheld their subsequent conviction of conspiracy to obstruct the draft, based on the fact that the nation was currently at war and the statements posed a "clear and present danger" to the nation's ability to defend itself. *Id.* at 52.

[23] *Id.* at 52.

[24] *Id.* ("It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.").

[25] *Id.* ("It is a question of proximity and degree.").

[26] Parker v. Levy, 417 U.S. 733 (1974).

[27] *Id.* at 736.

[28] *Id.* at 737.

[29] *Id.* at 738.

[30] *Id.* at 740–41.

[31] *Id.* at 762.

[32] *Id.* at 743.

[33] *Id.* at 744 ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." (citation omitted)).

fundamental difference by addressing servicemembers' right to free expression. "[T]he different character of the military community and of the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[34]

Justice Rehnquist concluded, "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[35] With the decision, the Supreme Court enunciated the standard allowing the military to prohibit certain types of speech. If the speech or expression of a servicemember undermines the effectiveness of response to command, it is not protected. Read together with the military cases cited in *Parker v. Levy*,[36] the military could prohibit speech that was prejudicial to good order and discipline or service discrediting, so long as it created a clear and present danger.

III. Military Treatment of Speech Cases

While 1964's *United States v. Sadinsky* did not involve speech, its holding set the stage for most speech cases to follow.[37] In *Sadinsky*, a naval recruit jumped off the deck of an aircraft carrier.[38] The Navy charged and convicted him under Article 134, and he appealed, claiming his act was not specifically prohibited by the text of Article 134.[39] The Court of Military Appeals (CMA)[40] disagreed, holding, "the critical inquiry, with regard to the first category of offenses covered by Article 134,[41] was whether the act was palpably and directly prejudicial to the good order and discipline of the service—this notwithstanding that the act was not otherwise denounced."[42]

The CMA's holding in *Sadinsky* was critical for two reasons. First, it upheld the notion that the UCMJ need not specifically prohibit conduct for it to be proscribed by the military.[43] Second, it stated that for conduct to be lawfully prohibited under the first prong of Article 134, it must be "palpably and directly" prejudicial.[44] The court stated, "[T]he General Article is not such a catchall as to make every irregular, mischievous, or improper act a court-martial offense."[45] "[T]he Article contemplates only the punishment of that type of misconduct which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline."[46]

The *Sadinsky* decision, in requiring more than a mere tendency towards prejudice, appeared to conflict with the *Schenck* holding that speech need only *threaten* national defense to be unprotected. The CMA did not directly address this inconsistency when they decided *United States v. Daniels*.[47] In *Daniels*, an African-American Marine conducted several private meetings with other African-American Marines wherein he advised them to not participate in the Vietnam War

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[34] *Id.* at 758.

[35] *Id.* at 759 (citing United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970)).

[36] *See* United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972); *Gray*, 42 C.M.R. 255.

[37] 34 C.M.R. 343 (C.M.A. 1964).

[38] *Id*. at 345.

[39] *Id.* at 344.

[40] The U. S. Court of Military Appeals was renamed the U. S. Court of Appeals for the Armed Forces in 1994 by Act of Congress. *See* Establishment of the Court, http://www.armfor.uscourts.gov/Establis.htm (last visited Jan. 12, 2009).

[41] Article 134, Uniform Code of Military Justice prohibits three different categories of offenses. UCMJ art. 134 (2008). These three separate theories of liability are often called the "prongs" or "clauses" of Article 134. Specifically, Article 134 criminalizes, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." *Id.*

[42] *Sadinsky*, 34 C.M.R. at 346.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 345.

[46] *Id.* (citing United States v. Holliday, 16 C.M.R. 28, 30 (C.M.A. 1954)).

[47] 42 C.M.R. 131 (C.M.A. 1970).

because it was "The White Man's War."[48] At one point, he organized several other Marines in his unit to join him in refusing to go to Vietnam and requesting discharge from the Marine Corps.[49]

Daniels was charged under the third prong of Article 134, assimilating 18 U.S.C. § 2387. Section 2387 was a successor statute to the Espionage Act of 1917, the very statute at issue in *Schenck*.[50] The Government's evidence at trial included testimony by another Marine, Private Jones, whom Daniels had urged to refuse to go to Vietnam and request a discharge.[51] The Court utilized the *Schenck* "clear and present danger" test and found that Daniels's statements had caused "an impairment of the loyalty and obedience" of Private Jones and several other Marines in his unit.[52] Despite the fact that his statements did not accomplish what he had intended (Jones did not refuse to go to Vietnam), the Court was satisfied that he had intended to impair loyalty, morale, and discipline and that there was a clear and present danger that his activities would cause disloyalty and insubordination.[53]

The court in *Daniels*, which applied the *Schenck* test and found "[t]he failure did not immunize the accused from prosecution," seemed to require less than a showing of actual prejudice to uphold a conviction under Article 134.[54] The facts of *Daniels*, however, indicate that there was in fact an impact on unit morale and discipline: several Marines were apparently incited to refuse to fight in the war even though they did not ultimately refuse. As of 1970, then, the law in the military was still unclear. Was actual prejudice, as envisioned by *Sadinsky* necessary for speech to be illegal? The court attempted to answer that question two years later in *United States v. Priest*.[55]

In 1969, Journalist Seaman Apprentice (JOSA) Roger Priest, stationed in Washington, D.C., edited and published a newsletter called "OM," which he distributed around Washington and mailed to servicemembers nationwide.[56] Several articles in OM were highly critical of U.S. policy, especially the war in Vietnam.[57] Priest encouraged his readers to resist U.S. policy by refusing to go to Vietnam, and he even gave detailed instructions on how to desert and flee to Canada.[58] At times, his language espoused violence. He advocated the violent end to several prominent officials and threatened the use of violence to achieve his goals.[59]

The Navy convicted JOSA Priest under prong one of Article 134.[60] On appeal, his counsel argued that his conduct was not prejudicial to good order and discipline.[61] In addressing JOSA Priest's claim, the court first repeated the *Sadinsky* holding that Article 134 requires conduct to be "palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect and remote sense."[62] The court next reiterated that servicemembers were entitled to less First Amendment protection than civilians because restrictions on speech exist in the military for reasons that do not apply to the civilian community.[63] "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[64]

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[48] *Id.* at 135.

[49] *Id.* at 135–136.

[50] *Id.* at 134; *see* United States v. Schenck, 249 U.S. 47, 48 (1919).

[51] *Daniels*, 42 C.M.R. at 136–137.

[52] *Id.* at 137.

[53] *Id.* at 136–38.

[54] *Id.* at 138.

[55] 45 C.M.R. 338 (1972).

[56] *Id.* at 339-40, 343. He distributed 800 free copies in Washington alone, to locations including the Navy Exchange, the Washington Navy Yard, and the Pentagon newsstand. *Id.*

[57] *Id.* at 340.

[58] *Id.* at 340–41.

[59] *Id.* at 341.

[60] 45 C.M.R. 338.

[61] *Id.* at 341–42.

[62] *Id.* at 343 (citing United States v. Snyder, 4 C.M.R. 15, 18 (C.M.A. 1952)).

[63] *Id.* at 343–44.

[64] *Id.* at 344 (citing United States v. Gray, 42 C.M.R. 255, 258 (C.M.A. 1970)).

The court had to determine if JOSA Priest's actions legally amounted to conduct prejudicial to good order and discipline when it did not appear anyone was influenced by his statements to desert or to refuse to fight in Vietnam, or that his words caused a disruption in any of the units of the people who read his newsletter. Essentially, the Government proved that JOSA Priest made the statements and that they were disloyal. But did they prove that the statements had a tendency to disrupt good order and discipline, and did they have to?

The CMA addressed the question stating, "[T]he danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained."[65] The court established a new test: "Our inquiry . . . is whether the gravity of the effect of [an] accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[66]

In upholding JOSA Priest's conviction, the court found, "[T]he Government is entitled to protect itself in advance against a calculated call for revolution," and it ruled the statements' tendency was such that they could palpably and directly affect military order and discipline.[67] Therefore, JOSA Priest could be punished under Article 134.[68] After *Priest*, it appeared that the government could simply prove that an accused had used certain speech, and if the words were so offensive or dangerous as to speak for themselves, the fact-finder could reasonably infer that their tendency was prejudicial to good order and discipline or service discrediting.

IV. *United States v. Wilcox*[69] and the Current State of the Law

The first case since *Priest* to significantly change the military's treatment of speech offenses was *United States v. Wilcox*.[70] In *Wilcox*, the CAAF addressed the conviction of an Army paratrooper who was convicted under Article 134, in part, for espousing racist, anti-Semitic, and disloyal viewpoints during private Internet "chats" with an undercover military investigator.[71] In overturning his conviction,[72] the court ruled that the Government had failed to present any evidence to show that his conduct was prejudicial to good order and discipline or service discrediting.[73] Along the way, the court greatly eroded the legacy of *Priest*, *Parker*, and *Schenck*, and ushered in a new and more restrictive test for speech crimes in the military.

Private First Class (PFC) Jeremy Wilcox, on active duty with the Army's 82d Airborne Division at Fort Bragg, created two America Online (AOL) Internet profiles.[74] Each profile announced he was a member of the Army stationed at Fort Bragg and contained statements and phrases that made it clear he was a white supremacist.[75] After a civilian police officer noticed the profiles describing PFC Wilcox's racist views and identifying him as an Army paratrooper, he alerted the Army's Criminal Investigation Command (CID).[76] An agent with CID, Investigator Sturm, posed as a young female with an interest in white supremacy and created her own AOL account to communicate with PFC Wilcox.[77] During their online "chats," PFC Wilcox made several racist and anarchistic statements to Sturm[78] and encouraged her to visit racist websites.[79]

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[65] *Id.*

[66] *Id.* at 344–45.

[67] *Id.* at 345.

[68] *Id.* at 345–46.

[69] 66 M.J. 442 (C.A.A.F. 2008). The author acted as government appellate counsel on this case the first time it went before the Court of Appeals for the Armed Forces and the second time it went before the Army Court of Criminal Appeals. In addition, the author supervised the attorney who represented the Government the second time it went before the Court of Appeals for the Armed Forces.

[70] *Id.* at 442.

[71] *Id.* at 445.

[72] *Id.* at 452.

[73] *Id.*

[74] *Id.* at 445.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

Private First Class Wilcox was tried and convicted of several offenses, including a specification under prongs one and two of Article 134.[80] The single specification accused him of making racist, anti-government, and disloyal statements and advocating racial intolerance by advising others on racist views, which "conduct was to the prejudice of good order and discipline in the armed forces *or* was of a nature to bring discredit to the armed forces."[81] At trial, the Government produced Wilcox's online profiles, including their racist language; Investigator Sturm, who testified regarding the online conversations she had with PFC Wilcox; and expert testimony that PFC Wilcox's words were consistent with the white supremacy movement.[82]

The court began its analysis by re-examining the holding in *Parker*.[83] It stated that the Supreme Court in *Parker* upheld the constitutional viability of Article 134 only because of the limitations military case law had placed on it.[84] In essence, the Supreme Court did not nullify Article 134 as overbroad or vague because the military had always used it responsibly and had a body of law in place to ensure that it would continue to do so. Therefore, the court stated, it was important for military courts to narrowly limit conduct proscribed by Article 134.[85]

The court then employed an interesting interpretation of the *Priest* opinion to determine that, in speech cases charged under Article 134, the Government must show a "'reasonably direct and palpable' connection between an appellant's statements and the military mission."[86] Significantly, the *Priest* decision never required this. The language the CAAF relied on from *Priest* actually stated, "[T]his Court has construed Article 134 . . . as requiring punishable conduct to be 'palpably prejudicial to good order and discipline and not merely prejudicial in an indirect and remote sense.'"[87]

The difference between the language of *Priest* and the interpretation in *Wilcox* is subtle but important. The original language said only that the military nexus between the conduct and good order and discipline must be more than speculative, indirect, or remote.[88] The CAAF's opinion in *Wilcox*, however, elevated that standard. By requiring the Government to prove beyond a reasonable doubt that an accused's speech have a "reasonably direct and palpable connection to the military mission," the court established a new test, essentially requiring actual prejudice.[89] In fact, it went on to extend this heightened standard to include speech cases charged under clause two of Article 134: "We conclude that a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory."[90]

The court relied on this new standard throughout its opinion.[91] It examined the facts to determine if the conduct resulted in a "direct and palpable effect on the military mission or military environment."[92] The court found no evidence that PFC Wilcox's statements had actually affected unit morale, discipline, or cohesion. Likewise, they found no evidence that someone had read the statements, believed the speaker to be in the military, and, as a result, held the military in lower esteem. Therefore, the CAAF ruled the Government had not met its burden under the new standard, and the evidence was legally insufficient to sustain a finding of guilty under Article 134.[93]

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[79] *Id.*

[80] *Id.* at 443–44.

[81] *Id.* at 444 (emphasis added).

[82] *Id.* at 445–46.

[83] *Id.* at 447.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 448 (citing United States v. Priest, 45 C.M.R. 338, 343 (1972)).

[87] *Priest*, 45 C.M.R. at 343 (citations omitted).

[88] *Id.*

[89] *Wilcox*, 66 M.J. at 448 (citing *Priest*, 45 C.M.R. at 343).

[90] *Id.*

[91] *Id.* at 448–51.

[92] *Id.* at 450.

[93] *Id.* at 451–52.

The court in *Wilcox* created two new tests for speech cases charged under Article 134. First, it established a three-part analysis for reviewing speech convictions.[94] Is the speech "otherwise protected under the First Amendment"?[95] Did the Government prove all the elements of Article 134?[96] If both these questions are answered in the affirmative, the court must then balance the needs of the military against the servicemember's right to speak freely.[97] In addition to this three-part analysis, the court created a new test for determining the quantum of evidence necessary to satisfy the final element of Article 134.[98] The court essentially stated, relying on their interpretation (or misinterpretation) of *Priest*, that the Government needed to show an actual connection between the conduct and the prejudice to the mission or discredit to service.[99]

This second test enunciated in *Wilcox* represents a paradigm shift in military law regarding speech offenses. As discussed earlier, by elevating the quantum of proof required by *Schenck* and *Priest*, it heightened the standard for criminalizing speech cases under either the first or second prong of Article 134. No longer could the Government argue the tendency of words. From *Wilcox* forward, the Government would have to prove it. The CAAF had created an actual prejudice and discredit test for speech cases charged under Article 134.

One of the first cases to employ the new *Wilcox* test was the Coast Guard case of *United States v. Blair*.[100] In *Blair*, Storekeeper Third Class (SK3) Blair drove to a public airport twice in a Government vehicle.[101] Both times, while there, he posted Ku Klux Klan recruiting flyers on the mirror in the men's restroom.[102] On both occasions, SK3 Blair was dressed in civilian clothes, but several people at the airport knew him and knew that he was in the Coast Guard.[103] No one ever saw SK3 Blair post the flyers.[104]

The Coast Guard charged SK3 Blair with several offenses, including a specification under Article 134 for "wrongfully recruiting for, soliciting membership in, and promoting activities of the Ku Klux Klan while publicly displaying an affiliation with the Armed Services."[105] At his general court-martial, SK3 Blair pled guilty and admitted that his public conduct had a tendency to bring the service into disrepute or lower it in public esteem.[106] The military judge accepted his plea, and convicted and sentenced him.[107]

On appeal, SK3 Blair argued that his plea should not have been accepted by the military judge because the facts he admitted did not amount to a "public display of affiliation with the Armed Services," especially since he was not seen posting the flyers.[108] The Coast Guard Court of Criminal Appeals relied on the new *Wilcox* test to analyze SK3 Blair's claim.[109] First, the court recognized that the case was different than *Wilcox* because it was a guilty plea where the appellant had acknowledged the service-discrediting nature of his conduct under oath.[110] In addition, albeit during the sentencing case, evidence in the record demonstrated actual service discredit. The director of the airport, an Air Force retiree, testified that when he found out a Coast Guardsman had posted the flyers, "it just made [him] sick."[111]

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[94] *Id.* at 447.

[95] *Id.*

[96] *Id.*

[97] *Id.* (citing United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972)).

[98] *Id.* at 448–51. The first element is that the accused committed some act, and the second element is that the act was prejudicial or service discrediting. UCMJ art. 134 (2008).

[99] *Id.* at 448–49.

[100] 67 M.J. 566 (C.G. Ct. Crim. App. 2008).

[101] *Id.* at 569.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 567.

[106] *Id.* at 569.

[107] *Id.* at 567.

[108] *Id.* at 569.

[109] *Id.* at 570.

[110] *Id.*

[111] *Id.* at 571.

Still, the court in *Blair* did discuss the *potentially* service-discrediting effect of SK3 Blair's actions. In reciting the facts of the case, the court stated that SK3 Blair "*could* have been seen posting the flyer if anyone had walked into the restroom."[112] In comparing its case to *Wilcox*, the court stated, "Surely the *possibility* of a member of the public observing [SK3 Blair's] conduct and taking it seriously was much greater than such a possibility in the *Wilcox* case."[113] Thus, the *Blair* court seemed to rely on something far more speculative and remote than the "reasonably direct and palpable connection" required by *Wilcox*.

Blair will withstand scrutiny by the CAAF because the appellant pled guilty and testified that his conduct was *in fact* service discrediting. The pains the *Blair* court had to go through, however, to uphold his guilty plea point out the potential difficulty military courts and practitioners may have with the new *Wilcox* standard.

V. Regulating Speech in the Military

While all of the examples cited thus far have involved political or "hate" speech charged under the General Article, there are several other forms of speech the military can regulate. These other offenses should not ordinarily be subject to the type of scrutiny the courts used in cases like *Priest* and *Wilcox*. The first group of these type of offenses contained in the UCMJ can be referred to as "verbal acts." These offenses involve speech as the medium of the conduct, but are not designed to criminalize expression. Examples include solicitation,[114] false official statement,[115] perjury,[116] false swearing,[117] and communicating a threat.[118] Another group of offenses contained in the UCMJ involving speech are purely military offenses—crimes that have no comparable offense in civilian criminal law and are uniquely designed to preserve the military rank structure, obedience to command, and good order within the ranks. These offenses include contempt toward officials,[119] disrespect toward a superior commissioned officer,[120] insubordinate conduct,[121] and disloyal statements.[122]

Next, speech offenses can be charged as a violation of a lawful regulation. For example, Army Regulation 600-20 prohibits Soldiers from participating in public rallies or demonstrations, recruiting, or distributing literature for any extremist organization.[123] Accordingly, a Soldier who tries to recruit other members of his unit to join the Ku Klux Klan or marches in a demonstration protesting the burial of fallen servicemembers could be prosecuted under Article 92 for disobeying a lawful general regulation. In the Army, mere membership in an extremist organization can result in a negative performance evaluation, loss of security clearance, or even a bar to reenlistment.[124]

Commanders can also order servicemembers not to engage in certain types of speech. For example, to increase operational security, a unit deploying to a theater of contingency operations could order its members not to keep an Internet blog of their activities in the area of operations. A Soldier who violates such an order could be prosecuted under Article 92 for disobeying a lawful order.

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[112] *Id.* at 569 (emphasis added).

[113] *Id.* at 570 (emphasis added).

[114] UCMJ art. 82 (2008).

[115] *Id*. art. 107.

[116] *Id*. art. 131.

[117] *Id*. art. 134.

[118] *Id*.

[119] *Id*. art. 88.

[120] *Id*. art. 89.

[121] *Id*. art. 91.

[122] *Id*. art. 134.

[123] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-12 (18 Mar. 2008) [hereinafter AR 600-20] ("Participation in extremist organizations and activities by Army personnel is inconsistent with the responsibilities of military service.").

[124] *Id.*

Of course, the main focus of this article, and the most controversial form of restriction on speech, involves those cases charged under the General Article.[125] Like any other class of misconduct, speech offenses charged under Article 134 are often the most susceptible to abuse, challenge, and scrutiny. Article 134 can still be used, however, to charge several different forms of speech, so long as they pose a clear danger to the military mission or environment under the *Wilcox* test.

VI. Practice Tips for Trying Speech Cases in the Military

Military prosecutors need to be aware of the difficulty of trying speech cases. Unlike a murder, fraud, or larceny case, the line between "legally protected" and "criminal" in speech cases is particularly blurry. Civilian and military courts alike are reluctant to circumscribe an individual's freedom of expression. Military prosecutors need to recognize criminal speech when they see it and prosecute it correctly.

Remembering four simple rules will help trial counsel avoid acquittal or reversal.

Rule 1: *Anything but 134*. When faced with dangerous speech, trial counsel should endeavor to find some article of the Code, or some regulation or order, which proscribes the speech, other than Article 134. Other articles have defined elements and evidentiary standards that judges, panels, and practitioners may feel more comfortable following than the General Article. In addition, using these other offenses negates the need to go through the "mental gymnastics"[126] of the *Wilcox* test.

Rule 2: *Pass the* Wilcox *Test*. If Article 134 is the only option, trial counsel should ensure that the facts of the case are sufficient to pass the *Wilcox* test. Is the speech otherwise protected? Can the Government prove the elements of Article 134, especially the prejudice or discredit element, beyond a reasonable doubt? Will the facts of the case withstand a judicial balancing test between the needs of the military and the rights of the individual servicemember?[127] Can the trial counsel articulate a compelling governmental interest in suppressing an individual's First Amendment rights?[128]

Rule 3: *Exigencies of Proof*. The prosecutors in *Wilcox* prudently charged in the alternative. By charging his speech as prejudicial *or* service discrediting, they allowed for exigencies of proof. If they were unable to provide evidence, or if the fact-finder was unwilling to make an inference as to one theory under Article 134, they always had another basis of liability. Practitioners should consider charging in the alternative in Article 134 prosecutions.

Rule 4: *Put It on the Record*. *Wilcox* may have survived appeal if evidence had been presented that Wilcox's speech had actually impacted unit morale, discipline, or preparedness, or that it had actually reduced the public esteem for the armed forces. Imagine if a Soldier had testified that he read PFC Wilcox's comments and did not want to serve anymore, or if the police officer who discovered PFC Wilcox's AOL profile testified that he thought less of the Army after discovering it. While the language of the *Wilcox* opinion does not formally demand proof of *actual* impact, the restrictions imposed therein cannot realistically be satisfied without it. The trial counsel who can provide evidence of an actual impact on good order and discipline or service discredit will have a stronger case on appeal.

In addition, trial counsel should be prepared for likely defense tactics. Defense counsel representing an accused charged with a speech offense will likely begin their defense with motions, including motions to dismiss based on failure to state an offense and on constitutional grounds. Defense counsel will attempt to show that their client's statements did not *actually* impact unit mission or morale. Put another way, they will keep the Government from proving the final element of Article 134. Armed with *Wilcox*, the defense counsel could argue for a dismissal under Rule for Court-Martial 917.[129]

Defense counsel will also likely be selective in agreeing to panel instructions. For cases charged under Article 134, the Government is not entitled to an instruction on all three theories of liability; rather, they are entitled only to the one (or ones) specifically charged. For example, if the Government charges that the accused made a statement that brought discredit upon the armed forces, the defense will likely not agree to an instruction regarding prejudice to good order and discipline. By

[125] A similar analysis can be used for cases against officers charged under Article 133 (conduct unbecoming an officer and gentleman), although the elements of that offense are distinct from those of Article 134.

[126] See *supra* Part IV, at 23.

[127] United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008).

[128] See *supra* Part IV, at 23.

[129] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 917 (2008).

opposing an instruction on this issue, the defense counsel can more effectively hold the Government to its burden during closing argument. Trial counsel need to be mindful of these defense strategies and plan accordingly.

Trial counsel prosecuting speech offenses face unique challenges in this evolving area of the law. It is difficult to imagine an area of American law where society is more hesitant to call a particular act a crime. In addition, these cases are rife with constitutional pitfalls and evidentiary hurdles. To prevail in the face of these obstacles, trial counsel must examine the relevant case law[130] and focus on what is required to sustain a conviction.

VII. Conclusion

The right to free expression, for all Americans, is limited—limited to those situations where the speech has some potential value to society. That value can be negligible in some cases, but nonetheless, a free democracy will scrupulously protect the freedom to express such thoughts. "A society that tolerates [distasteful] speech is a strong society."[131] The military is no different in their its zeal to defend free expression, but there is a difference between the citizen and the Soldier. An ordinary citizen does not hold the safety and security of the entire nation in his hands. Because of this awesome responsibility, the Soldier is asked to sacrifice portions of his liberty for the greater good.

The twenty-first century marks the height of the "information superhighway." Between the Internet, e-mail, and cellular or satellite phones, individuals are able to communicate with the entire world from their desktop, their barracks room, or even their foxhole. With the ability to speak at an all-time high, the dangers inherent to speech are likewise on the rise. Both military prosecutors and commanders need to be aware of the restrictions on speech in the military. *United States v. Wilcox* changed the landscape for speech cases and made it harder to restrict speech that could impair the military, and by extension, the nation. By understanding this area of the law, the judge advocate can better protect the future of both.

[130] Counsel at all levels, representing both sides, need to recognize the shift in the law that *United States v. Wilcox* represents. Counsel should therefore apply "pre-*Wilcox*" case law with caution.

[131] *Wilcox*, 66 M.J. at 457 (Baker, J., dissenting).

Prosecuting an HIV-Related Crime in a Military Court-Martial: A Primer

*Major Derek J. Brostek**

I. Introduction

Prosecuting an human immunodeficiency virus (HIV) assault under the Uniform Code of Military Justice (UCMJ) creates unique substantive and procedural challenges for the military prosecutor. Substantively, the challenge for prosecutors begins with the fact that there are no HIV-specific articles in the UCMJ. Procedurally, prosecutors may encounter witness issues, pretrial agreement (PTA) provisions, and sentencing arguments that are unique to HIV prosecutions. This article discusses all of these challenges in two major sections: the charging decision and procedural issues.[1]

In section II, this article analyzes the charging decision in HIV cases. The most common methods of charging HIV-related misconduct under the UCMJ are aggravated assault under Article 128,[2] violation of a "safe-sex" order under Article 90[3] or Article 92,[4] and conduct that is prejudicial to good order and discipline and/or service discrediting under Article 134.[5] The applicable tests and standards for HIV prosecutions, especially for aggravated assaults, were fairly well-settled[6] until the 2008 decision by the Court of Appeals of the Armed Forces (CAAF) in *United States v. Dacus*.[7] In *Dacus*, a two-judge concurrence expressed concern about the viability of the current practice of charging HIV-related assaults as aggravated assaults.[8] The section will look at the effect of *Dacus* on HIV charging decisions. It also looks at the effect of recent developments regarding an individual's right to private sexual behavior[9] on the constitutionality of HIV "safe-sex" orders.

Section III of this article contains three sub-sections that cover all aspects of HIV prosecutions not related to the charging decision. The first procedural sub-section describes the unique hurdles in HIV investigations related to investigating a case and coordinating witness interviews. These hurdles are in the areas of medical privacy, the Department of Defense (DoD) homosexual conduct policy, and immunity. The section explains how prosecutors can comply with applicable regulations in these areas and ensure all evidence and witness testimony are available for trial. The section concludes with a recommended process for HIV cases that helps coordinate the efforts of prosecutors, investigators, medical authorities, and commanders. The second procedural sub-section examines the opportunity for a unique PTA provision in guilty plea cases that can protect

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[1] Earlier articles have focused on the basic framework for HIV-related prosecutions in the military, but they did not cover some of the procedural aspects of prosecutions and have also become slightly outdated due to more recent court opinions. *See generally* Major John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice (1997)*, ARMY LAW., Apr. 1998, at 20, 24–27 (discussing the "means likely" element of aggravated assault in HIV cases); Elizabeth Beard McLaughlin, *A "Society Apart?" The Military's Response to the Threat of AIDS*, ARMY LAW., Oct. 1993, at 3 (examining the military's approach to HIV-related cases); Captain Melissa Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, ARMY LAW., Jan. 1988, at 17 (discussing substantive issues with charging HIV-related crimes).

[2] UCMJ art. 128(b)(1) (2008).

[3] *Id*. art. 90(2).

[4] *Id*. art. 92.

[5] *Id*. art. 134.

[6] The first reported opinion for an HIV case was an interlocutory appeal. *See* United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987). After *Morris*, appellate courts narrowly tailored their opinions as they tried to make an HIV-related crime fit into an existing punitive article. The last reported Court of Appeals for the Armed Forces (CAAF) opinion on the merits of an HIV charge, prior to *United States v. Dacus*, 66 M.J. 235 (C.A.A.F. 2008), was in 1997. *See* United States v. Klauck, 47 M.J. 24 (C.A.A.F. 1997).

[7] 66 M.J. 235 (upholding a guilty plea for an HIV aggravated assault).

[8] *Id.* at 240 (Ryan, J., concurring) ("There is at least a question whether traditional notions of aggravated assault comport with current scientific evidence regarding HIV and AIDS.").

[9] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (finding consenting adults have a "full right to engage in [private sexual conduct] without intervention of the government"); *see infra* notes 65–66, and accompanying text (discussing impact of *Lawrence* on safe-sex orders).

other potential victims of the accused. The third procedural sub-section discusses using the accused's HIV-positive status as an aggravating factor in non-aggravated assault convictions.

Although the coordination for the procedural hurdles in an HIV case should occur very early in the process, prosecutors must first understand the legal basis for the anticipated charges. Prosecutors can gain this understanding with a careful analysis of the different HIV charging options that have developed in appellate case law.

II. Substantive Case Law—The Charging Decision

In most HIV-related cases, the criminal "act" is exposing another individual to HIV without that individual's knowledge and consent. Although there are civilian cases dealing with HIV transmission through spitting[10] and biting,[11] all reported military cases involve some type of sexual behavior as the means of exposure. Normally, sexual assaults are covered by Article 120,[12] which provides a comprehensive and detailed framework using the nature of the criminal act and the status of the victim to aid prosecutors in the charging decision.[13] Unfortunately, the current Article 120, like its predecessor, does not provide guidance on what to do with HIV-related misconduct. The most effective way to charge this behavior falls into one of three categories: aggravated assault, disobeying a lawful order, or conduct that is prejudicial to good order and discipline and/or service discrediting. This section will summarize each of these potential charging methods and examine key case law for each method.

A. Article 128—Aggravated Assault

When an HIV-infected individual exposes another person to the virus without that person's knowledge, the criminal activity most closely resembles an assault. There is clearly an uninvited, offensive touching.[14] Although the sexual activity may have been consensual, the exposure to HIV was not consensual.[15] The strong likelihood of death following infection by HIV makes HIV assault more serious than simple assault;[16] aggravated assault is therefore the most appropriate charge under the UCMJ.[17] An aggravated assault is an assault "with a dangerous weapon or other means of force likely to produce death or grievous bodily harm."[18] The "means likely" in an HIV prosecution is either the accused's semen or the virus itself. In *United States v. Johnson*, the court said, "[w]hether the means was alleged to be the virus itself, or the medium and the virus, does not seem significant to us."[19] Later cases, however, moved the focus away from the virus as the "means likely" to the

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[10] *See, e.g.*, Weeks v. Scott, 55 F.3d 1059 (5th Cir. 1995) (upholding conviction for attempted murder where HIV-positive appellant spit on a prison guard).

[11] *See, e.g.*, United States v. Sturgis, 48 F.3d 784 (4th Cir. 1995) (upholding conviction for assault with a dangerous weapon where HIV-positive appellant bit corrections officers).

[12] UCMJ art. 120 (2008) (Rape, sexual assault, and other sexual misconduct); *see also id*. art. 125 (Sodomy).

[13] *See generally* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136, 3256 (completely revising the scope of Article 120 by expanding the number of offenses from two to fourteen, removing "without consent" as an element, and creating new definitions for "sexual act" and "sexual contact").

[14] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 54c(1)(a) (2008) [hereinafter MCM] (defining an assault as "unlawful force or violence . . . done without legal justification or excuse and without the lawful consent of the person affected"). Even if the victim is aware of the accused's HIV status and "invites" the offensive touching, there can still be an aggravated assault. *See* United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (affirming aggravated assault where victim knowingly consented to unprotected sex with HIV-positive accused because you cannot consent to an act likely to produce death or grievous bodily harm).

[15] *See* United States v. Joseph, 37 M.J. 392, 395 (C.M.A. 1993) ("We can think of no reason why a factfinder cannot rationally find it to be an 'offensive touching' when a knowingly HIV-infected person has sexual intercourse with another, without first informing his sex partner of his illness—regardless whether protective measures are utilized.").

[16] *See, e.g.*, *id*. at 395–96 ("Given the consequences of Acquired Immune Deficiency Syndrome (AIDS), the label 'offensive touching' seems rather mild for such unwarned, intimate contact with an HIV-infected person.").

[17] MCM, *supra* note 14, pt. IV, ¶ 54b(4)(a).

[18] *Id.*

[19] 30 M.J. 53, 56 n.5 (C.M.A. 1990).

act of intercourse itself.[20] Whether the "means likely" is the virus or intercourse, the prosecution must satisfy a two-prong analysis used for all aggravated assault cases.[21] The two prongs are as follows:

> (1) the risk of harm and (2) the magnitude of harm. The likelihood of death or grievous bodily harm is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.[22]

Because the likelihood of death is so high for a person with HIV, little litigation exists for HIV cases involving the second prong of the test—the magnitude of harm.[23] Instead, "[t]he HIV cases focus on the first prong, the risk of harm, that is, likelihood that HIV will be transmitted and the victim will develop acquired immune deficiency syndrome (AIDS)."[24] The difficulty with the first prong is that HIV assaults do not always neatly fit within the existing elements of Article 128. Prosecutors must therefore understand how the courts have analyzed this first prong.

Early aggravated assault cases focused heavily on the first prong—the risk of harm. In the first Court of Military Appeals (COMA) case dealing with aggravated assault, the court issued a simple two-page opinion upholding an HIV aggravated assault conviction by citing medical testimony that there was a thirty to fifty percent chance of getting AIDS from HIV.[25] The court did not provide a detailed legal analysis about why aggravated assault was a proper charge in an HIV case,[26] thereby leaving the issue to be explored in later cases. Unfortunately, some subsequent opinions also failed to provide a comprehensive analysis on the proper use of Article 128. Instead, they simply found it to be appropriate. In *United States v. Johnson*,[27] the court relied on three earlier non-Article 128 HIV prosecutions to hold that "[i]t is now beyond cavil that it is permissible under the Code to charge aggravated assault, where the means alleged as likely to produce death or grievous bodily harm is HIV."[28] From those three earlier cases, the *Johnson* court created a very low threshold for finding sufficient risk of harm, stating that it "must at least be more than merely a fanciful, speculative, or remote possibility."[29] The *Johnson* court's focus on the risk of harm, under its "more than merely fanciful standard," influenced HIV cases for the following seven years. Courts spent little time on the magnitude of harm prong as they struggled to apply the *Johnson* test to issues such as the intent requirement for an HIV aggravated assault,[30] consent,[31] the use of condoms,[32] and vasectomies.[33] The

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[20] *See* United States v. Schoolfield, 40 M.J. 132, 135 (C.M.A. 1994) (upholding an aggravated assault conviction under the "intentional-battery theory of assault with the bodily harm being unprotected sexual intercourse"); *Joseph*, 37 M.J. at 395–96 (upholding an aggravated assault conviction under a battery theory).

[21] United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998) ("The standard for determining whether an instrumentality is a 'means likely to produce death or grievous bodily harm' is the same in all aggravated assault cases under Article 128(b)(1).").

[22] *Id*. (citations omitted).

[23] *See id*. at 212 ("The test for the second prong, set out in the Manual for Courts-Martial, is whether death or grievous bodily harm was a natural and probable consequence."); *see also* MCM, *supra* note 14, pt. IV, ¶ 54c(4)(a)(ii) ("When the natural and probable consequence of a particular use of any means or force would be death or grievous bodily harm, it may be inferred that the means of force is 'likely' to produce that result."). The second prong is almost assumed to be met in most HIV cases. *See Weatherspoon*, 49 M.J. at 211 ("The second prong of the likelihood analysis, consideration of the magnitude of the risk, was not at issue in the HIV cases. In those cases, it was uncontested that death was a natural and probable consequence if the virus was transmitted and the victim developed AIDS."); *see also Johnson*, 30 M.J. at 55 (noting expert testimony that thirty-five percent of those with HIV will develop AIDS, with a fifty percent mortality rate for those with AIDS).

[24] *Weatherspoon*, 49 M.J. at 211.

[25] United States v. Stewart, 29 M.J. 92, 93 (C.M.A. 1989) (finding that the chance of getting AIDS was sufficient to meet the "natural and probable consequence" test).

[26] *Id*. (relying mainly on a "very thorough and detailed inquiry" during providency about the accused's unprotected sexual intercourse).

[27] 30 M.J. 53 (C.M.A. 1990).

[28] *Id*. at 56; *see* United States v. Womack, 29 M.J. 88 (C.M.A. 1989) (upholding a safe-sex order in a narrowly written opinion that said the safe-sex order was the least restrictive means available to address a compelling governmental interest); *Stewart*, 29 M.J. at 92 (upholding an aggravated assault conviction but providing very little legal justification for doing so); United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (upholding an Article 134 conviction in a case where an HIV-positive accused had unprotected sex with a fellow servicemember; the court specifically did not address if the act would justify another offense under the Code, or if violation of the safe-sex order in the case could be enforced as violation of a direct order).

[29] *Johnson*, 30 M.J. at 57 (citing *Stewart* and *Womack* for this proposition, even though *Stewart* only used a "natural and probable consequence" test and *Womack* did not even discuss a risk of harm analysis because it only focused on the lawfulness of a safe-sex order).

[30] *See* United States v. Schoolfield, 40 M.J. 132 (C.M.A. 1994) (upholding an HIV-aggravated assault with a detailed analysis of the intent requirement in an HIV-aggravated assault; four judges held it was general intent crime, and one judge held it was a specific intent crime); *see also* United States v. Joseph, 37 M.J. 392 (C.M.R. 1993) (finding the use of a condom is not a defense, with a concurring opinion expressing concern that the majority opinion never discussed how the use of a condom relates to the intent requirement of the crime).

"more than merely fanciful" standard present in all of these early HIV cases is also the standard risk-of-harm test in all types of aggravated assault cases.[34]

Although it would seem that the simple risk of harm and magnitude of harm tests would make HIV prosecutions easy, prosecutors must still use caution before charging an HIV aggravated assault for two reasons. First, the existing case law on HIV aggravated assaults has left some issues unanswered. Specifically, the courts have not ruled on whether a putative victim can consent to protected sex with an HIV-positive accused. In *United States v. Bygrave*, the CAAF held that consent was not a defense to unprotected sex.[35] In *United States v. Klauck*, the CAAF clearly stated that using a condom "is not a defense" to an HIV aggravated assault.[36] Reading *Bygrave* and *Klauck* together, it seems there is still an aggravated assault when an HIV-positive person has consensual, protected intercourse. This interpretation would make all sexual contact by HIV-positive servicemembers a crime. Service-specific guidance, in contrast, informs HIV-positive members they can only have intercourse if they inform potential partners of their HIV status and they practice safe sex.[37] By using a non-HIV specific crime for HIV aggravated assaults, the courts may have created legal conclusions that are irreconcilable with current service guidance.[38] Another open issue involves sex between two HIV-positive individuals. In *Bygrave*, the court specifically mentioned this issue without ruling on it.[39]

The second reason prosecutors must use caution in charging HIV aggravated assaults is the *Dacus* concurrence, which creates some doubt about the applicability of Article 128 in general. In *Dacus*, medical evidence presented at trial showed that the accused's likelihood of transmitting HIV during sexual intercourse was very low due to his uniquely low viral load.[40] The accused had protected intercourse with one woman, and both protected and unprotected intercourse with another woman, without informing either woman of his HIV status.[41] Despite the extremely unlikely, but possible, chance that the accused could transmit HIV to a sexual partner, a three-judge majority upheld an aggravated assault conviction because "although the risk of transmitting the virus was low and therefore arguably 'remote,' the risk was certainly more than fanciful or speculative."[42] The two-judge concurrence agreed with the majority because the "Appellant did not raise matters inconsistent

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[31] *See* United States v. Bygrave, 46 M.J. 491 (C.A.A.F. 1997) (affirming aggravated assault where victim knowingly consented to unprotected sex with HIV-positive accused because one cannot consent to an act which is likely to produce grievous bodily harm or death); *see also* United States v. Outhier, 45 M.J. 326 (C.A.A.F. 1996) (finding, in a non-HIV case, that it is legally impossible to consent to aggravated assault; this opinion was used as precedent in the *Bygrave* decision).

[32] *See* United States v. Klauck, 47 M.J. 24 (C.A.A.F. 1997) (finding that the accused's use of a condom is not a defense to an HIV aggravated assault); *Joseph*, 37 M.J. at 396 (finding that "use of a condom does not translate into 'safe sex,' but potentially 'safer sex'").

[33] *See* United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991) (finding no aggravated assault where the accused previously had a vasectomy, a defense expert testified the accused was incapable of transmitting the virus because of the vasectomy, and the government did not rebut the defense expert or prove that transmission was possible after a vasectomy).

[34] United States v. Weatherspoon, 49 M.J. 209, 211–12 (C.A.A.F. 1998) (upholding accused's aggravated assault conviction for choking his wife and kicking her in the face and holding that the proper test for the risk of harm prong in any aggravated assault case was whether the risk of harm was "more than merely a fanciful, speculative, or remote possibility" (citations omitted)).

[35] *Bygrave*, 46 M.J. at 494 n.5 ("Because appellant was only prosecuted for having unprotected sex, we need not, and do not, address whether one may validly consent to protected sex with an HIV-positive partner.").

[36] *Klauck*, 47 M.J. at 25 ("The fact that a male uses a condom during sexual intercourse is not a defense to assault with a means or force likely to produce death or grievous bodily harm.").

[37] *See infra* notes 51–54 and accompanying text.

[38] *See Bygrave*, 46 M.J. at 494 n.8 ("Thus, the prosecution of an HIV-positive servicemember for having safe sex after providing appropriate notice of his status to his or her partner might conceivably raise constitutional due process concerns.").

[39] *Id*. at 494 n.6 (noting, but not deciding, that evaluating consent in HIV cases may be different if both parties were HIV-positive). The court mentioned the "'antigenic stimulation' theory," where "additional exposure to HIV increases [the] speed with which HIV-positive individuals begin to show symptoms of full-blown AIDS . . . ." *Id.* (citing Gruca v. Alpha Therapeutic Corp., 51 F.3d 638, 641–43 (7th Cir. 1995)).

[40] 66 M.J. 235, 237 n.1 (C.A.A.F. 2008) (noting that the accused's "viral load was so low that it was not detectable with existing technology"). According to expert testimony in the case, the accused's likelihood of "transmission of HIV through unprotected sex was approximately 1 in 10,000," and only "1 in 50,000" during protected sex. *Id*. at 240 (Ryan, J., concurring).

[41] *Id.* at 236–37.

[42] *Id*. at 239 (supporting their holding by reaffirming the two-step risk of harm/magnitude of harm test discussed in *Weatherspoon*).

with Appellant's guilty plea under our current case law."[43] The concurrence, however, expressed doubt that in a litigated court-martial the "means likely" test could be satisfied when the likelihood of harm was "statistically remote."[44]

Although the facts in *Dacus* are unique,[45] prosecutors should be wary of the concurring opinion for two reasons. First, *Dacus* is an example of the importance of medical evidence in HIV trials. Experts are essential to explain why the risk of harm prong[46] and the magnitude of harm prong[47] are satisfied in a specific case. Second, prosecutors should take note of the strongest language in the *Dacus* concurrence: "There is at least a question whether traditional notions of aggravated assault comport with current scientific evidence regarding HIV and AIDS."[48] This language, in conjunction with the remaining open issues involving HIV assaults, should caution all prosecutors to carefully consider the facts of their case, as well as alternate charging options.

For prosecutors charging a case under Article 128, it is vital that they use a detailed stipulation of fact that incorporates key language from any applicable cases.[49] At a minimum, it should address how the facts of the case meet the *Weatherspoon* two-prong harm test. Appendix A contains a sample stipulation of fact provision for an aggravated assault case. If the facts do not support an Article 128 charge, prosecutors should consider a disobedience-based charge.

B. Disobeying or Failing to Follow a Lawful Order

Servicemembers diagnosed with HIV will significantly interact with medical authorities and commanders. From the medical community, HIV servicemembers will receive thorough medical treatment, and substantial education on the ramifications of living with HIV. From their commanders, HIV servicemembers receive specific orders about how to handle their medical status. In many HIV cases, prosecutors will therefore have the additional option of charging the accused with violating or disobeying a "safe-sex" order.[50] Charging a violation of a safe-sex order requires an understanding of two sets of information: (1) DoD and service-specific guidance on HIV infected individuals, and (2) case law upholding the constitutionality of safe-sex orders.

Although DoD policy prevents the accession of HIV-positive individuals,[51] individuals who contract HIV after joining the military can stay on active duty if they are physically able to perform their duties.[52] Individuals remaining on active duty will receive medical treatment and "training on the prevention of further transmission of HIV infection to others and the legal

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[43] *Id*. at 240 (Ryan, J., concurring).

[44] *Id*.

[45] The medical testimony at trial indicated that "less than one percent of the population . . . have an immune system [like the accused's] that can almost completely suppress the virus on their own." *Id*. at 239.

[46] The *Dacus* concurrence indicates the near strict liability test of early cases, where sexual contact alone satisfied the risk of harm prong, will be more carefully scrutinized. *See id*. at 240 n.1 ("It is no doubt true that earlier cases from this Court, and other courts throughout the country, found that the mere fact that one engaged in sexual activity while HIV positive constituted a means likely to cause death or grievous bodily harm."); *see also* United States v. Perez, 33 M.J. 1050, 1053 (A.C.M.R. 1991) (finding "the government . . . failed to prove an essential element of the offense" by not rebutting defense expert testimony about the accused's vasectomy).

[47] The strong likelihood of HIV turning into AIDS easily satisfies the magnitude of harm prong. *See* United States v. Johnson, 30 M.J. 53, 55 (C.M.A. 1990) (noting medical testimony that there is a "35 percent probability that an individual who tests positive for HIV will develop AIDS"). If methods of treating HIV improve and these percentages drop significantly, it may become harder to meet the second prong.

[48] *Dacus*, 66 M.J. at 240 n.1 (Ryan, J., concurring).

[49] *See id.* at 236–37 (thoroughly reviewing key provisions of the stipulation of fact to uphold a guilty plea where medical evidence showed a very low risk of transmission). In a contested case, prosecutors should draft proposed findings of fact on the same issues.

[50] A "safe-sex" order protects against the spread of HIV by limiting an HIV-infected servicemember's allowable sexual activity.

[51] U.S. DEP'T OF DEFENSE, INSTR. 6485.01, HUMAN IMMUNODEFICIENCY VIRUS para. 4.1 (Oct. 17, 2006) [hereinafter DoDI 6485.01].

[52] *Id*. para. 6.2. Human immunodeficiency virus members can be retained on active duty but may be restricted in the duties they can perform or where they can be assigned. *See, e.g.*, U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5300.30D, MANAGEMENT OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION IN THE NAVY AND THE MARINE CORPS para. 3c(3) (3 Jan. 2006) [hereinafter SECNAVINST 5300.30D] (limiting assignment of HIV-positive members to the continental United States or Hawaii); U.S. DEP'T OF ARMY, REG. 600-110, IDENTIFICATION, SURVEILLANCE, AND ADMINISTRATION OF PERSONNEL INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS (HIV) para. 4-2 (15 July 2005) [hereinafter AR 600-110] (stating that HIV-positive Soldiers "will not be deployed or assigned overseas"); U.S. DEP'T OF AIR FORCE, INSTR. 48-135, HUMAN IMMUNODEFICIENCY VIRUS PROGRAM para. A10 (12 May 2004) [hereinafter AFI 48-135] (limiting duty assignments for HIV-positive members).

consequences of exposing others to HIV infection."[53] The reference to legal consequences is amplified in service regulations that direct commanders to give HIV-positive members in their command direct orders to inform all sexual partners of the member's HIV status and to engage only in safe sex.[54]

If an accused violates a safe-sex order from a commander, prosecutors can charge the accused with violating Article 90[55] or Article 92.[56] Courts have affirmed the constitutionality of these orders with relative ease, but most opinions only analyzed narrow portions of the safe-sex orders.[57] Many of the courts' decisions built on the logic used in earlier safe-sex order cases, and in some instances on HIV cases not involving safe-sex orders. Therefore, the best way to understand how to charge a safe-sex order violation is to examine how these cases arrived at the conclusion that the orders are lawful.

The first case to address safe-sex orders was the Army Court of Military Review (ACMR) in *United States v. Negron*.[58] In *Negron*, the appellant wore a condom as ordered, but did not inform his partner of his HIV status.[59] The appellant challenged his conviction under Article 90 by asserting that the safe-sex order violated his right to privacy under the Constitution.[60] The court soundly rejected appellant's argument after analyzing Supreme Court privacy cases that identified "penumbral" privacy rights.[61] The court relied on *Bowers v. Hardwick*[62] to find the appellant had no "constitutionally protected privacy 'right to freely, and without limitation, engage in consensual, private, intimate heterosexual relations'."[63] Prosecutors must be aware that the entire line of military appellate decisions on safe-sex orders following *Negron* was decided before *Lawrence v. Texas*,[64] which overruled *Bowers*.[65] A full analysis of the *Lawrence* opinion is beyond the scope of this article, but it is important to note that *Lawrence* found the Texas statute did not have a "legitimate state interest . . . [justifying] . . . intrusion into the personal and private life of the individual."[66] After *Lawrence*, prosecutors must be ready to identify a legitimate governmental interest for issuing a safe-sex order.

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[53] DoDI 6485.01, *supra* note 51, para. 6.3.

[54] The Navy states that HIV members "shall be advised that they will be directed to follow these preventive medicine procedures by their command." SECNAVINST 5300.30D, *supra* note 52, para. 12b(1)(a). The Navy provides commanders with a preventive medicine order that is a "legal order that the member must obey and is not to be confused with the physician counseling statement the member may have signed during initial evaluation or follow-up treatment." *See* U.S. DEP'T OF NAVY, BUREAU OF MED. AND SURG., GUIDE FOR COMMANDING OFFICERS AND OFFICERS IN CHARGE OF HIV-INFECTED MEMBERS para. 4.0 (Oct. 2008), *available at* http://www.bethesda.med.navy.mil/patient/health_care/clinical_support/hiv/forms/Guide_for_Commanding_Officers.doc. Army commanders must use a specific form and language to counsel all HIV Soldiers and give them direct orders to engage in safe sex. *See* AR 600-110, *supra* note 52, para. 2-14. The Air Force also requires commanders to give a preventive medicine order and provides a specific form. *See* AFI 48-135, *supra* note 52, para. A8.1.

[55] *See, e.g.*, United States v. Pritchard, 45 M.J. 126 (C.A.A.F. 1996) (upholding an order that prohibited sodomy without a condom and that required HIV-positive member to wear a condom when having intercourse with his spouse); United States v. Womack, 29 M.J. 88 (C.M.A. 1989) (finding written safe-sex order constitutionally valid); United States v. Sargent, 29 M.J. 812 (A.C.M.R. 1989) (upholding written safe-sex order from commander); United States v. Negron, 28 M.J. 775 (A.C.M.R. 1989), *aff'd*, 29 M.J. 324 (C.M.A. 1989) (finding safe-sex order did not violate a privacy right).

[56] *See, e.g.*, United States v. Klauck, 47 M.J. 24 (C.A.A.F. 1997) (reviewing only an aggravated assault issue, but the trial court also convicted the accused of Article 92); United States v. Dumford, 30 M.J. 137 (C.M.A. 1990) (extending the scope of the *Womack* holding by finding that a written safe-sex order restricting sex with civilians was not overbroad).

[57] *See, e.g.*, *Womack*, 29 M.J. at 91 (declining to review appellant's claim that a safe-sex order prohibiting sex with civilians was overbroad because the charges in the case did not specifically involve civilians).

[58] *Negron*, 28 M.J. 775 *aff'd*, 29 M.J. 324.

[59] *Id*. at 776.

[60] Appellant did not claim that the commander's order lacked a lawful military purpose. *Id*. at 777.

[61] *Id*. (noting that the Constitution "does not expressly articulate a right to privacy," but acknowledging a long line of Supreme Court cases dealing with the "penumbral privacy right protecting some aspects of sexual intimacy" (citations omitted)).

[62] 478 U.S. 186 (1986) (holding there is no constitutionally protected right to consensual homosexual sodomy). The *Bowers* Court found that its earlier privacy cases did not establish "that any kind of private sexual contact between consenting adults [was] constitutionally insulated from state proscription." *Id*. at 191.

[63] *Negron*, 28 M.J. at 777, *aff'd*, 29 M.J. 324.

[64] 539 U.S. 558 (2003).

[65] *Id*. at 578 (finding consenting adults have a "full right to engage in [private sexual conduct] without intervention of the government"). "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled." *Id*.

[66] *Id*.

A review of other HIV safe-sex order cases demonstrates that there is a legitimate governmental interest in limiting the sexual conduct of HIV-positive servicemembers. At the same time the *Negron* court was looking at the privacy aspect of safe-sex orders, the COMA was looking at the governmental interest and valid military purpose aspects of safe-sex orders.[67] In *United States v. Womack*, the accused conditionally pled guilty to an Article 90 violation after unsuccessfully challenging a written safe-sex order as overbroad, overly intrusive, and exceeding military necessity.[68] On appeal, the COMA found the order lawful after looking at five areas. First, the court found a legitimate governmental interest in preventing the spread of infectious disease and called safe-sex orders a "less restrictive means" to meet that interest.[69] Second, the court said the order in the case was "specific, definite, and certain," and therefore not void for vagueness.[70] Third, the court found a valid military purpose, stating, "[t]he military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty."[71] Fourth, the court held the order was not overbroad.[72] The court refused to analyze how the order applied to any hypothetical situations beyond the facts of the case involving the appellant's sexual contact with another servicemember.[73] The fifth and final area the court examined was privacy. Similar to *Negron*, the court found no valid privacy interest involving sodomy.[74]

Negron and *Womack* laid the foundation for safe-sex order cases in military criminal practice, but two other cases expanded their basic holdings. In *United States v. Dumford*, COMA answered the open question in *Womack* about applying safe-sex orders to sexual contact with civilians with very clear language: "We have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective. It is clear to us that such conduct could be found to be service-discrediting."[75]

In *United States v. Pritchard*,[76] the CAAF addressed the scope of sexual conduct covered by safe-sex orders. In *Pritchard*, the safe-sex order only discussed intercourse, but the accused also received medical counseling that explained the virus could be transmitted by oral-genital contact.[77] During providency, the military judge conducted a "thorough, searching inquiry" where the accused acknowledged that he understood the safe-sex order also required him to "advise sodomy partners of his infection and to wear a condom during sodomy."[78] The CAAF affirmed the accused's Article 92 conviction because "failure to wear a condom or advise a sexual partner about a communicable disease prior to sexual intercourse is 'closely related' to failure to do the same prior to another form of sexual connection."[79]

The *Dumford* and *Pritchard* cases make it clear that safe-sex orders will be broadly accepted by courts,[80] but prosecutors must be aware of potential pitfalls. *Pritchard* did not address the fact that the accused was convicted in part for "unprotected

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[67] United States v. Womack, 29 M.J. 88, 89 (C.M.A. 1989) (reviewing a safe-sex order that required a servicemember to notify all partners of his infected status, and which prohibited him from engaging in acts of sodomy or homosexuality); *see also* United States v. Sargent, 29 M.J. 812, 814–17 (A.C.M.R. 1989) (providing detailed analysis about why a written safe-sex order had a valid military purpose and did not violate any constitutional privacy rights).

[68] *Womack*, 29 M.J. at 89.

[69] *Id*. at 90 (referring to earlier cases involving sexually transmitted diseases and smallpox). The court did not engage in any significant discussion about the particular dangers of HIV.

[70] *Id*. (finding the accused "had actual knowledge of its nature and terms, and he was on fair notice as to the particular conduct which was prohibited").

[71] *Id*. The court specifically referred to its holding in *United States v. Woods* where it held that transmitting HIV through intercourse was an "inherently dangerous act" that was prejudicial to good order and discipline. 28 M.J. 318, 320 (C.M.A. 1989).

[72] *Womack*, 29 M.J. at 91 (rejecting appellant's argument that the order was overbroad because it had "implicit limitations on sexual contact with civilians having no connection with the military," as well as a "requirement to notify *all* medical personnel").

[73] *Id*. (citing Parker v. Levy, 417 U.S. 733 (1974)).

[74] *Id*.

[75] 30 M.J. 137, 138 n.2 (C.M.A. 1990).

[76] 45 M.J. 126 (C.A.A.F. 1996).

[77] *Id*. at 128–29.

[78] *Id*. at 128.

[79] *Id*. at 130 (noting that the issue was a "technical variance problem aris[ing] for the first time on appeal").

[80] The rationale used by the courts in the safe-sex order cases has been adopted in other types of cases. *See generally* United States v. McDaniels, 50 M.J. 407, 408–09 (C.A.A.F. 1999) (citing *Womack* to uphold an order prohibiting a servicemember with narcolepsy from driving an automobile); United States v. Padgett, 48 M.J. 273, 277–78 (C.A.A.F. 1998) (citing *Dumford* and *Womack* to uphold an order for a servicemember to cease all interaction with a fourteen-year-old girl).

sexual intercourse with his *wife* in violation of his commander's safe-sex order."[81] The CAAF said the issue had "obvious constitutional implications, but they need not be addressed in this case [because the accused] conceded this issue at trial."[82] Regulating an HIV-positive servicemember's sexual contact with his or her spouse is therefore still an open question. Another open question is the impact of *Lawrence* on safe-sex orders. Prosecutors must be prepared to use the rationale of earlier safe-sex order cases to explain why there is a legitimate governmental interest, and how the safe-sex order in the case is the least restrictive means of meeting that interest. Prosecutors should use a stipulation of fact, or proposed findings of fact, that clearly identifies why the safe-sex order is lawful.[83] If the facts do not support an orders violation charge, prosecutors can consider an Article 134 charge.

C. Article 134—The General Article

The last charging option for prosecutors in an HIV case is Article 134. In the first two reported HIV cases, *United States v. Woods*[84] and *United States v. Morris*,[85] the prosecutors charged the offenses under Article 134. In *Woods*, there was no safe-sex order, but the court upheld a conviction under Article 134 for conduct that was prejudicial to good order and discipline when the accused had unprotected sex without informing his partner of his HIV status.[86] The court offered little analysis in support of its finding, simply stating, "a factfinder could properly find that the conduct 'was palpably and directly prejudicial to good order and discipline of the service'."[87] The *Woods* court did not seemed overly concerned about notice to a servicemember that unprotected intercourse while HIV-positive could be a crime because "a member of the armed forces has Article 134 'carefully explained' to him or her on initial 'entrance on active duty' and 'again after he [or she] has completed six months of' service."[88]

In *Morris*, the appellant had unprotected sexual intercourse with another servicemember who knew of the appellant's HIV status.[89] The appellant argued that because there was no safe-sex order in his case, the conviction "violat[ed] his right to due process in that he did not know nor could he have reasonably known that his conduct was unlawful."[90] Even though there was no safe-sex order, the court upheld the conviction because the specification alleging that the appellant's conduct showed a "wanton disregard for human life" provided fair notice to the appellant.[91]

Woods and *Morris* are the only reported HIV opinions that contain Article 134 charges. As the number of HIV cases increased, the charging theories moved toward aggravated assault and violating safe-sex orders. The appellate analysis of the issues in these newer charging theories was more in depth than the relatively conclusory opinions of fair notice in *Woods* and *Morris*. Prosecutors should use Articles 90, 92, and 128 in future cases, and not rely on Article 134 if at all possible, thereby avoiding any concern about fair notice and alleging words of criminality. If prosecutors have proof issues for a lawful order or aggravated assault charge and must look elsewhere, they can consider using Article 134, Reckless Endangerment,[92] which

[81] *Pritchard*, 45 M.J. at 131 (emphasis added).

[82] *Id*. (citations omitted).`

[83] Appendix A contains sample language for a stipulation of fact involving a safe-sex order.

[84] 28 M.J. 318 (C.M.A. 1989).

[85] 30 M.J. 1221 (A.C.M.R. 1990). Although this opinion was issued after the aggravated assault case in *United States v. Johnson*, the facts of the case preceded *Johnson*. The *Morris* case experienced a significant delay due to an interlocutory appeal on the admissibility of medical records. *See* United States v. Morris, 25 M.J. 579 (A.C.M.R. 1987) (ruling on the admissibility of HIV medical records).

[86] *Woods*, 28 M.J. 318. The court did not decide if the accused could have been convicted of another offense or if violation of a safe-sex order would be a valid charge. *Id*. at 320 n.2.

[87] *Id*. at 319–20.

[88] *Id*. at 320.

[89] *Morris*, 30 M.J. at 1228.

[90] *Id*. at 1224–25. The appellant urged that he "engaged in non-deviant sexual intercourse with a female who, like himself, was unmarried at the time, and that such conduct is not a crime." *Id*. at 1225.

[91] *Id*. (noting that several people had counseled the accused on the danger of unprotected sexual intercourse, and that the accused had Article 134 "carefully explained" to him when he entered the service and "again after he . . . completed six months of service" (citing *Woods*, 28 M.J. at 320)).

[92] MCM, *supra* note 14, pt. IV, ¶ 100a (criminalizing "wrongful and reckless or wanton" conduct that "was likely to produce death or grievous bodily harm to another person"). The prejudicial to good order and discipline, and/or service discrediting element of this offense is easily satisfied by the rationale

codified the rationale used in *Woods*.[93] Before a prosecutor makes a final decision on a charging theory, however, they should consider the potential procedural hurdles that may arise in HIV cases.

III. Procedural Issues

In addition to the unique substantive issues found in HIV cases, prosecutors should be aware of three unique procedural issues related to witnesses, PTAs, and sentencing. These three issues may not apply in every HIV prosecution, but prosecutors must understand the concepts behind them, or they will be surprised when the issues do occur. If these issues are not identified and planned for at the time the charging decision is made, the prosecutor may have a difficult time proving his case or achieving a just and proper sentence.

A. Witness Issues

In HIV prosecutions, investigations and witness coordination may require careful analysis of medical privacy regulations, the DoD homosexual conduct policy, and the need for immunity. These three issues can be tightly intertwined, creating hurdles for unwary prosecutors. Investigators will ask prosecutors what information they can get about the accused's HIV status and what they can reveal to potential witnesses about that status. Investigators will also ask how to approach suspected consensual partners of the accused to determine if they were exposed to HIV. Prosecutors must be able to answer these questions in a way that complies with regulations, preserves evidence, and assists the investigators in efficiently completing the investigation.

1. Medical Privacy

The most important procedural witness issue in an HIV case is medical privacy. The DoD policy is to "[p]rotect the privacy of individuals with serologic evidence of HIV infection, according to DoD 5400.11-R and DoD 6025.18-R."[94] Military prosecutors must be primarily aware of two HIV-specific privacy issues.

The first issue is the use of medical records that indicate a servicemember's HIV status. The general DoD rule is that HIV medical information cannot be used for adverse personnel actions against a servicemember.[95] The rule contains an exception for "otherwise authorized rebuttal or impeachment purposes,"[96] but it does not address how a prosecutor could use medical information to charge an accused prior to trial. The ACMR addressed the issue of using HIV medical information to charge an accused in *United States v. Morris*.[97] *Morris* was a Government interlocutory appeal after the trial judge suppressed the accused's HIV test results as privileged information based on guidance published in a Department of the Army policy letter.[98] The policy prohibited the use of HIV test results "against the service member in actions under the Uniform Code of Military Justice."[99] The policy also contained an impeachment/rebuttal exception, as well as an exception for "[d]isciplinary or other action based on independently derived evidence."[100] The *Morris* court overruled the trial judge,

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upholding the safe-sex order cases. *See, e.g.*, United States. v. Dumford, 30 M.J. 137, 138 n.2 (C.M.A. 1990) ("It is clear to us that such conduct could be found to be service-discrediting.").

[93] MCM, *supra* note 14, pt. IV ¶ 100a analysis, at A23-24.

[94] DoDI 6485.01, *supra* note 51, para. 6.6. *See generally* U.S. DEP'T OF DEFENSE, REG. 5400.11-R, DEPARTMENT OF DEFENSE PRIVACY PROGRAM (May 14, 2007); U.S. DEP'T OF DEFENSE, REG. 6025.18-R, DOD HEALTH INFORMATION PRIVACY REGULATION (Jan. 24, 2003).

[95] *See* DoDI 6485.01, *supra* note 51, para. 6.5 ("Do not use information obtained during or primarily as a result of an epidemiologic assessment interview to support any adverse personnel action against the member . . . .").

[96] *Id*.

[97] 25 M.J. 579 (A.C.M.R. 1987).

[98] *Id*.; *see also* United States v. Morris, 30 M.J. 1221, 1223–24 (A.C.M.R. 1990) (reaffirming its interlocutory ruling granting admissibility in a later opinion on the merits of the case); UCMJ art. 62(a)(1)(B) (2008) (creating a Government right to appeal "an order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding").

[99] *Morris*, 25 M.J. at 579.

[100] *Id*.

holding "the privilege is a form of limited immunity granted for possible past criminal misconduct and does not prohibit use of the test results where they directly relate to future misconduct."[101] The logic of the *Morris* opinion is found in current service regulations on HIV.[102]

The second HIV privacy issue is how medical authorities inform individuals of potential HIV exposure. Service regulations provide detailed guidance on this process. A common theme in service regulations is that "HIV antibody test results must be treated with the highest degree of confidentiality and released to no one without a demonstrated need to know."[103] This "need to know" provision would seem to limit the ability of an investigator to reveal the accused's HIV status to a potential victim. The credibility of the investigator's information about sexual contact between the accused and the potential victim would determine if there is a "need to know." Additionally, if the victim is an active duty servicemember who has HIV, a physician, not an investigator, should initially inform the victim of his HIV status.[104]

2. Homosexuality and Immunity

Homosexuality and immunity[105] are the second and third procedural issues that may be important in HIV cases. In an HIV-related criminal investigation that involves homosexual acts, witness and victim interviews can be difficult. In a normal criminal investigation, investigators have little difficulty talking to witnesses about consensual sexual activity that may be relevant to the case. Investigators' biggest concern may be a witness not talking out of embarrassment, but they can usually work around that with tact and professionalism. In a case involving homosexuality, however, investigators face three obstacles. First, DoD policy limits when investigators can question a servicemember about homosexual activity.[106] Second, potential HIV victims may be afraid to talk out of fear of criminal prosecution themselves.[107] Third, a servicemember involved in homosexual activity may be unwilling to cooperate out of fear of administrative separation.[108] Investigators of potential HIV aggravated assaults need a way to get over these three obstacles while still complying with regulations. A possible answer is immunity.

If a potential victim was a consensual homosexual partner of the accused, getting a grant of immunity is strongly recommended before interviewing the victim. Although a convening authority is unlikely to prosecute a servicemember for a consensual homosexual relationship without any aggravating factors,[109] a servicemember may still fear prosecution. A grant

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[101] *Id*. at 580 ("Here the basis of the disciplinary action is not the mere presence of HIV antibodies but rather conduct alleged to have occurred after the test and with the knowledge of HIV infection.").

[102] *See* SECNAVINST 5300.30D, *supra* note 52, para. 15b(4) (allowing the use of HIV test results for adverse action if the servicemember violates the guidance in a preventive medicine counseling, or a preventive medicine order, or if the HIV status is an element of proof in a criminal offense); AR 600-110, *supra* note 52, para. 7-2.b (using language similar to SECNAVINST 5300.30D); AFI 48-135, *supra* note 52, paras. A11.1.2.5, A11.1.3 (using similar language).

[103] SECNAVINST 5300.30D, *supra* note 52, para. 14a.; *accord* AR 600-110, *supra* note 52, para. 1-13f (placing a duty on commanders to "limit[] disclosure of a soldier's HIV antibody status to only those personnel who have a need to know about the medical condition in the performance of their duties"). The Air Force does not have any similar "need to know" guidance.

[104] *See* SECNAVINST 5300.30D, *supra* note 52, para. 12b(1)(a) ("shall be counseled by a physician"); AR 600-100, *supra* note 52, para. 2-12 ("All soldiers will be individually and privately notified of all positive HIV test results in a face-to-face interview with a physician."); AFI 48-135, *supra* note 52, para. A12.1.2 ("shall be counseled by a physician").

[105] *See* MCM, *supra* note 14, R.C.M. 704.

[106] "Under DoD policy, a commander may initiate an investigation into homosexual conduct only upon receipt of credible information of such conduct. Credible information exists when information, considering its source and the surrounding circumstances, supports a reasonable belief that a service member has engaged in homosexual conduct." Memorandum from the Under Secretary of Defense to Secretaries of the Military Departments et al., subject: Guidelines for Investigating Threats Against Service Members Based on Alleged Homosexuality (24 Mar. 1997), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=2171; *see also* U.S. DEP'T OF DEFENSE, INSTR. 5505.8, DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS AND OTHER DOD LAW ENFORCEMENT ORGANIZATIONS INVESTIGATIONS OF SEXUAL MISCONDUCT para. 4 (Jan. 24, 2005) ("It is DoD policy that the DCIOs or other DoD law enforcement organizations shall not conduct an investigation solely to determine a Service member's sexual orientation (heterosexual, homosexual, or bisexual).").

[107] *See* United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004) (finding that the military can still criminally punish consensual sodomy under unique military specific circumstances, even after the holding in *Lawrence v. Texas*, 539 U.S. 558 (2003)). Witnesses may be further intimidated if investigators read them their Article 31 rights for suspected sodomy.

[108] *See* 10 U.S.C. 654(b) (2006) (mandating separation from the armed forces for homosexual conduct).

[109] *See Marcum*, 60 M.J. 198 (allowing sodomy prosecutions, but only when there is an aggravating factor related to military service that removes the conduct from the privacy interest created in *Lawrence*, 539 U.S. 558); U.S. MARINE CORPS, ORDER P1900.16F Ch 2, MARINE CORPS SEPARATION AND

of immunity may eliminate the fear of prosecution from a potential victim. However, the grant of immunity will most likely not apply to an administrative separation.[110]

3. Putting It All Together—The Need to Coordinate

The key to dealing with the procedural issues involving medical privacy, homosexuality, and immunity is coordination. Prosecutors and investigators should discuss the interplay between these three areas as soon as an HIV-related investigation begins.

The most effective way to question a potential victim and comply with applicable regulations and policy is a five-step process. First, investigators should make a proper request for the accused's medical records to confirm his HIV status. They should also check the records to see if the accused had previously informed medical authorities about any sexual contact with the potential victim. Second, if the accused did not tell medical authorities that the potential victim was a sexual partner exposed to HIV, investigators should contact the appropriate medical authority to have the individual informed of his potential exposure. Third, while medical authorities conduct HIV testing of the potential victim, investigators should contact the immunity authority in the potential victim's chain of command to get a grant of immunity related to the individual's homosexual behavior. If this step involves multiple commands and/or services, significant coordination and time may be required between prosecutors, staff judge advocates, and convening authorities in the commands of the accused and the witness. Fourth, prior to interviewing the potential victim, investigators should locate the individual's local victim assistance office to coordinate immediate services for the individual after he learns more details about his exposure to HIV.[111] Fifth, after investigators have the HIV test results, medical authorities have discussed the results with the individual, and the grant of immunity is approved, the investigators should interview the individual. This sequence of events is much more complicated than the process used to interview witnesses in a traditional criminal investigation, but it is the best method for many HIV cases. It will only work when prosecutors coordinate early and often with investigators.

B. Pretrial Agreements

A second unique procedural area in HIV prosecutions only occurs in guilty pleas. In an HIV guilty plea, the convening authority should consider using a provision that addresses any other potential victims of the accused. Beginning with the earliest military court opinions involving HIV, courts noted the military's duty to protect not only the health and welfare of its own fighting force, but also the health and welfare of society in general.[112] This governmental interest justifies a PTA provision that requires the accused to notify the applicable military health department of the accused's sexual partners.[113] The list of names included with the PTA provision should be submitted to the applicable service's lead health agency, and not the convening authority.[114]

RETIREMENT MANUAL para. 6207.3f(1) (6 June 2007) ("Informal fact finding inquires and administrative separation procedures are the preferred method of addressing homosexual conduct.").

[110] *See* MCM, *supra* note 14, R.C.M. 704(b) analysis, at A21-38 ("Note that this rule relates only to criminal proceedings. A grant of immunity does not extend to administrative proceedings unless expressly covered by the grant."). The conditional language in the second sentence does not seem applicable to administrative separations for homosexual conduct, where a member "shall be separated" upon a finding of qualifying homosexual conduct. 10 U.S.C. 654(b).

[111] If the witness has HIV, investigators should let medical authorities initially inform the accused of his status before investigators begin questioning. *See supra* note 104 and accompanying text.

[112] *See supra* Section II.B (discussing safe sex orders).

[113] Although the accused is supposed to have done this with medical authorities, in certain cases, investigators may have good reason to believe that the accused did not tell medical authorities about all of the accused's sexual contacts.

[114] The convening authority generally does not need to know the health status of members outside of his command, or the private sexual activities of any military member. The goal of the provision is to warn and protect other victims; medical authorities can accomplish that goal. If the list is given to the convening authority, a perception may arise in some cases that the convening authority is using the list to find other homosexual servicemembers in order to separate them.

There are three reasons to include this PTA provision. First, it allows medical authorities to inform and test potential victims. This course of action would allow other infected persons to seek treatment and prevent the unknowing transmission of HIV to others. Second, the accused might be able to use it in exchange for some leniency in sentencing, thereby encouraging a guilty plea and quick resolution of the case. Third, the provision encourages full disclosure by the accused, because under the terms of the PTA, the accused would not face prosecution for any new victims identified on the list.[115] If the Government discovers new victims after trial that are not on the submitted list, Rule for Courts-Martial (RCM) 1109 allows for a vacation hearing.[116]

C. Sentencing

The third and final procedural area unique to HIV prosecutions is a sentencing issue that occurs when the facts of the case preclude a successful Article 128 prosecution.[117] When the Government is able to convict the accused for a crime other than aggravated assault, the prosecutor should consider using the accused's HIV status in aggravation. In *United States v. Jones*, the military judge acquitted the accused of aggravated assault at a general court-martial, but convicted him of adultery based on the same sexual encounter.[118] The court allowed the prosecutor to use the accused's HIV status in aggravation and the military judge awarded the "maximum punishment for adultery, including a dishonorable discharge," when the trial counsel had only "suggested that a bad-conduct discharge was 'warranted,'" in addition to requesting "a term of confinement, reduction to E-1, and forfeitures."[119] When the military judge announced his sentence, he told the accused, "I find your conduct to be outrageous—your disregard for the health and safety of an unknown victim and this purposeful conduct committed immediately after being made aware of the circumstances [of your HIV status]."[120]

Although the three procedural issues involving witnesses, PTAs, and sentencing will not apply equally in every HIV prosecution, they are important considerations for prosecutors. Because they can affect the evidence available for trial, as well as the sentence following a guilty finding, prosecutors should review each case for these procedural issues prior to making a charging decision. Early identification of these issues will not only help in the charging decision, but will also help in explaining the value of the case to the convening authority.

IV. Conclusion

Prosecuting HIV crimes in the military presents unique substantive and procedural issues that require advance planning, study, and coordination. The *Dacus* concurrence should remind prosecutors that HIV aggravated assaults are not always easy to charge or prove. First, prosecutors must deal with substantive charging issues left open by earlier court opinions, such as protected consensual sex with the spouse of an HIV accused. Second, prosecutors must consult with medical experts to determine if the facts of the case will satisfy the *Weatherspoon* risk of harm and magnitude of harm prongs. These requirements alone can make HIV aggravated assaults more complex and time-consuming than normal assault cases, and they only relate to the charging decision, and not to any procedural issues.

Prosecutors must also be aware of the unique procedural issues related to witnesses, PTAs, and sentencing. The largest concern involves witnesses and the interplay between medical privacy, homosexual conduct policy, and immunity that can be present in HIV cases. A legally sound charge is of no use if the accused does not plead guilty and the prosecutor is unable to get a victim or witness to testify in the case.

Unless an HIV-specific crime is created for the UCMJ, prosecutors must continue to cautiously charge HIV crimes under existing articles. Despite the potential complexities of HIV prosecutions, prosecutors can succeed with well-thought-out

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[115] The PTA provision would contain specific language about how the names on the list will be used. *See infra* app. B (sample PTA provision).

[116] MCM, *supra* note 14, R.C.M. 1109. If the Government learns of a new victim after trial, prosecutors simply have to ask medical authorities if that victim's name was on the list submitted by the accused. If the name was not on the list, a Rule for Courts-Martial (RCM) 1109 hearing will be held to determine if the accused breached the PTA and if any portion of the suspended sentence should be vacated.

[117] UCMJ art. 128 (2008).

[118] 44 M.J. 103 (C.A.A.F. 1996).

[119] *Id*. at 104.

[120] *Id*.

charges and early and continuous coordination with medical authorities, investigators, and command representatives. Once at trial, prosecutors should use detailed stipulations of fact, or proposed findings of fact for contested cases, that clearly explain why the facts justify a guilty finding. An HIV assault is clearly one of the most serious types of assaults, and the potentially deadly consequences of the assault demand prosecutors continue to find a way to successfully charge the offenses at courts-martial.

Appendix A

Article 128

A stipulation of fact for an HIV aggravated assault should include specific details about the sexual activity relevant to the case. The stipulation should address how the risk of transmission under the first prong of *Weatherspoon* was affected by the accused's viral load, the type of sexual activity (vaginal intercourse, anal intercourse, sodomy, etc.), the use of a condom, and the means of transmission (semen, blood, saliva). It should also discuss the magnitude of harm under the second prong of *Weatherspoon*, and the issue of consent (if applicable). In addition to identifying each relevant factor in the case, the stipulation of fact should use key language from applicable case law.[121]

An example of the core language needed in a stipulation of fact is below. Prosecutors are encouraged to consult an expert and get specific information about how the facts of the case relate to the risk of transmission and the magnitude of harm. Prosecutors can use the expert's information in the stipulation. In particularly detailed cases, prosecutors may want to attach the expert's evidence directly to the stipulation. The sample provision below is for an HIV aggravated assault that involved vaginal intercourse, a condom, and a victim who did not know the accused was HIV-positive prior to intercourse:

> I understand that an aggravated assault is an assault with a dangerous weapon or other means of force likely to produce death or grievous bodily harm. The test for whether a means of force is likely to produce death or grievous bodily harm is a two-pronged analysis. The first prong is the risk of harm and the second prong is the magnitude of harm.[122] The likelihood of death or grievous bodily harm is determined by measuring both prongs, not just the statistical risk of harm. Where the magnitude of harm is great, there may be an aggravated assault, even though the risk of harm is statistically low.[123]
>
> I agree that the first prong is met in this case because the risk of harm was more than merely a fanciful, speculative, or remote possibility.[124] The risk of harm in this case was the transmission of HIV to [victim] via my semen through the act of vaginal intercourse (the "means likely"). [insert specific medical information here related to the facts of the case and the likelihood of transmission]. I agree that the use of a condom during sexual intercourse is not a defense to assault with a means or force likely to produce death or grievous bodily harm.[125] In this case, my use of a condom during intercourse with [victim] did not make the risk of HIV transmission less than merely a fanciful, speculative, or remote possibility.[126] [insert specific medical information here regarding failure rate of condoms].
>
> I agree that the second prong is met in this case because the natural and probable consequence of my intercourse with [victim] is that I would transmit HIV to her, which would develop into AIDS and eventually cause her death. I specifically agree that the likelihood of HIV developing into AIDS is [insert specific medical information].

Article 92

Any stipulation of fact must identify the accused's knowledge of the lawfulness of the safe-sex order and his understanding of the scope of it. The lawfulness of the order must include a description of the governmental interest in controlling the spread of HIV. For a case with a military victim, it should also cite the need to preserve a healthy fighting force as well as good order and discipline. The stipulation should use specific language from the preventive medicine order.

Sample stipulation of fact language for a safe-sex order violation:

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[121] The footnotes in the sample stipulation of fact have been included to identify the origin of certain language. It is the prosecutor's discretion whether to include citations to cases in an actual stipulation of fact.

[122] United States v. Weatherspoon, 49 M.J. 209, 211 (C.A.A.F. 1998).

[123] *Id*.

[124] United States v. Johnson, 30 M.J. 53, 57 (C.M.A. 1990).

[125] United States v. Klauck, 47 M.J. 24, 25 (C.A.A.F. 1997).

[126] *Johnson*, 30 M.J. at 57.

On [date], military medical officials informed me that during a routine physical, my blood tested positive for the Human Immunodeficiency Virus (HIV). Shortly thereafter, I began a thorough and continuous course of treatment and education about my condition at [insert applicable military medical facility]. During that treatment period, I received detailed counseling and information on how to care for my HIV and how to prevent spreading it to others. As part of my treatment, I was required to sign annual counseling statements with my provider that explained how I may infect others, and what I was required to do if I desired to have sexual contact with others. Those counseling statements are included in Attachment 1. In addition to these counseling sessions, on [date] I received a preventive medicine order, or "safe-sex order," from my commanding officer directing me not to engage in sexual intercourse, and [other listed sexual activity], without first informing my partner of my HIV-positive status. The safe-sex order also required that I use a condom for all sexual activity, including intercourse. The safe-sex order is included in Attachment 2. Based on my counseling, treatment, discussions with the medical officials, and the safe-sex order, I was well informed of what types of activity could put others at risk to exposure. Specifically, I knew that if I engaged in protected vaginal intercourse, I was putting my partner at risk. I knew that condoms decrease but do not eliminate the risk of HIV transmission because they may have defects or may not be used properly. Knowing all of this, I chose to engage in protected sexual intercourse with [victim] without informing her of my HIV-positive status.

I believe the safe-sex order in Attachment 2 was a lawful military order for two reasons. First, the military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty.[127] Military members with HIV are significantly hindered in their ability to be worldwide deployable, are at risk for increased health problems, and can adversely affect the performance of the military's overall mission. Second, transmitting HIV through intercourse is an inherently dangerous act that is prejudicial to good order and discipline.[128] I believe these two reasons are the types of legitimate state interests that justify intrusion into the personal and private life of an individual, including private sexual conduct.[129]

[127] United States v. Womack, 29 M.J. 88, 91 (C.M.A. 1989).

[128] United States v. Woods, 28 M.J. 318, 320 (C.M.A. 1989).

[129] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

Appendix B

In an HIV-related guilty plea, prosecutors should consider using a PTA provision that requires the accused to notify medical authorities of any other individuals the accused may have exposed to HIV. A sample provision is below:

> I agree to provide a list of names of all sexual partners I had sexual relations with after I learned of my HIV status. The list of names shall contain any and all identifying information I have for each person, to include, but not limited to: name, address, telephone numbers, Internet screen name or user names, and e-mail addresses. The list of names is due to the (applicable medical authority) five days prior to my trial date. I understand that the information I provide will be used by an appropriate government health agency to notify each individual that may have been exposed to HIV. The notification shall be done in accordance with established medical procedures that do not identify me as the potential source of the virus. The convening authority will not see the list of submitted names and the list of names will not be admissible against me in a later court-martial proceeding in accordance with MRE 410. However, if the convening authority independently learns after trial about a person I exposed to HIV, the convening authority shall be allowed to ask the (applicable medical authority) if that new name was on the submitted list. If the (applicable medical authority) confirms the name was not on the list, the convening authority may, after complying with the procedures set forth in R.C.M. 1109, vacate any periods of suspension agreed to in this PTA or as otherwise approved by the convening authority, and that previously suspended portion of my sentence could be imposed upon me.

Claims Report

U.S. Army Claims Service

The Judge Advocate General's Excellence in Claims Award

Lieutenant Colonel Cheryl E. Boone[*]

The Judge Advocate General's Excellence in Claims Award is an annual award to recognize outstanding performance by claims offices worldwide.[1] The award measures performance in a number of areas, to include claims prevention, claims processing time, and an office's method of ensuring a quick and fair settlement of claims.[2] Each claims office that wishes to be considered for the award must submit an application, which is available on the Claims Forum of The Judge Advocate General's Corps website.[3]

The U.S. Army Claims Service (USARCS) receives numerous applications for the claims award, and the criteria for the award are extremely demanding. In Fiscal Year 2008, only thirty offices won the award.[4] Each application is reviewed by a committee of subject matter experts from USARCS and from overseas claims service commands. During the evaluation process, the committee reviews data from claims databases and considers the comments of Army Claims Service personnel who have interacted with each claims office. The claims offices are judged based on their compliance with regulatory standards and demonstrated innovation in providing service.[5]

Claims offices may gauge their own performance by reviewing the award criteria. Tallying positive and negative responses to questions asked on the application can provide a rough idea of how well an office may score on the official evaluation. The following suggestions should assist claims offices score better on the Excellence in Claims Award and provide better service.

1. Training. Claims offices should send their claims professionals to training annually. Conferences and seminars conducted throughout the year provide a variety of opportunities for professional training. For example, basic personnel claims training conferences are offered four times a year at locations throughout the United States,[6] and a tort claims conference is held in the Maryland area each fall.[7] Claims conferences are also offered annually in Europe and Korea.[8] In addition, Area Action Officers (AAOs) from USARCS can conduct training on a number of subjects. Claims offices may take advantage of AAO talent by asking them to provide training during their visits. Online claims training is also available through JAG University, an Internet site sponsored by the U.S. Army Judge Advocate General's Legal Center and School.[9]

2. Personnel Stability. Staff judge advocates are encouraged to leave judge advocates in claims positions for at least a year to foster continuity and to ensure that claims are investigated and acted on in a timely manner. Offices encountering

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[1] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 1-23 (8 Feb. 2008).

[2] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 1-23 (21 Mar. 2008).

[3] A message announcing the Fiscal Year 2008 award was posted on 12 September 2008. Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: Award for Excellence in Claims—FY 2008 (original posting), https://www.jagcnet2.army.mil/nntp/fclaims.nsf/AllByDate?OpenView (Sept. 2, 2008) [hereinafter Masterton's original posting]. The application containing the criteria for the award was published on the same day. Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: Award for Excellence in Claims—FY 2008 (supplemental posting), https://www.jagcnet2.army.mil/nntp/fclaims.nsf/AllByDate?OpenView (Sept. 2, 2008). A message announcing the criteria for the FY 2009 award was posted on 10 July 2009. Posting of Colonel Reynold P. Masterton to JAGCNet Claims Forum, subject: Criteria for 2009 Excellence in Claims Award, https://www.jagcnet2.army.mil/nntp/fclaims.nsf/AllByDate?OpenView (July 10, 2009).

[4] A message announcing Winners of The Judge Advocate General's 2008 Excellence in Claims Award was posted on 21 Apr. 2009, https://www.jagcnet.army.mil.

[5] *See* Masterton's original posting, *supra* note 3

[6] *Id.*

[7] These conferences are announced on the USARCS website, https://www.jagcnet.army.mil/8525752700444FBA.

[8] The European conference is hosted by the U.S. Army Claims Service, Europe. Information on this conference may be obtained by contacting them at Box 37, Unit 30010, APO AE 09166 or by telephone at 001-49-621-730-6417 or 6467. The Asian conference is hosted by the U.S. Armed Forces Claims Service, Korea. Information on this conference may be obtained from their Internet site at http://8tharmy.korea.army.mil/ClientLegalSVC/default.htm.

[9] The U.S. Army Judge Advocate General's Corps, JAG University, *available at* https://jag.learn.army.mil/webapps/portal/frameset.jps (follow "My Organizations" hyperlink; then follow "TJAG Training" hyperlink; then follow "Core Legal" hyperlink; then follow "Claims" hyperlink).

personnel shortages should contact their USARCS AAO for advice on claims issues. AAOs can assist offices to formulate a plan to prioritize investigations and maximize limited resources.

3. Use of Claims Databases and Automation Resources. All claims personnel should have access to JAGCNet,[10] the Internet site that contains all claims automation resources. A member of each claims office should review the Claims Forum on JAGCNet daily to obtain the latest claims information.[11] Claims offices should also regularly update claims in the Personnel Claims Database, the Tort and Special Claims Application, and Affirmative Claims Database.[12] All tort claims should be logged into the Tort and Special Claims Application as soon as possible after receipt, and new records related to tort claims should be uploaded at least on a weekly basis.

4. Communication. It is paramount that claims offices forge effective relationships with their USARCS AAO, military treatment facilities (MTF), Directorates of Public Works, Criminal Investigation Division and military police offices, post exchanges, commissaries and other agencies involved in claims. These relationships can help ensure that claims offices receive timely notice of potential claims as they arise. Enhanced communication can not only foster teamwork but can assist in the prompt resolution of claims.

5. Hands-on Tort Claims Investigations. Tort claim investigators should not wait to receive second-hand claims information. Instead, investigators should be proactive and should conduct thorough investigations themselves or work in conjunction with an injured party or the party's attorney once notified of an accident. Failure to investigate tort claims in a timely fashion only complicates the overall claims process because accident scenes change, memories fade and witnesses move out of the area. USARCS can provide a professional accident scene investigator if necessary.

6. TRICARE Agreement. Under the 2009 Memorandum of Agreement between The Judge Advocate General, The Medical Command, and TRICARE, the TRICARE Management Activity agreed to pay proportionate costs of select medical affirmative claims personnel who, until 2009, had been funded exclusively by Medical Treatment Facilities (MTFs).[13] This year, claims offices have the opportunity to enter into or revise a current memorandum of understanding between their office and the local MTF to hire new personnel or initiate changes in funded personnel positions. Some claims offices may be able to negotiate for new claims positions devoted exclusively to TRICARE reimbursements. This could benefit both the claims office, which would gain additional resources, and TRICARE, which could reap greater medical recoveries.

7. Publication of Claims Information and Articles. Claims offices should incorporate claims into their preventive law programs. Offices should be proactive in disseminating claims information to Soldiers, Family members, and employees regarding office hours and location, claims policies, potential risks, and the process for filing claims. Reaching the broadest audience can be achieved by publishing articles on claims in local post newspapers and similar sites, distributing brochures and information papers through command information channels, and participating in installation briefings for inbound personnel. Furthermore, linking office websites with installation websites can increase visibility and provide another useful venue in which to offer claims guidance and instruction.

8. Standard Operating Procedures (SOPs). Standing Operating Procedures should be both accurate and easy to understand. Offices should update their SOPs annually to ensure they are both practical and current.

9. Evaluate Customer Satisfaction. Offices should assess customer satisfaction frequently by calling claimants after settlement or distributing customer satisfaction surveys during claims intake. Feedback may identify areas warranting improvement.

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[10] JAGCNet, *available at* https://www.jagcnet.army.mil (last visited 31 July 2009).

[11] The current Claims Forum is available at the USARCS website, https://www.jagcnet.army.mil/8525752700444FBA. The forum is scheduled to be converted to a discussion board in 2009, but both the old forum and the new discussion board will be available at the current Internet address.

[12] The Personnel Claims Database is scheduled to be replaced by the Personnel Claims Army Information Management System (PCLAIMS), an online application, in October 2009. The new application will be available at the USARCS website, https://www.jagcnet.army.mil/8525752700444FBA. The Tort and Special Claims Application and the Affirmative Claims Database are also available at this Internet address.

[13] Additional information on this agreement can be obtained from the Affirmative Claims Forum on JAGCNet. Posting of Thomas Kennedy to JAGCNet Affirmative Claims Forum, subject: Reimbursement Agreement with TRICARE Management Activity, https://www.jagcnet2.army.mil/nntp/FACnsf/AllByDate?OpenView (Feb. 11, 2009).

10. Initiative. The Excellence in Claims Award rewards "out-of-the-box" thinking. Offices undertaking unique initiatives to improve operations are encouraged to share their accomplishments in the award application.

Applications are due in January of each year. Area Claims Offices should submit their applications through their SJA directly to USARCS. Claims processing offices should submit their applications through their Area Claims Office and SJA. Overseas offices should submit their applications through their SJA to the U.S. Army Claims Service, Europe, or the Armed Forces Claims Service, Korea, as appropriate. Staff judge advocates must submit a forwarding endorsement with the application.

All claims offices are encouraged to apply for this award. Regardless of whether an office wins the award, the application process provides an outstanding means of assessing an office's claims operations.

Book Reviews

RETRIBUTION: THE BATTLE FOR JAPAN, 1944–45[1]

REVIEW BY MAJOR BAILEY W. BROWN, III[2]

Thus using fire to aid an attack is enlightened, using water to assist an attack is powerful. Water can be used to sever, but cannot be employed to seize.[3]

The book *Retribution: The Battle for Japan, 1944–45*, written by noted British war correspondent Max Hastings,[4] describes the last year of warfare in the Pacific Theater of World War II, a subject prolifically dissected by prior historians.[5] Hastings' richly detailed narrative immerses the reader in a vivid, empirical account of the war in the Pacific. By addressing the personal struggles and experiences of participants at all levels, Hastings reveals strategic lessons that remain relevant today.

The book has two primary themes. The first is that Japan's brutal conduct of the war gave rise to a spirit of retribution among her enemies. This spirit of retribution explains, and may justify,[6] the use by Allied Forces of incendiary bombing and atomic weapons against Japan. Having equipped his reader with a narrative both broad and convincingly detailed, Hastings argues in his second theme that Japan must accept responsibility for its institutionalized brutality in the prosecution of the war before it can regain credibility with its neighbors in the region.[7] During an interview with the Pritzker Military Library,[8] Hastings remarked that "you can't understand what Asia is today unless you understand what happened there all those years ago."[9] The challenges leaders faced in the Pacific still resonate with the challenges leaders face on today's battlefields.

Having written extensively on matters of military history, Hastings is quite familiar with the scholarship surrounding the Second World War.[10] He wrote *Armageddon*,[11] which details the closing days of the war in Europe and to which *Retribution* is a companion volume.[12] The Pritzker Military Library provides a bibliography to *Retribution*, crediting Hastings with ten scholarly works on warfare and military history.[13] With an abundant arsenal of prior research, Hastings attacks the project of synthesizing accounts from all sides of the Pacific campaign to shed new light on the conflict and its modern implications.

While grounded in established literature, Hastings brings new light to his topic by incorporating personal interviews, recorded oral histories, and original sources such as "minutes of meetings, unit war diaries or ships' logs."[14] Acknowledging

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[1] MAX HASTINGS, RETRIBUTION: THE BATTLE FOR JAPAN, 1944–45 (Alfred A. Knopf 2008).

[2] Judge Advocate, U.S. Army. Currently assigned as the Deputy Staff Judge Advocate, U.S. Army Garrison, Fort McPherson, Ga. LL.M., 2009, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] SUN TZU, THE ART OF WAR 227 (Ralph D. Sawyer, trans., Barnes & Noble Books 1994) (ca. sixth century B.C.E.).

[4] HASTINGS, *supra* note 1, inside back cover.

[5] HASTINGS, *supra* note 1, at xxi (acknowledging that "the specialized literature is vast"). A search for the term, "World War II Pacific" at the website of on-line bookseller Amazon.com, revealed almost 6000 items available for sale. *See* http://www.amazon.com/s/ref=nb_ss_gw?url=search-alias%3Dstripbooks&field keywords=World+War+II+Pacific&x=10&y=25 (last visited Sept. 12, 2008).

[6] HASTINGS, *supra* note 1, at xix.

[7] *Id*. at 550.

[8] The Pritzker Military Library is located at 610 North Fairbanks Court 2nd Floor, Chicago, IL 60611, telephone: 312.587.0234, FAX: 312.587.0536. *See* Pritzker Military Library, *available at* http://www.pritzkermilitarylibrary.org (last visited May 20, 2009).

[9] Web video: Retribution: The Battle for Japan, 1944–45, *Sir Max Hastings*, http://www.pritzkermilitarylibrary.org/events/2008-05-01-max_hastings.jsp (The Pritzker Military Library video of an interview with Max Hastings May 1, 2008).

[10] HASTINGS, *supra* note 1, inside back cover (crediting Hastings with "more than 15 books").

[11] MAX HASTINGS, ARMAGEDDON: THE BATTLE FOR GERMANY, 1944–1945 (Alfred A. Knopf 2004).

[12] HASTINGS, *supra* note 1, at xvii.

[13] Pritzker Military Library, Selected Bibliography for Retribution: The Battle for Japan, 1944–45, http://www.pritzkermilitarylibrary.org/events/2008/files/2008-05-01-bibliography.pdf (last visited May 31, 2009).

[14] HASTINGS, *supra* note 1, at xxiii.

the limitations of such evidence, Hastings cautions the reader that "[f]ew official narratives in any language explicitly acknowledge disaster, panic, or failure, or admit that people ran away."[15] Concerning eyewitness interviews, Hastings candidly observes that,

> old people have forgotten many things, or can claim to remember too much. Those who survive today were very young in the war years. They held junior ranks and offices, if indeed any at all. They knew nothing worth rehearsing about events beyond their own eyesight and earshot. . . . It is essential to reinforce their tales with written testimony from those who were at the time more mature and exalted.[16]

With his readers thus informed about the method and limitations of the research supporting the book, Hastings draws them, willing or otherwise, into a compelling and suspenseful narrative of the battle for the Pacific.[17]

Hastings argues that until Japan fully acknowledges the depravity of its wartime conduct, "it will remain impossible for the world to believe that Japan has come to terms with the horrors which it inflicted upon Asia almost two-thirds of a century ago."[18] At the beginning of the text, Hastings explains the origins and nature of the Japanese prosecution of the war, first contextualizing it in the politics of the time. "Japan perceived itself merely as a latecomer to the contest for empire in which other great nations had engaged for centuries. It saw only hypocrisy and racism in the objections of Western imperial powers."[19] Since Japan's efforts in China and elsewhere sought primarily to "strip [occupied lands] of food and raw materials for the benefit of Japan's people,"[20] occupying forces were "inhibited from treating their conquests humanely, even had they wished to do so."[21] The result, Hastings argues, was the "Japanese wartime inhumanity to British, Americans, and Australians who fell into their hands. This pales into absolute insignificance beside the scale of their mistreatment of Asians."[22]

Early in the text, Hastings mentions "systemic brutalities against Allied prisoners and civilians in the Philippines, East Indies, Hong Kong and Malaya . . . long before the first Allied atrocity against any Japanese is recorded."[23] He cites "the slaughter of Chinese outside Singapore in February 1942" as one example.[24] Throughout the text, Hastings details important military atrocities, a notable example of which is Japanese action during MacArthur's capture of Manila in early 1945. When Japanese General Shizuo Yokoyama and Admiral Sanji Iwabuchi learned their superiors had ordered them to pull out, they elected to stay and fight on the basis of personal honor.[25] MacArthur's forces shortly surrounded the city, trapping the Japanese.[26] The Japanese "fought accordingly,"[27] committing themselves to a house by house, street by street defense against the Allies and "asserting that everyone found in the battle area was a guerilla," and was therefore subject to wholesale slaughter.[28] This assertion included the civilian inhabitants of Manila, who were exterminated as a matter of policy.[29] Japanese soldiers went so far as segregating women and girls from groups of doomed civilians to provide Japanese soldiers

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[15] *Id.* at xxiii to xxiv.

[16] *Id.* at xxiv.

[17] Hastings focuses appropriately, though by no means exclusively, on the United States and Japan in the conflict. For a five-volume British account of the Pacific campaign, written from a strategic perspective, see generally S. WOODBURN KIRBY, THE WAR AGAINST JAPAN (Her Majesty's Stationary Office 1957) (acknowledging that, among the Allies, "the United States assumed primary responsibility for the Pacific"). *Id.* at xvii.

[18] *Id.* at 550.

[19] *Id.* at 5.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 6.

[23] *Id.* at 8.

[24] *Id.*

[25] *Id.* at 230.

[26] *Id.* at 231.

[27] *Id.*

[28] *Id.* at 234.

[29] *Id.* at 236 (citing REPORT ON THE SACK OF MANILA, U.S. CONGRESSIONAL COMMITTEE ON MILITARY AFFAIRS 14–15 (1945) (describing a Japanese Battalion order stating that, "[w]hen Filipinos are to be killed they must be gathered into one place and disposed of in a manner that does not demand excessive use of ammunition or manpower")).

"who were soon to die a final exalting sexual experience."[30] As a result of this and other atrocities across Asia, many of which Hastings describes in ghastly detail, "it became impossible for Japan's leaders credibly to deny systematic inhumanity as gross as that of the Nazis."[31]

Hastings argues that the predictable result of Japanese conduct on and off the battlefield was that "Allied commanders favored the use of extreme methods to defeat them."[32] "After years in which Japan's armies had roamed Asia at will, killing on a Homeric scale, retribution was at hand,"[33] Hastings summarizes pithily. This retribution ultimately included Major General Curtis E. LeMay's controversial firebombing campaign and the decision to deploy atomic weapons.[34] Hastings addresses the moral debates surrounding these actions in the context of his two larger themes. While the morality of these actions is not a primary theme of the book, it plays an important part of the author's argument.

Hastings does not specifically defend the bombing campaign. Instead, he defends its participants with the persuasive argument that "if the destruction of Japan's cities and massacre of its civilians were deemed inappropriate objectives for the [U.S. Army Air Force], the onus rested squarely on the media and the political leadership of the U.S.A. to demand that the campaign be prosecuted differently. They never did so."[35] In this context, it makes sense that "[i]f striking at cities was the best means of inflicting damage upon the enemy's industrial base with available navigational and bomb-aiming technology, then this was what the XXth Bomber Command would do."[36]

Commanders relied upon a perception of "operational necessity" as well as "strategic desirability" in authorizing these attacks.[37] The American public, in contrast, sought retribution for Pearl Harbor and the subsequent Japanese atrocities. Hastings points out that when the campaign commenced, "[n]o moral doubts were expressed" in the public press[38] and that "[w]hereas the adoption of nonvisual bombing techniques in Europe signified that civilian casualties were a matter of decreasing concern . . . by the time such methods were applied against Japan, civilian casualties were of no concern at all."[39]

Regardless of the popularity of the action, the U.S. Army Air Force (USAAF) "clung to fig leaves,"[40] claiming its "object *was not* to indiscriminately bomb civilian populations. The object *was* to destroy the *industrial and strategic targets* concentrated in the urban areas."[41] These word games demonstrate self-consciousness among USAAF leaders of their own participation in potential wartime atrocities.[42]

Hastings addresses the use of the atomic bombs similarly, pointing out that American forces "had already participated in bombing campaigns which killed around three-quarters of a million German and Japanese civilians, and to which public opinion had raised little objection."[43] Hastings argues that the American demand for retribution also played a role in the atomic project.[44] Events after the bombings seem to support this argument as "the vehement demands of the American public for retribution . . . subsided immediately after the news of the bombings had been broadcast."[45]

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[30] *Id.* at 235.

[31] *Id.* at 236.

[32] *Id.* at 8.

[33] *Id.* at 18.

[34] *Id.*

[35] *Id.* at 309.

[36] *Id.* at 296.

[37] *Id.*

[38] *Id.* at 298.

[39] *Id.* at 296 (citing CONRAD C. CRANE, BOMBS, CITIES AND CIVILIANS 76 (Kansas Univ. Press 1993)).

[40] *Id.* at 298.

[41] *Id.* (citing an unspecified XXIST BOMBER COMMAND REPORT (n.d.)).

[42] Hastings describes these rationalizations as truthful "in a narrow, absurdly literal sense." *Id.*

[43] *Id.* at 473.

[44] *Id.* at xix.

[45] STEPHEN E. AMBROSE, RISE TO GLOBALISM 49 (7th rev. ed., Penguin Books 1993).

Some have suggested that an invasion of the Japanese home islands would have been unnecessary even without atomic weapons, due to the effective strangulation of the Japanese war machine by naval blockade.[46] Hastings offers that we will never "be sure what an enemy nation which had displayed such a resolute commitment to mass suicide might do, when confronted with the last ditch."[47] We can merely consider "the plight of civilians and captives, dying in thousands daily under Japanese occupation, together with the casualties that would have been incurred had the Soviets been provoked into maintaining their advance across mainland China."[48] Hastings concludes that with or without an invasion, "far more people of many nationalities would have died in the course of even a few further weeks of war than were killed by the atomic bombs."[49]

The most important lesson for modern military leaders is that perception of a nation's conduct may carry ramifications at a strategic level for decades to come.[50] Japan's atrocities made any compromise impossible in the Allied objective to achieve unconditional surrender by any means.[51] Japan's acts also degraded their international legitimacy, an effect that remains significant more than sixty years later.[52] Japan represents an extreme example of wartime conduct resulting in retribution rather than victory. Japan's actions contributed to the annihilation of the state. In the cases of America's current conflicts, poor conduct can lead to "lives and resources . . . wasted for no real gain"[53] and can threaten the perceived legitimacy of our efforts.[54] To put it more simply, the book cautions us not to bring retribution upon ourselves.

In addition to this general lesson, the book is replete with examples of leadership choices and tactical decisions that drastically impacted the effectiveness of fighting formations. For example, the author points out certain Japanese military leaders' "reckless insouciance towards the technological development of warfare."[55] By 1943, this resulted in Japanese air, ground, and naval weapons being "decisively outclassed" by those of the Allies.[56] Although Japanese "front-line soldiers urged the importance of developing more advanced weapons," they were ignored.[57] Japan's resulting failures affirm the importance of developing and refining the technology of war to ensure success on future battlefields, even as current battles unfold.

Hastings argues that the Japanese indifference to technology reflected a failure by Japanese leaders to adapt fighting doctrine to their present circumstances. Prior to the Pacific campaign, "Japan's [most recent] experience of war had been gained entirely against the Chinese."[58] The Chinese possessed very little advanced military technology.[59] Japanese leaders failed to adjust their attitudes and doctrine when they turned their efforts to the United States, which possessed a very high level of military technology.[60] The annihilation of Japan starkly illustrates the importance of continually developing new doctrine in light of new experience. Hastings' description of Japan's failure to adapt to a new type of war in the Pacific invites us to consider our own adaptation to a new type of war in the Middle East.

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[46] HASTINGS, *supra* note 1, at 475.

[47] *Id.*

[48] *Id.* at 513.

[49] *Id.*

[50] U.S. DEP'T OF THE ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-157 (15 Dec. 2006) [hereinafter FM 3-24] ("[Y]oung leaders—so-called 'strategic corporals'—often make decisions at the tactical level that have strategic consequences.").

[51] HASTINGS, *supra* note 1, at 8, 474.

[52] *Id.* at 550.

[53] FM 3-24, *supra* note 50, para. 1-156.

[54] *Id.* para. 1-123.

[55] HASTINGS, *supra* note 1, at 47.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* After 1942, "Allied weapons decisively outclassed Japanese ones." *Id.*

Retribution is incredibly readable and persuasive. Compelling narrative and graphic descriptions of human struggle engross the reader and build an effective platform for Hastings's arguments. This study of direct war-fighting experiences is especially rewarding for the military professional. For general readers, the narrative style makes this period of history accessible, even compelling, and will likely enable Hastings's arguments to penetrate popular, as well as academic, opinion.

The book's primary weakness is the difficulty of tracing specific themes through the narrative structure. As the war developed across fronts, some challenges remained the same while others evolved. Topics of particular interest to current military practitioners, such as methods and effects of military discipline, appear as they arose on the various battlefields, scattered throughout the text instead of reposing in a single chapter under easily identifiable headings.

Hastings, however, did not set out to prepare discreet essays on a scattering of subtopics. He developed an involving narrative of the Pacific Campaign to persuade readers of his primary themes. As a result, readers fall into his story and vicariously live the experiences of the various actors. Lessons learned arise from these experiences and are fully informed by vivid context. This approach makes the book not only involving, but also persuasive on both a scholarly and a visceral level.

A second weakness of the text is that readers may lose track of the two primary themes. Although Hastings devotes the final chapters of the work to a substantial recitation of his two main arguments, in the body of the text the reader often becomes immersed in the moment, losing track of the larger picture. While in some cases this level of detail may be essential to support Hastings's conclusions, at times the book appears merely to recite the experiences of those interviewed.[61] Ironically, Hastings dismisses John Toland's similarly empirical *The Rising Sun*[62] as "not a scholarly work."[63]

Quibbling criticisms pale beside the monumental contribution *Retribution* makes to the reader's understanding of the events and context of the Pacific Theater. Hastings's arguments assume great persuasive power in the context of empirical narrative. The book aims to persuade readers that Japan's behavior during World War II precipitated its destruction, and that Japan should account for its atrocities. In this endeavor, *Retribution* succeeds brilliantly.

[61] Posting by Blog Host to Blogging the Second World War, http://secondworldwar.wordpress.com/2008/03/28/retribution-by-max-hastings-review-by-jonathan-d-beard/ (Mar. 28, 2008, 19:41) ("All too often [Hastings] simply drops three or four paragraphs of testimony from American pilots, Chinese civilian victims, or others into a chapter without their adding much to its message.").

[62] JOHN TOLAND, THE RISING SUN: THE DECLINE AND FALL OF THE JAPANESE EMPIRE 1936–1945 (Random House 1970).

[63] HASTINGS, *supra* note 1, at xxi.

YOUR GOVERNMENT FAILED YOU: BREAKING THE CYCLE OF NATIONAL SECURITY DISASTERS[1]

REVIEWED BY MAJOR MATTHEW J. KEMKES[2]

When a nation fails to do something, it is not the failure of a building (the White House, the Pentagon), an institution, a party, or an administration; it is the failure of people, of individuals. Standing in the White House Situation Room on the morning of 9/11, just having been given the job of national crisis manager and more responsibility than I had ever had in thirty years of government, I knew that I had failed.[3]

I. Introduction

In *Your Government Failed You*, Richard Clarke tells a compelling story of civil servants from across the U.S. Government seemingly unable to "get it right" despite the high stakes—our national security. By tackling the toughest contemporary national security issues and dealing with perceived deficiencies in a blunt and honest manner, Clarke writes a topical, thought-provoking book that posits hard truths in an area that demands our attention. *Your Government Failed You* is a well–written, highly readable prescription of the changes necessary to restore our national security apparatus to function at its maximum potential.

Your Government Failed You necessarily takes a dim view of what Clarke sees as an expensive,[4] bloated,[5] and, at times, profiteering[6] network of private and government actors charged with the important task of protecting the United States. National security personnel, regardless of whether they agree with Clarke on every point, should at least thoughtfully consider the author's recommendations.

II. Analysis

Few authors possess the requisite credibility to write a book like *Your Government Failed You* on their own. Clarke's high level positions in the U.S. Government provided him with unparalleled access to observe and influence decision-makers, as well as opportunities to observe first-hand how some policy decisions unfold to become problems in their own right.[7] With national security experience crossing five Republican and two Democratic presidential administrations,[8] Clarke speaks with authority and successfully avoids coming across as a partisan yoked to a particular party or ideology.

A reader need not be an expert in foreign policy, the military, the Middle East, or the intelligence community to understand *Your Government Failed You*. Clarke does not assume expertise in any area. When necessary, Clarke educates the reader on job titles, vocabulary or practices unique to a particular organization or field. For readers with significant backgrounds in the national intelligence community or military affairs, the few basic, explanatory parts of the book enable the reader to compare his experiences or views with Clarke's. For the average reader, Clarke strikes the right balance of

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[1] RICHARD A. CLARKE, YOUR GOVERNMENT FAILED YOU (2008).

[2] Judge Advocate, U.S. Army. Presently assigned as Senior Defense Counsel, National Capital Region, U.S. Army Trial Defense Service, Fort Myer, Va. LL.M., 2009, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] CLARKE, *supra* note 1, at 154.

[4] *See id.* at 95. Clarke claims the combined budget of the sixteen agencies comprising the U.S. intelligence community exceeds $50 billion a year. *Id.* Clarke's estimate is probably not too far off. The Government disclosed it had spent $43.5 billion in 2007. *US Intelligence Budget Disclosed*, BBC News, http://news.bbc.co.uk/2/hi/americas/7069916.stm (last visited May 21, 2009). Earlier, Clarke asserts "[t]he United States spends more than a trillion dollars a year on national security." CLARKE, *supra* note 1, at 8.

[5] CLARKE, *supra* note 1, at 320–23.

[6] *See id.* at 212. The allure of the influx of homeland security money was too great a temptation for defense contractors to keep away from the White House. *Id.* Eventually, state and local governments and some universities were getting an appetite for the easy homeland security money. *Id.*

[7] *Id.* at 4. Clarke served the nation for thirty years in a variety of key positions at the Pentagon, State Department, and White House. *Id.* Over the span of that career, Clarke "performed and managed intelligence analysis, tasked intelligence collection, provided oversight to covert action, and tried as a policy maker to utilize intelligence analysis as an aid in decision making." *Id.* at 93.

[8] *Id.* at 4. *See generally* Richard Clarke Biography, http://www.notablebiographies.com/news/Ca-Ge/Clarke-Richard.html (last visited May 21, 2009) (describing Clarke's extensive background and the controversy surrounding some of his public actions since 9/11).

assumptions by treating the audience as intelligent and informed. In short, a cursory knowledge of the major U.S. news stories of the last eight years and a basic familiarity with the Federal Government, the executive branch in particular, is all that a reader needs to follow the author's main points.[9]

Whenever necessary, Clarke properly uses and cites outside sources to support his positions. His lengthy career in government service has provided Clarke with a vast personal experience and first-hand knowledge of many of the issues he addresses.[10] Therefore, the most persuasive source is Clarke himself. When recalling a story or recounting an event, the author simply includes his account in the text as he draws upon his personal observations and anecdotes.[11] On the other hand, when relying on others, Clarke mostly cites secondary sources to make his points. *Your Government Failed You* is not a scholarly work in the sense that it is written for a narrow audience of academics or policymakers. The use of secondary sources—mainly newspapers, reports, and books—adds to the book by giving depth to his assertions and offering sources for further study of a subject. The endnotes work well but are not necessary to appreciate the author's arguments. Nevertheless, inquisitive readers who demand more information on a specific topic will likely find what they are looking for in the endnotes.[12]

Clarke's writing style is easy to follow and well-organized. From the outset, the reader knows the book's purpose[13] and stays engaged as the author remains faithful to it. By clearly asserting his thesis,[14] Clarke lays a solid framework around which he builds a strong discussion and analysis of the issues. That fleshed-out framework comprises the book's scope, which the author thoroughly covers by devoting a chapter to each main issue.[15] This manner of organization enables readers to focus on particular issues without delving into others.[16]

For brief moments, the reader may question Clarke's objectivity, but overall the author's treatment of the issues is surprisingly balanced for a book entitled *Your Government Failed You*. For example, Clarke does not look favorably on some of the Iraq war's architects who, he implies, needlessly manufactured the war.[17] In particular, he derides Condoleezza Rice, in her capacity as National Security Advisor, along with President George W. Bush, Vice President Dick Cheney, and Secretary of Defense Donald Rumsfeld, who he feared were all blinded by groupthink[18] and an unrealistic view of the Middle East and its problems.[19] Clarke does not discriminate in his targets or find it necessary to spare anybody's feelings. Each time he mentions General Richard Myers, the former Chairman of the Joint Chiefs of Staff, he does so in an insolent tone.[20] Clarke points the finger in an effective way, without making it personal, and to maintains his credibility by supporting his

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[9] Although not necessary, readers may want to first read Clarke's book *Against All Enemies: Inside America's War on Terror*. RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR (2004). In *Your Government Failed You*, Clarke builds on some of his earlier ideas published in *Against All Enemies*. CLARKE, *supra* note 1, at 156.

[10] CLARKE, *supra* note 1, at inside back cover.

[11] *See, e.g.*, *id.* at 92–93.

[12] *See generally id.* at 360–88.

[13] *See id.* at 8–9.

[14] *See id.* at 3. Clarke seeks "to understand what happened after 9/11 and answer the larger question of why the U.S. government, despite all of its resources, performs so poorly at national security." *Id.*

[15] *See id.* at 3–4.

[16] To help readers or potential researchers, Clarke also includes a thorough index. *Id.* at 389–408.

[17] *See id.* at 49. "Dick Cheney, Donald Rumsfeld, Paul Wolfowitz, and the 'create-a-war' crew had no active-duty general prominent in their ranks." *Id.* Clarke later compares Vice President Cheney to Iranian President Mahmoud Ahmadinejad as the two people who would be most pleased by an American bombing campaign in Iran. *Id*. at 201.

[18] "Groupthink is the phenomenon wherein all analysts involved assume an answer at the outset of an investigation and then fit the facts they find to support that answer, suppressing the rest." *Id.* at 130; *see also id*. at 163–65.

[19] *See id.* at 180. Expressing his concern after hearing a particularly troubling Bush administration idea, Clarke noted, "[i]f they really felt that way—and I was afraid they did—the Bush team was dangerously naive and was about to cause thousands of people to die on the basis of some half-baked messianic theory." *Id.*

[20] *See id.* at 50–52, 85, 138.

conclusions with evidence. Clarke even points a finger at himself[21] and takes responsibility for his role in the series of missteps that he believes contributed to 9/11.

Clarke's style of placing blame where he feels it is due and calling attention to major problems naturally reads as a somewhat negative account. As told by Clarke, the blunders of multiple presidential administrations, multiple agencies and their respective directors, decades of well-intentioned military leaders, and others pile up. In the aggregate, these mistakes may lead the reader to deduce that systemic dysfunction is inherent to the Federal Government and is unpreventable. While that style comes across at times as cynical, readers are well-served to remember Clarke's declaration that, through it all, he is an optimist.[22] In that light, this hope shrouded in quasi-cynicism emphasizes the urgency of the matters Clarke addresses.

The impetus for *Your Government Failed You* is Clarke's grim realization that, although many changes within government followed 9/11,[23] the best courses of action repeatedly eluded the Bush administration. He asserts that in the national security area, "[t]here seems to be an inability to get anything done, to successfully tackle any major issue."[24] By expressing his frustration with the current state of the Government, the author effectively tries to gain the reader as an interested partner with whom he will examine the factors contributing to the Government's breakdown. Clarke's first chapter succinctly lays out the remainder of the book, introduces the author and his background, and captures the reader's attention for what is to come.

Next, Clarke's discussion of manipulating the military as a means to influence its future employment is insightful. Primarily offering historical background, Clarke helpfully examines in some detail the efforts undertaken since Vietnam to prevent a repeat of the problems that arose in that war.[25] He persuasively concludes the "fixes" put into place were unable to prevent some of the same issues from plaguing the United States in its current fight in Iraq.[26] His third chapter in particular allows the reader to think critically about the culpability of generals who failed to properly plan for the wars in Afghanistan and Iraq. Clarke pulls no punches as he upbraids senior military officers whom he feels failed their country and profession.[27] Clarke's assumption that structure alone can prevent mismanagement of forces is thought-provoking but ultimately implausible.

The intelligence community is what Clarke knows best, and he effectively makes the case that U.S. collection and analysis assets need proper leadership, training, and slight reorganization to maximize their effectiveness. Clarke does not mince words when he says collection assets currently under Pentagon control belong under the Director of National Intelligence (DNI).[28] He makes a strong case for his position, especially when focusing on the advantages of a unified intelligence budget.[29] Clarke makes several interesting recommendations for the DNI that would strengthen that relatively new post.[30] In short, Clarke rightly supports restoring the DNI position to its intended status as the President's premier manager of the intelligence community.

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[21] *See id.* at 164–65. Clarke suggests 9/11 and its consequences could have possibly been avoided had he simply stepped down in the early days of the Bush administration's Iraq war planning. *Id.* According to this theory, Clarke's successor, by virtue of having been selected by the Bush administration, would have had a more receptive audience in Bush's inner circle. *Id.* at 165. Although possible, this theory seems improbable.

[22] *Id.* at 8.

[23] The Government aggressively attempted to identify problems and make changes by organizing the 9/11 Commission. *See generally* NAT'L COMMISSION ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT (2004) (discussing in detail what contributed to the 9/11 terrorist attacks and making recommendations to remedy deficiencies).

[24] CLARKE, *supra* note 1, at 8.

[25] *Id.* at 10–45.

[26] Clarke's discussion of Goldwater-Nichols is particularly helpful for readers interested in the "jointness" that pervades today's armed forces. Clarke argues Goldwater-Nichols "failed to create a force ready for the next war" when Americans invaded Iraq in 2003. *Id.* at 68; *see also* CTR. FOR STRATEGIC & INT'L STUDIES, BEYOND GOLDWATER-NICHOLS: U.S. GOVERNMENT AND DEFENSE REFORM FOR A NEW STRATEGIC ERA 140 (2005), *available at* http://www.ndu.edu/library/docs/BeyondGoldwaterNicholsPhase2Report.pdf (discussing how Goldwater-Nichols was only partially successful).

[27] CLARKE, *supra* note 1, at 49–57.

[28] *Id.* at 140, 150.

[29] *Id.* at 140.

[30] *Id.* at 150–53.

Clarke's opinions on terrorism and homeland security comprise nearly a third of *Your Government Failed You*. The author holds strong convictions concerning what the U.S. Government should be doing to fight terrorism and protect the nation. Similarly, Clarke holds nothing back when voicing his disdain for the Department of Homeland Security in its current form.[31] Of note, Clarke does not recognize a Global War on Terrorism as the proper course, and he argues our terror war is misguided and poorly prosecuted.[32] By asserting the real enemy is a radical Islamic movement, Clarke argues the war on terror means more than defeating Al Qaeda or the Taliban.[33]

Clarke, in the shortest chapter of the book, discusses energy policy and concludes that global warming, not a dependence on oil, is the real threat to our national security.[34] Clarke's passages about oil[35] and global warming are among the most contentious in the book. For readers who already believe U.S. involvement in the Middle East stems from our thirst for foreign oil, Clarke's rationale is unconvincing. Likewise, readers who do not subscribe to the predicted doomsday effects of global warming or who even deny global warming exists, Clarke's flimsy support for his assertions will fail to convert nonbelievers. Even if one is in complete agreement with the author, the recommendation to manage global carbon emissions by economic incentives with trading partners seems elementary wishful thinking if not outright fantasy.

Clarke's writings on cyberspace and the real and growing dangers we face is well-researched and credible. Readers unfamiliar with the current level of sophistication of threats over the Internet will be surprised to learn just how vulnerable the United States is in cyberspace. Of particular interest, readers will discover that attacks are no longer just the handiwork of individual hackers and that states like China have sought to increase their cyberattack capabilities.[36] This chapter is especially timely given the recent Russian use of cyberwarfare, coupled with a conventional attack against Georgia, in August 2008.[37]

Upon completing *Your Government Failed You*, readers can consider at least three valuable lessons important to leaders seeking to maximize their national security organization's effectiveness. First, government service is an honorable, worthwhile pursuit befitting the best and brightest our nation has to offer. Second, individuals in truly important jobs must not allow failure. Third, challenging the status quo, even at the risk of going it alone, is sometimes necessary to properly serve in an office of responsibility. While Clarke makes many astute observations, these three easily applied lessons pervade all the issues he raises.

Leaders in and out of government must genuinely value their service and encourage their best students, employees, or coworkers to serve our nation. The issues of national security require smart people to protect us from current and emerging threats. While appeals to a person's patriotism alone will recruit and retain many qualified people, society is better served by a national security staff that is highly selective, highly trained, and highly valued by its citizens.[38] As integral as the private sector is in the current collaborative effort of national security, leaders must make every effort to avoid outsourcing essential government functions. By reinvigorating the personnel structure, leaders can address "the culture of mediocrity that is asserting itself in our national security apparatus" by promoting excellence.[39]

Critical national security jobs, in which thousands of lives are at stake, are too important to accept failure. When failures occur real consequences must follow, not business as usual. It is understandable for groups to demand change, but measured prudent action must prevail over reactionary half measures. Going through the motions and caving to political pressures in

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[31] Regarding the Department of Homeland Security, Clarke writes, "[t]his is the story of a bad idea, poorly executed, how it happened, and why it failed." *Id*. at 205.

[32] *Id.* at 156–91.

[33] *Id.* at 189.

[34] *Id.* at 272–75.

[35] Clarke discusses the Government's preoccupation with freedom from foreign oil. *See id.* at 263–66. This passage, while factually accurate, was not persuasive and came across as overly simplified.

[36] *Id.* at 293–94, 311–12.

[37] *See generally* John Markoff, *Before the Gunfire, Cyberattacks*, N.Y. TIMES, Aug. 13, 2008, at A1 (claiming the Russian attack was the first time a cyberattack coincided with a shooting war).

[38] Almost six years after 9/11, the FBI was still short 400 intelligence analysts. Jerry Seper, *FBI Hiring of Analysts Not Up to Speed*, WASH. TIMES, Apr. 24, 2007, at A3.

[39] CLARKE, *supra* note 1, at 8.

such important matters not only fails to contribute to improved national security, but such reactionary half-measures can exacerbate the problem by creating a false sense of security when, in fact, the vulnerabilities continue to fester.[40] When such half-measures fail, people must be held accountable.[41] Assigning blame is never the end; but it is a necessary step to learning. A system lacking personal accountability, by its nature, lacks consequences.

Finally, Clarke's book teaches that government service at times calls for independent thinking that cuts against the conventional wisdom. Challenging the status quo, coworkers, or especially superiors can be unpleasant. On occasion, such a transgression from towing the line is career-ending.[42] Sometimes organizations succumb to groupthink or take an action because it is politically expedient. Nevertheless, leaders must remember national security policy formulation and execution is not a game, nor is it a popularity contest. When faced with a situation in which a leader finds himself alone or in the minority, the leader must have the personal courage to act contrary to the majority. In the national security arena, the stakes are too high to acquiesce to an inferior position without a fight.

III. Conclusion

Your Government Failed You is an excellent, candid examination of our national security agencies and the problems they face. This book offers an insider's look behind some of the most pressing policy issues and inspires government leaders and concerned citizens to call for real and necessary changes. National security personnel, to include military officers, should read this book. They alone can best judge whether Clarke is correct in his "woe are we" assessment of our national security policy situation. At the very least, they will benefit from the exposure to the viewpoints of a gifted, dedicated American who, like them, wants nothing but the best for our country.

[40] *See, e.g.*, *id.* at 213.

[41] Apart from Secretary Rumsfeld's resignation, pessimists might note the most highly publicized firings were politically motivated, and had nothing to do with national security or 9/11. *See* Editorial, *Politics, Pure and Cynical*, N.Y. TIMES, Mar. 14, 2007, at A22.

[42] *See* CLARKE, *supra* note 1, at 72–73. Many would argue that Major General Taguba's career was a success by any measure. The point is speaking out against power runs risks regardless of a person's rank. Unfortunately, one can see how such risks make inaction or tacit cooperation with authority a much more likely course of action when weighing a career against an impersonal cause.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (2009—September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	58th Judge Advocate Officer Graduate Course	10 Aug 09 – 20 May 10
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C20	179th JAOBC/BOLC III (Ph 2)	17 Jul – 30 Sep 09
5-27-C20	180th JAOBC/BOLC III (Ph 2)	6 Nov 09 – 3 Feb 10
5-27-C20	181st JAOBC/BOLC III (Ph 2)	19 Feb – 5 May 10
5-27-C20	182d JAOBC/BOLC III (Ph 2)	16 Jul – 29 Sep 10
5F-F1	209th Senior Officer Legal Orientation Course	19 – 23 Oct 09
5F-F1	210th Senior Officer Legal Orientation Course	25 – 29 Jan 10
5F-F1	211th Senior Officer Legal Orientation Course	22 – 26 Mar 10
5F-F1	212th Senior Officer Legal Orientation Course	14 – 18 Jun 10
5F-F1	213th Senior Officer Legal Orientation Course	30 Aug – 3 Sep 10

5F-JAG	2009 JAG Annual CLE Workshop	5 – 9 Oct 09
5F-F55	2010 JAOAC	4 – 15 Jan 10
5F-F5	Congressional Staff Legal Orientation (COLO)	18 – 19 Feb 10
5F-F3	16th RC General Officer Legal Orientation Course	10 – 12 Mar 10
5F-F52S	13th SJA Team Leadership Course	7 – 9 Jun 10
5F-F52	40th Staff Judge Advocate Course	7 – 11 Jun 10
JARC-181	Judge Advocate Recruiting Conference	21 – 23 Jul 10
5F-F70	Methods of Instruction	22 – 23 Jul 10
NCO ACADEMY COURSES		
5F-F301	27D Command Paralegal Course	1 – 5 Feb 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D30	1st Paralegal Specialist BNCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D30	2d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	3d Paralegal Specialist BNCOC (Ph 2)	4 Jan – 9 Feb 10
512-27D30	4th Paralegal Specialist BNCOC (Ph 2)	8 Mar 10 Apr 10
512-27D30	5th Paralegal Specialist BNCOC (Ph 2)	17 May – 22 Jun 10
512-27D30	6th Paralegal Specialist BNCOC (Ph 2)	12 Jul – 17 Aug 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	26 Aug – 30 Sep 09
512-27D40	1st Paralegal Specialist ANCOC (Ph 2)	19 Oct – 24 Nov 09
512-27D40	2d Paralegal Specialist ANCOC (Ph 2)	8 Mar – 13 Apr 10
512-27D40	3d Paralegal Specialist ANCOC (Ph 2)	17 May – 22 Jun 10
512-27D40	4th Paralegal Specialist ANCOC (Ph 2)	12 Jul – 17 Aug 10
WARRANT OFFICER COURSES		
7A-270A3	10th Senior Warrant Officer Symposium	1 – 5 Feb 10
7A-270A0	17th JA Warrant Officer Basic Course	24 May – 18 Jun 10
7A-270A1	21st Legal Administrators Course	14 – 18 Jun 10
7A-270A2	11th JA Warrant Officer Advanced Course	5 – 30 Jul 10
ENLISTED COURSES		
512-27D/20/30	21st Law for Paralegal NCO Course	22 – 26 Mar 10
512-27D-BCT	12th 27D BCT NCOIC/Chief Paralegal NCO Course	19 – 23 Apr 10
512-27DC5	30th Court Reporter Course	27 Jul – 25 Sep 09
512-27DC5	31st Court Reporter Course	25 Jan – 26 Mar 10
512-27DC5	32d Court Reporter Course	19 Apr – 18 Jun 10
512-27DC5	33d Court Reporter Course	26 Jul – 24 Sep 10

512-27DC6	10th Senior Court Reporter Course	12 – 16 Jul 10
512-27DC7	12th Redictation Course	4 – 15 Jan 10
512-27DC7	13th Redictation Course	29 Mar – 9 Apr 10
	ADMINISTRATIVE AND CIVIL LAW	
5F-F23	65th Legal Assistance Course	26 – 30 Oct 09
5F-F23E	2009 USAREUR Client Services CLE Course	2 – 6 Nov 09
5F-F28E	2009 USAREUR Tax CLE Course	30 Nov – 4 Dec 09
5F-F28	2009 Income Tax Law Course	7 – 11 Dec 09
5F-F28P	2010 PACOM Income Tax CLE Course	5 – 8 Jan 10
5F-F28H	2010 Hawaii Income Tax CLE Course	11 – 15 Jan 10
5F-F24	34th Administrative Law for Military Organizations	15 – 19 Mar 10
5F-F202	8th Ethics Counselors Course	12 – 16 Apr 10
5F-F29	28th Federal Litigation Course	2 – 6 Aug 10
5F-F22	63d Law of Federal Employment Course	23 – 27 Aug 10
5F-F24E	2010 USAREUR Administrative Law CLE	13 – 17 Sep 10
	CONTRACT AND FISCAL LAW	
5F-F11	2009 Government Contract Law Symposium	17 – 20 Nov 09
5F-F14	28th Comptrollers Accreditation Fiscal Law Course	7 – 11 Dec 09
5F-F12	81st Fiscal Law Course	14 – 18 Dec 09
5F-F101	9th Procurement Fraud Advisors Course	10 – 14 May 10
5F-F10	163d Contract Attorneys Course	19 – 30 July 10
	CRIMINAL LAW	
5F-F301	13th Advanced Advocacy Training Course	1 – 4 Jun 10
5F-F31	16th Military Justice Managers Course	23 – 27 Aug 10
5F-F33	53d Military Judge Course	19 Apr – 7 May 10
5F-F34	32d Criminal Law Advocacy Course	14 – 25 Sep 09
5F-F34	33d Criminal Law Advocacy Course	1 – 12 Feb 10
5F-F34	34th Criminal Law Advocacy Course	13 – 24 Sep 10

5F-F35	33d Criminal Law New Developments Course	2 – 5 Nov 09
5F-F35E	2010 USAREUR Criminal Law CLE	11 – 15 Jan 10
INTERNATIONAL AND OPERATIONAL LAW		
5F-F45	9th Domestic Operational Law Course	19 – 23 Oct 09
5F-F47	53d Operational Law of War Course	22 Feb – 5 Mar 10
5F-F47	54th Operational Law of War Course	26 Jul – 6 Aug 10
5F-F47E	2010 USAREUR Operational Law CLE	9 – 13 Aug 10
5F-F48	3d Rule of Law	16 – 20 Aug 10

3. Naval Justice School and FY 2009-2010 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (040) Lawyer Course (010) Lawyer Course (020) Lawyer Course (030)	3 Aug – 2 Oct 09 13 Oct – 18 Dec 10 25 Jan – 2 Apr 10 2 Aug – 9 Oct 10
0258	Senior Officer (080) Senior Officer (010) Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	21 – 25 Sep 09 (Newport) 13 – 16 Oct 09 (Newport) 8 – 12 Mar 10 (Newport) 12 – 16 Apr 10 (Newport) 24 – 28 May 10 (Newport) 12 – 16 Jul 10 (Newport) 23 – 27 Aug 10 (Newport) 27 Sep – 1 Oct 10 (Newport)
2622	Senior Officer (Fleet) (010) Senior Officer (Fleet) (010) Senior Officer (Fleet) (020) Senior Officer (Fleet) (030) Senior Officer (Fleet) (040) Senior Officer (Fleet) (050)	21 – 25 Sep 09 (Pensacola) 16 – 20 Nov 09 (Pensacola) 14 – 18 Dec 10 (Hawaii) 10 – 14 May 10 (Naples, Italy) 19 – 23 Jul 10 (Quantico, VA) 26 – 30 Jul 10 (Camp Lejeune, NC)
03RF	Legalman Accession Course (010) Legalman Accession Course (020) Legalman Accession Course (030)	9 Oct – 18 Dec 09 15 Jan – 2 Apr 10 10 May 23 Jul 10
049N	Reserve Legalman Course (010) (Ph I)	29 Mar – 9 Apr 10

056L	Reserve Legalman Course (010) (Ph II)	12 – 23 Apr 10
03TP	Trial Refresher Enhancement Training (010) Trial Refresher Enhancement Training (020)	1 – 5 Feb 10 2 – 6 Aug 10
4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020)	1 – 12 Feb 10 (San Diego) 19 – 30 Apr 10 (Norfolk)
4046	Mid Level Legalman Course (010) Mid Level Legalman Course (020)	22 Feb – 5 Mar 10 (San Diego) 14 – 25 Jun 10 (Norfolk)
4048	Legal Assistance Course (010)	19 – 23 Apr 10
3938	Computer Crimes (010)	21 – 25 Jun 10
525N	Prosecuting Complex Cases (010)	19 – 23 Jul 10
627S	Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (010) Senior Enlisted Leadership Course (Fleet) (020) Senior Enlisted Leadership Course (Fleet) (030) Senior Enlisted Leadership Course (Fleet) (040) Senior Enlisted Leadership Course (Fleet) (050) Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	14 – 16 Sep 09 (Pendleton) 14 – 16 Oct 09 (Norfolk) 9 – 10 Nov 10 (San Diegeo) 16 – 20 Nov 10 (Norfolk) 11 – 15 Jan 10 (Jacksonville) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 16 – 20 Feb 10 (Norfolk) 16 – 18 Mar 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 10 – 14 May 10 (Naples) 1 – 3 Jun 10 (San Diego) 2 – 4 Jun 09 (Norfolk) 29 Jun – 1 Jul 10 (San Diego) 9 – 13 Aug 10 (Great Lakes) 13 – 17 Sep 10 (Pendleton) 13 – 17 Sep 10 (Hawaii) 22 – 24 Sep 10 (Norfolk)
7485	Classified Info Litigation Course (010)	3 – 7 May 10
748A	Law of Naval Operations (010) Law of Naval Operations (010)	14 – 18 Sep 09 13 – 17 Sep 10
748B	Naval Legal Service Command Senior Officer Leadership (010)	26 Jul – 6 Aug 10
748K	USMC Trial Advocacy Training (040)	14 – 18 Sep 09 (San Diego)
786R	Advanced SJA/Ethics (010)	26 – 30 Jul 10
7878	Legal Assistance Paralegal Course (010)	30 Aug – 3 Sep 10
846L	Senior Legalman Leadership Course (010)	26 – 30 Jul 10
846M	Reserve Legalman Course (010) (Ph III)	26 Apr – 7 May 10

850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	19 – 30 Apr 10 (Norfolk) 5 – 16 Jul 10 (San Diego)
850V	Law of Military Operations (010)	7 – 18 Jun 10
900B	Reserve Lawyer Course (020) Reserve Lawyer Course (010) Reserve Lawyer Course (020)	21 – 25 Sep 09 14 – 18 Jun 10 20 – 24 Sep 10
932V	Coast Guard Legal Technician Course (010) Coast Guard Legal Technician Course (010)	3 – 14 Aug 09 2 – 13 Aug 10
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020) Continuing Legal Education (030)	14 – 15 Dec 09 (Hawaii) 25 – 26 Jan 10 (Yokosuka) 10 – 11 May 10 (Naples)
961J	Defending Complex Cases (010)	12 – 16 Jul 10
961M	Effective Courtroom Communications (010) Effective Courtroom Communications (020)	19 – 23 Oct 09 (Norfolk) 12 – 16 Apr 10 (San Diego)
NA	Iraq Pre-Deployment Training (010) Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (030) Iraq Pre-Deployment Training (040)	6 – 9 Oct 09 5 – 8 Jan 10 6 – 9 Apr 10 6 – 9 Jul 10
NA	Speech Recognition Court Reporter (030)	25 Aug – 31 Oct 09
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 25 Jan – 12 Feb 10 22 Feb – 12 Mar 10 29 Mar – 16 Apr 10 3 – 21 May 10 14 Jun – 2 Jul 10 12 – 30 Jul 10 16 Aug – 3 Sep 10
0379	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	26 Oct – 6 Nov 09 7 – 18 Dec 09 1 – 12 Feb 10 1 – 12 Mar 10 5 – 16 Apr 10 19 – 30 Jul 10 23 Aug – 3 Sep 10
3760	Senior Officer Course (070) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	14 – 18 Sep 09 5 – 9 Oct 09 16 – 20 Nov 09 11 – 15 Jan 10 22 – 26 Mar 10 24 – 28 May 10 9 – 13 Aug 10 13 – 1 7 Sep 10

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (010) Legal Officer Course (020) Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	19 Oct – 6 Nov 09 30 Nov – 18 Dec 09 4 – 22 Jan 10 22 Feb – 12 Mar 10 3 – 21 May 10 7 – 25 Jun 10 19 Jul –6 Aug 10 16 Aug – 3 Sep 10
947J	Legal Clerk Course (010) Legal Clerk Course (020) Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	13 – 23 Oct 09 30 Nov – 11 Dec 09 4 – 15 Jan 10 29 Mar – 9 Apr 10 3 – 14 May 10 7 – 18 Jun 10 26 Jul – 6 Aug 10 16 – 27 Aug 10
3759	Senior Officer Course (080) Senior Officer Course (010) Senior Officer Course (020) Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080) Senior Officer Course (090)	14 – 18 Sep 09 (Pendleton) 5 –9 Oct 09 (San Diego) 25 – 29 Jan 10 (Yokosuka) 1 – 5 Feb 10 (Okinawa) 8 – 12 Feb 10 (San Diego) 29 Mar – 2 Apr 10 (San Diego) 19 – 23 Apr 10 (Bremerton) 26 – 30 Apr 10 (San Diego) 24 – 28 May 10 (San Diego) 13 – 17 Sep 10 (Pendleton)

4. Air Force Judge Advocate General School Fiscal Year 2010 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 09-06	11 Aug – 23 Sep 09
Trial & Defense Advocacy Course, Class 09-B	14 – 25 Sep 09
Civilian Attorney Orientation, Class 10-A	1 – 2 Oct 09
Area Defense Counsel Orientation Course, Class 10-A	5 – 9 Oct 09
Defense Paralegal Orientation Course, Class 10-A	5 – 9 Oct 09
Federal Employee Labor Law Course, Class 10-A	5 – 9 Oct 09

Paralegal Apprentice Course, Class 10-01	6 Oct – 20 Nov 09
Judge Advocate Staff Officer Course, Class 10-A	13 Oct – 17 Dec 09
Paralegal Craftsman Course, Class 10-01	13 Oct – 19 Nov 09
Reserve Forces Judge Advocate Course, Class 10-A	17 – 18 Oct 09
Advanced Environmental Law Course, Class 10-A (off-site Wash., DC)	20 – 21 Oct 09
Pacific Trial Advocacy Course, Class 10-A (off-site Japan)	7 – 11 Dec 09
Deployed Fiscal Law & Contingency Contracting Course, Class 10-A	14 – 17 Dec 09
Trial & Defense Advocacy Course, Class 10-A	4 – 15 Jan 10
Paralegal Apprentice Course, Class 10-02	5 Jan – 19 Feb 10
Judge Advocate Mid-Level Officer Course, Class 10-A	11 – 29 Jan 10
Air National Guard Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Air Force Reserve Annual Survey of the Law, Class 10-A (off-site)	22 – 23 Jan 10
Homeland Defense/Homeland Security Course, Class 10-A	1 – 5 Feb 10
CONUS Trial Advocacy Course, Class 10-A (off-site, Charleston, SC)	1 – 5 Feb 10
Legal & Administrative Investigations Course, Class 10-A	8 – 12 Feb 10
European Trial Advocacy Course, Class 10-A (off-site, Kapaun AS Germany)	16 – 19 Feb 10
Judge Advocate Staff Officer Course, Class 10-B	16 Feb – 16 Apr 10
Paralegal Craftsman Course, Class 10-02	16 Feb – 24 Mar 10
Paralegal Apprentice Course, Class 10-03	2 Mar – 14 Apr 10
Area Defense Counsel Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Defense Paralegal Orientation Course, Class 10-B	29 Mar – 2 Apr 10
Military Justice Administration Course, Class 10-A	26 – 30 Apr 10
Advanced Labor & Employment Law Course, Class 10-A (off-site, Rosslyn, VA)	27 – 29 Apr 10
Paralegal Apprentice Course, Class 10-04	27 Apr – 10 Jun 10
Reserve Forces Judge Advocate Course, Class 10-B	1 – 2 May 10
Advanced Trial Advocacy Course, Class 10-A	3 – 7 May 10
Environmental Law Update Course (DL), Class 10-A	4 – 6 May 10
Operations Law Course, Class 10-A	10 – 20 May 10

Negotiation & Appropriate Dispute Resolution, Class 10-A	17 – 21 May 10
Reserve Forces Paralegal Course, Class 10-A	7 – 11 Jun 10
Staff Judge Advocate Course, Class 10-A	14 – 25 Jun 10
Law Office Management Course, Class 10-A	14 – 25 Jun 10
Paralegal Apprentice Course, Class 10-05	22 Jun – 5 Aug 10
Judge Advocate Staff Officer Course, Class 10-C	12 Jul – 10 Sep 10
Paralegal Craftsman Course, Class 10-03	12 Jul – 17 Aug 10
Paralegal Apprentice Course, Class 10-06	10 Aug – 23 Sep 10
Environmental Law Course, Class 10-A	23 – 27 Aug 10
Trial & Defense Advocacy Course, Class 10-B	13 – 24 Sep 10
Accident Investigation Course, Class 10-A	20 – 24 Sep 10

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE:
American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA:
American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL:
Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA:
American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

APRI:
American Prosecutors Research Institute
99 Canal Center Plaza, Suite 510
Alexandria, VA 22313
(703) 549-9222

ASLM:	American Society of Law and Medicine Boston University School of Law 765 Commonwealth Avenue Boston, MA 02215 (617) 262-4990
CCEB:	Continuing Education of the Bar University of California Extension 2300 Shattuck Avenue Berkeley, CA 94704 (510) 642-3973
CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University National Law Center 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272

IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837
MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
NCDA:	National College of District Attorneys University of South Carolina 1600 Hampton Street, Suite 414 Columbia, SC 29208 (803) 705-5095
NDAA:	National District Attorneys Association National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (703) 549-9222
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637

PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421
TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2010 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2009 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

2. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact

LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

3. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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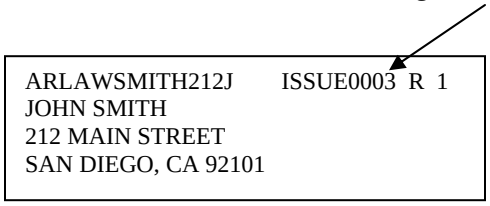

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The Judge Advocate General's Legal Center & School
U.S. Army
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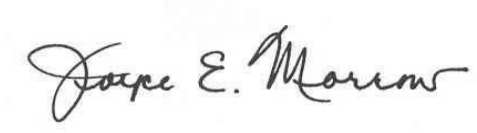

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