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Don't Ask Don't Tell Repeal Act of 2010

On 22 December 2010, President Obama signed the Don't Ask Don't Tell Repeal Act of 2010.[1] The Act repeals 10 U.S.C § 654 sixty days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that three actions have occurred: (1) that they have considered the Department of Defense Comprehensive Review on repealing Don't Ask Don't Tell; (2) that the Department of Defense has established the necessary policies and regulations to implement repeal; and (3) that implementation of those policies and regulations is consistent with military readiness, effectiveness, cohesion, retention, and recruiting.[2] Until certification occurs, current regulations and directives implementing 10 U.S.C. § 654 are still in effect.[3]

On 23 February 2011, the Army began training personnel on how the Army will implement the repeal of 10 U.S.C. § 654. The deadline for training all Active[4] and Reserve component personnel on implementing the repeal is 15 August 2011.[5]

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Summary of *Thompson v. North American Stainless*

In January 2011, the U.S. Supreme Court ruled in an 8-0 opinion (Kagan, J., recused) that Title VII's ban on workplace retaliation against an employee who challenges discrimination also protects a co-worker who is closely related to the employee who filed the complaint. In *Thompson v. North American Stainless, LP* (NAS),[6] the respondent (NAS) fired Thompson after his fiancée, also a NAS employee, filed a sex discrimination charge against NAS with the Equal Employment Opportunity Commission (EEOC). The district court granted NAS summary judgment on the ground that third-party retaliation claims were not permitted by Title VII, and the Sixth Circuit affirmed.

Justice Scalia, writing for the Court, rejected the Sixth Circuit's narrow reading of Title VII's anti-retaliation ban. The Court held that the anti-retaliation provision "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[7] In this case, the Court argued that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[8] The Court declined to identify a fixed class of relationships that would warrant protection under Title VII, stating only that "firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance would almost never do so."[9]

The Court adopted a "zone of interests" test for determining whether a complainant has a cause of action for alleged retaliation. In order to be in the "zone of interests" necessary to sustain a complaint, the employee must have an interest that Congress intended to be protected by the relevant statute. Since Title VII's purpose is to protect employees from unlawful retaliation, the Court found that Thompson fell within the zone of interests because, assuming the alleged facts were true, it was unlawful retaliation for NAS to fire Thompson for his fiancée's EEOC complaint.[10] Thus, the Court held that Thompson, as a third party, had a cause of action under Title VII despite the fact that he personally did not file the EEOC complaint or otherwise engage in protected activity.

Thompson v. North American Stainless, LP is significant because it expands the scope of Title VII's protection against workplace retaliation. While this is the first time the Court has explicitly allowed a third party to sue under Title VII, the EEOC has been applying a similar interpretation for years.[11] Practitioners and managers should be aware of the practical effect this ruling has in expanding the potential class of employees who have actionable retaliation claims.

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[1] Pub. L. No. 111-321, __ Stat. __.

[2] 10 U.S.C. § 654 (2006).

[3] *Id.*

[4] Memorandum, Under Sec'y of Def. (Pers. & Readiness), subject: Repeal of Don't Ask, Don't Tell and Future Impact on Policy (28 Jan. 2011).

[5] *Id.*

[6] No. 09-291, slip op. at 1 (S. Ct. Jan. 24, 2011).

[7] *Id.* at 3 (quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006)).

[8] *Id.*

[9] *Id.* at 4.

[10] *Id.* at 7.

[11] *See* EEOC COMPLIANCE MANUAL § 8, at 8008 (1998) (retaliation) ("Although EEOC Guidelines are not binding on the courts, they 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

Lore of the Corps

A Remarkable Judge Advocate By Any Measure: Colonel Hubert Miller (1918–2000)

Fred L. Borch III
Regimental Historian & Archivist

War hero, two-time Olympian, outstanding judge advocate (JA)—Colonel (COL) Hubert "Hube" Miller was all of these. He was decorated with the Distinguished Service Cross for extraordinary heroism in France in 1944, competed in the four-man bobsled event in the 1952 and 1956 Winter Olympics, and served twenty years as an Army lawyer in a variety of important positions.

Born at Saranac Lake, New York on 24 February 1918, Hube Miller graduated from high school in 1935. He was a superb athlete and, while attending St. Lawrence University from 1936 to 1938, was a member of the school's skiing, wrestling, and football squads.

After completing his studies in 1938, Miller entered Albany Law School, from which he graduated in 1941 with an LL.B. He then worked in Boston, Massachusetts for the Liberty Mutual Insurance Company. After the Japanese attack on Pearl Harbor, Miller left civilian life and enlisted in the Army.

In February 1942, Private Miller reported for duty at Fort Benning, Georgia. After completing training as an infantryman, Miller applied for and was accepted into Officer Candidate School. On 8 October 1942, Miller pinned on the gold bars of a second lieutenant and, after more than a year at Fort Jackson, South Carolina, he sailed for Europe.

After arriving in England in April 1944, now First Lieutenant Miller joined the 358th Infantry Regiment, 90th Infantry Division. The "Tough 'Ombres" landed in Normandy at Utah Beach on D-Day plus 2 and immediately saw hard fighting against the Germans.[1] Miller, who served first as a platoon leader and then as a company commander, excelled as a combat Soldier. Proof that Miller was the epitome of the young infantry officer came the following month, when Miller's battalion was heavily engaged. As the citation for his Distinguished Service Cross explains:

> On 12 July 1944, near La Valaissere, France, while the 3rd Battalion, 358th Infantry was attacking through hedgerows, Lieutenant Miller, as Commanding Officer of Company "I," was severely and painfully wounded when the battalion was pinned down by intense enemy machine gun fire. Learning that all other officers of Companies "I," "K," and "L" had become casualties, Lieutenant Miller refused to be evacuated and took command of the reorganization of the three companies under heavy enemy fire. With disregard of his injuries and personal safety, he then moved forward in direct line of fire from the enemy and brought back to safety a severely wounded enlisted man. Lieutenant Miller remained in command of his troops until relieved by another officer some three hours later. The gallant example set by this officer inspired the troops which he commanded to strive more aggressively for success in all their combat missions.[2]

Miller's wounds were so severe that he was evacuated to England on 13 July. He returned to the United States in January 1945 and then served as a training company commander and regimental operations officer until October, when now Captain (CPT) Miller was released from active duty.

Returning to the private practice of law in Saranac Lake, New York, Miller also was actively involved in New York State's Division of Veteran Affairs as a Veterans' Counselor. He also entered local politics and was elected to his county's Board of Supervisors.

A year after the Korean War broke out, Miller was recalled to active duty as an infantry officer. But CPT Miller did not deploy to the Far East. On the contrary, the Army sent him to Fort Dix, New Jersey, to serve as an infantry training company commander. While in this assignment, Miller arranged some temporary duty at Lake Placid, New York, where he tried out for the U.S. Olympic four-man Bobsled Team. He made the team, and participated in the 1952 Winter Olympic Games in Oslo, Norway.

[1] The red "T-O" on the shoulder sleeve insignia of the 90th Division stood for "Texas-Oklahoma"—indicating its origins as a National Guard division. But the Soldiers of the 90th liked to believe that the letters on the patch stood for "Tough 'Ombres."

[2] Headquarters, Third U.S. Army, Gen. Order No. 89, para. 2 (12 Nov. 1944).

Shortly thereafter, CPT Miller was assigned to Garmisch, Germany, where he assumed duties as the post Recreational Services Officer. In this assignment, Miller was responsible for all recreational and entertainment programs and activities for the Army recreation center in Garmisch. He supervised about 300 military and civilian personnel and oversaw the operation of ski tours, ice shows, sports clinics, golf courses, bowling alleys, theaters, and dance bands. But Miller also continued to train. His hard work paid off: Miller was a member of the four-man U.S. bobsled team that won the World Championships in Garmisch in 1953.

After returning to the United States in early 1955, Miller decided it was time to put his legal training to good use. He was detailed to the Judge Advocate General's Corps in December and immediately assumed duties as Chief of Military Justice in the Office of the Staff Judge Advocate (SJA) at Fort Dix, New Jersey. Promoted to major in April 1955, Miller was selected to attend the Fourth Advanced Course and he began his classes at The Judge Advocate General's School (TJAGSA) in Charlottesville, Virginia in August.

Interestingly, Miller took a short break from his classes in January 1956, when he travelled to Cortina, Italy to once again join the U.S. Olympic Team in the four-man bobsled event. Miller is the only TJAGSA student in history to participate in the Olympic Games as a student. Unfortunately, Miller did not make history as the only Army JAG Corps officer to participate in the Olympic Games because he did not formally transfer to the Corps until March 1956 (shortly before he graduated from the Advanced Course).

As an Army lawyer, Miller served in a variety of assignments and locations, to include Staff and Faculty, TJAGSA; Deputy SJA, 101st Airborne Division; SJA, 1st Cavalry Division; SJA, Air Defense Command; and SJA, Army Air Defense Center.

But Miller made history while serving as the SJA, 1st Logistical Command, from June 1966 to June 1967. With over 60,000 personnel assigned to it, this was the largest single command in Vietnam. Now COL Miller was the principal legal advisor and he "and his legal staff of ten military attorneys handled criminal, procurement, real estate, international and maritime law."[3]

Ninety percent of the workload for the attorneys at the 1st Logistical Command involved general courts-martial. Few of these trials, however, were for military offenses. Rather, most were for murders, rapes and robberies. While this Soldier-related misconduct was bad, a bigger problem was the rise in civilian misconduct in areas falling under the command's jurisdiction. Since the South Vietnamese were unwilling to prosecute American civilians for criminal offenses, Miller decided to prosecute a civilian offender at a summary court-martial.

After a civilian merchant seaman named Bruce was caught stealing from a ship in Cam Ranh Bay, Miller conferred with Major General (MG) Charles W. Eifler, the Commanding General, 1st Logistical Command. Miller prepared a memorandum, which Eifler signed on 8 December 1966, in which Eifler stated that "in view of the conditions now prevailing in Vietnam, I have determined that 'time of war' within the meaning of the UCMJ exists in this area of operations."[4] First Logistical Command Special Orders were then published detailing JA CPT Bernard Radosh as summary court officer. Radosh travelled to Cam Ranh Bay, heard the evidence against Bruce, and convicted him. The punishment was a reprimand, a fine, and restriction to the ship. Miller reviewed the abbreviated record of the summary court and MG Eifler approved the findings and sentence.

In addition to prosecuting the first civilian in Vietnam, the 1st Logistical Command also processed the first enlisted resignation in lieu of court-martial. A sergeant (SGT) and some other men had stolen a jeep and radio, dug a hole, and buried them, planning to retrieve the property later. The SGT's misconduct was discovered, and charges were preferred against him for larceny of government property.

Prior to trial by general court-martial, Miller suggested to the accused's defense counsel that the Soldier consider submitting a resignation in lieu of trial under Army Regulation (AR) 635-200. This was a new provision, and the defense counsel had never heard of it. But the accused submitted the resignation, and Miller took it to MG Eifler. The latter also was unfamiliar with the new provision, but he took Miller's recommendation and approved the accused's request. The accused had a good record, and so Eifler gave him a break, approving a general discharge rather than the bad conduct or dishonorable discharge the accused likely would have been given at trial.

Interestingly, it was Miller who had first proposed creating an enlisted resignation in lieu of court-martial when he was working in the Pentagon at Office of the Judge Advocate General's Military Justice Branch from 1960 to 1963. Under then existing law, an officer could resign in lieu of court-martial, but enlisted Soldiers had no comparable mechanism to avoid trial. Believing that the enlisted ranks should have the same right as officers, then Lieutenant Colonel Miller sent his proposal forward for staffing, but no action was taken. During a later visit with then Brigadier General Kenneth Hodson, the Assistant Judge

[3] FREDERIC L. BORCH, JUDGE ADVOCATES IN VIETNAM 68 (2003).

[4] Memorandum from the Commanding General, 1st Logistical Command, for Commanding General, U.S. Army Support Command, Cam Ranh Bay, subject: Jurisdiction over Civilians (8 Dec. 1966)

Advocate General for Military Justice, Miller again suggested that creating this enlisted resignation mechanism was a good idea. Hodson agreed, picked up the telephone, and spoke personally with The Adjutant General, requesting speedy approval of Miller's proposal. The new provision appeared in the July 1966 revised version of AR 635-200.[5]

After retiring from active duty in 1975, Miller and his wife settled in Elberta, Alabama, where he lived until his death in 2000.

The Corps has not forgotten COL Hubert Miller. At Fort Bliss, Texas, where Miller had his final assignment as the Army Air Defense Center SJA, the command recently named their new courtroom in his honor.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

[5] BORCH, *supra* note 3, at 70.

Vanquishing Paper Tigers:
Applying Comparative Law Methodology to Enhance Rule of Law Development

Captain Ronald T. P. Alcala[*]

I. Introduction

The conflicts in Iraq and Afghanistan have had a transformative impact on military doctrine and strategy.[1] By focusing attention on irregular threats and highlighting the dangers of unconventional, asymmetric methods of warfare,[2] both conflicts have changed the way military assets are evaluated and employed. In 2005, for example, the United States recognized the importance of stability operations[3] to achieving long-term, national strategic objectives[4] by elevating stability operations to a priority comparable with combat operations.[5] This re-conceptualization of the military's core mission, however, has raised a number of practical questions. The U.S. Army Capstone Concept, a doctrinal guide describing the Army's vision for future force development, poses the following questions: "How should the U.S. Army use available and anticipated resources, to educate its leaders and organize, equip, and train units to fight and win wars . . . ?"[6] Other than combat, how can the Army "engage in security force assistance," "support state building efforts," and "persuade and influence relevant populations in pursuit of national policy goals?"[7] One solution would involve more robust Army participation in rule of law operations.

Rule of law operations, however, cannot succeed without a thorough understanding of local laws and judicial traditions, subjects the Army has largely overlooked in the education of its leaders. Current rule of law instruction normally focuses on principals and overarching theories to the exclusion of more substantive topics, including foreign domestic law and foreign administrative bureaucracies. The growing emphasis on counterinsurgency and stability operations in transitioning and post-conflict environments warrants a reconsideration of this educational model, particularly as it relates to rule of law. More specifically, professional military education (PME) should include greater instruction on foreign and comparative law to enable commanders to pursue rule of law with greater cultural awareness and situational understanding.[8] Legal PME should further emphasize substantive criminal law and procedure, rather than civil law, because of the outsize role criminal justice plays in the early stages of stability operations, when reliance on military professionals is often

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[1] *See* U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS para. 4.1 (28 Nov. 2005) [hereinafter DODD 3000.05]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0]. In his foreword to FM 3-0, General William S. Wallace states, "The operational environment in which . . . persistent conflict will be waged will be complex, multidimensional, and increasingly fought 'among the people.' . . . This edition of FM 3-0 . . . is a revolutionary departure from past doctrine. It describes an operational concept where commanders employ offensive, defensive, and stability or civil support operations simultaneously as part of an interdependent joint force . . . ." *Id.* at foreword (emphasis omitted).

[2] *See, e.g.*, FM 3-0, *supra* note 1, para. 1-15 ("Irregular threats are those posed by an opponent employing unconventional, asymmetric methods and means to counter traditional U.S. advantages. . . . Irregular warfare includes such means as terrorism, insurgency, and guerilla warfare.").

[3] Stability operations include "various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at GL-26 (13 Feb. 2008) (C2, 22 Mar. 2010) [hereinafter JOINT PUB. 3-0]

[4] *See* FM 3-0, *supra* note 1, at vii ("Winning battles and engagements is important but alone is not sufficient. Shaping the civil situation is just as important to success.").

[5] DODD 3000.05, *supra* note 1, para. 4.1 ("Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations . . . ."); *see also* FM 3-0, *supra* note 1, at vii ("Within the context of current operations worldwide, stability operations are as important—or more important than—offensive and defensive operations."); *see also* JOINT PUB. 3-0, *supra* note 3, at I-9 (explaining that stability operations may be necessary to achieve national strategic objectives or protect national interests).

[6] *See* U.S. ARMY TRAINING AND DOCTRINE COMMAND, PAM. 525-3-0, THE ARMY CAPSTONE CONCEPT—OPERATIONAL ADAPTABILITY: OPERATING UNDER CONDITIONS OF UNCERTAINTY AND COMPLEXITY IN AN ERA OF PERSISTENT CONFLICT, 2016–2028, para. 3-2 (21 Dec. 2009) [hereinafter TRADOC PAM. 525-3-0].

[7] *Id.*

[8] The curriculum at The Judge Advocate General's School (JAG School), U.S. Army, in Charlottesville, Virginia, currently features a number of courses on rule of law. Students of both the Judge Advocate Officer Basic Course and the Judge Advocate Graduate Course receive an introductory block of instruction on rule of law. Interested students in the Judge Advocate Graduate Course may also enroll in an advanced elective on rule of law for credit toward their master of laws (LL.M.) degree in military law. Rule of law instruction is also provided during the Operational Law Course, Senior Officer Legal Orientation, Congressional Staff Legal Orientation, and Reserve Component off-sites. Additionally, since 2008, the JAG School has hosted a week-long Rule of Law Course taught by members of the International & Operational Law Department and leading figures of the interagency rule of law effort. These courses have traditionally dwelt on more expansive subjects—e.g., "Counterinsurgency Doctrine," "Overview of the Department of Justice Role"—to the exclusion of more focused instruction on foreign law. The curriculum is currently being revised to incorporate more foreign and comparative law instruction. Other institutions also offer rule of law courses for practitioners. The U.S. Institute of Peace's Rule of Law Practitioners Course is particularly well-regarded. For a brief examination of rule of law instruction at civilian law schools, see Robert Stein, *Teaching the Rule of Law*, 18 MINN. J. INT'L L. 403 (2009), which notes that only seventeen ABA-accredited law schools offered rule of law courses in 2009 and which provides an overview of the rule of law curriculum at the University of Minnesota Law School.

most acute. Ultimately, future rule of law missions will require some background in foreign law and foreign legal traditions. The Army should prepare for those missions now by developing expertise through PME.

II. Background

The anti-coalition resistance that emerged following the U.S. invasion of Iraq in 2003 gained traction gradually before erupting into full blown insurgency.[9] Initially, much of the post-invasion violence was ascribed to remnants of the old regime, including the Ba'ath Party and the Fedayeen Saddam, which continued to fight following Saddam Hussein's ouster.[10] As fighting persisted and instability spread, however, it became increasingly clear that the insurgency had become something more serious and pervasive than first anticipated.[11] Moreover, a new strategy was needed to combat the escalating threat.

The release of Field Manual 3-24,[12] the Army and Marine Corps *Counterinsurgency* manual, in December 2006 did much to reframe debate on the war in Iraq.[13] Counterinsurgency, or COIN, soon became the mantra in both Iraq and Afghanistan, though the authors of the manual were careful not to overstate its message. "Insurgency and its tactics are as old as warfare itself,"[14] the manual asserts, noting that "[t]hroughout its history, the U.S. military has had to relearn the principles of counterinsurgency (COIN) while conducting operations against adaptive insurgent enemies."[15]

The manual itself was intended to provide "principles and guidelines for counterinsurgency operations,"[16] though only in general terms.[17] Nearly five years after publication of the *Counterinsurgency* manual, some of the particulars—the tactics, techniques, and procedures—of counterinsurgency warfare have been more fully circumscribed as a result of its release. Rule of law is one subject that has benefited from the attention.[18]

The Army's *Rule of Law Handbook* and similar publications deserve credit for helping to demystify this elusive area of practice. Still, rule of law continues to confound and frustrate even the most seasoned rule of law practitioners, in part because every rule of law campaign, like every insurgency, is "contextual and presents its own set of challenges."[19] Part of that challenge lies in preparation: What can and should the rule of law practitioner do to prepare for the rule of law mission? What background

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[9] *See generally* THOMAS E. RICKS, FIASCO (2006).

[10] *See, e.g.*, Eric Schmitt, *2 U.S. Officials Liken Guerillas to Renegade Postwar Nazi Units*, N.Y. TIMES, Aug. 26, 2003, at A10 (summarizing two senior officials' opinion that "Baathist and Fedayeen remnants" were responsible for the violence in Iraq); Eric Schmitt & David E. Sanger, *Guerillas Posing More Danger, Says U.S. Commander for Iraq*, N.Y. TIMES, Nov. 13, 2003, at A1 (describing enemy fighters as "the shadowy armed opposition" and citing General John P. Abizaid as saying "loyalists to Saddam Hussein," not foreign terrorists, "pose the greatest danger to American troops and to stability in Iraq").

[11] *See* JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 11 (2004). The panel found,

> In Iraq, there was not only a failure to plan for major insurgency, but also to quickly and adequately adapt to the insurgency that followed after major combat operations. . . . Major combat operations were accomplished more swiftly than anticipated. Then began a period of occupation and an active and growing insurgency. Although the removal of Saddam Hussein was initially welcomed by the bulk of the population, the occupation became increasingly resented.

Id. Ricks suggests the United States squandered its early military successes by failing to plan adequately for the postwar aftermath. *See* RICKS, *supra* note 9, at 136–138, 146–148. Ricks notes that as looting broke out across Iraq, "the U.S. military was perceptibly losing its recent gains; it gave the sense that it really didn't know what to do next and was waiting to pass the mission to someone else." *Id.* at 136. He further observes, "When top Pentagon officials refused to acknowledge the realities of Iraq, the opportunity to take hold of the situation slipped between the fingers of the Americans. In military terms, in April and May [2003], the U.S. military lost the initiative . . . ."

[12] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter COUNTERINSURGENCY MANUAL].

[13] *See, e.g.*, Michael R. Gordon, *Military Hones a New Strategy on Insurgency*, N.Y. TIMES, Oct. 5, 2006, at A1 (quoting Jack Keane, who explains, "The Army will use [the counterinsurgency] manual to change its entire culture as it transitions to irregular warfare"); Thomas E. Ricks, *General May See Early Success in Iraq; But Sharp Rise in Insurgent Violence Could Soon Follow, Officials Say*, WASH. POST, Jan. 23, 2007, at A01 ("[Troops'] top priority will be protecting the Iraqi population, following counterinsurgency doctrine laid out in a new Army manual . . . that says 'the people are the prize.'"); Sarah Sewall, *He Wrote the Book. Can He Follow It?*, WASH. POST, Feb. 25, 2007, at B03 ("The new [counterinsurgency] manual challenges the Army to think differently about how it conducts war.").

[14] COUNTERINSURGENCY MANUAL, *supra* note 12, at 1.

[15] *Id.* at ix. The foreword to the manual states that the manual was "designed to fill a doctrinal gap." *Id.* at foreword. The foreword continues, "It has been 20 years since the Army published a field manual devoted exclusively to counterinsurgency operations. For the Marine Corps it has been 25 years." *Id.* Meanwhile, counterinsurgency operations were generally "neglected in broader American military doctrine and national security policies since the end of the Vietnam War over 30 years ago," and publication of the *Counterinsurgency* manual was "designed to reverse that trend." *Id.* at vii.

[16] *Id.* at foreword.

[17] *Id.* ("This manual takes a general approach to counterinsurgency operations.").

[18] *Id.* ("As this publication explains, performing the many nonmilitary tasks in COIN requires knowledge of many diverse, complex subjects. These include governance, economic development, public administration, and the rule of law.").

[19] *Id.* ("The Army and Marine Corps recognize that every insurgency is contextual and presents its own set of challenges."). In their foreword, General David H. Petraeus and General James F. Amos further observe, "You cannot fight former Saddamists and Islamic extremists the same way you would have fought the Viet Cong, Moros, or Tupamaros; the application of principles and fundamentals to deal with each varies considerably." *Id.* The same holds true for rule of law operations.

knowledge should commanders and policymakers have before pursuing rule of law initiatives in counterinsurgency or post-conflict environments? If counterinsurgency is the "graduate level of war,"[20] the syllabus must include instruction in foreign and comparative law.

III. Defining "Rule of Law"

The shift from traditional combat operations to a counterinsurgency strategy in Iraq and Afghanistan stimulated intense interest in rule of law and its importance to the success of post-conflict stability. Although definitions of rule of law differ,[21] the conceptual framework for rule of law and the universality of rule of law as a principle have been widely acknowledged. The *Rule of Law Handbook* observes, "There is no widespread agreement on what exactly constitutes the rule of law, just as there is no widespread agreement on what exactly it means to have a 'just society.' But there is common ground regarding some of the basic features of the rule of law . . . ."[22] Meanwhile, this "common ground" rests on ideas so fundamental and basic no nation, legal system, or cultural tradition can lay sole claim to them. As the U.N. Secretary General noted in a 2004 report on rule of law, the norms and standards that undergird the United Nation's rule of law efforts "have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States . . . . As such, these norms and standards bring a legitimacy that cannot be said to attach to exported national models . . . ."[23] The U.S. Agency for International Development (USAID) has similarly observed, "The rule of law is not Western, European or American. It is available to all societies."[24] As a practical matter, this has "important implications for practitioners. If the rule of law is a universal principle, then supporting the rule of law is not necessarily imposing foreign ideas on a society."[25]

Universal principles make excellent polestars, but they lack immediate direction. Unfortunately, even today, much of the discourse on rule of law remains theoretical and exasperatingly obscure to the practitioner in the field. As David Galula noted in his classic 1964 book *Counterinsurgency: Theory and Practice*, there is often a dearth of guidance when it comes to "suggesting concrete courses of action for the counterrevolutionary."[26] Galula suggests, "Very little is offered beyond formulas—which are sound enough as far as they go—such as, 'Intelligence is the key to the problem,' or 'The support of the population must be won.'"[27] Still, "[h]ow to turn the key, how to win the support, this is where frustrations usually begin."[28]

Importantly, a number of publications, including the U.S. Army's *Rule of Law Handbook*, USAID's *Guide to Rule of Law Country Analysis*, and the U.S. Institute of Peace's (USIP) *Guiding Principles for Stabilization and Reconstruction* have begun to provide just such direction for rule of law practitioners in transitioning and post-conflict societies. Consequently, there is no reason to restate their recommendations in total again here. Instead, this article will focus on one discreet and often overlooked area of rule of law operations of particular relevance to judge advocate practitioners: the study of foreign law and, more specifically, host nation criminal law and procedure. This article, however, is not a primer on Iraqi law, Afghan law, or the law of any individual nation. Rather, it is a reminder to all practitioners that understanding and defining the applicable laws lies at the center of rule of law development. No rule of law judge advocate should deploy to theater without some familiarity of the applicable law, whether it is wholly foreign law, an interim international code, or a hybrid of the two. Without knowledge of the relevant law, the principle of rule of law may remain the ideal, but resentment of the rule of law mission may become the reality.

IV. Rule of Law Lines of Effort—Courts, Cops, and Corrections

Army doctrine defines rule of law as "a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that

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[20] *Id.* at 1-1 ("Counterinsurgency is not just thinking man's warfare—it is the graduate level of war."), *quoting* a Special Forces Officer in Iraq in 2005. *But see* Colonel David S. Maxwell, *Is Counterinsurgency the Graduate Level of War?*, SMALL WARS J. (July 20, 2008, 1:44 AM), http://smallwarsjournal.com/blog/2008/07/is-counterinsurgency-the-gradu/ (arguing that the graduate level of war "has to be full spectrum" and is "any form of war because war is as complex in major combat operations as it is in stability operations").

[21] *See, e.g.*, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 10 (2010) [hereinafter RULE OF LAW HANDBOOK (2010)].

[22] *Id.* at 10.

[23] U.N. Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 10, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rep. of the Secretary-General*].

[24] U.S. AGENCY FOR INT'L DEV., GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 5 (2008) [hereinafter USAID GUIDE], *available at* http://pdf.usaid.gov/pdf_docs/PNADM700.pdf.

[25] *Id.*

[26] DAVID GALULA, COUNTERINSURGENCY: THEORY AND PRACTICE, at xii (1964). Galula uses the term "revolutionary war" to describe what in today's vernacular might be called "counterinsurgency." Galula explains, "Since insurgency and counterinsurgency are two different aspects of the same conflict, an expression is needed to cover the whole; 'revolutionary war' will serve this purpose." *Id.* at xiv.

[27] *Id.* at xii.

[28] *Id. See also* DAVID KILCULLEN, COUNTERINSURGENCY 18 (2010). Kilcullen captures the frustration many junior officers felt after the *Counterinsurgency* manual's release with a quote by a Marine Corps company commander: "The Field Manual tells us what to achieve, but not what to do. It lays out the theory, but we need practical advice at the company level." *Id.*

are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law."[29] The establishment of rule of law, moreover, is crucial to both counterinsurgency and stability operations.[30] The *Counterinsurgency* manual states, "Establishing the rule of law is a key goal and end state in COIN."[31] Ensuring confidence in, and access to, judicial institutions that operate transparently, equitably, and independently is also an imperative of stability operations.[32] Ultimately, rule of law is a necessary end state in counterinsurgency and stability operations, because "[w]ithout rule of law, criminal and politically motivated violence will perpetuate the threat that warring parties posed during violent conflict."[33] Such violence is antithetical to a stable society.

Rule of law operations in Iraq and Afghanistan have focused broadly on improving three aspects of the criminal justice system: judicial institutions, law enforcement, and the prison system[34]—known informally as "courts, cops, and corrections."[35] Rule of law efforts to strengthen these institutions have involved joint, interagency, intergovernmental, and multinational (JIIM) participation,[36] with the U.S. Department of State serving as the putative lead agency for rule of law activities.[37] In practice, however, U.S. military forces have frequently served as the lead for rule of law operations—and other stability operations—in Iraq and Afghanistan.[38] This reliance on military management of rule of law operations is not surprising. Rule of law activities take place throughout the continuum of full spectrum operations[39] and, as a consequence, often occur in security environments that may preclude significant civilian agency involvement. Joint Publication 3-0, *Operations*, explains, "The military's predominant presence and its ability to command and control forces and logistics under extreme conditions may give it the de facto lead in stability operations normally governed by other agencies that lack such capacities."[40] The development of rule of law institutions, therefore, will frequently devolve to the military, even during stability operations.

V. Determining the Applicable Law

Determining the applicable law in theater is critical to the rule of law mission because rule of law cannot develop in a vacuum of legal certainty. The absence of publicly promulgated laws, at best, breeds confusion; at worst, it invites the type of disorder and violence that too often result in grave abuses of human rights.[41] Defining the applicable law at the outset of stability operations, therefore, should be a priority, and military personnel—judge advocates and military police in particular—should be prepared to intelligently apply and enforce the applicable law in support of the legal regime.

Determining which laws to apply and enforce, however, can be a singular challenge. Sometimes, existing legal codes may suffice as the applicable law, either in their entirety or *mutatis mutandis*; other times, entirely new laws may be necessary to replace unacceptable or illegitimate laws.[42] In East Timor, for example, the U.N. peacekeeping mission

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[29] U.S. AGENCY FOR INT'L DEV., U.S. DEP'T OF DEF. & U.S. DEP'T OF STATE, SECURITY SECTOR REFORM 4 (Feb. 2009); *see also* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 11.

[30] *See generally* COUNTERINSURGENCY MANUAL, *supra* note 12; U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008) [hereinafter STABILITY OPERATIONS MANUAL].

[31] COUNTERINSURGENCY MANUAL, *supra* note 12, para. D-38.

[32] STABILITY OPERATIONS MANUAL, *supra* note 30, para. 1-40. The *Stability Operations* manual also states that "[a]dherence to the rule of law is essential to legitimate and effective governance. Rule of Law enhances the legitimacy of the host-nation government by establishing principles that limit the power of the state and by setting rules and procedures that prohibit accumulating autocratic and oligarchic power." *Id.* para. 1-42.

[33] U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 7-64 (2009) [hereinafter USIP GUIDING PRINCIPLES].

[34] *See generally* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 94–102; STABILITY OPERATIONS MANUAL, *supra* note 30, paras. 6-90 to 6-99 (describing "justice reform" with respect to "courts," "law enforcement," and "corrections").

[35] *See, e.g.*, RULE OF LAW HANDBOOK (2010), *supra* note 21, at 231.

[36] *Id.* at 23. "Joint" is defined as "activities, operations, organizations, etc., in which elements of two or more Military Departments participate." JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (as amended through 30 May 2008).

[37] *See* NAT'L SECURITY PRESIDENTIAL DIR./NSPD-44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTING AND STABILIZATION (Dec. 7, 2005) ("The Secretary of State shall coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities."); *see also* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 9 ("As a matter of U.S. policy, the Department of State (DOS) is the lead agency in conducting most stability and reconstruction activities . . . .").

[38] Joint Publication 3-0 anticipates the possibility that military forces may be forced to serve as the lead agency for stability operations. The publication states U.S. military forces should be prepared to lead stability operations activities "when indigenous civil, USG [U.S. Government], multinational or international capacity does not exist or is incapable of assuming responsibility." JOINT PUB. 3-0, *supra* note 3, at V-25.

[39] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at 3-1 (27 Feb. 2008) [hereinafter OPERATIONS]; *see also* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 19–22.

[40] JOINT PUB. 3-0, *supra* note 3, at V-25; *see also* JAMES DOBBINS ET AL., RAND CORPORATION, THE BEGINNER'S GUIDE TO NATION-BUILDING, at xxiv (2009) ("Soldiers . . . are often called upon initially to perform many functions that would be better fulfilled by civilian experts, were such experts available in sufficient numbers.").

[41] *See, e.g.*, DOBBINS ET AL., *supra* note 40, at 124 ("There is often little or no functioning justice system in the immediate post-conflict phase. Uncertainty about applicable law causes great confusion.").

[42] *Id.* at 125; USAID GUIDE, *supra* note 24, at 13 ("Post-conflict interventions may include adopting previous codes or introducing internationally accepted codes as interim measures while longer-term reforms are developed.").

adopted existing Indonesian law as the applicable law, with the exception of laws governing capital punishment and subversion.[43] In contrast, enmity and resentment provoked by years of interethnic violence in Kosovo essentially de-legitimized the existing legal regime, precluding it as a viable foundation for post-conflict law.[44] In general, when existing laws are unsuitable for post-conflict application—because they are unjust, are unacceptable to the population, or violate human rights or other international standards—new laws should be implemented as quickly as possible, even if temporarily, to provide some framework for the development of rule of law institutions. Unpopular law, to borrow a phrase from Ralph Waldo Emerson, can be a "rope of sand" that "perishes in the twisting."[45]

In post-conflict scenarios, the daunting task of defining the applicable law has traditionally fallen to international lawyers, academics, and practitioners trained in comparative law, human rights law, and judicial reform.[46] The process typically begins with a comprehensive assessment of the legal codes, statutes, regulations, and procedures that comprise the existing legal framework.[47] Existing laws are examined in light of international civil, political, economic, social, and human rights standards,[48] and short-term legal reform is instituted if necessary.[49] The *Guiding Principles for Stabilization and Reconstruction* recommends that short-term reforms "involve discreet changes to existing laws rather than a long-term overhaul"[50] and that they address "urgent problems such as laws that grossly undermine human rights or inadequate laws for pretrial detention."[51] Longer-term legal reform may involve more sweeping changes and should aspire to legitimacy through "societal consensus."[52] Ensuring the reform process is "transparent and participatory" is crucial to achieving such consensus.[53] As USIP notes, "Participation makes the population more invested in new laws, bringing the laws increased acceptability and public legitimacy."[54] International standards should, nevertheless, serve as a guide for these reforms.[55]

Legal reform is often essential to the establishment of rule of law, but even after culling unjust and illegitimate provisions from the law, elements of the pre-existing legal code are likely to endure. As already noted, international law can provide a normative framework for reform,[56] but unless a state's laws are completely discarded and new laws prescribed, significant portions of the preexisting law will survive intact, as was the case in East Timor and Iraq. More often than not, therefore, those responsible for conducting rule of law operations must understand both foreign law—that is, nation-specific domestic law—and international law in order to competently prosecute the rule of law mission.[57]

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[43] These exceptions included the abrogation of various anti-subversion laws and the elimination of capital punishment.

[44] On 25 July 1999, the U.N. Interim Administration Mission in Kosovo (UNMIK) promulgated UNMIK Regulation 1999/1, which decreed that the "laws applicable in the territory of Kosovo prior to 24 March 1999," the start of the NATO air campaign, would continue to apply insofar as they did not conflict with international standards of human rights or U.N. Security Council Resolution 1244 (1999). Local judges would not apply the law, however, because they refused to apply "Serbian" law in Kosovo. Simon Chesterman, *UNaccountable?: The United Nations, Emergency Powers, and the Rule of Law*, 42 VANDERBILT J. TRANSNAT'L L. 1509, 1522 (2009). Instead, they "insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that Belgrade had illegally revoked them." *Id.* (quoting SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 166 (2004)) (internal quotation marks omitted). Eventually, less than five months later, UNMIK revoked Regulation 1999/1 and instead established the applicable law as the law in effect on 22 March 1989. *Id.* at 1522–23; UNMIK Reg. 1999/24, § 1.1, U.N. Doc. UNMIK/REG/1999/24 (Dec. 12, 1999).

[45] RALPH WALDO EMERSON, ESSAYS AND ENGLISH TRAITS (Charles W. Eliot ed., P.F. Collier & Son 1909–1914) (1844).

[46] *See* DOBBINS ET AL., *supra* note 40, at 78–82.

[47] USIP GUIDING PRINCIPLES, *supra* note 33, at 7-68; *see also* DOBBINS ET AL., *supra* note 40, at 79 ("Obtaining all the legislation that constitutes the applicable body of law and translating it so that international experts can assist their colleagues are also major challenges.").

[48] These standards are codified in a variety of international agreements, including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the Convention Relating to the Status of Refugees.

[49] USIP GUIDING PRINCIPLES, *supra* note 33, at 7-69; DOBBINS ET AL., *supra* note 40, at 79 ("International lawyers may be required to engage in interpreting the penal code or the criminal code through the lens of international human rights. This means applying provisions that meet international standards while eliminating those that do not."); *see also* USAID GUIDE, *supra* note 24, at 9 ("Rule of law exists . . . only if the national legal system both recognizes essential human rights and respects those rights in practice.").

[50] USIP GUIDING PRINCIPLES, *supra* note 33, at 7-69, 7-72.

[51] *Id.*

[52] An assessment process itself can take one to two years. *Id.* at 7-68.

[53] *Id.* at 7-70.

[54] *Id.*

[55] *See, e.g.*, *Rep. of the Secretary-General*, *supra* note 23.

[56] *See, e.g.*, *id.* ¶ 9. ("The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. . . . These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.") (footnote omitted).

[57] The USIP *Guiding Principles for Stabilization and Reconstruction* further recommends that rather than "attempting to fix everything at once, the international community and host nation counterparts should adopt a human rights–based approach to rule of law; pay special attention to marginalized groups, and focus on urgent problems including major crimes, human rights violations, and politically motivated violence." USIP GUIDING PRINCIPLES, *supra* note 33, at 7-66.

VI. The Need for PME in Foreign Law

Knowledge of nation-specific domestic law would seemingly fall within the professional bailiwick of foreign-law-trained State Department attorney-advisors, yet State Department personnel and other civilian legal experts rarely have access to "courts, cops, and corrections" during ongoing combat operations—and certainly not in sufficient numbers to have a meaningful impact.[58] As Janine Davidson notes in *Lifting the Fog of Peace*, the "State Department has no expeditionary capacity of its own."[59] Consequently, military personnel, including civil affairs officers, judge advocates, and the military police, must grapple with issues of substantive law and legal procedure specific to their areas of responsibility as a corollary to the performance of rule of law operations.[60]

Unable to rely on readily and consistently available civilian expertise during counterinsurgency and stability operations, military leaders must cultivate a base of knowledge in the foreign law of their areas of responsibility. While the basic architecture of rule of law operations, with its broad emphasis on developing transparency, equity, and independence within an indigenous legal system, may be universally applicable, implementing plans and executing projects at the local level requires a comprehensive knowledge of local laws and judicial practices. A successful rule of law plan will acknowledge local circumstances and societal idiosyncrasies, including peculiarities in the law or judicial practice. Ultimately, an honest appreciation of indigenous laws can mean the difference between designing a locally viable rule of law plan or promulgating an academically sound, theoretically satisfying plan that has no practical value on the ground. Given the realities of full spectrum operations, military officials must increasingly possess the requisite comparative legal expertise and knowledge of the applicable law to plan and execute rule of law operations with minimal input from civilian agencies.

VII. Prioritizing the Development of Criminal Law

The U.S. Army must apply its finite resources wisely to achieve strategic goals and policy aims in noncombat operations. Because security is essential to rule of law and counterinsurgency, military rule of law efforts should prioritize the enforcement of laws that promote security—namely, domestic criminal law—and leave the development of civil law to other groups involved in the interagency, intergovernmental effort.[61] Prioritizing the Army's emphasis on bolstering the criminal justice system—rather than civil justice mechanisms—is prudent for several reasons.

First, security is essential to the development of rule of law. The *Counterinsurgency* manual describes security as the "cornerstone" of any COIN effort[62] and states, "Without a secure environment, no permanent reforms can be implemented and disorder spreads."[63] The USAID *Guide to Rule of Law Country Analysis* similarly places a high priority on "order and security," explaining, "Rule of law cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety."[64]

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[58] *See, e.g.*, JANINE DAVIDSON, LIFTING THE FOG OF PEACE: HOW AMERICANS LEARNED TO FIGHT MODERN WAR 166–73 (2010). Davidson observes that military personnel commonly and mistakenly believe "the State Department, the U.S. Agency for International Development (USAID), the Treasury, the Justice and Commerce departments, and even the Department of Agriculture" have deployable experts "who are available and can conduct the myriad stabilization and reconstruction tasks needed to ensure political success in the aftermath of an invasion." *Id.* at 166. According to Davidson, however, the "capability and capacity of the so-called interagency . . . is simply dwarfed by that of the U.S. military," and "unrealistic expectations about the capacity and capability of nonmilitary agencies and partners undermined success in Iraq from planning to execution and beyond." *Id.* Secretary of Defense Robert M. Gates wryly observed during a speech to the Marine Memorial Association, "If you took every Foreign Service Officer in the world and added them up, the number would not be enough to crew one aircraft carrier. There are about 6,000 FSOs. Condi Rice used to say we have more people in military bands than they have in the Foreign Service. She was not far wrong." Robert M. Gates, U.S. Sec'y of Def., Remarks to the Marine Memorial Association, San Francisco, Cal. (Aug. 12, 2010), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4672. Meanwhile, Philip Lynch, a former Rule of Law Coordinator with the U.S. Embassy in Baghdad, has stated flatly, "You can't promote the rule of law while sitting inside the American embassy." Rebecca Agule, *Iraq, Afghanistan Struggle to Secure Rule of Law*, HARV. L. REC., Apr. 16, 2009, *available at* http://www.hlrecord.org/2.4463/iraq-afghanistan-struggle-to-secure-rule-of-law-1.577076.

[59] DAVIDSON, *supra* note 58, at 169.

[60] Rule of law activities that involve the practice of law, however, are limited to judge advocates. *See* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-3 (30 Sept. 1996); *see also* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. D-10 (15 Apr. 2009) ("Judge Advocates who fall under the statutory technical supervision of The Judge Advocate General are the only persons authorized to provide legal advice regarding rule of law planning and activities. Judge advocates also perform or supervise all rule of law activities that involve the practice of law.").

[61] The development of the civil law aspects of rule of law seems ideally suited to civilian organizations. *Department of Defense Directive 3000.05* states, "Many stability operations tasks are best performed by indigenous, foreign, or US civilian professionals." DODD, *supra* note 1, para. 4.3; *see also* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 20. Meanwhile, ignoring the development of civil courts and dispute resolution mechanisms can seriously undermine the establishment of governmental legitimacy. As David Kilcullen relates in *The Accidental Guerilla*, the Taliban operated thirteen guerilla courts in southern Afghanistan by mid-2008. DAVID KILCULLEN, THE ACCIDENTAL GUERRILLA 47 (2009). The courts represented a "shadow judiciary that expanded Taliban influence" in the absence of a strong government presence. *Id.* Although the Taliban were widely acknowledged as cruel, they were also seen as fair, particularly when compared to local judges, prosecutors, and police who dispensed "phony 'justice'" to the highest bidders. *Id.*

[62] COUNTERINSURGENCY MANUAL, *supra* note 12, para. 1-131.

[63] *Id.*

[64] USAID GUIDE, *supra* note 24, at 1. The U.S. Agency for International Development identifies five elements that comprise the rule of law: (1) order and security, (2) legitimacy, (3) checks and balances, (4) fairness, and (5) effective application. Moreover, "[a]lthough country circumstances will vary, . . . there are inherent priorities among the five essential elements."

The USIP *Guiding Principles for Stabilization and Reconstruction* states, "Without public order, people will never build confidence in the public security system and will seek security from other entities like militias and warlords."[65] Security, therefore, is a necessary condition to the establishment of rule of law, especially in the immediate aftermath of conflict.[66] In this twilight between war and peace, conflict and stability, the most valuable contribution military forces can make to rule of law is the establishment of public order and the revivification of the criminal justice system.

Second, military forces usually have a small window of opportunity to contribute to rule of law development, and that time should be spent addressing the most pressing and elemental issues, including security and the establishment of governmental legitimacy. As noted earlier, the military is not the designated lead for rule of law but will frequently serve as the de facto lead during stability operations. Military involvement in the rule of law enterprise will typically last only as long as military forces maintain a presence in the host nation; once military forces withdraw, military involvement in rule of law development ceases.[67] Given the military's finite and relatively short participation in any given rule of law campaign, military forces should focus on projects that not only set conditions for success but that also use the military's limited resources to best advantage. Frequently, prioritizing the criminal justice system will yield the greatest results because improvements in criminal justice can enhance overall security and help promote the overarching objective of governmental legitimacy.

Third, effective policing is critical to the maintenance of public order and security.[68] As Galula observes, the responsibility for maintaining order is a "heavy liability" and one that belongs to the counterinsurgent.[69] Police, meanwhile, are the "eye and the arm of the government in all matters pertaining to internal order" and are "obviously a key factor in the early stages of an insurgency."[70] Many post-conflict societies, however, lack the police forces necessary to conduct law enforcement and impose public order. In these situations, law enforcement functions "may fall directly on the intervening authorities, and in particular on its police and military forces."[71] United States military involvement in law enforcement will typically take the form of active participation in police operations or activities that promote the re-establishment of civilian police capability.[72] In executing both types of missions, knowledge of criminal law is essential. For example, the *Counterinsurgency* manual stresses, "U.S. forces conducting COIN should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation."[73] The manual further states that counterinsurgents should "carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene," because evidence is necessary "to process the insurgents into the legal system and thus hold them accountable for their crimes while still promoting the rule of law."[74]

International involvement in post-conflict law enforcement is not new. Recognizing the practical importance of policing to the establishment of rule of law, the United Nations has historically incorporated law

Order and security, and legitimacy, "comprise the highest priority . . . ." *Id.* at 1–3.

[65] USIP GUIDING PRINCIPLES, *supra* note 33, at 7-74 (citing U.S. INST. OF PEACE, COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS (Colette Rausch, ed. 2006)).

[66] *See, e.g.*, DOBBINS ET AL., *supra* note 40, at xxiii ("The first order priorities for any nation-building mission are public security and humanitarian assistance. If the most basic human needs for safety, food, and shelter are not being met, any money spent on political or economic development is likely to be wasted.").

[67] As the *Rule of Law Handbook* explains, "The military role in rule of law capacity-building will end with the redeployment of U.S. forces, but the effort will likely continue with civilian agencies assuming an increasingly central role." RULE OF LAW HANDBOOK (2010), *supra* note 21, at 9. The end of Operation Iraqi Freedom and the expected withdrawal of U.S. military forces from Iraq by October 2011 are likely to set the pattern for future transitions to civilian control, most obviously for Afghanistan. Meanwhile, the undertaking promises to be a daunting one. James F. Dobbins, a former ambassador and envoy, has opined, "I don't think State has ever operated on its own, independent of the U.S. military, in an environment that is quite as threatening on such a large scale. . . . It is unprecedented in scale." Michael R. Gordon, *Civilians to Take U.S. Lead After Military Leaves Iraq*, N.Y. TIMES, Aug. 19, 2010, at A1.

[68] *E.g.*, DOBBINS ET AL., *supra* note 40, at 50 ("The prime responsibility of any police force is to enforce the law and provide for public security."); USAID GUIDE, *supra* note 24, at 14 ("Police are an integral part of a system of rule of law for the preservation of security and the enforcement of law.").

[69] GALULA, *supra* note 26, at 7.

[70] *Id.* at 31.

[71] DOBBINS ET AL., *supra* note 40, at 50; *see also* USIP GUIDING PRINCIPLES, *supra* note 33, at 7-75 ("Law enforcement . . . is vital for security and cannot be postponed for months. Because local forces will likely be weak, discredited, or a party to the conflict, assistance from international actors may be necessary to ensure that urgent law enforcement functions are performed . . . .").

[72] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98–100.

[73] COUNTERINSURGENCY MANUAL, *supra* note 12, at D-4. Galula suggests that "the extraordinary conditions of an insurgency" will often make "[p]rompt adaptation" of the judicial system necessary to the establishment of internal order. GALULA, *supra* note 26, at 31. He states, "If insurgents, though identified and arrested by the police, take advantage of the many normal safeguards built into the judicial system and are released, the police can do little." *Id.*

[74] *Id.* The *Counterinsurgency* manual briefly addresses the status of insurgents under international law. Citing Common Article 3, the manual avers that "insurgents have no special status under international law" and "are not, when captured, prisoners of war." *Id.* Instead, "[i]nsurgents may be prosecuted legally as criminals for bearing arms against the government and for other offenses, so long as they are accorded the minimum protections described in Common Article 3." *Id.*

enforcement into the structure of peacekeeping operations. Indeed, "[o]ver the past 15 years, international police have become a standard element of stability missions, representing some 10 percent of the personnel of most current UN-led operations."[75] Where the indigenous security apparatus has collapsed, "international police [may] perform direct law enforcement roles until reliable local police units can be assembled and trained."[76] Alternatively, military forces may perform law enforcement functions when international police units are unavailable. In Kosovo and East Timor, for example, armed interventions "led to the withdrawal, in their entirety, of the political and administrative cadres that had previously governed the territories, including the security and law enforcement apparatus."[77] Consequently, the Kosovo Force (KFOR) in Kosovo and the International Force for East Timor (INTERFET) in East Timor assumed immediate responsibility for security and law enforcement in their respective territories.[78] In Kosovo, U.N. Security Council Resolution 1244 directed KFOR to ensure "public safety and order until the international civil presence can take responsibility for this task."[79] Similarly, in East Timor, U.N. Security Council Resolution 1272 authorized the U.N. Transitional Administration in East Timor (UNTAET), which succeeded the INTERFET, to "provide security and maintain law and order through the territory of East Timor."[80] In addition to participating in active law enforcement, international police forces have also helped train local police forces because "[i]n virtually all major post-conflict stability operations since World War II, internal security bodies—especially the police—have been partially or wholly rebuilt," and that rebuilding has always required some form of training.[81]

United States rule of law operations have likewise centered on both active law enforcement and police training. The *Rule of Law Handbook* states that "as the Dominate phase evolves into the Stabilize phase, combat forces previously engaged in high intensity conflict will shift over to a police role."[82] Additionally, "as the theater matures into one in which full-scale stability operations are underway, US forces are likely to participate in the reestablishment of civilian police functions."[83] However, although the United States has organized and deployed civilian police in past conflicts,[84] the United States currently has no standing civilian police component and no reliable mechanism for recruiting civilian police, from federal law enforcement agencies or state and local forces, to carry out the police element of rule of law operations.[85] Consequently, "the United States has developed little capacity to deploy civil police officers in formed, cohesive units; is unable to recruit individual police officers in sufficient numbers; and must rely on other nations or its own military to perform functions such as SWAT, riot control, counterterrorism, and counternarcotics where such capabilities are needed."[86] In contrast, organizations like the United Nations and the European Union have regularly deployed international police to conduct police missions abroad.[87] Some states, such as Italy, France, and Spain, further maintain gendarmerie forces that can act as civil police in times of peace and as military police in times of war.[88] These forces, which may have "close or formal ties to the military," can be deployed as cohesive units in support of stability and rule of law missions.[89]

For the United States, the shortage of civilian police officers available for assignment to overseas contingency

[75] DOBBINS ET AL., *supra* note 40, at 47.

[76] *Id.*; *see also id.* at 54 ("International police may need to assume law enforcement responsibilities, especially when indigenous police have disintegrated during the conflict or have been discredited because of their abusive behavior.").

[77] Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 A.J.I.L. 46, 47 (2001); *see also* USIP GUIDING PRINCIPLES, *supra* note 33, at 7-75 ("Certain public order functions are critical whether performed by international or host nation actors.").

[78] Strohmeyer, *supra* note 77, at 46–52.

[79] S.C. Res. 1244 ¶ 9(d), U.N. Doc. S/RES/1244 (June 10, 1999). "In response to the rising security concerns and pursuant to its mandate, KFOR started to carry out large-scale arrests to restore public peace and order to the territory." Strohmeyer, *supra* note 77, at 49.

[80] S.C. Res. 1272 ¶ 2(a), U.N. Doc. S/RES/1272 (Oct. 25, 1999).

[81] DOBBINS ET AL., *supra* note 40, at 51.

[82] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98.

[83] *Id.* In Rajiv Chandrasekaran's stunning book, *Imperial Life in the Emerald City*, Chandrasekaran recounts the early years of the U.S. occupation in Iraq. RAJIV CHANDRASEKARAN, IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ'S GREEN ZONE 84–90 (2006). Among other initiatives and missed opportunities, Chandrasekaran highlights the failure to train the Iraqi police in the formative period following the U.S. invasion. Chandrasekaran notes,

> The first months after liberation were a critical period for Iraq's police. Officers needed to be called back to work and screened for any Baath Party connections. They'd have to learn about due process, how to interrogate without torture, how to simply walk the beat. . . . Tens of thousands more officers would have to be hired to put the genie of anarchy back in the bottle.

Id. at 87. Unfortunately, funding for "desperately needed police advisor" was never secured, and "[w]ith no help on the way, the task of organizing and training Iraqi officers fell to American military-police soldiers, many of who had no experience in civilian law enforcement." *Id.*

[84] For example, the "U.S. Department of State funded and managed the U.S. police deployments to Haiti, Bosnia, and Kosovo, employing a contractor, DynCorp, to recruit and pay the individual U.S. police officers." DOBBINS ET AL., *supra* note 40, at 64.

[85] *Id.* at 64.

[86] *Id.*

[87] *Id.* at 63.

[88] *Id.* at 48.

[89] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 99.

operations, unless seriously addressed at the policy level, will continue to saddle the military with responsibility for law enforcement and host nation police training, as it has in both Iraq and Afghanistan.[90] Meanwhile, the burden of these duties will, not surprisingly, fall primarily on the military police, who are better equipped, by virtue of training and experience, to engage in active law enforcement than are other units of the Armed Forces.[91] However, given the magnitude and nature of the policing mission, particularly as sustained combat operations subside and the stabilization phase of operations begins, other military units, including infantry units, will invariably participate in law enforcement alongside military police.[92]

Educating all forces involved in police operations on the applicable law in the area of responsibility (AOR) is crucial to the success of stabilization and the development of respect for rule of law.[93] The *Rule of Law Handbook* notes, "Commanders need to understand that the application of force in a police context is very different than in major combat operations, and they will need to recognize . . . the point at which they need to change force models."[94] The handbook continues, "Assuring that military forces receive adequate training, and that appropriate are promulgated and understood by coalition military forces, is critical to successfully policing in the aftermath of high intensity conflict, and will be critical to . . . establishing the legitimacy of the legal rules that are being enforced."[95] As discussed earlier, identifying the applicable law is a necessary first step in this process. Once defined, however, commanders and servicemembers should be trained on the relevant law, particularly the criminal laws and procedures they must apply to conduct law enforcement operations. Unfortunately, proper training on the applicable law is often overlooked until the eleventh hour or later. In Iraq, for example, comprehensive training on Iraqi criminal law and procedure did not begin in earnest until the eve of the U.S.-Iraq Security Agreement,[96] which mandated respect for Iraqi law, despite the anticipated transition from law of war-based detentions to criminal law-based arrests under Iraqi domestic law.[97]

VIII. The Judiciary[98]

In addition to training law enforcement forces, military forces may be required to train judicial officials during counterinsurgency and stability operations. Because the final adjudication of crimes, like effective policing, can promote order and security, the reasons for emphasizing criminal law instruction discussed earlier equally apply. A functioning court system, however, can shape another crucial goal of rule of law operations: the establishment of governmental legitimacy. Considered an essential element of rule of law, the establishment of governmental legitimacy is often considered an early priority—along with order and security—in counterinsurgency or post-conflict environments.[99]

A strong criminal justice system can foster governmental legitimacy by establishing the government's bona fides to redress crime and hold perpetrators accountable for their actions in a principled and authoritative manner. Criminal trials can be particularly influential in transitional contexts by inspiring "public confidence in the State's ability and willingness to enforce the law,"[100] and during a counterinsurgency, a host nation's willingness to

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[90] *See, e.g.*, DOBBINS ET AL., *supra* note 40, at 64–65.

[91] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98 ("MPs will take the lead in the police elements of rule of law missions.").

[92] JOINT OPERATIONS, *supra* note 3, at V-24 (observing that operations in the Stabilization phase "typically begin with significant military involvement to include some combat, then move increasingly toward enabling civil authority as the threat wanes and civil infrastructures are reestablished").

[93] *See, e.g.*, Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, *available at* http://www.nytimes.com/2006/12/17/world/middleeast/17justice.html (quoting an Air Force officer as stating, "The most fundamental thing that we need to do in Iraq is establish the rule of law. . . . It's the cornerstone of a civilization. Without it you have anarchy."). Moss's article further reports that "despite many victories for the military in court, about half of the 3,000 American-held detainees who have gone to trial [in the Iraqi central court] have walked free." *Id.* One Iraqi judicial official attributed the high incidence of acquittals to poor evidence collection and inattentiveness to Iraqi judicial requirements. *See id.* (citing the manager of legal affairs of the Iraqi Higher Judicial Council, who "blames the Americans for bringing cases without the kind of evidence that Iraqi law requires").

[94] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98–99.

[95] *Id.*

[96] Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraqi, U.S.-Iraq, Nov. 17, 2008, *available at* http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

[97] *See, e.g.*, JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 323 (2006); Captain Ronald T. P. Alcala & Captain John Haberland, *Prosecution Task Forces and Warrant Applications in Multinational Division–Center*, *in* THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 291, 291–93 (2009) [hereinafter RULE OF LAW HANDBOOK (2009)].

[98] The term "judiciary" as used here refers to the courts, which include judges, administrative staffs (including court clerks), and prosecutors. This definition is substantially similar to the definition of "judiciary" provided in the USAID *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*. *See* USAID GUIDE, *supra* note 24, at 13 n.11.

[99] *See, e.g.*, USAID GUIDE, *supra* note 24, at 1, 23; COUNTERINSURGENCY MANUAL, *supra* note 12, at 1-21 to 1-22; STABILITY OPERATIONS MANUAL, *supra* note 30, paras. 1-28 to 1-34.

[100] *Rep. of the Secretary-General*, *supra* note 23, ¶ 39. The *Report of the Secretary General* further suggests that trials "can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes." *Id.*

deal openly with insurgents as criminals in the legal system, particularly a legal system "established in line with local culture and practices," can signal respect for rule of law and garner public support for civil authority.[101] In contrast, "[e]fforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law."[102] Recognizing the significance, both real and symbolic, of public trials, military leaders can promote legitimate civil authority by facilitating the shift from law of war-based detentions to criminal law-based arrests, and by ensuring criminal laws and judicial procedures are vigorously observed.

Before trials can be held, however, the judiciary must be capable of processing criminal cases. Restoring judicial capacity will often entail rebuilding physical infrastructure,[103] ensuring adequate administrative support to the courts,[104] and training judges on domestic law and respect for the rule of law.[105] Although rule of law operations are likely to undertake all three missions in theater, this article focuses on judicial training and the role of military practitioners can make in that effort.

Judicial training may be especially important when domestic laws are modified or new laws are instituted. As discussed above, changes to the legal regime are not uncommon during or after conflict.[106] When the law changes, however, the courts must be willing to accept the changes or the new laws will languish, ignored and unenforced by a skeptical judiciary. Sometimes, judges' resistance to new laws may be justifiable and further modifications may be appropriate. This may occur when the new legal regime is considered particularly odious by the society. In Kosovo, for example, judges bluntly refused to apply the U.N. Interim Administration Mission in Kosovo's (UNMIK) choice of law—that is, the law in force before NATO air operations began in Kosovo on 24 March 1999—because of its association with Serbian rule.[107] Instead, Kosovar judges "insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that Belgrade had illegally revoked them."[108] Confronted with ardent local opposition, the U.N. mission eventually rescinded its decision and reinstituted the laws in force on 22 March 1989 as the applicable law.[109]

On the other hand, some changes to the applicable law must be enforced, regardless of resistance from local actors, to ensure the growth of a legal system in harmony with international standards. As the USIP *Guide* notes, "In most war-torn states, the legal framework frequently . . . contains elements of discrimination and seldom meets the requirements of international human rights and criminal law standards."[110] Because new laws are "paper tigers if they do not result in changes in patterns and behavior,"[111] all rule of law practitioners must ensure international norms are adopted and internalized by the host nation judiciary.[112] Adherence to rule of law must transcend mere observance of the positive law—whatever law that may be—and embrace "substantive values of justice" even in societies disinclined to conform to global norms.[113] When judicial officials fail to accept changes reflective of international standards, rule of law practitioners must work to instill acceptance through training, education, and collaboration.[114]

The relationships rule of law practitioners form with judicial and law enforcement officials, coupled with their specialized knowledge of host nation laws and local practices, make them uniquely qualified to serve another valuable role during counterinsurgency and stability operations: that of honest broker. Although developing judicial competence and creating institutional capacity are

[101] COUNTERINSURGENCY MANUAL, *supra* note 12, at 1-24.

[102] *Id.*

[103] *See, e.g.*, RULE OF LAW HANDBOOK (2010), *supra* note 21, at 97 (suggesting that "[i]n some theaters, the need to provide for physical venues initially outstrips the need to provide for judges and prosecutors").

[104] *See, e.g.*, *id.* at 98.

[105] *See, e.g.*, *id.* at 95–97.

[106] *E.g. supra* part V.

[107] Chesterman, *supra* note 44, at 1522. Chesterman states, "The largely Albanian judiciary that was put in place by UNMIK rejected [UNMIK's choice of applicable law] with some judges reportedly stating that they would not apply 'Serbian' law in Kosovo." *Id.* (quoting Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, INT'L PEACE ACAD. REP., Sept. 2002, at 5) (internal quotation marks omitted).

[108] *Id.* (quoting Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, INT'L PEACE ACAD. REP., Sept. 2002, at 5) (internal quotation marks omitted).

[109] *Id.* at 1522–23.

[110] USIP GUIDING PRINCIPLES, *supra* note 33, at 7-68.

[111] *Id.* at 7-69.

[112] The USIP *Guiding Principles* cites treaties on organized crime, conventions on drug trafficking, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, among others, as possible sources of reference for international standards on human rights law, criminal law, civil law, and commercial law. *Id.* at 33.

[113] *See* STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW 196 (2010) (suggesting that the United Nations's "expansive definition" of rule of law "relies on an idea of the rule of law that promotes substantive values of justice, and not one that simply demands the exercise of power in accordance with posited law norms").

[114] The 2009 edition of the *Rule of Law Handbook* declared,

> Although it is critical to respect local institutions and norms, in order to obtain the stability and security sought by the rule of law mission, it will often be necessary to encourage or require the rejection of certain foreign nation laws that promote violence, discrimination, or other social divisiveness in the concern country."

RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222.

important rule of law objectives, the legal system must ultimately be capable of managing and adjudicating criminal cases effectively to sustain public confidence.[115] When issues arise that threaten the system's effectiveness, rule of law practitioners must be prepared to identify and resolve them to protect the long-term viability of the system.

Obstacles to the timely adjudication of cases will vary but can include misunderstandings of the law, systemic or bureaucratic impediments (such as poor communication or animosity between law enforcement and judicial officials), or a lack of adequate physical infrastructure (including courthouses and jail facilities). When poor communication, bureaucratic barriers, or even open hostility between institutional actors lie at the root of the problem, rule of law practitioners may serve as intermediaries that bridge the divide between competing parties and their interests.[116] For example, following the implementation of the U.S.-Iraq Security Agreement and the shift to a domestic law enforcement paradigm in Iraq, judge advocates and civilian rule of law advisors worked closely with judges and law enforcement to ensure criminal cases were properly adjudicated in the courts.[117] Drawing on relationships they had established working on other rule of law projects, these individuals met regularly with judges and the police to build mutual understanding of each other's role and expectations.[118] Without active practitioner involvement in the process, progress toward their common goal might have stalled, potentially delaying the growth of rule of law indefinitely.

IX. General Training in Comparative Law

In addition to specialized training in foreign law and international human rights law, general preparation for rule of law operations should include instruction in comparative law—the comparative study of foreign legal systems and traditions.[119] Broader and more general in scope than the study of nation-specific law, the study of comparative law should serve as a foundational requirement for leaders and practitioners engaged in stability operations. If, as the *Rule of Law Handbook* notes, "[a] frequent problem encountered by US Judge Advocates in rule of law operations is a lack of experience with non-US legal traditions,"[120] even a basic familiarization of the world's legal traditions could help narrow the knowledge gap.

Familiarity with the world's legal traditions—as well as sensitivity to informal or tribal law—can reduce misunderstandings and help temper cultural biases in the application of foreign law during operations.[121] The RAND report suggests that "[b]efore deployment, civilian police personnel should be made familiar with international standards that apply to a broad range of public security and human rights functions. They should have some understanding of the general differences among legal systems based on the Napoleonic code, English common law, and sharia, as they may relate to the mission at hand."[122] These recommendations are equally relevant to military police personnel, who must similarly conduct police operations in theater, and to judge advocates, who are the military's legal subject matter experts.[123] In essence, the RAND report advocates the study of comparative law.

Still, the study of comparative law is frequently neglected in favor of foreign law and human rights law training. Certainly, when the applicable law in theater incorporates pre-existing foreign law, in whole or in part, ignorance of that law is tantamount to professional malpractice; knowledge of the applicable law is an obvious prerequisite to engagement with the indigenous legal system during rule of law operations.[124] Similarly, familiarity with

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[115] Measuring the "effectiveness" of a system can be maddeningly speculative. A number of sources offer guidance on how to measure effectiveness. *See generally* RULE OF LAW HANDBOOK (2010), *supra* note 21, ch. 9 (describing methods of "measuring rule of law"). In the end, effectiveness, at least initially, may be best understood in relative terms.

[116] *See, e.g.*, Lieutenant Colonel Jeff Bovarnick, *Linking Up Investigative Judges with Investigators*, *in* RULE OF LAW HANDBOOK (2009), *supra* note 97, at 293, 293–96 (explaining how judge advocates served as a "conduit to build relationships between Iraqi [Investigative Judges] and . . . Iraqi investigators" and how the "link-up between the IJs and their investigators was absolutely essential to progressing a case through the Iraqi criminal justice system and therefore essential to the overall advancement of the rule of law in Iraq"); Timothy Kosis, *Finding an Iraqi Solution to Overcrowded Prisons in Basrah*, *in* RULE OF LAW HANDBOOK (2009), *supra* note 97, at 302, 302–04 (noting that a "deep distrust between the judiciary and police . . . contributed to the breakdown of the criminal justice process" but "Coalition members were able to play an important role by bringing judges and [Iraqi Security Forces] commanders together, advising on possible solutions to the problem, and provid[ing] targeted resources to build capacity in the justice system").

[117] *See, e.g.*, Alcala & Haberland, *supra* note 97.

[118] *Id.* at 93 (describing how judge advocates and civilian rule of law attorneys resolved a growing rift between judges and the police over the sufficiency of evidence necessary to support a judicial warrant by helping to "clarify what evidence the judges required . . . to approve warrant applications").

[119] *See generally e.g.*, JOHN HENRY MERRYMAN ET AL., THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA 1 (1994).

[120] RULE OF LAW HANDBOOK (2010), *supra* note 21, at 93.

[121] RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222–23 ("Crucial to establishing rule of law is understanding what is culturally acceptable for the developing nation. Legal reforms will only take hold if they are sensitive to the cultural and legal tradition of the host country.").

[122] DOBBINS ET AL., *supra* note 40, at 65.

[123] *See* AR 27-1, *supra* note 60.

[124] *See, e.g.*, RULE OF LAW HANDBOOK (2010), *supra* note 21, at 145. The *Rule of Law Handbook* notes that while it may seem obvious that those responsible for rebuilding a legal system should first understand the legal system, "many units . . . responsible for restoring the legal system in Iraq went into the mission with very little understanding of the Iraqi civil law system and no copies of the Iraqi laws whatsoever." *Id.*; *see also* STROMSETH ET AL, *supra* note 97, at 323.

international human rights norms is fundamental, particularly when the target society lacks a tradition of respect for human rights. In comparison, knowledge of comparative law may not have as conspicuous or as immediate an impact on operations, and that is probably why it has been largely overlooked as a matter of PME. Nevertheless, training in comparative law can be an effective way to introduce practitioners to the diversity of legal systems they may encounter throughout their careers.[125]

The *Rule of Law Handbook* warns against perpetuating a "West is Best" mentality, and the study of comparative legal systems can help guard against intellectual insularity.[126] Cultivating even a rudimentary understanding of foreign legal traditions can begin the process of shedding cultural prejudices while serving as a prelude to more targeted training in nation-specific foreign law. As John C. Reitz suggests, the "[c]omparative study of law can be undertaken simply to inform the reader about foreign law, perhaps for the practical purpose of facilitating an international transaction or resolving a conflict of laws problem," although "[t]here is no reason why comparative studies should be limited to any particular set of purposes. The comparative method is just a tool."[127] For judge advocates and others working in the field of rule of law, the "comparative method" may provide an education in itself.

John H. Merryman proposes that the study of foreign and comparative law can "deprovincialize students, broaden their perspectives, and show them that other people can do things differently and yet survive and prosper."[128] Because context and cultural sensitivity are so important to rule of law operations, PME should incorporate the study of comparative legal systems and traditions into leadership training. Ultimately, personnel deploying to Iraq should be educated on Iraqi law, and personnel deploying to Afghanistan should be educated on Afghan law; but all leaders can and should be educated in comparative law.

X. Conclusion

Stability operations in Iraq and Afghanistan have underscored the critical role military personnel play in promoting rule of law in societies in conflict. Although other organizations may bear primary responsibility for the rule of law mission, military forces' operational capabilities often require they take the lead in areas of ongoing conflict or instability. Despite this foreseeable result, preparation for rule of law activities within the military has frequently overlooked an essential piece of the rule of law puzzle: the study of the applicable law in the theater of operations.

Military forces cannot and should not execute the rule of law mission without a firm grasp of the applicable law because law itself is central to the rule of law construct and should inform the development process. When the applicable law can be determined, military personnel engaged in rule of law operations should be educated on it. Meanwhile, legal instruction should emphasize the domestic criminal law, and operations in theater should likewise focus on strengthening criminal justice institutions to bolster security and promote governmental legitimacy. As a more general matter, PME should educate leaders and practitioners on comparative law to broaden their perspectives and prepare them to engage in a world of diverse and varied cultures.

For better or worse, military involvement in civil society building is likely to remain a mainstay of future conflicts. The success of these missions, as with all missions, will depend largely on training and preparation. For military forces engaged in rule of law operations, preparation must include the study of foreign law.

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[125] John H. Merryman suggests that "a cultivated American lawyer should be familiar with the principal features of other major legal systems and have some idea of how lawyers in other major nations think, and why they think that way." MERRYMAN ET AL., *supra* note 119, at 1.

[126] *See* RULE OF LAW HANDBOOK (2010), *supra* note 21, at 93. Previous editions of the *Rule of Law Handbook*, however, were even more explicit on this point. In a section titled "Cultural Blindness or a 'West Is Best' Mentality," earlier editions of the handbook dealt squarely with the dangers of cultural chauvinism. *See, e.g.*, RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222–23. The 2009 edition of the *Rule of Law Handbook* stated,

> The inability of host nation legal institutions to operate in a post-conflict environment will present the temptation for those with the physical capabilities—frequently coalition forces—to simply take over legal functions, imposing a US-oriented system in the process. Rule of law planners should not view their mission as writing upon a blank slate, seeking to transplant a US style, common law system in the place of the host nation's preexisting system. . . . After all, it is the host nation, not coalition forces, that both defines and lives under the rule of law.

Id. The section on cultural blindness was eliminated from the 2010 edition of the handbook.

[127] John C. Reitz, *How To Do Comparative Law*, 46 AM. J. COMP. L. 617, 624 (1998).

[128] MERRYMAN ET AL, *supra* note 119, at 1.

Clarifying the Implied Bias Doctrine:
Bringing Greater Certainty to the *Voir Dire* Process in the Military Justice System

Major Philip Staten[*]

He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.[1]

I. Introduction

Assume the following facts: the accused is charged with one specification of burglary[2] for breaking and entering into a house on-post at night and stealing money and jewelry. The convening authority properly selects a qualified panel, and refers the case to a general court-martial. The panel members fill out standard detailed voir dire questionnaires in response to questions about themselves and their professional background. All of the panel members state in their questionnaires that they had served alongside Soldiers in the past who have been victims of burglary, but the burglaries occurred several years ago. The questionnaires are given to both government and defense counsel well in advance of trial.

At trial, during general voir dire, the military judge asks the members if they know anyone who has ever been a victim of a burglary, and all of the members respond in the affirmative. The military judge asks them how so, and the members inform the military judge about their respective fellow Soldiers. The military judge asks them if they feel they can be impartial in deciding the accused's innocence given they had served alongside other Soldiers who had been victims of a burglary, and each responds in the affirmative. Both trial and defense counsel further question each panel member during individual voir dire. In the end, the panel members unequivocally state they can sit impartially as a panel member and decide the case based solely on the evidence presented at trial.

Pursuant to Rule for Court-Martial (RCM) 912(f)(1)(N),[3] defense counsel challenges all of the members for cause on implied bias grounds, arguing a reasonable member of the public would have substantial doubt as to the legality, fairness, and impartiality of the proceeding considering every panel member served with a soldier who was a victim of the same crime the accused is charged with committing. The military judge denies defense counsel's implied bias challenges, but fails to articulate his findings on the record. The panel convicts the accused of burglary, and sentences him to confinement for three years and a dishonorable discharge. On appeal, appellate defense counsel asserts as an assignment of error that the military judge abused his discretion in denying defense counsel's request to excuse the members on implied bias grounds.

Recent decisions by the U.S. Court of Appeals for the Armed Forces (CAAF) have created a confusing and impractical standard of review concerning how military appellate courts should decide when the law *presumes* bias in factual situations like the one described above. This is problematic because of the multitude of varying factual scenarios which arise daily in voir dire in courts-martial throughout the world. This article proposes a more practical and comprehensive standard of review to implied bias challenges which military justice practitioners will better understand, and which will lead to greater certainty and uniformity of decision by military appellate courts. As a backdrop, the article first addresses whether the U.S. Constitution mandates application of an implied bias rule, focusing primarily on Supreme Court case law. Second, the article compares and contrasts federal and military appellate court decisions addressing the doctrine of implied bias, with a view towards the different considerations the courts have to consider as well as the scope of its application. Third, the article provides two counterarguments in the application of the implied bias doctrine in the military justice system. Finally, the article recommends the President amend RCM 912(f)(1)(N) to specifically state implied bias challenges must be granted by the military judge only if the average person in the challenged member's position would be biased against the accused based on all of the facts presented, and not on the public's "perception" of the military justice system were the challenged member allowed to sit on the

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[1] United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807) (Chief Justice John Marshall made this quote when presiding over Aaron Burr's trial for treason). Chief Justice Marshall wrote that an individual under the influence of personal prejudice is "presumed to have a bias on his mind which will prevent an impartial decision of the case according to the testimony." *Id.*

[2] The Uniform Code of Military Justice (UCMJ) defines the offense of burglary as "any person subject to this chapter who, with intent to commit an offense punishable under sections 918–928 of this title (articles 118–128) breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct." UCMJ art. 129 (2008).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter MCM] ("A member shall be excused for cause whenever it appears that the member should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.").

panel. The article further recommends Congress amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on actual or implied bias grounds is reviewed for an abuse of discretion which will bring greater certainty and uniformity to the military justice system.

II. Constitutional Background Surrounding Implied Bias

In the military, the constitutional foundation upon which the doctrine of implied bias rests is the Fifth Amendment to the U.S. Constitution, which states that no person "shall be deprived of life, liberty, or property without due process of law."[4] While the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,"[5] unlike a civilian accused, a military accused has no Sixth Amendment right to a trial by jury.[6] However, it is well-settled law a military accused has a Fifth Amendment due process and equal protection right to a trial before impartial court members.[7] In fact, this right "is the cornerstone of the military justice system."[8] However, despite this well-settled law, there is considerable debate concerning whether the Constitution *requires* the implied bias rule as an established rule of constitutional procedure. As Judge Crawford noted in her dissent in *United States v. Wiesen*: "It is unclear whether the doctrine of implied bias even exists as a matter of law. The Supreme Court has neither embraced nor rejected the doctrine."[9]

A review of Supreme Court precedent supports the doctrine of implied bias as a rule of constitutional procedure to ensure an accused's right to a fair and impartial criminal trial, but only in extreme or exceptional circumstances. In *United States v. Wood*,[10] the Supreme Court held an accused has a Sixth Amendment right to challenge the partiality of a jury member on implied bias grounds.[11] The Court specifically stated that while the Sixth Amendment prescribes no specific tests, "the bias of a prospective juror may be actual *or implied*; that is, it may be bias in fact *or bias conclusively presumed as a matter of law*."[12] In *Wood*, the Court was confronted with the issue of whether a Washington D.C. statute allowing federal employees to sit as jury members violated Wood's Sixth Amendment right to a fair and impartial jury.[13] Twelve prospective jurors were called and several were federal employees.[14] Wood challenged the prospective jurors on implied bias grounds, arguing they were presumptively biased against him as a matter of law because they were federal government employees and the U.S. Government was the entity prosecuting him.[15] The trial court denied the challenges for cause.[16] Wood then exercised three peremptory challenges, but two jurors remained who were employed by the federal government, and a third was the holder of a "bonus certificate" from the federal government.[17] The jury ultimately convicted Wood of petit larceny.[18] On appeal, Wood argued the trial court erred in denying his implied bias claim.[19] Specifically, Wood argued his Fifth Amendment due process and Sixth Amendment rights to a fair and impartial trial mandated absolute disqualification in criminal cases of any potential juror employed by the government, a disqualification which Congress could not remove or modify.[20] The Supreme Court rejected Wood's argument, finding no such absolute disqualification requirement of government employees at either English common law or at

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[4] U.S. CONST. amend. V.

[5] *Id.* amend. XI. *See also* Weiss v. United States, 510 U.S. 163, 179 (1994).

[6] United States v. Kemp, 22 C.M.A. 152, 154 (1973) ("The Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial.") (citing *Ex parte* Quirin, 317 U.S. 1, 39–41 (1942); O'Callahan v. Parker, 395 U.S. 258 (1969); DeWar v. Hunter, 170 F.2d 993 (10th Cir. 1948), *cert. denied*, 337 U.S. 908 (1949)). *See also* United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988).

[7] Irvin v. Dowd, 366 U.S. 717, 722 (1973) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); Frontiero v. Richardson, 411 U.S. 677, 680 (1973) (concept of equal protection of the laws applies to members of the Armed Forces through the Due Process Clause of the Fifth Amendment); United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008); United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (citations omitted).

[8] United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991).

[9] *Wiesen*, 56 M.J. at 177 (Crawford, J., dissenting) (citing Andrews v. Collins, 21 F.3d 612, 620 (5th Cir. 1994); Tinsley v. Berg, 895 F.2d 520, 527 (9th Cir. 1990); Person v. Miller, 854 F.2d 656, 664 (4th Cir. 1988)).

[10] 299 U.S. 123 (1936).

[11] *Id*.

[12] *Id*. at 133 (emphasis added). *See also* Clark v. United States, 289 U.S. 1, 9 (1933) ("Just as we would presume bias if the brother of the prosecutor were on a jury, we presume bias where a juror lies in order to secure a seat on the jury."); Dyer v. Calderon, 151 F.3d 970, 984 (9th Cir.), *cert. denied*, 525 U.S. 1033 (1998) ("Implied bias may indeed be the single *oldest* rule in the history of judicial review.") (emphasis in original) (internal citation omitted).

[13] *Wood*, 299 U.S. at 133.

[14] *Id*. at 131.

[15] *Id*. at 149–50.

[16] *Id*. at 130–31.

[17] *Id*. at 131. A bonus certificate was a financial loan the federal government gave to returning veterans from World War I. *See* Editorial, *available at* http://www.u-s-history.com/pages/h1512.html (last visited Mar. 2, 2010).

[18] *Wood*, 299 U.S. at 130.

[19] *Id*. at 133.

[20] *Id*. at 134 ("The question here is as to implied bias, a bias attributable in law to the prospective juror regardless of actual partiality. The contention of the defendant is that there must be read into the constitutional requirement an absolute disqualification in criminal cases of a person employed by the government, a disqualification which Congress is powerless to remove or modify.").

the adoption of the Sixth Amendment.[21] The Court specifically recognized that at English common law, prospective jurors could be challenged on actual and implied bias grounds:

> Challenges at common law were to the array, that is, with respect to the constitution of the panel, or to the polls, for disqualification of a juror. Challenges to the polls were either "principal" or "to the favor," *the former being upon grounds of absolute disqualification*, the latter for actual bias.[22]

While the Court recognized the Constitution could require bias to be presumed as a matter of law in appropriate cases, it determined the facts in *Wood* did not rise to that level.[23] The Court held, "to impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny and burglary."[24]

The Supreme Court has reversed criminal convictions on implied bias grounds in only a handful of cases, and only when exceptional or unique factual circumstances justified its invocation. For example, in *Leonard v. United States*,[25] the Court held that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.[26] Defense counsel objected, but the trial judge overruled the objection.[27] Five jurors who had heard the verdict in the first case were allowed to sit as jurors in the second case, and Leonard was found guilty of transporting a forged instrument in interstate commerce.[28] Leonard's conviction was affirmed on initial appeal.[29] However, after the Supreme Court granted Leonard's petition for a writ of certiorari, the government reversed its position and conceded the jurors should have been absolutely disqualified from serving at the second trial.[30] The Supreme Court agreed, and found reversible error based on implied bias grounds.[31] The Court held that potential jurors who sit in the courtroom and hear a verdict returned against the defendant charged with a crime in a similar case immediately prior to the trial of another indictment against him should be automatically disqualified from serving at the second trial.[32] Thus, *Leonard* and *Wood* support the argument the Supreme Court has recognized the doctrine of implied bias as a constitutional procedural rule. However, while this debate continues, the Court has made clear that implied bias should only be used in extreme or exceptional factual circumstances to ensure a fair and impartial criminal trial.

The Supreme Court explicitly held implied bias should only be used in rare factual circumstances in the frequently cited case of *Smith v. Phillips*.[33] In *Smith*, the petitioner challenged his murder conviction after discovering that a juror had applied for a job at the prosecutor's office.[34] The district court found implied bias and granted the petitioner habeas relief.[35] However, the Supreme Court reversed, holding due process "does not require a new trial every time a juror has been placed in a potentially compromising

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[21] *Id*. at 137.

[22] *Id*. at 134–35 (emphasis added). The Court noted Blackstone recognized the doctrine of implied bias should be applied to exclude a prospective juror when:

> He is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him.

Id. at 138 (citing Sir William Blackstone, *Commentaries on the Laws of England* 363 (3d ed. 1999)).

[23] *Id.* at 149–50 ("We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation."). *See also* Dennis v. United States, 339 U.S. 162 (1950). Dennis was convicted of criminal contempt for failing to appear before the Committee on UnAmerican Activities of the House of Representatives. *Id*. at 164. On appeal, as in *Wood*, Dennis argued the jury was impliedly biased against him because it was comprised primarily of employees of the United States Government. *Id*. at 164–65. The Court rejected Dennis's argument. *Id*. at 171–72. However, the Court never held that implied bias could not be found in more serious situations involving federal government employees. In his concurring opinion, Justice Reed wrote he understood "the Court's decision to mean that Government employees may be barred for implied bias when circumstances are properly brought to the Court's attention which convince the court that Government employees would not be suitable jurors in a particular case." *Id*. at 172–73.

[24] *Wood*, 299 U.S. at 149–50.

[25] 378 U.S. 544 (1964) (per curiam).

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*. at 544–45. The Solicitor General filed a brief with the Court in which the Government conceded the procedure followed by the district court in selecting the jury was "plainly erroneous." *Id*.

[31] *Id*.

[32] *Id*. *See also* Willie v. Maggio, 737 F.2d 1372, 1379 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984) ("A juror is presumed to be biased when he or she is apprised of such inherently prejudicial facts about the defendant that the court deems it highly unlikely that the juror can exercise independent judgment, even if the juror declares to the court that he or she will decide the case solely on the evidence presented.") (citing *Leonard*, 378 U.S. at 544, United States v. Brown, 699 F.2d 704, 708 (5th Cir. 1983), and United States v. Haynes, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969)).

[33] 455 U.S. 209 (1982).

[34] *Id*. at 212.

[35] *See* Phillips v. Smith, 485 F. Supp. 1365, 1372–73 (S.D.N.Y. 1980).

situation. Were that the rule, few trials would be constitutionally acceptable."[36] The Court concluded voir dire and curative instructions from the trial judge are not infallible, and that it is impossible to shield jurors from every contact or influence that might theoretically affect their vote.[37] The Court also concluded due process means "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge watching to prevent prejudicial occurrences from occurring and to determine the effect of such occurrences when they happen."[38] In her concurring opinion cited frequently by federal and state appellate courts, Justice O'Connor wrote separately "to express my view that the opinion does not foreclose the use of 'implied bias' in appropriate circumstances."[39] Discussing juror bias, Justice O'Connor keenly observed that determining whether a juror is biased or has prejudged a case is difficult because the juror could have an interest in concealing his own bias or because the juror may be unaware of it.[40] Justice O'Connor correctly pointed out the problem could be compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror.[41] While Justice O'Connor concluded a post-conviction hearing would in most cases be adequate to determine whether a juror is biased, she made clear there would be some instances in which it would not, and that a finding of implied bias would be necessary to uphold an accused's Sixth Amendment right to an impartial jury.[42] However, Justice O'Connor also made clear those factual circumstances mandating a finding of per se implied bias would be rare.[43] Citing *Leonard* and *Dennis v. United States*,[44] Justice O'Connor wrote, "while each case must turn on its own facts, there are some *extreme situations* that would justify a finding of implied bias."[45] In fact, Justice O'Connor provided the following examples of the sort of extreme situations which would be needed to justify a finding of implied bias: (1) the juror is an actual employee of the prosecuting agency; (2) the juror is a close relative of one of the participants in the trial or the criminal transaction; and (3) the juror was a witness or somehow involved in the criminal transaction.[46]

Justice O'Connor's reasoning in *Smith* that implied bias should only be invoked in extreme situations was validated by the Court two years later in *McDonough Power Equipment, Inc. v. Greenwood*.[47] In *McDonough*, a prospective juror failed to respond affirmatively to a question during voir dire seeking to elicit information about previous injuries to members of the juror's immediate family that resulted in disability or prolonged pain.[48] In fact, the juror's son had sustained a broken leg as a result of an exploding tire.[49] Following judgment in favor of McDonough, Greenwood sought a new trial on the grounds of juror bias.[50] The Court rejected Greenwood's argument, holding an accused is entitled to fair trial, not a perfect one, and that "to invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."[51] The Court emphasized a trial represents an important investment of private and social resources, and that "it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination."[52] Thus, the Court held in order to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then

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[36] *Smith*, 455 U.S. at 217.

[37] *Id.*

[38] *Id.*

[39] *Id*. at 221 (O'Connor, J., concurring); *see also infra* Part III.

[40] *Id*. at 221–22 (O'Connor, J., concurring).

[41] *Id*. at 222 (O'Connor, J., concurring). In *Crawford v. United States*, 212 U.S. 183, 196 (1909), the Court also held:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Id. at 196.

[42] *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) ("In certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.").

[43] *Id.* (O'Connor, J., concurring).

[44] 339 U.S. 162, 172 (1950) ("None of our previous cases preclude the use of the conclusive presumption of implied bias in appropriate circumstances."). *See also Smith*, 455 U.S. at 223.

[45] *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (emphasis added).

[46] *Id*. In his dissent, Justice Marshall, joined by Justices Brennan and Stevens, wrote:

> I believe that in cases like this one, where the probability of bias is very high, and where the evidence adduced at a hearing can offer little assurance that prejudice does not exist, the juror should be deemed bias as a matter of law…. The right to a trial by an impartial jury is too important, and the threat to that right too great, to justify rigid insistence on actual proof of bias. Such a requirement blinks reality.

Id. at 231–32 (Marshall, Brennan, and Stevens, JJ., dissenting).

[47] 464 U.S. 548 (1984).

[48] *Id*. at 550.

[49] *Id*.

[50] *Id*.

[51] *Id*. at 555.

[52] *Id*.

show that a correct response would have provided a valid basis for a challenge for cause.[53] Five justices made it clear, as Justice O'Connor did in her concurrence in *Smith*, that a court could still find a juror to be impliedly biased and unable to sit for jury service regardless of the validity of his or her responses during voir dire or at a post-trial hearing.[54] At the same time, three of those five justices also made clear that implied bias should only be used in exceptional circumstances "to preserve Sixth Amendment rights."[55] Citing Justice O'Connor's concurring opinion in *Smith*, Justice Blackmun, joined by Justices O'Connor and Stevens, wrote:

> Regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate . . . *in exceptional circumstances*, that the facts are such that bias is to be inferred.[56]

Thus, the Supreme Court made clear in *McDonough* and *Smith* that implied bias should only be used in exceptional factual circumstances to ensure a fair and impartial criminal trial. Unfortunately, the Court failed to provide a comprehensive test for trial and appellate courts to determine when and how implied bias should be constitutionally applied, or define what constitutes "extreme circumstances" which justifies a finding of implied bias.[57] As a result, as discussed in Part III of this article, this failure has led to conflicting and unpredictable outcomes in federal and military appellate courts applying the implied bias doctrine.

III. Federal and Military Appellate Court Decisions Addressing Implied Bias

Since *Smith* and *McDonough*, federal circuit courts have "split on this issue"[58] as to whether implied bias even exists as a matter of law.[59] Regardless, following Justice O'Connor's concurrence in *Smith*, the circuit courts have found implied bias only in extreme or exceptional circumstances. For example, in *United States v. Scott*,[60] the Fifth Circuit, quoting Justice O'Connor's concurrence in *Smith*, presumed bias where the juror had failed to disclose during voir dire that his brother was a deputy in the sheriff's office that had investigated the case.[61] Similarly, in *Dyer v. Calderon*,[62] the Ninth Circuit found implied bias in a juror in a death penalty case who failed to disclose during voir dire that her brother was the victim of a murder performed in a manner similar to the defendant's alleged crime.[63] Further, the prosecutor in the case had previously prosecuted the person who murdered the juror's brother.[64] The court held,

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[53] *Id*. at 556.

[54] Citing Justice O'Connor's concurring opinion in *Smith*, Justice Blackmun, joined by Justices O'Connor and Stevens, wrote:

> I agree with the Court that the proper inquiry in this case is whether the defendant had the benefit of an impartial trier of fact. I also agree that, in most instances, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial. I therefore join the Court's opinion, but I write separately to state that I understand the Court's holding not to foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury. Thus, regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate . . . in exceptional circumstances, that the facts are such that bias is to be inferred.

Id. (Blackmun, J., concurring) (citing United States v. Smith, 455 U.S. 209, 221–24 (1982) (O'Connor, J., concurring)).

Justice Brennan, joined by Justice Marshall, concurred in the judgment, but wrote:

> For a court to determine properly whether bias exists, it must consider at least two questions: are there any facts in the case suggesting that bias should be conclusively presumed; and, if not, is it more probable than not that the juror was actually biased against the litigant. Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intention, are simply factors to be considered in this latter determination of actual bias.

Id. at 558–59 (Brennan, J., dissenting).

[55] *Smith*, 522 U.S. at 224. Justice O'Connor added, "I read the Court's opinion as not foreclosing the use of implied bias in appropriate situations, and, therefore, I concur." *Id*. (O'Connor, J., concurring).

[56] *McDonough*, 464 U.S. at 556 (Blackmun, J., concurring) (citing *Smith*, 455 U.S. at 221–24 (O'Connor, J., concurring)).

[57] In his dissent in *Smith*, Justice Marshall applied a two-part test to determine implied bias: (1) the probability of bias is very high; and (2) the evidence adduced at a hearing will do little to assure the bias does not exist. *Id*. at 231 (Marshall, J., dissenting).

[58] Dyer v. Calderon, 151 F.3d 970, 995 (9th Cir. 1998) (O'Scannlain, J., dissenting).

[59] *See* Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir. 1990) ("The Supreme Court has never explicitly adopted or rejected the doctrine of implied bias."); Andrews v. Collins, 21 F.3d 612, 620 (5th Cir. 1994) ("As an initial matter, we note that the Supreme Court has never explicitly adopted or rejected the doctrine of implied bias."). *See also* United States v. Wiesen, 56 M.J. 172, 177 (C.A.A.F. 2001) ("It is unclear whether the doctrine of implied bias even exists as a matter of law.") (Crawford, J., dissenting).

[60] 854 F.2d 697 (5th Cir. 1988).

[61] *Id*. at 699–700 ("This case presents us with a combination of the two means of proving juror bias, a juror (1) with connection to the circumstances in the case (2) whose express explanation of his failure to disclose that connection creates a legal presumption of bias or an "implied bias.").

[62] 151 F.3d 970 (9th Cir. 1998).

[63] *Id*. at 976–77.

[64] *Id*. *See also* Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992) (sustaining an implied bias claim after the jurors, who were in a burglary/murder case, had been deadlocked but then voted to convict after several of their rooms had been burglarized during the night at the hotel at which they were

"the facts here add up to that rare case where we must presume juror bias."[65] Additionally, in *Burton v. Johnson*,[66] the Tenth Circuit presumed bias where the juror, who was a victim of domestic abuse, sat in a murder trial in which the defense was battered-wife syndrome.[67]

At the same time, several federal circuits have refused to presume bias in a number of cases. For example, in *United States v. Haynes*,[68] the Second Circuit, citing *Wood*, refused to presume bias where seven jurors sat in appellant's trial and had been jurors in previous narcotics cases where the same government witnesses had testified.[69] In *Person v. Miller*,[70] the Fourth Circuit, quoting Justice O'Connor in *Smith*, refused to impute bias to prospective black jurors based on the fact the defendant was a white supremacist.[71] Thus, while circuit courts differ as to whether the Constitution or Supreme Court case law requires an implied bias procedural rule, they all agree it should be limited to rare or extreme circumstances. At one time, the same held true in military appellate courts, when the CAAF made clear to military judges that "challenges for implied bias should be invoked sparingly."[72] However, a critical distinction is that, unlike circuit courts, military courts have had to interpret and apply RCM 912(f)(1)(N).[73] In doing so, the CAAF has inexplicably parted ways with both its own precedent as well as that of its federal counterparts. As Judge Crawford correctly pointed out in her dissent in *United States v. Wiesen*,[74] "That implied bias be reserved for only the most exceptional circumstances seems to have been forgotten, or like some unfortunate aspects of our society, what used to be the exception has now become the rule."[75] In order to properly determine why the exception has now become the rule, it is necessary to re-trace the roots of the doctrine of implied bias in the military justice system.

The doctrine of implied bias first found its way into the military justice system in the 1917 *Manual for Court-Martial* (*MCM*).[76] Article of War 18 of the 1917 MCM stated members of a general or special court-martial could be challenged by the accused for cause stated to the court.[77] Additionally, chapter VIII, section I, paragraph 120, referred to Article of War 18 and noted, just as the Supreme Court did in *Wood* discussed *supra*, that at English common law prospective jurors could be challenged on actual and implied bias grounds.[78] It states "the various classes of challenges recognized at common law have been practically reduced in courts-martial practice to two, viz, (1) *principal* challenges, or those where the member must be excused upon proof of the ground for challenges as alleged; (2) *for favor*, where the court must decide whether the facts proved constitute cause to excuse the member."[79] As the Supreme Court recognized in *Wood*, "principal" challenges were based on grounds of implied bias or absolute disqualification, while "for favor" challenges were based on actual bias.[80] Further, in the 1917 MCM, chapter VIII, section I, paragraph 121(a), specifically lists grounds for principal or implied bias challenges, the majority of which can now be found in RCM 912(f)(1).[81] However, for unexplained reasons, the implied bias grounds

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sequestered); United States v. Gonzalez, 214 F.3d 1109 (9th Cir. 2000) (finding implied bias when a juror gave equivocal answers about whether her recent divorce and family breakup-occasioned by her ex-husband's use of cocaine, the same drug involved in the trial-would affect her judgment adversely).

[65] *Dyer*, 151 F.3d at 984.

[66] 948 F.2d 1150 (10th Cir. 1991).

[67] *Id*. at 1159 ("We find that the record establishes that Mrs. G's silence and the inherently prejudicial nature of her own family situation deprived Mrs. Burton of her right to a fair trial by an impartial jury.").

[68] 398 F.2d 980 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120 (1969).

[69] *Id*. at 985–86 ("We agree that there is an opportunity for a juror to be prejudiced when he hears the same witness in two different cases, but if the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.") (internal citation omitted).

[70] 854 F.2d 656 (4th Cir. 1988).

[71] *Id*. at 664. The Court stated:

> Miller is suggesting that no black citizen could ever serve as an impartial juror in an action involving a white supremacist, group or individual, as a party. But this suggestion extends beyond the boundaries of class membership and proffers the imputation of bias to all those groups or individuals offended by the white supremacy movement. The appropriate way to raise such a wide ranging and generalized claim of bias is by showing actual bias, not by invoking the doctrine of implied bias.

Id.

[72] United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004).

[73] *See supra* note 3.

[74] 56 M.J. 172 (C.A.A.F. 2001).

[75] *Id*. at 179 (Crawford, J., dissenting).

[76] A MANUAL FOR COURTS-MARTIAL COURTS OF INQUIRY AND OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ARMY (1917) [hereinafter 1917 MCM].

[77] *Id*. Art. of War 18.

[78] *Id*. ch. VIII, § I, para. 120.

[79] *Id*. (emphasis in original).

[80] 299 U.S. 123, 134–35 (1936).

[81] 1917 MCM, *supra* note 76, ch. VIII, § I, para. 120(a). It states:

> In the following cases a member will be excused when challenged upon proof of the fact as alleged: 1) that he sat as a member of a court of inquiry which investigated the charges; 2) that he has personally investigated the charges and expressed an opinion thereon, or that he has formed a positive and definite opinion as to the guilt or innocence of the accused; 3) that he is the accuser; 4) that he will be a witness for the prosecution; 5) that upon a rehearing of the case he sat as a member on the former trial; 6) that, in the case of the trial of an officer, the member will be promoted by the dismissal of the accused; 7) that he is related by blood or marriage to the accused; and 8) that he has a declared enmity against the accused.

for challenge were amended in the 1928 MCM to include "any other facts indicating that he should not sit as a member in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality."[82] The lack of knowledge for the reasons behind the change is unfortunate because this language is practically verbatim to RCM 912(f)(1)(N), which states "a member shall be excused for cause whenever it appears that the member should not sit in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[83] Further, some of the other implied bias grounds for challenge contained in the 1928 MCM still exist and are contained in RCM 912(f) and its discussion.[84] With so little guidance as to the reasons behind why RCM 912(f)(1)(N) was created, it was left up to the appellate courts to decide what it would truly mean.

The CAAF first recognized the doctrine of implied bias in *United States v. Deain*.[85] In *Deain*, the president of the panel was assigned the duty of preparing and submitting to the convening authority fitness or efficiency reports on the other permanent members of the court.[86] He also made it a practice to show the reports to the members involved.[87] During voir dire, these members asserted their promotion status was so hopeless that an unfavorable report could not materially affect them.[88] The president of the panel also stated that he was familiar with the presumption of innocence, but that he did not recognize it as a constitutional right because he believed that persons in the military services had no constitutional rights.[89] Rather, he believed the presumption existed in military law because Congress had chosen to grant it to an accused.[90] Further, he was also heard to have stated "the accused must be guilty of something" because charges were referred for trial.[91] Defense counsel challenged the member for cause under chapter XI, paragraph 62f(1) of the 1951 MCM which stated "the challenged law officer or member is not eligible to serve as law officer or member, respectively, on courts-martial."[92] Defense counsel's challenge for cause was denied.[93] The Court of Military Appeals (CMA) reversed appellant's conviction and dismissed the charges.[94] First, the CMA held the panel member's eligibility to serve was not the issue because the president of the court was an officer on active duty and had been duly appointed as a member of the court by competent authority; he was not the accuser or a witness for the prosecution; and he had not acted as investigating officer or counsel in the same case.[95] However, while defense counsel referred to the wrong subdivision of the *Manual* to describe the category of challenge, the CMA held "no doubt exists as to his true intent."[96] The CMA concluded defense counsel challenged the member under paragraph 62f(13), which provided for challenge "in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality."[97] The Court went on to hold that the president of the panel should have been excused under

[82] A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ch. XII, para. 58e (1928) [hereinafter 1928 MCM]. I could find no indication in either the 1928 MCM or any other relevant publication as to the reasoning behind why this language was added other than the Introduction to the 1928 MCM which states:

> The Articles of War of 1920 introduced many changes in the procedure before courts-martial. In 1923, feeling that sufficient time had elapsed to permit of fair observation, suggestions were invited from all commanding officers with a view to the correction of such defects as experience has disclosed. Constructive criticisms and suggestions were received from practically every command in the Army. They were especially valuable as coming from those most intimately associated with carrying the articles into present execution. These suggestions were carefully studied, and the present edition of the manual is to some extent a composite of all the ideas so received.

Id. intro.

[83] MCM, *supra* note 3, R.C.M. 912(f)(1)(N).

[84] *Compare* 1928 MCM, *supra* note 82, ch. XII, para. 58e, *with* MCM, *supra* note 3, R.C.M. 912(f)(1), discussion. The examples provided in the 1928 MCM, ch. XII, para. 58e include:

> That he will be a witness for the defense; that he testified or submitted a written statement on the investigation of the charges, unless at the request of the accused; that he has officially expressed an opinion as to the mental condition of the accused; that he is a prosecutor as to any offense charged; that he has a direct personal interest in the result of the trial; that he is in any way closely related to the accused; that he participated in the trial of a closely related case; that he is decidedly hostile or friendly to the accused; that not having been present as a member when testimony on the merits was heard, or other important proceedings were had in the case, his sitting as a member will involve an appreciable risk of injury to the substantial rights of an accused, which risk will not be avoided by a reading of the record.

Id.

[85] 17 C.M.R. 44 (C.M.A. 1954).

[86] *Id*. at 47–48.

[87] *Id*. at 44, 48.

[88] *Id*.

[89] *Id*. at 48.

[90] *Id*.

[91] *Id*.

[92] MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XI, para. 62f(1) (1951) [hereinafter 1951 MCM].

[93] *Deain*, 17 C.M.R. at 49.

[94] *Id*.

[95] *Id*. (internal citations omitted).

[96] *Id*.

[97] *Id*.

these grounds.[98] Further, in his concurring opinion, Judge Latimer touched on the reasons why the implied bias doctrine exists in military law, stating "there are certain matters found in this record which cast such doubt on the validity of the findings and sentence that no appellate court could find reasonably that this accused was granted a fair trial within the letter or spirit of the Code."[99]

The CAAF re-affirmed the implied bias doctrine in *United States v. Harris*.[100] In *Harris*, the president of the panel wrote or endorsed the fitness reports of three other members of the court.[101] He also worked with two of the victims of appellant's larcenies, and talked about these larcenies with the victims before the trial.[102] Additionally, he had an official interest in discouraging larcenies like the ones appellant had committed by virtue of his position.[103] The CAAF held the military judge erred in denying defense counsel's challenge for cause by relying solely on the panel member's disclaimers during voir dire, and that the military judge should have presumed bias based on these factors.[104] First, the court found "such a challenge raises disturbing questions not only as to the existence of actual bias against appellant by the challenged member but also as to the perception of fairness which reasonable men would draw from his sitting on this court."[105] Second, echoing the Supreme Court justices' concurrences in *Smith*, the court noted that where circumstances are present which raise "an appearance of evil" in the eyes of disinterested observers, sincere declarations of impartiality are insufficient by themselves to "ensure legal propriety."[106] Third, the CAAF concluded the military judge was "not free as a matter of military law to ignore these facts and circumstances in reaching her decisions simply because she found the member's disclaimer sincere . . . we find her decision erroneous as a matter of law on the question of implied bias."[107]

Harris began the real confusion surrounding the standard of review for implied bias cases in the military. On the one hand, the CAAF talked about implied bias in terms of the perception of fairness from the perspective of "reasonable men."[108] On the other hand, the CAAF also linked appellate review of implied bias cases to "an *appearance* of evil in the eyes of disinterested observers."[109] Thus, the CAAF put forward two different standards of review for implied bias challenges. The first standard was based on whether the average "reasonable" person in the challenged member's position would be biased against the accused based on all of the facts presented. Indeed, the Court remarked, "all three judges of the Court of Military Review implied that as reasonable persons they might have decided this challenge for cause differently under the same facts and circumstances which faced the trial judge."[110] The second standard was based on the "appearance of evil" or "public's perception" of the military justice system were the challenged member allowed to sit on the panel.[111] However, the Court never cited any supporting authority for its use of the "appearance of evil" language.

Thus, the CAAF in *Harris* accomplished two things. First, the Court followed *Deain* and gave notice to military justice practitioners that implied bias can be used to enforce a military accused's constitutional and regulatory right to a fair and impartial panel.[112] Second, the Court put out two competing and different standards of review to address implied bias challenges, with the amorphous public perception of the military justice system ultimately winning out. As discussed more below, this inevitably led to a series of confusing and unpredictable decisions in implied bias cases at the CAAF "in an on-going attempt to explain the

[98] *Id*. at 53. *See also id*. at 49 ("An accused is still entitled to have his guilt or innocence determined by a jury composed of individuals with a fair and open mind.").

[99] *Id*.

[100] 13 M.J. 288 (C.M.A. 1982). *See also* United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996) (acknowledging that *Harris* "recognized the concept of implied bias"). However, "in support of his implied bias argument, Judge Fletcher relied on *United States v. Deain*, 17 C.M.R. 44 (C.M.A. 1954) and *Irvin v. Dowd*, 366 U.S. 717 (1961). These two cases reinforced the basic criminal law concept that an accused is entitled to be judged by one who is impartial, that is, one who has an open mind and is fair." United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001).

[101] *Harris*, 13 M.J. at 292.

[102] *Id*.

[103] *Id*. at 290 (As part of his regularly assigned duties, the President of the panel served as the chairman of a base resources protection committee. The committee was responsible for surveying areas of the base that had personal or government property losses.).

[104] *Id*. However, the court made the important point that "while a military judge is certainly not bound by such assurances, in a given case they may be highly persuasive." *Id*. at 293.

[105] *Id*. at 291 (citing United States v. Deain, 17 C.M.R. 44 (C.M.A. 1954); United States v. Haynes, 398 F.2d 980, 983–86 (2d Cir. 1968), *cert. denied*, 393 U.S 1120 (1969)).

[106] *Id.* at 292 (citing *Deain*, 17 C.M.R. at 53).

[107] *Id*. (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. XI, para. 62f (13) (1969) [hereinafter 1969 MCM] (stating a military judge must also consider "any other facts indicating that he should not sit as a member. . . . in the interest of having the trial and subsequent proceedings free from substantial doubt as to legality, fairness, and impartiality"). Additionally, the Analysis to RCM 912 (f)(1) specifically states "subsection (1) is based on Article 25 and paragraph 62f of MCM, 1969 (Rev.)." Thus, this language as a grounds for challenge for cause, which first appeared in the 1928 MCM, was carried forward to all subsequent *MCM*s and is presently codified in RCM 912(f)(1).

[108] *Id*. at 291.

[109] *Id*. at 292 (emphasis added).

[110] *Id*. n.4.

[111] *Id*. at 291.

[112] "As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). *But see* United States v. Porter, 17 M.J. 377 (C.A.A.F. 1984) (Court held the fact that trial counsel and court member ran together did not constitute grounds for removing court member for implied bias.).

fundamentals of implied bias in challenges for cause,"[113] and is one the main reasons why the current standard of review needs to be changed.

IV. Recent CAAF Decisions Addressing Implied Bias

A close examination of recent CAAF cases addressing implied bias reveals an amorphous, confusing, and impractical standard of review to implied bias challenges which needs to be changed. Under the current appellate framework, appellate courts give military judges, "great deference when deciding actual bias challenges because it is a question of fact, and the judge has observed the demeanor of the challenged member."[114] However, the military judge is somehow afforded less deference for implied bias challenges despite the fact he or she has observed the very same challenged member.[115] The reason for the difference given by the CAAF is because implied bias is objectively "*viewed through the eyes of the public, focusing on the appearance of fairness*."[116] As such, implied bias challenges are reviewed under an amorphous "de novo plus" standard, that is, "less deferential than abuse of discretion but more deferential than de novo."[117] Even more confusing is the fact that "a military judge who addresses implied bias by applying the liberal grant mandate on the record will receive more deference on review than one that does not."[118] Thus, despite the fact appellate courts never observe the demeanor of a challenged member as opposed to the military judge, the court nonetheless: (1) gives *less* deference to the military judge on an implied bias challenge; (2) gives *even less* deference if they fail to address the liberal grant mandate on the record; and (3) conducts its review based on the public's perception of the military justice system somewhere between de novo and abuse of discretion. This standard of review is too amorphous, confusing, and impractical for military justice practitioners. A closer examination of recent decisions by the CAAF overturning convictions on implied bias grounds supports this argument.

In *United States v. Bragg*,[119] the CAAF used this amorphous and confusing standard of review to set aside the findings and sentence on implied bias grounds.[120] In *Bragg*, appellant was a Marine recruiter who had been charged with raping two female high school students, as well as committing other inappropriate acts.[121] During voir dire, one member, Lieutenant Colonel (LtCol) W, volunteered that he had learned information about the case outside of the trial proceedings.[122] Lieutenant Colonel W stated that in his former role as the deputy assistant chief of staff for recruiting, he "usually" read the relief for cause (RFC) packets that would have been submitted for any recruiters accused of misconduct under his jurisdiction.[123] While he lacked specific memory of most of the particulars of the case, LtCol W was able to recall several facts, including the nature of the offense, the general identity of the victim, and investigatory measures undertaken by the police.[124] Lieutenant Colonel W stated that he was unsure whether he had gained his knowledge of the case through reading the RFC packet or through reading the newspaper.[125] However, after recalling what he knew of the case, he later stated, "so, based off that, I believe I read the investigation as opposed to reading the newspaper accounts and all that kind of stuff."[126] When asked whether he would have made a recommendation on the case, LtCol W equivocated, then stated, "I probably would have recommended relief if it had come up in front of me."[127] However, LtCol W also stated he could be impartial in sitting as a member of appellant's court-martial.[128]

Defense counsel challenged LtCol W for cause, but the military judge denied defense counsel's challenge, specifically finding that LtCol W's "answers and candor . . . . and body language" suggested that he would be impartial and decide the case solely on the evidence presented in court.[129] However, despite the fact the military judge followed the CAAF's guidance and made explicit findings on the record, the court *still* set aside the findings and sentence on implied bias grounds.[130] The CAAF found that a member of the public would nonetheless somehow have *substantial* doubt that it was fair for LtCol W to sit on a panel because he had *likely* already reached a judgment as to whether the charged misconduct occurred.[131] The court also

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[113] Major Charles S. Neill, *There's More to the Game than Shooting: Appellate Court Coaching of Panel Selection, Voir Dire, and Challenges for Cause*, ARMY LAW., Mar. 2009, at 72.

[114] United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).

[115] *Id*.

[116] United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) (emphasis added).

[117] United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002).

[118] United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007) ("We do not expect record dissertations but, rather, a clear signal that the military judge applied the right law. While not required, where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted.") (citation and quotation marks omitted).

[119] 66 M.J. 325 (C.A.A.F. 2008).

[120] *Id*. at 327.

[121] *Id*. at 326.

[122] *Id*.

[123] *Id*.

[124] *Id*.

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] *Id*.

[129] *Id*.

[130] *Id*. at 328.

[131] *Id*.

concluded the perception of unfairness is "compounded" when that member has *likely* reached such a conclusion based on information gained prior to trial.[132] However, the problem with the decision in *Bragg* is that military justice practitioners have no idea how much deference the court gave to the military judge, who put his observations and findings on the record. In other words, it is impossible to understand in clear terms, let alone apply, a "less than abuse of discretion but more than de novo" standard of review to implied bias challenges. In reality, as Judge Crawford correctly predicted in her dissent in *United States v. Rome*[133]: "this subjective 'I know it when I see it' approach to the theory of implied bias by appellate courts can lead to inconsistent results, which leaves the bench and bar without clear guidelines."[134]

This confusing "subjective public perception"[135] standard of review was also applied by the CAAF in *United States v. Townsend*,[136] only this time the court rendered a unanimous decision *rejecting* a member challenge on implied bias grounds.[137] In *Townsend*, appellant was convicted of attempted unpremeditated murder and reckless endangerment.[138] On appeal, appellant argued the military judge abused his discretion by failing to grant appellant's challenge to Lieutenant (LT) B on the grounds of implied bias.[139] During voir dire, LT B indicated he had taken the "Non-Lawyer Legal Officer Course" at the Naval Justice School where he received "just basics" on legal defenses which included the concept of self-defense.[140] At the time of trial, LT B was enrolled in a criminal law class as a night law student.[141] Lieutenant B stated he wanted to become a prosecutor to "put the bad guys in jail," and "keep the streets safe."[142] Nonetheless, LT B stated that he was not biased towards the Government's case and that he could "absolutely" set aside anything he may have learned elsewhere and follow the instructions as given by the military judge.[143] Following up on questions about why LT B wanted to be a prosecutor, defense counsel asked LT B, "What are your opinions of defense counsels?"[144] Lieutenant B responded that he had a "mixed view."[145] Specifically, LT B had high regard for military defense counsel who were military officers and individuals of high ethical and moral standards.[146] However, LT B had "[less respect] for some of the ones you see on TV, out in the civilian world."[147] Lieutenant B also stated his father, with whom he was close, was a member of law enforcement community and, as a result, LT B had a "healthy respect for law enforcement, and people in authority,"[148] adding he would hold the testimony of law enforcement personnel in higher esteem than other witnesses.[149] However, despite LT B's personal relationship and favoritism towards law enforcement and professional desire to put bad guys in jail, the CAAF concluded there was *no* implied bias concern because the record "reflects that the factors asserted as a basis for implied bias are not disqualifying or egregious and would not, individually or cumulatively, result in the public perception that [appellant] received something less than a court-martial of fair and impartial members."[150] Further, the court came to its conclusion despite giving *less* deference to the military judge because he failed to address the liberal grant mandate on the record.[151]

If the concern behind the implied bias doctrine is the public's perception of the military justice system, then it is almost impossible to reconcile its application in *Bragg* and *Townsend*. In each case, the military judge made findings on the record concerning the demeanor and credibility of the challenged member.[152] Further, as mentioned above, the military judge in *Townsend* was given less deference because he failed to address the liberal grant mandate.[153] Yet, under this analytical framework, the CAAF held an outside observer would not have substantial doubt about the legality, fairness, or impartiality of the court-martial with a challenged member sitting on the panel who is clearly "pro law enforcement" or "pro-prosecution," but would have substantial doubt if he had some knowledge or recollection of the facts of the case. Judge Baker even highlighted this

[132] *Id*.

[133] 47 M.J. 467 (C.A.A.F. 1998).

[134] *Id*. at 472.

[135] *Id*.

[136] 65 M.J. 460 (C.A.A.F. 2008).

[137] *Id*. at 462.

[138] *Id*. at 461.

[139] *Id*. at 462.

[140] *Id*.

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] *Id*. This reference to television lawyers arose from the fact that Lieutenant B was a regular viewer of the television show *Law and Order*. *Id*.

[148] *Id*.

[149] *Id*. Lieutenant B responded that he would try to be objective about everything, but that if he had a "gut decision" to make, "a good cop, if he's had a good record, you know, was well respected, that-that would definitely give some credibility to their testimony." *Id*.

[150] *Id*. at 465.

[151] *Id*. at 464 ("The ruling denying the challenge of LT B did not reflect whether he considered either implied bias or the liberal grant rule. Therefore, we accord less deference to his ruling than we would to one which reflected consideration of implied bias in the context of the liberal grant mandate.") (internal citation omitted).

[152] *Id*. at 463; United States v. Bragg, 65 M.J. 325, 326 (C.A.A.F. 2008).

[153] *Townsend*, 65 M.J. at 464.

exact point concerning the existing confusing nature of appellate review of member challenges in his concurring "dubitante"[154] opinion in *Townsend* when he wrote that "appellate review of member cases is an ungainly, if not impractical, tool to uphold and reinforce the importance of RCM 912."[155] Judge Baker made his position clear in the first sentence of his concurring opinion: "[T]he liberal grant mandate exists for cases like this."[156] To Judge Baker, while the military judge did not abuse his discretion by rejecting the implied bias challenge, he would have granted it in the military judge's position: "In my view, this case presented an easy trial level call to dismiss the member and avoid any issues of implied bias on appeal."[157] However, Judge Baker's positions are irreconcilable from an appellate perspective. On the one hand, Judge Baker concluded the military judge did not err, but on the other hand he also concluded the judge should have granted the challenge on implied bias grounds. In reality, Judge Baker's concurring opinion in *Townsend* reads as a dissent, and reflects why a change in the standard of review to implied bias challenges is needed.

The confusing and impractical nature of the current standard of review to implied bias challenges was also shown in *United States v. Elfayoumi*,[158] where the CAAF rejected an implied bias challenge when the facts actually supported the conviction being overturned on implied bias grounds. In *Elfayoumi*, appellant was convicted of forcible sodomy, assault and battery, and three specifications of indecent assault against other men.[159] The indecent assault specifications were based on touching other men while watching pornography.[160] During voir dire, Major (MAJ) G stated he had strong moral and religious objections to homosexuality.[161] When defense counsel asked MAJ G to explain, he stated: "I feel that it is morally wrong. It is against what I believe as a Christian and I do have some strong opinions against it."[162] MAJ G also stated he had a moral aversion to pornography.[163] Defense counsel challenged MAJ G for cause, but the military judge denied the defense request.[164] As in *Townsend*, the CAAF upheld the military judge's decision to deny defense counsel's challenge against MAJ G, despite the fact the judge failed to address the liberal grant mandate.[165] The court held:

> It would not be unusual for members to have strongly held views about lawful conduct involving sex or pornography. Indeed, in today's society it will be hard to find a member who does not hold such views, one way or another. . . . the question is not whether they have views about certain kinds of conduct and inclinations regarding punishment, but whether they can put their views aside and judge each particular case on its own merits and the law.[166]

Thus, the CAAF had no issue with the member's strong moral and religious objections to homosexuality and pornography, or the judge's repeated questioning, even though the military judge never differentiated between actual or implied bias nor discussed the liberal grant mandate.[167] Under these circumstances, it is extremely difficult, if not impossible, to read *Bragg*, *Townsend*, and *Elfayoumi* in concert with each other.[168] Indeed, these cases are but three examples of the lack of definitive guidance to military judges as to what the legal parameters are in an implied bias analysis which results in inconsistent and unpredictable outcomes on appeal.[169] Judge Crawford correctly highlighted this point in her dissent in *United States v. Rome*,[170] when she remarked: "[W]hat are the parameters of the majority's implied-bias rule? How is it to be applied by the trial judge? I suggest that the majority's invocation of the implied-bias theory is too vague to be workable."[171]

In protecting a military accused's constitutional and regulatory right to a fair and impartial panel, the CAAF has improperly shifted the focus from the alleged bias of the member himself to the public's perception of the military

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[154] Dubitante is a latin word meaning "having doubts." *See* Dictionary.com, *available at* http://dictionary.reference.com/browse/dubitante (last visited Mar. 4, 2010). It is used by judges to express doubt about [object] but does not dissent from a decision reached by a court. *Id*.

[155] *Townsend*, 65 M.J. at 467.

[156] *Id*. at 466.

[157] *Id*. at 467.

[158] 66 M.J. 354 (C.A.A.F. 2008).

[159] *Id*. at 355.

[160] *Id*.

[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *Id*. at 356.

[165] *Id*. at 356, 358.

[166] *Id*. at 357.

[167] *Id*. In *Townsend*, the court also concluded that extensive rehabilitative questioning could be grounds for an implied bias challenge: "There is a point at which numerous efforts to rehabilitate a member will themselves create a presumption of unfairness in the mind of a reasonable observer." United States v. Townsend, 65 M.J. 460, 465 (C.A.A.F. 2008).

[168] Neill, *supra* note 113, at 89 ("Looking at all three implied bias cases from the CAAF's last term, it is difficult to read the cases in concert.").

[169] United States v. Wiesen, 26 M.J. 172 (C.A.A.F. 2001) ("A subjective 'I know it when I see it approach to the theory of implied bias by appellate courts can lead to inconsistent results, which leaves the bench and bar without clear guidelines."); Neill, *supra* note 113, at 90 ("Perhaps most important, the CAAF suggested that implied bias is a fluid concept that may yield disparate results.").

[170] 47 M.J. 467 (C.A.A.F. 1998) (Crawford, J., dissenting).

[171] *Id*. at 471 (Crawford, J., dissenting).

justice system. In doing so, military justice practitioners are forced to determine implied bias under RCM 912(f)(1)(N) on an "ad hoc" basis with zero guidance as to when the public would have "substantial doubt" about the court-martial's legality, fairness, or impartiality.[172] As discussed *supra*, the language from RCM 912(f)(1)(N) is rooted in the English common law "principal" challenge which disqualified prospective jurors as a matter of law based on the individual voir dire responses and/or their relationship to the case. However, this absolute disqualification was never based on the "public's perception" of the English judicial system if the challenged member were to sit on the jury. Rather, it was designed to guarantee the individual's right to a fair and impartial jury by preventing the biased juror from judging his guilt or innocence. Further, there is no written documentation supporting the position that the public's perception of the military justice system was ever a consideration when RCM 912(f)(1)(N)'s language was added to the 1928 MCM.[173] Additionally, there is no evidence it was ever a consideration when the language remained in all subsequent versions of the *MCM* and was ultimately codified in the 1951 MCM. Rather, jury disqualification at common law, upon which RCM 912(f)(1)(N) derives, focused on the prospective member's bias and its potential effect on the accused's right to a fair and impartial jury.

In reality, the CAAF has "read in" the public's perception of the military justice system in interpreting RCM 912(f)(1)(N).[174] Judge Crawford correctly noted this fact in her dissent in *Wiesen* that "unlike other courts, the majority finds that implied bias is an issue of public perception and the appearance of fairness in the military justice system, not one of individual court member disqualification based on that member's bias."[175] This is unfortunate because the CAAF, like other federal circuit courts, reviewed implied bias challenges under RCM 912(f)(1)(N) based on whether a similarly situated member would be biased, and not the public's perception of the military justice system.[176] However, inexplicably, the court's implied bias analysis slowly but gradually shifted from a focus on the panel member's alleged bias or partiality to the public's perception of the military justice system. Regardless of when exactly this shift occurred, it is now complete.[177]

I propose reversing course and returning appellate review of implied bias challenges to the following simple but more practical and realistic standard: "Implied bias exists when, regardless of an individual member's disclaimer of bias, most people in the same position would be prejudiced [i.e., biased]."[178] Returning appellate review to whether an average person, similarly situated, would be biased creates a more realistic and practical approach, is a concept widely understood by military justice practitioners, and will bring greater certainty and uniformity of decision to the military justice system. At the outset, there is no disagreement that the standard of review should not be based solely on the prospective panel member's responses. However, beyond that, the CAAF has left the military justice system in the dark concerning what standard to apply in

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[172] Judge Baker directly addressed this point in *Wiesen* which was raised by Judge Crawford in her dissent in *Rome*. Writing for the majority, Judge Baker remarked:

> The dissent in *Rome* argued that this Court has adopted a Justice Potter Stewart—'I know it when I see it' standard when it comes to implied bias . . . . Whether one agrees with appellant that the panel would constitute a "brigade staff meeting" or not, we have no doubt that "viewed through the eyes of the public," serious doubts about the fairness of the military justice system are raised when the senior member of the panel and those he commanded or supervised commanded a two-thirds majority of members that alone could convict the accused. This is not "knowing it when you see it," or appellate judges attempting to extrapolate "public perceptions" from the bench. This is a clear application of law to fact, and illustrates well why this court recognizes a doctrine of implied bias, as well as one of actual bias, in interpreting RCM 912.

Id. at 175-177; *but see* United States v. Minyard, 46 M.J. 229, 235 (C.A.A.F. 1997) (Crawford, J., dissenting) ("As I warned in [*United States v. Dale*, 42 M.J. 384, 386-88] 'The Court seems to be establishing a *per se* rule against law enforcement personnel sitting as court members. Now a majority has extended that rule to spouses of law enforcement agents. Where goest thou?'").

[173] 1928 MCM, *supra* note 82, ch. XII, para. 58e.

[174] *See* United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995) ("RCM 912(f)(1)(N) provides that a court member should not sit where his service would raise 'substantial doubt' on the 'legality, fairness, and impartiality' of the proceedings. The focus of this rule is on the perception or appearance of fairness of the military justice system."). However, the CAAF cites no authority in support of its position that the focus of RCM 912(f)(1)(N) is on the public's perception of the military justice system.

[175] United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001) (Crawford, J., dissenting). Judge Crawford added:

> In the two decades that this Court has wrestled with the doctrine of implied bias, the focus of this Court has shifted from examining whether an average person, sitting in the position of the court member in controversy, would be fair and open-minded, to a concern about the impartiality of our military judicial system in the eyes of the public at large. Justice O'Connor's admonition in *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring), that implied bias be reserved for only the most exceptional circumstances seems to have been forgotten, or like some unfortunate aspects of our society, what used to be the exception has now become routine.

Id. (Crawford, J., dissenting) (internal citations omitted).

[176] *See* United States v. Deain, 17 C.M.R. 44, 53 (C.M.A. 1954).

[177] *Wiesen*, 56 M.J. at 175 ("While this Court's application of the implied bias may evolve with case law, at its core remains a concern with public perception and the appearance of the military justice system.").

[178] United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000) (citation and internal quotations omitted).

determining when the public would have this substantial doubt.[179] Returning appellate review to whether an average person, similarly situated, would be biased will eliminate this problem entirely. Further, it will also eliminate the CAAF's current implied bias analysis approach of creating per se rules for challenges for cause that is solely within the province of the Executive or Legislative Branches to decide. Senior Judge Sullivan summed up this argument the best in his dissenting opinion in *Wiesen*:

> The majority's holding in this case creates new law, and it is law which Congress or the President should make, not the judiciary. . . . Congress has been aware that, for years, commanders have sat on panels with their subordinates. Congress could have prohibited this situation by law but failed to do so. A court should not judicially legislate when Congress, in its wisdom, does not.[180]

Senior Judge Sullivan correctly added that, "RCM 912(f)(1)(N) does not contemplate mandatory exclusion rules such as that fashioned by the majority. . . . instead it calls for discretionary judgment by the trial judge, based on all of the circumstances of the case."[181] My proposal will allow the judge to do just that.

I also propose Congress amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on actual or implied bias grounds is reviewed for an abuse of discretion. As discussed *supra*, the current standard of review is too confusing and unworkable for military justice practitioners, especially at the appellate level. Further, the CAAF in fact used to apply a *clear* abuse of discretion standard when reviewing implied bias cases. In *Deain*, the CMA actually adopted a clear abuse of discretion standard for military appellate courts to apply when reviewing implied bias challenges.[182] Chief Judge Quinn stated "there must be a clear abuse of discretion in resolving the conflict before an appellate tribunal, which lacks the power to reweigh the facts, will reverse a decision."[183] However, without explanation, the court slowly changed the standard of review for implied bias cases from "clear" abuse of discretion to somewhere less than an abuse of discretion but more than de novo.[184] Thus, while the CAAF openly stated it would give military judges great deference when reviewing implied bias decisions, in reality they wound up doing just the opposite. Judge Crawford summed up this point the best in *Rome*:

> In effect, the majority applies the liberal-grant mandate at the appellate level rather than at the trial level. While we have indicated that the implied-bias rule is to be rarely invoked, this Court has frequently applied the rule to set aside convictions in the last two terms. While at first blush the majority action may appear to be laudible in terms of public perception, it raises serious questions about the standards to be employed in the military justice system. Certainly, undermining these standards does not enhance public perception or confidence in the military justice system.[185]

The logical and practical solution is to return the implied bias standard of review to just an abuse of discretion. First, there is no significant difference between "clear" abuse of discretion and an abuse of discretion. Second, and more importantly, the change will bring greater certainty and uniformity to the military justice system, especially at the appellate level. An abuse of discretion

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[179] *See* Colonel Louis J. Puleo, *Bulletproof Your Trial: How to Avoid Common Mistakes that Jeopardize Your Case on Appeal*, ARMY LAW., Aug. 2008, at 64–66 ("The court, however, does not provide any specific guidance on the issue. Rather, *Clay* appears to invite a prophylactic approach to the issue.").

[180] *Wiesen*, 56 M.J. at 182 (Sullivan, S.J., dissenting).

[181] *Id*. at 183 (Sullivan, S.J., dissenting) (emphasis in original). In her dissent in *United States v. Rome*, 47 M.J. 467 (C.A.A.F. 1998), Judge Crawford stated "while the majority denies invoking the theory of implied bias to establish *per se* rules for challenges for cause, the result of its recent decisions appears to do just that." *Id*. at 471 (Crawford, J., dissenting) (emphasis in original). *See also* United States v. Smart, 21 M.J. 15, 20 (C.M.A. 1985) ("Prejudice must be suspected when most people in the same position would be prejudiced.") (internal citation omitted).

[182] *Deain*, 17 C.M.R. at 49. *See also Smart*, 21 M.J. at 19 ("There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.") (citing United States v. Ploof, 464 F.2d 116, 118-19 n.4 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972)); *Wiesen*, 56 M.J. at 181 (Sullivan, J., dissenting) ("We have forgotten our observation in *Smart*."). *See generally* United States v. White, 36 M.J. 284 (C.M.A. 1993) (Court discussed clear abuse of discretion standard for actual and implied bias challenges.).

[183] *Deain*, 17 C.M.R. at 49 ("There must be a clear abuse of discretion in resolving the conflict before an appellate tribunal, which lacks the power to reweigh the facts, will reverse a decision.") (internal citations omitted).

[184] *See generally* United States v. Townsend, 65 M.J. 460 (C.A.A.F. 2008).

[185] *Rome*, 47 M.J. at 471. *See also* Puleo, *supra* note 179 at 53–55:

> Until the court provides definitive guidance, trial counsel should ensure that when a defense's challenge for cause is denied, the military judge applies the *Clay* analysis. Specifically, the military judge should recognize his duty to address the challenge under the implied bias standard and the court's liberal grant mandate. The military judge should state on the record what facts, other than the member's assurances of impartiality and the credibility of such assertions, he relied upon it determining that a member of the public, who is familiar with military justice matters, would not substantially doubt the fairness or impartiality of the court-martial given the members' presence on the panel.

Id. (emphasis in original).

standard of review will do away with the confusing "more deference" versus "less deference," or "more than de novo but less than abuse of discretion" implied bias standards military appellate courts currently use. Third, military judges will have a clear understanding that their decisions on member challenges are subject to an abuse of discretion standard regardless of the basis of the challenge. As such, this change will significantly improve the legal framework appellate courts use presently to address implied bias challenges.

V. Counterarguments: Maintaining the Status Quo or Liberally Granting Implied Bias Challenges

One counterargument to this proposal is to maintain the status quo and continue to apply the current standard of review to implied bias challenges. The supporting argument is that, while not perfect, the current standard of review is simply the product of the difficult yet necessary application of the implied bias doctrine to uphold a military accused's constitutional and regulatory right to a fair and impartial panel.[186] Indeed, the CAAF has acknowledged its struggle to define or agree what the scope should be: "[T]his Court has struggled to define the scope of implied bias, or perhaps just disagreed on what that scope should be."[187] However, this struggle does not mean the current standard of review for implied bias challenges isn't necessary. Moreover, this standard of review arguably derives from the creation of RCM 912(f)(1)(N). On the one hand, the common law principal challenge on which RCM 912(f)(1)(N) is based required the judge to make an implied bias determination based on the circumstances of the case. On the other hand, in the absence of definitive guidance to the contrary, it is the duty of judges to interpret and apply the law as written.[188] Rule for Court-Martial 912(f)(1)(N) states "A member shall be excused whenever it *appears* that the member should not sit in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[189] A reasonable interpretation of the word "appears" in RCM 912(f)(1)(N) could be as it appears to the public.

The strongest argument in support of the current implied bias standard of review is the importance of public perception of the military justice system given its differences with the civilian criminal justice system. In *United States v. Lavender*,[190] then Judge Effron emphasized this exact point, and did not agree with the majority opinion view that implied bias under RCM 912(f)(1)(N) required an "exceptional circumstance" as Justice O'Connor articulated in *Smith*.[191] Rather, Judge Effron described the future prevailing view of the court, namely that important differences between both systems justified a different standard for determining implied bias under RCM 912(f)(1)(N).[192] Judge Effron correctly pointed out that, while there are certain similarities between civilian jurors and court-martial panel members, there also are important differences.[193] For example, members of a court-martial panel are not randomly selected like civilian jurors, but are personally selected by the command.[194] Also, in contrast to the multiple peremptory challenges in most civilian jurisdictions, each side has only one peremptory challenge in a court-martial.[195] Further, military judges are required to apply the liberal-grant mandate to causal challenges to court-martial panel members.[196] Based on these differences, Judge Effron concluded that the military justice system should not adopt a standard of review in which the doctrine of implied bias would be rarely applied.[197] Admittedly, Judge Effron highlights important differences between the military and civilian criminal justice systems. However, contrary to Judge Effron's conclusion, they simply do not rise to the level justifying maintaining the current implied bias standard of review because it has become too amorphous and confusing in its application. Further, as discussed above, the Supreme Court's case law makes clear that the doctrine of implied bias should be "invoked sparingly."[198]

A second counterargument to the proposal is to amend RCM 912(f)(1)(N) to specifically state actual and implied bias challenges for cause will be liberally granted by the military judge in order to ensure the court-martial will be free from substantial doubt as to legality, fairness, or

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[186] United States v. Mack, 41 M.J. 51, 54 (C.M.A. 1994).

[187] *Wiesen*, 56 M.J. at 175.

[188] *Id*. at 177 n.5. The court wrote:

> Senior Judge Sullivan renews his opposition to this Court's precedent regarding implied bias as an interpretive framework for applying RCM 912. Senior Judge Sullivan may disagree with the majority view that where the President of a panel commands or supervises a two-thirds majority of court members sufficient to convict, serious doubts about the fairness of military justice are raised, but that does not make the majority view *ultra vires*. The duty of judges is to say what the law is.

Id. (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).

[189] MCM, *supra* note 3, R.C.M. 912(f)(1)(N) (emphasis added).

[190] 46 M.J. 485, 489 (C.A.A.F. 1997) (Effron, J., concurring) ("I do not agree, however, with the paragraph in the majority opinion that implicitly embraces *Hunley's* view of implied bias necessarily as a 'rare exception' found in 'the very unique facts stated [t]herein' and reflecting a test that 'should rarely apply.'").

[191] *Id*. at 489 (Effron, J., concurring).

[192] *Id*. at 489–90. (Effron, J., concurring).

[193] *Id*. at 489.

[194] *Id*. at 490.

[195] *Id*.

[196] *Id*.

[197] *Id*. ("That concept does not appear to have been endorsed in the past by this Court; it is not suggested in any of our recent cases, and it is not necessary to the disposition of this case.").

[198] United States v. Strand, 59 M.J. 455, 458 (C.A.A.F. 2004).

impartiality. In other words, the liberal grant mandate would be incorporated into RCM 912(f)(1)(N) regardless of the party making the challenge. The reasoning behind this argument is that it does not matter if government or defense counsel asserts a challenge under RCM 912(f)(1)(N) because the very purpose behind both the Rule and the liberal grant mandate is identical—protecting the public's perception of the military justice system. In fact, the liberal grant mandate has been recognized since the promulgation of the 1951 MCM.[199] It was designed to address historic concerns about the real *and perceived* potential for command influence on members' deliberations, as well as protecting society's interest in the prompt and final adjudication of criminal accusations.[200] Given these important considerations, a proponent of this change would argue that challenges for cause should be liberally construed under RCM 912(f)(1)(N) regardless of who makes the challenge or whether or not it is a "close call." Further, even absent a challenge by either party, the military judge has a *sua sponte* duty to excuse a member under RCM 912(f)(1)(N) in the interest of justice should a valid challenge for cause exist.[201] Thus, a proponent of this change would also argue the military judge should be allowed in the interest of justice to liberally grant challenges for cause in order to protect the appearance or fairness of the military justice system. Finally, and perhaps most importantly, the military judge is in the best position to make this determination. As the CAAF pointed out in *United States v. Clay*:

> Military judges are in the best position to address issues of actual bias, as well as the appearance of bias of court members. Guided by their knowledge of the law, military judges observe the demeanor of the members and are better situated to make credibility judgments. However, implied bias and the liberal grant mandate also recognize that the interests of justice are best served by addressing potential member issues at the outset of judicial proceedings, before a full trial and possibly years of appellate litigation.[202]

Admittedly, military judges are in the best position to make implied bias determinations because they have the incalculable benefit of observing the challenged member. However, changing the implied bias standard of review to whether an average person, similarly situated, would be prejudiced based on all the known facts and circumstances will do nothing to change this important consideration. To the contrary, this clearer standard of review will allow military judges to make more comprehensive implied bias determinations because they will be able to more accurately determine if an average person, similarly situated, would be biased as opposed to an amorphous public perception of the military justice system. Further, applying a liberal grant mandate to both actual and implied bias challenges would also undermine the convening authority's power to personally select panel members under Article 25, UCMJ. Indeed, Congress has specifically given power to the convening authority to detail such members that he or she feels are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.[203] Further, applying a liberal grant mandate standard of review to causal challenges will not "protect" the public's perception of the military justice system. As Judge Crawford eloquently summarized in her dissent in *Wiesen*: "The American public with which I am familiar is both perceptive and informed. When presented with all the facts, it is most capable of making a fair and reasoned judgement."[204] Judge Crawford correctly pointed out the public's perception is not limited to a handful of individuals dedicated either to vilifying or lionizing the role of a convening authority in the selection of court-martial members.[205] Judge Crawford also correctly noted an informed public understands the differences between courts-martial with members and trials in the civilian sector with civilian jurors.[206] Further, Judge Crawford noted that: "American citizens are also capable of understanding the differences between the military justice system and the various civilian criminal law systems, and knowing that in the military justice system, a convening authority selects court-martial members "by reason of age, education, training, experience, length of service, and judicial temperament."[207] Indeed, court-martial members have been referred to as "blue ribbon" panels due to the quality of their membership.[208] Thus, under these circumstances, the

[199] United States v. White, 36 M.J. 284, 287 (C.A.A.F. 1993) ("The liberal-grant mandate was expressly set out in paragraph 62*h*(2) of the 1951 MCM, and carried forward in paragraph 62 *h* (2) of the 1969 revised edition of the *MCM*. While RCM 912(f)(3) of the 1984 MCM did not contain an express statement of the liberal-grant mandate, the deletion of the express language was not intended to change the policy expressed in that statement.") (citing the MANUAL FOR COURTS-MARTIAL, UNITED STATES drafter's analysis, at A21-54 (1982)).

[200] United States v. Clay, 64 M.J. 274, 276–77 (C.A.A.F. 2007) (emphasis added).

[201] Rule for Court-Martial 912(f)(4) states: "Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge should, in the interest of justice, excuse a member against whom a challenge for cause would lie." Further, trial counsel also has an affirmative duty to "state any ground for challenge for cause against any member of which the trial counsel is aware." MCM, *supra* note 3, R.C.M. 912(c).

[202] *Clay*, 64 M.J. at 277.

[203] UCMJ art. 25(d)(2) (2008).

[204] United States v. Wiesen, 56 M.J. 172, 179 (C.A.A.F. 2001) (Crawford, J., dissenting).

[205] *Id*. (Crawford, J., dissenting).

[206] *Id*. (Crawford, J., dissenting).

[207] *Id*. (Crawford, J., dissenting) (citing UCMJ art. 25(d)(2) (2008)).

[208] *Id*. at 180 (Crawford, J., dissenting). In her dissent in *Rome*, Judge Crawford highlighted some sources who have found a military panel of court members to be (?) a "blue ribbon" panel due to the quality of its members. United States v. Rome, 47 M.J. 467, 471 (C.A.A.F. 1998) (citing Jesse Birnbaum, *A New Breed of Brass: From the Ashes of Vietnam, the Pentagon Has Shaped a Sophisticated Military that Speaks Well and Fights Smart*, 1991 WL 3118757, TIME MAG., Mar. 11, 1991, at 58 and David

CAAF's preoccupation with protecting the public's concern of the military justice system, while noble, has been exaggerated. The public will have just as much confidence in the military justice system regardless of any change to appellate review of implied bias challenges. As such, while each counterargument makes valid legal points, they do not undermine or present better solutions than the proposal of an appropriate standard of review for implied bias challenges.

VI. Conclusion

The President should amend RCM 912(f)(1)(N) to specifically state implied bias challenges must be granted by the military judge only if the average person in the challenged member's position would be biased against the accused based on all of the facts presented, and not on the public's "perception" of the military justice system were the challenged member allowed to sit on the panel. Congress should also amend Article 41(a), UCMJ, such that a military judge's denial of a challenge for cause on implied bias grounds is reviewed for an abuse of discretion which will bring greater certainty and uniformity to the military justice system. The Constitution and the Supreme Court's relevant case law support military appellate courts applying the doctrine of implied bias to preserve a military accused's constitutional and regulatory right to a fair and impartial panel under RCM 912(f)(1)(N), but only in very limited circumstances. The CAAF's "read in" of the public's perception of the military justice system in interpreting RCM 912(f)(1)(N) has unnecessarily forced military justice practitioners to determine implied bias on an "ad hoc" basis with little if any guidance as to when the public would have substantial doubt about the court-martial's legality, fairness, or impartiality. The CAAF's current implied bias analysis approach also creates per se rules for challenges for cause that is solely within the province of the Executive or Legislative Branches to decide. Further, the significant differences between the military and criminal justice systems do not justify a different standard of review for appellate courts to determine implied bias under RCM 912(f)(1)(N).

An abuse of discretion standard of review will also bring greater certainty and uniformity to the military justice system, particularly at the appellate level, because it will do away with the confusing "more deference than de novo but less deference than abuse of discretion" implied bias standard military appellate courts currently use. As *Bragg*, *Townsend*, and *Elfayoumi* show, this standard is simply too subjective at the appellate level to be applied consistently, and leads to unpredictable outcomes. A simple abuse of discretion standard of review to both actual and applied bias challenges will largely eliminate this problem because it will bring one clear standard of review for appellate courts to apply. In addition, military judges will have one uniform standard under which they are judged.

Simply maintaining the status quo will only ignore this problem which needs a practical solution. Further, amending RCM 912(f)(1)(N) to specifically state both actual and implied bias challenges for cause will be "liberally" granted by the military judge regardless of the party making the challenge will also not fix this problem. Admittedly, the military judge is in the best position to make an implied bias determination because he has the incalculable benefit of observing the challenged member. However, this proposed solution undermines too greatly the convening authority's power to personally select panel members under Article 25, UCMJ. Thus, while this proposal may not be the perfect solution, it will certainly work much better than the implied bias legal framework military courts presently use.

The Constitution and our military justice system require vigilance in protecting a military accused's right to a fair and impartial panel regardless of the circumstances. The protection of these rights is so fundamental to our system of government that the law must presume a juror is biased in limited situations based on the totality of the circumstances. At the same time, it is for this very reason a consistent and uniform application of implied bias law is needed in the military justice system to not only protect a service member's constitutional rights, but also the very fabric of military law as well. However, as Justice O'Connor stated in *Smith*, determining whether a juror is biased is difficult to determine, especially when the juror may not even know it. This proposal is the best solution to address this difficult determination at the appellate level.

In perhaps the most famous criminal trial in American history, Chief Justice Marshall recognized the important role the implied bias doctrine plays in American jurisprudence. Riding circuit and presiding over the trial of Aaron Burr for treason in the killing of Alexander Hamilton, Chief Justice Marshall wrote:

> The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, *because in general persons in a similar situation would feel prejudice*.[209]

Gergen, *Bringing Home the "Storm"; What the Victorious American Military Could Teach the Rest of Us*, 1991 WL 2142956, WASH. POST, Apr. 28, 1991)). Judge Crawford also noted that, "arguably, this difference is such that invocation of the doctrine of implied bias should be even rarer in the military." *Rome*, 47 M.J. at 471.

[209] United States v. Burr, 25 F. Cas. 49, 50 (D. Va. 1807) (emphasis added).

Even in a criminal trial as popular as Aaron Burr's trial for treason, Justice Marshall properly recognized the focus of implied bias review should be based on whether an average person, similarly situated, would be prejudiced against the accused based on all the known facts and circumstances. It is time for the military justice system to follow Justice Marshall's position and adopt the same standard of review to challenges based on implied bias grounds. In doing so, the public will not lose any confidence in the military justice system. To the contrary, changing the implied bias standard of review to be in-line with its civilian counterpart will do just the opposite, and inspire confidence in the military justice system.[210]

[210] *See* Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring) ("Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history.").

TJAGLCS Practice Notes
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Legal Research Note

Congressional Research Service

Heather M. Enderle
Electronic Services Librarian

The Congressional Research Service (CRS) provides detailed, objective research on issues relevant to members and committees of the U.S. Congress. The CRS, formerly known as the Legislative Reference Service, has provided analysis to Congress since 1914.[1] The agency's staff analyzes current policy and legal issues in a legislative context. One might find CRS reports on the Deepwater Horizon Oil Spill, the Open Government Initiative, or transportation security.

The CRS staff produce reports exclusively for Congress and do not make the documents publicly available. An internal website provides twenty-four hour access to representatives, senators, and several legislative branch agencies.[2] If the report is released at all, a member of Congress may release the report. Without a publicly available database of CRS reports, researchers must use other avenues to locate reports.

Individuals wanting a copy of a CRS report may contact the senator or representative who requested the specific study. Numerous organizations make the released reports publicly available on the web and offer a quicker, online alternative. Open CRS, a project of the Center for Democracy and Technology, is one of the most comprehensive archives for CRS reports and is a free, searchable database.[3] The Federation of American Scientists (FAS) is a popular resource for faculty at The Judge Advocate General's Legal Center and School (TJAGLCS) because the FAS collection contains CRS reports on national security, intelligence, foreign policy, and related topics.[4]

Another notable CRS web archive of interest to military lawyers is the U.S. Department of State, which has CRS reports available by date, topic, and region. The listing for more recent reports is fairly extensive, but there is limited coverage going back to 1999.[5] The Air War College has select CRS reports on homeland security, military topics and legal issues.[6] For attorneys searching for a general collection, the University of North Texas's CRS Digital Collection is freely searchable and has reports dating back to 1990.[7]

There are numerous other online resources for CRS reports, including subscription databases. A comprehensive reference for CRS collection databases is Stephen Young's article, *Guide to CRS Reports on the Web*, which provides a list of databases broken down by subject matter and cost.[8]

For more information contact the Electronic Services Librarian at TJAGLCS-Digital-Librarian@conus.army.mil

[1] History and Mission, THE LIBR. OF CONG., CONG. RES. SERV., http://www.loc.gov/crsinfo/about/history.html (last visited Feb. 21, 2011).

[2] 2009 CONG. RES. SERV. ANN..REP. at 37.

[3] Open CRS, http://www.opencrs.com/ (last visited Feb. 21, 20111).

[4] CONG. RES. SERV. (CRS) REP., FED'N OF AM. SCIENTISTS, http://www.fas.org/sgp/crs/ (last visited Feb. 21, 2010).

[5] CONG. RES. SERV. REP. (CRS) AND ISSUE BRIEFS, U.S. DEP'T OF STATE, http://fpc.state.gov/c18185.htm (last visited Feb. 21, 2011).

[6] SELECTED CONG. RES. SERV. (CRS) REP., AIR WAR COLL., http://www.au.af.mil/au/awc/awcgate/crs/ (last visited Feb. 21, 2011).

[7] CONG. RES. SERV. REP., THE UNIV. OF N. TEX. DIGITAL LIBR., http://digital.library.unt.edu/explore/collections/CRSR/ (last visited Feb. 21, 2011).

[8] Stephen Young, *Guide to CRS Reports on the Web*, LLRX.com (September 17, 2006), http://www.llrx.com/features/crsreports.htm.

A View from the Bench: The Overlooked Art of Conducting *Voir Dire*

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Introduction

The accused elects trial by an enlisted panel. As the defense counsel on the case, you think "Too easy. The convening authority has already selected the members, so all I need to do is get my witnesses ready for trial and practice my best Tom Cruise-inspired findings argument."[1] If this is your approach to preparing for a members' case, you have missed a critical advocacy opportunity. New counsel frequently overlook the importance of *voir dire* in selecting fair and impartial jurors, and making favorable first impressions, because of an often misguided belief there are more pressing concerns. As with all endeavors, trial advocates will not get a second chance to make a good first impression. Investing even a small amount of time preparing for *voir dire* can yield big dividends for your case.

Court members begin to form their opinions about a court-martial immediately upon entering the courtroom. Therefore, the advocate and her client, whether the government or the accused, are always "on".[2] In a court-martial, an advocate's first opportunity to persuade the court members and make a favorable impression comes during *voir dire*.[3] The advocate who fails to recognize this truism does so at her own peril. This note provides an overview of the *voir dire* process by emphasizing some basic advocacy considerations.

The purpose of *voir dire* at both a court-martial and a jury trial is the same: to gain information in order to intelligently exercise challenges and, ultimately, seat a fair and impartial panel.[4] Although the Sixth Amendment right to trial by jury does not apply to courts-martial,[5] Soldiers do have a statutory right to be tried by members.[6] This right to members in a court-martial, like its jury trial corollary, includes a right to be tried by a "fair and impartial" panel.[7] *Voir dire* is a necessary extension of an accused's Fifth Amendment due process right to exercise informed challenges for cause and peremptory challenges of members in order to ensure an impartial panel and a fair trial.[8]

While the primary purpose of *voir dire* is the selection of a fair and impartial panel, the experienced trial advocate recognizes another goal. The selection of a panel which is "favorably disposed" to an advocate's case is a legitimate objective.[9] In our adversarial military justice system, one hopes that counsels' vested interest in the best possible outcome for their client, on both sides of the aisle, will ultimately empanel impartial members to consider the case. The military appellate courts have recognized this secondary purpose of conducting *voir dire*.[10]

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[1] The reference is to Tom Cruise's portrayal of Lieutenant Daniel Kaffee, a Navy defense counsel, defending two Marines on trial for the death of a fellow Marine. A FEW GOOD MEN (Castle Rock Entertainment 1992).

[2] "Surveys of jurors have shown that the most favorable impressions are created by lawyers who act and look well prepared and knowledgeable, have effective verbal abilities, and demonstrate dedication to their client within the bounds of fairness. The least liked qualities are unnecessary theatrics and lack of preparation, particularly when it wastes time." THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 21 (2d ed. 1988).

[3] *Voir dire*, which literally means "to speak the truth," is "[a] preliminary examination of a prospective juror by a judge or a lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY 1569 (7th ed. 1999).

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(d) discussion (2008) [hereinafter MCM] ("The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges."); United States v. Bragg, 66 M.J. 325, 327 (C.A.A.F. 2008) ("The purpose of voir dire and challenges is, in part, to ferret out facts, to make conclusions about the member's sincerity, and to adjudicate the member's ability to sit as part of a fair and impartial panel.").

[5] *Ex parte* Quirin, 317 U.S. 1, 39-45 (1942); United States v. New, 55 M.J. 95 (C.A.A.F. 2001).

[6] United States v. Witham, 47 M.J. 297, 301 (C.A.A.F. 1997) (citing UCMJ art. 16 (2008)).

[7] "An accused 'has a constitutional right, as well as a regulatory right, to a fair and impartial panel.'" United States v. Bragg, 66 M.J. 325, 326 (C.A.A.F. 2008) (quoting United States v. Wiesen, 56 M.J. 172, 174 (2001)). The constitutional right referenced in *Bragg* is rooted in the Fifth Amendment's due process clause.

[8] *Witham*, 47 M.J. at 301 (citing UCMJ arts. 16 and 41).

[9] As an advocate "you want to select a jury that will be fair, is favorably disposed to you, your client, and your case, and will ultimately return a favorable verdict." MAUET, *supra* note 2, at 29-30.

[10] *E.g.*, United States v. Jefferson, 44 M.J. 312, 318 (C.A.A.F. 1996) (In addition to empanelling impartial members, *voir dire* "is used by counsel as a means of developing a rapport with members, indoctrinating them to the facts and the law, and determining how to exercise peremptory challenges and challenges for cause.") (citation omitted).

Conducting *Voir Dire* in a Court-Martial

A successful *voir dire*, like all other aspects of a trial, requires preparation. Success can be defined by three specific goals:

> 1. Present yourself and your client in a favorable light to the [panel]
>
> 2. Learn about the [members'] backgrounds and attitudes, so that you can exercise your challenges intelligently, and
>
> 3. Familiarize the [panel] with certain legal and factual concepts, if permitted by the court.[11]

Of these three goals, only the second relates to the primary purpose of selecting impartial members. The other two goals are designed to achieve the secondary purpose of selecting a "favorably disposed" panel. Goals one and three are designed to build rapport with the members and to educate members about your theory of the case.[12] The successful advocate will prepare for *voir dire* with all three goals in mind. Achieving them, however, is easier said than done.

As provided in Rule for Courts-Martial (RCM) 912(d),[13] the military judge has broad discretion in controlling *voir dire*. The permissive language of the rule allows the judge considerable leeway in both deciding which questions will be asked of the members and whether the judge or the trial advocates will ask them.[14] For example, an accused does not have a right to individually question the members.[15] Furthermore, in deciding which questions will be asked either by the judge or by counsel, many judges require advocates to obtain advanced approval of group *voir dire* questions by submitting proposed questions prior to trial.[16] Given the judge's considerable discretion in controlling *voir dire*, advocates should learn the preferences of the military judge detailed to the court-martial before preparing for this aspect of the trial.[17]

Judges understandably exercise their discretion over the conduct of *voir dire* by ensuring that the primary purpose of *voir dire* is satisfied. The art of *voir dire* requires the advocate to keep both the primary and secondary purposes in mind when formulating questions and preparing for group *voir dire*. As a general rule, all questions must be couched in terms that legitimately explore the potential impartiality or disqualification of the members.[18] Otherwise, counsel risk the possibility that the military judge will disallow the question.

Voir Dire Practice Tips[19]

Know Your Judge

A thorough understanding of the judge's *modus operandi* in conducting *voir dire* is essential to your case preparation. If you do not regularly practice before the judge, ask local counsel what the judge prefers. Or better yet, ask the judge. To truly be an effective advocate, you must know what procedures the judge will follow and what types of questions the judge will allow.

Know the Questions the Judge Will Ask

Prior to allowing questions by counsel, most judges ask the preliminary *voir dire* questions listed in the *Military Judges' Benchbook*.[20] Some judges also ask additional

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[11] MAUET, *supra* note 2, at 30.

[12] *See* CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, at C-1-2 (2008) [hereinafter THE ADVOCACY TRAINER].

[13] MCM, *supra* note 4, R.C.M. 912(d). The rule states that "[t]he military judge may permit the parties to conduct the examination of the members or may personally conduct the examination." The discussion to this rule further states that "[t]he nature and scope of the examination of members is within the discretion of the military judge." *See also id.* R.C.M. 801(a)(3) and its discussion (stating that the judge "exercise[s] reasonable control over the proceedings," which includes "the manner in which voir dire will be conducted and challenges made")).

[14] United States v. Belflower, 50 M.J. 306 (C.A.A.F. 1999)

[15] United States v. Dewrell, 55 M.J. 131 (C.A.A.F. 2001).

[16] The U.S. Army Trial Judiciary rules recognize the judge's authority to "require counsel to submit voir dire questions to the judge in advance of trial." U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL R. 13.1 (15 Sept. 2009) [hereinafter RULES OF PRACTICE], https://www.jagcnet.army.mil/JAGCNET/USATJ. This same rule acknowledges the judge's authority to allow only those questions which "are deemed reasonable and proper by the judge."

[17] Ordinarily, the judge should allow the parties adequate opportunity to personally conduct *voir dire*. *See* United States v. Smith, 27 M.J. 25, 27 (C.M.A. 1988) (quoting United States v. Parker, 19 C.M.R. 400, 405 (1955) with emphasis added) ("*The accused should be allowed considerable latitude in examining members so as to be in a position to intelligently and wisely exercise a challenge for cause or a peremptory challenge*."); MCM, *supra* note 4, R.C.M. 912(d) discussion ("Ordinarily, the military judge should permit counsel to *personally* question the members.") (emphasis added). *See also* David Court, *Voir Dire: It's Not Just What's Asked, But Who's Asking and How*, ARMY LAW., Sept. 2003, at 32 (advocating that military judges allow counsel to personally conduct *voir dire*).

[18] *See* 2 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURES § 15-53.00 at 28 (2d ed. 1999) ("Although voir dire can be used for many other purposes, such as highlighting various issues, educating the court members, or building rapport between counsel [and] members, such uses are improper unless done in the otherwise proper process of voir dire.").

[19] *The Advocacy Trainer* is an excellent source for preparing and conducting *voir dire* in a court-martial. THE ADVOCACY TRAINER, *supra* note 12, at tab C, module 1. Many of the tips in this article highlight those contained in this comprehensive advocacy manual.

[20] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 2-5-1 (1 Jan. 2010). *See also* RULES OF PRACTICE, *supra*

questions, which may or may not be tailored to the individual case. Counsel should know the questions that the judge will ask, in order to not repeat them. Asking the members questions which the judge has already asked will not help in making a favorable impression on the panel. Counsel should, however, be attentive to member answers to the judge's questions and be prepared to follow up, if necessary, with individual *voir dire*.

Know the Members

The more information you can gather about the members before trial, the better prepared you will be as counsel. Members frequently will have completed questionnaires prior to trial.[21] You should review them all before *voir dire* begins. The members expect this. If you repeat questions which the members have already answered, it may result in a negative perception of your advocacy skills. Although you should not repeat questions which have already been asked on a questionnaire, you can and should follow up on those responses during individual *voir dire*. Counsel should also consider past experiences as a court member. Due to the prevalence of standing panels in Army courts-martial, a good advocate will research the impressions that other litigants may have gleaned about a particular member during a previous court-martial. Members are generally unknown entities, but previous experience with a member can be helpful in determining whether to exercise a challenge.

Get the Members Talking

During *voir dire*, you want to get the members talking with you, not to you. Leading questions that elicit "yes" or "no" answers are usually not the most effective means of discovering a potential bias.[22] To get the members talking, direct your question to an individual instead of the entire panel, and ask "open-ended direct-examination type questions that forces the [member] to talk."[23] For example, don't ask "Does anyone have a problem with people who drink alcohol?" This question calls for a "yes" or "no" answer and is a negative way of determining someone's beliefs about alcohol. Instead, pick one member and ask her "Major Jones, how do you feel about people who may drink a little too much alcohol at a retirement party?" This allows the member to explain her thoughts without the negative inference of the previous question. After the member answers the question, you can follow up with other members to obtain their views. Once one member begins to talk, others will feel more comfortable in doing so.

Do Not Alienate or Embarrass the Members

Avoid asking complicated or compound questions. Speak in plain English, not legalese. Members do not appreciate being asked convoluted questions to which they probably do not know the correct answer. For example an ineffective question might be phrased as follows: "Colonel Jones, what do you think reasonable doubt means?" Such a question puts a member on the spot and is invariably interpreted as a "trick" question. The inexperienced counsel may think that he is developing grounds for challenge, but what he is really accomplishing is making a bad first impression on all the members. As an advocate, you want the members to trust you, not be skeptical of you. For the same reason, you should wait until individual *voir dire* to inquire about a potentially embarrassing or uncomfortable issue. For example, in a rape case, if a member answers "yes" to a question about whether any family member or anyone close to them personally has been a victim of an offense similar to that charged in this case, counsel should wait until individual *voir dire* to follow up. Not only does this avoid potentially tainting other members, it will likely be appreciated by the member being questioned.

Avoid Improper Questions

Although empanelling a "favorably disposed" panel is a legitimate goal, there are some questions which simply go too far and will be disallowed by the judge. Counsel should keep in mind the primary purpose of *voir dire*, which is to gain information to intelligently exercise challenges. "Commitment" questions are one example of improper questioning. Specifically, counsel should be wary of asking hypothetical questions, based upon case-specific facts, in an attempt to get the members to commit to certain findings or a particular sentence before the presentation of any evidence.[24] Likewise, questions motivated by "jury nullification" are improper.[25]

note 15, R. 13.1 ("The judge will ordinarily initiate voir dire examination by asking preliminary questions.").

[21] The Rules for Courts-Martial allow trial counsel to submit questionnaires to the members prior to trial. Questionnaires are mandatory if requested by the defense. In addition to the standard information listed in the rule, counsel can request additional information from the members with the approval of the military judge. MCM, *supra* note 4, R.C.M. 912(a)(1).

[22] This is not to say that all leading questions are inappropriate during *voir dire*. For example, leading questions can be valuable in highlighting a certain aspect of the law. *See generally* THE ADVOCACY TRAINER, *supra* note 12, at C-1-7.

[23] MAUET, *supra* note 2, at 35.

[24] *See* United States v. Nieto, 66 M.J. 146 (C.A.A.F. 2008). *Nieto* also demonstrates the importance of objecting to improper *voir dire*, since the presumably improper questions asked in this case were upheld under a plain error analysis for lack of defense objection during trial.

[25] *See* United States v. Smith, 27 M.J. 25 (C.M.A. 1988) (Military judge properly disallowed *voir dire* question "Are you aware that a conviction for premeditated murder carries a mandatory life sentence?" where question was motivated by jury nullification).

Rehabilitating Members

Counsel should be aware of the standard the judge will use in deciding whether to grant challenges for cause. With that standard in mind, counsel can attempt to rehabilitate members who provide answers that could serve as a basis for a challenge. However, all counsel, and especially trial counsel, should recognize that the potential for implied bias may make some attempts at rehabilitation fruitless.[26]

Presenting Evidence of Impartiality

Counsel should be aware that volunteered answers from members are not the only way to establish a lack of impartiality. The RCMs allow any party to "present evidence relating to whether grounds for challenge exist against a member."[27] Therefore, if you have other information about a member which might raise a question as to the member's impartiality, then that evidence may be produced during the *voir dire* process without actually asking the member about it. For example, in a case involving charges of drunk driving, a letter of reprimand for drunk driving previously issued to a panel member would be admissible to establish a potential challenge for cause.

Have a Note Taker

Finally, one very practical tip is to have someone available to record member responses while you conduct the *voir dire*. Ideally, you will have a co-counsel to assist with this. However, if you are the only counsel on the case, consider having a paralegal or the accused help with recording the answers. It is much more difficult to both conduct the *voir dire* and record the answers simultaneously. Additionally, individual *voir dire*, based largely upon answers obtained during group *voir dire*, can be helpful in developing potential biases and disqualifications. Therefore, you will need a good system for recording the group *voir dire* answers. The ability to recall those answers is critical given that the party requesting individual *voir dire* bears the burden of establishing the necessity for it.[28]

Conclusion

Understanding the *voir dire* process is critical to empanelling fair and impartial members for a court-martial. A well-prepared *voir dire* also creates a favorable impression with the members and, hopefully, a favorably disposed panel for your client. Know the rules, prepare for *voir dire*, and you will undoubtedly become a better advocate.

[26] *See* United States v. Townsend, 65 M.J. 460, 465 (C.A.A.F. 2008) ("[T]here is a point at which numerous efforts to rehabilitate a member will themselves create a perception of unfairness in the mind of a reasonable observer.").

[27] MCM, *supra* note 4, R.C.M. 912(e).

[28] United States v. Belflower, 50 M.J. 306 (C.A.A.F. 1999) (citing United States v. Jefferson, 44 M.J. 312 (C.A.A.F. 1996)).

Operation Mincemeat: How a Dead Man and a Bizarre Plan Fooled the Nazis and Assured an Allied Victory[1]

Reviewed by *Major Richard E. Gorini*[*]

Deception story development is an art and a science. It combines intelligence on adversary information collection, processing, and dissemination; how adversary preconceptions are likely to influence the deception target's conclusions; and how the target makes decisions.[2]

Introduction

In Operation Mincemeat ("Mincemeat"), Ben Macintyre[3] colorfully describes the full history of Operation Mincemeat, a military deception operation that sprung from the plot of a second rate mystery novel: plant misleading information on a corpse dressed as a British officer to trick the German intelligence network into believing that the Allies were planning to attack Sardinia and Greece instead of Sicily.[4] Macintyre's narrative uses recently recovered primary sources and newly unclassified information[5] to fully describe how Lieutenant Charles Cholmondeley and Lieutenant Commander Ewen Montagu created and executed Mincemeat; their "bizarre plan" which supplemented Operation Barclay; and the Allied deception effort in support of the invasion of Sicily. For military planners, Macintyre's novel is an excellent case study in the art and science of planning a military deception. For judge advocates, the novel highlights the need to have a critical eye when evaluating evidence, whether as a member of a military staff or when preparing for a court martial. For everyone else, the novel is an entertaining history lesson hidden within a spy adventure, with minor flaws that do not detract from an otherwise engaging story.

The Oldest (Deception) Trick in the Book

Sun Tzu considered deception such an important part of military operations that it was one of the first subjects he covered in *The Art of War*;[6] planting misleading information for the enemy to "accidentally" find has been a timeless form of deception. According to ancient mythology, the Greeks planted soldiers inside a wooden horse to trick the Trojans into allowing them into the city of Troy.[7] In modern lore, the British allowed a haversack with false war plans to fall into the hands of the enemy Turks.[8] In Mincemeat, Macintyre describes this purposeful planting of misinformation as "deeply embedded in intelligence folklore . . . but there was precious little proof that it ever actually worked."[9] While the Trojan horse story is a myth and the Haversack ruse was ineffective,[10] events off the Spanish coast in 1942 would provide an opportunity for the Haversack ruse to prove its worth.

In September 1942, Allied intelligence officers became worried that German intelligence had discovered the date of a planned North Africa invasion.[11] A British plane that crashed near the coast of Spain contained a passenger list that included Lieutenant Turner, a Royal Navy courier carrying letters identifying the target date of the invasion, and Louis Daniélou, an intelligence officer with the Free French Forces carrying a notebook that also contained sensitive information about the North African plan.[12] Spanish authorities recovered the bodies and "assured Britain that Turner's corpse had 'not been tampered with.'"[13] However, the British discovered that the Germans eventually

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[1] BEN MACINTYRE, OPERATION MINCEMEAT: HOW A DEAD MAN AND A BIZARRE PLAN FOOLED THE NAZIS AND ASSURED AN ALLIED VICTORY (2009).

[2] U.S. DEP'T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES para. 4-76 (28 Nov 2003) [hereinafter FM 3-13].

[3] Ben Macintyre is a British author and an associate editor of the *Times of London*. He has authored other historical, non-fiction books including *Agent Zigzag, The Man Who Would Be King, The Englishman's Daughter, The Napoleon of Crime*, and *Forgotten Fatherland*. MACINTYRE, *supra* note 1, about the author.

[4] *Id.* at 12.

[5] In researching this book, Macintyre visited Ewan Montagu's son, Jeremy, in 2007. Jeremy Montague provided Macintyre access to an old trunk that contained Ewan Montagu's collection of top secret documents regarding the operation. *See* MACINTYRE, *supra* note 1, at 4-5. *See also* Security Service, MI5, *History: World War II*, https://www.mit.gov.uk/output/world-war-2.html (last visited May 24, 2011) (describing the release of MI5 World War II records to the British National Archives over the past ten years).

[6] SUN TZU, THE ART OF WAR 12 (Thomas Cleary trans., Shambhala Publ'ns 2005).

[7] In classical mythology, the Trojan horse was a trick where Greek soldiers hid inside a wooden horse which was brought within the city walls of Troy. Under cover of darkness, Greek soldiers opened the gates of Troy to the waiting Greek army. EDITH HAMILTON, MYTHOLOGY: TIMELESS TALES OF GODS AND HEROES 206–07 (Warner Books 1999).

[8] MACINTYRE, *supra* note 1, at 20. This became known as the Haversack ruse. A haversack is a small sturdy bag that soldiers used to carry equipment, much like a backpack.

[9] *Id.* at 22.

[10] BRIAN GARFIELD, THE MEINERTZHAGEN MYSTERY: THE LIFE AND LEGEND OF A COLOSSAL FRAUD 27 (2007); MACINTYRE, *supra* note 1, at 21.

[11] MACINTYRE, *supra* note 1, at 14.

[12] *Id.* at 14–15.

[13] *Id.* at 15.

received a copy of a notebook Daniélou had been carrying.[14] Luckily, the Germans discounted the information and the incident did not compromise the invasion.[15]

The Haversack Ruse in Action

Cholmondeley, armed with the knowledge about the fate of Daniélou's notebook, convinced British leadership to authorize a Haversack ruse style military deception plan, later known as "Operation Mincemeat."[16] With Montagu taking creative lead, the two intelligence officers planned this operation to reinforce Operation Barclay, a deception operation supporting the Allied invasion of Sicily, already underway in the Mediterranean theater.[17] Montagu's concept for Operation Mincemeat was a deception story that centered on Major Bill Martin, a fictitious staff officer on the Allied Combined Operation staff who was traveling by air when his plane crashed off the coast of Spain.[18] Major Martin would be carrying classified documents that would wash up on the Spanish shore.[19] Subsequently, the Spanish government, some members of whom were sympathetic to the Nazis, would leak the documents to the Germans.[20] Within the framework of this deception, Montagu and Cholmondeley's primary focus was ensuring that Martin's life, death, and classified documents would survive a skeptical enemy's examination.

In his book, Macintyre often points out that a cursory investigation into the circumstances of Bill Martin could have readily exposed the deception.[21] Nevertheless, Mincemeat succeeded because the deception plan followed important and fundamental principles of military deception. Analyzing Mincemeat by comparing it to current U.S. Army doctrine on military deception operations provides an excellent case study on how to create a successful deception plan.[22] While the operation is worthy of an analysis using all the military deception principles, this review will highlight two principles in particular: focusing on the deception target, and exploiting the deception target's bias.[23]

Focus on the Deception Target

In military deception doctrine, "the deception target is the adversary decisionmaker with the authority to make the decision that will achieve the deception objective."[24] For example, Adolf Hitler was making the strategic military decisions for the German Army, so he was the person whom Allied deception plans had to convince. Once the target is identified, planners should design a deception scheme which takes advantage of the target's information collection system and how he reacts to different forms of information.[25] This principle allows military planners to either apply limited resources effectively, or mitigate the risk of an operation by narrowly tailoring a deception plan for a specific audience.

For Montagu and Cholmondeley, Hitler was Mincemeat's primary deception target, and the Nazi spy network in Spain was the intended means to get Martin's documents into Hitler's possession.[26] Initially, the Mincemeat planners understood that only Hitler could make a decision regarding German troop movements to Sicily. Based on this, the first step was to ensure that Martin's documents received Hitler's personal attention. To achieve this goal, Montagu drafted the deception documents to mimic personal correspondence between well-known and high-ranking Allied military generals.[27] Montagu had to mimic such high ranking officers to ensure that Hitler would take personal interest into the documents.

The Mincemeat planners then had to choose how to get Martin's documents into the Nazi spy network. Because of their knowledge of the Daniélou incident, the Mincemeat planners knew they could rely on Nazi supporters in the Spanish government to allow Martin's documents to fall into German hands. With British intelligence providing refined information about the German spy network in Spain, Mincemeat planners were able to target a specific Nazi spy, Adolf Clauss, as bait. Clauss's operation was so efficient that the Mincemeat planners could be confident that anything that washed up on the Spanish coast would be reported to him. Allowing Clauss to "find" the information in the fake documents would also give the documents legitimacy because of Clauss's reputation. Thus, by focusing on Hitler and Clauss, the Mincemeat planners maximized the probability of success for Martin's documents to arrive on Hitler's desk with a full endorsement

[14] *Id.* at 16.

[15] *Id.*

[16] *Id.* at 18.

[17] *Id.* at 187.

[18] *Id.* at 59.

[19] *Id.*

[20] *Id.*

[21] *See id.* at 83-84, 201, 243.

[22] *See* FM 3-13, *supra* note 2

[23] *Id.* para. 4-13.

[24] *Id.* para. 4-12.

[25] *Id.* paras. 4-12, 4-13.

[26] MACINTYRE, *supra* note 1, at 39, 110.

[27] *Id.* at 119–22 (Letter from General Nye, Vice Chief of the Imperial General Staff, to General Alexander, Army Commander under General Eisenhower); *id.* at 123–24 (Letter from Lord Mountbatten, Chief of Combined Operations, to Admiral Cunningham, Commander in Chief in the Mediterranean); *id.* at 125–26 (Letter from Lord Mountbatten, Chief of Combined Operations, to General Eisenhower).

from German intelligence.[28]

Exploit the Deception Target's Bias

To exploit a deception target's pre-existing bias, a successful deception plan is simple and provides the deception target with an opportunity to confirm a preconceived notion.[29] For example, if an enemy believes that the U.S. Army always uses helicopters in an attack, a deception plan can include flying helicopters away from the location of the true attack. Additionally, because military decision makers always operate without complete information, their personal biases inevitably affect how they compensate for missing information in order to make a decision.[30] Ideally, a deception story leverages a pre-existing bias of the deception target, and removes the ability for him to make an objective decision.[31] Further, this exploitation of bias is most effective if the advisors to a deception target share the deception target's bias, or are somehow dissuaded from disagreeing with the deception target.[32] In this case, the advisors are likely to blindly accept a well crafted and plausible deception story because it is safer to agree with their leader, rather than present a position contrary to the leader's preconceived notion.

While Hitler suspected that the most likely Allied target was Sicily, he lost sleep at night because of his fear of an Allied attack on Germany's strategic resources in Greece.[33] Supplementing the Operation Barclay deception story, the Mincemeat planners successfully exploited Hitler's fears, as MacIntyre explains that "The lie went as follows: the British Twelfth Army (which did not exist) would invade the Balkans in the summer of 1943, starting in Crete and the Peloponnese, bringing Turkey into the war against the Axis powers."[34] Then American troops would attack Corsica and Sardinia, while the British Eighth Army would invade southern France; all Allied forces would bypass Sicily.[35] Martin's fake documents described portions of this plausible plan, and even identified Sicily as the Allied force's false target.[36] In an unforeseen stroke of good luck, the Spanish leaked the content of Martin's documents to other sources, who then all raced to present Hitler with this seemingly independent and valuable information of the impending Allied attack on Greece and Crete.[37] As a result, Hitler ordered the Nazi's focus changed from defending the strategically obvious target of Sicily to defending a less likely two-pronged assault on Greece and Sardinia.[38] Because the reports were specifically designed to exploit Hitler's pre-existing fears of an Allied attack on his strategic resources in Greece, Hitler eventually believed that Allied forces were not going to attack Sicily, and made his decisions accordingly.[39]

A True Spy Story Ian Fleming Would Enjoy

Besides providing valuable examples to military deception planners, Operation Mincemeat is an easy-to-read book with only a few minor flaws that do not detract from an entertaining and enjoyable story. While Macintyre's underlying thesis is declared in the book's subtitle—how a dead man and a bizarre plan fooled the Nazis and assured an Allied victory—his primary purpose is to provide a true to life spy novel based on newly uncovered information. While Macintyre's account of Operation Mincemeat is not the first time that this story has been told, it is probably the most complete because it incorporates declassified information recently released by the British government in the past ten years. Not only is Macintyre able to fully explore the history of Mincemeat after obtaining these declassified documents, but a trip to Montagu's son's home provided Macintyre with direct access to the entire top secret Mincemeat file.[40]

Macintyre relies on many of these primary sources for his book, especially the actual Mincemeat file and Montagu's personal papers. He also references many original documents, intelligence reports, telegrams and photographs that he obtained during his research in the British National Archives.[41] The number and quality of these sources give readers confidence in the historical accuracy of the book. While many of these documents are included as exhibits in the book, the addition of a map that clearly depicts the Mincemeat deception plan would have been helpful in assisting the reader's understanding of why the deception story was strategically sound.

While a map is a slight omission, Macintyre's prose incorporates his thorough research by providing the reader with background information on both the minor characters and the primary British, Spanish and German individuals

[28] *Id.* at 238.

[29] FM 3-13, *supra* note 2, paras. 4-42, 4-43.

[30] *Id.* para. 4-34.

[31] *Id.* para. 4-43.

[32] *Id.*

[33] MACINTYRE, *supra* note 1, at 39, 252.

[34] *Id.* at 39.

[35] *Id.*

[36] *Id.* at 120.

[37] *Id.* at 39.

[38] *Id.* at 238.

[39] *Id.* at 253–54. Someone in the Spanish government passed the information to the Italians. Other members of German intelligence unwittingly believed they had independent confirmation of the information in the documents, which was nothing more than gossip about the original documents.

[40] *Id.* at 4.

[41] *Id.* at 4, 5.

that were part of the deception ruse. Macintyre successfully weaves together this story using the colorful personalities of Montagu and Cholmondeley; submarine captain Lieutenant Bill Jewell; butterfly collector and Nazi spy Adolf Clauss; and Jewish-Nazi Intelligence Officer Major Karl-Erich Kühlenthal. Engrossed in the lives of these colorful characters, the reader is left cheering for their success—or rooting for their failure.

The book, while good, has a few noticeable flaws. For example, one source Macintyre did not consult was the register of the Black Lion Hotel, which was the hotel where Bill Martin's father supposedly stayed the week before Martin's death. As part of the deception ruse, Martin's father wrote a letter on hotel letterhead that was included on his son's corpse.[42] Macintyre states that "A glance at the hotel register for the Black Lion Hotel would show that no Mr. J.C. Martin had stayed there on the night of April 13."[43] However, after Mincemeat was published, it was discovered that the hotel register did have an entry for a Mr. J.C. Martin—although the entry seems to have been added as an afterthought.[44]

Additionally, Macintyre did not fully research the Haversack ruse. While Macintyre credits Richard Meinertzhagen with creating the Haversack ruse, this idea is challenged in Brian Garfield's book *The Meinertzhagen Mystery: The Life and Legend of a Colossal Fraud.*[45] Garfield argues the actual author of the ruse was James D. Belgrave.[46] Further, while Macintyre only questions whether the ruse actually worked, Garfield provides evidence that the enemy Turks believed that the documents were planted and therefore the ruse was unsuccessful.[47] This information would have added to Macintyre's conclusion that the Haversack ruse was not a successful means to execute a deception operation, but was instead nothing more than anecdotes friends told each other at cocktail parties.[48]

Finally, Macintyre spent a considerable amount of time describing Montagu's brother Ivor. While Ivor Montagu, a table tennis fanatic and Soviet spy, was a very interesting and colorful character, he had no direct impact on the Mincemeat operation. Overall, Macintyre does very well integrating the lives of the other characters into the main thesis, but Ivor's story was incongruous.

Throughout the book, Macintyre dramatically identifies flaws in the deception story that could have exposed not only the Mincemeat operation, but also compromised the entire Sicily deception operation. Despite this, Macintyre successfully convinces the reader that these flaws were overcome by quick thinking, hard work, or plain dumb luck. Macintyre ultimately concludes that Operation Mincemeat was successful because the Allies were hard pressed to take Sicily even though they outnumbered the German forces seven to one, and that a stronger German force would have completely repelled the assault.[49]

Conclusion

Operation Mincemeat is an excellent discussion tool for military planners not only because of the well written story of a successful deception ruse, but also because of the lesson it implicitly teaches on the enormous magnitude of the consequences of failure. If Mincemeat had backfired and reinforced the Axis belief that the Allies would next invade Sicily, the result of that battle could easily have changed history. Military planners could effectively utilize Macintyre's book and his critique of Operation Mincemeat as a valuable discussion tool in professional development settings. For judge advocates, it is a reminder that evidence must be thoroughly examined to determine its credibility. Finally, for those who are merely spy story buffs, Macintyre gives his readers an engrossing story of a modern day spy plot, despite outward appearances of an implausible tall tale.

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[42] *Id.* at 71.

[43] *Id.* at 84.

[44] Ben Macintyre, Amazon Exclusive Essay: When Spycraft is Not Crafty Enough, http://www.amazon.com/Operation-Mincemeat-Bizarre-Assured-Victory/dp/0307453278/ref=pd_rhf_p_t_3#reader_0307453278 (last visited Sept. 14, 2010). Macintyre argues in the essay that the entry was the effort of Cholmondeley to tighten up the facts surrounding Bill Martin. He further argues that the clearly forged entry would bring more scrutiny from curious German agents than the omission of a name from the register.

[45] GARFIELD, *supra* note 10.

[46] *Id.* at 27.

[47] *Id.* at 28–29.

[48] MACINTYRE, *supra* note 1, at 22.

[49] *Id.* at 292.

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 (August 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-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11
JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

LEGAL ADMINISTRATOR COURSES		
7A-270A0	18th JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrator Course	13 – 17 Jun 11

PARALEGAL COURSES		
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F47E	2011 USAREUR Operational Law CLE	16 – 19 Aug 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 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 (030)	1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (070) Senior Officer (080)	13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)
2622 (Fleet)	Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (030)	13 Jun – 28 Aug 11
07HN	Legalman Paralegal Core (020) Legalman Paralegal Core (030)	24 May – 9 Aug 11 31 Aug – 20 Dec 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (020)	19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (020)	11 – 22 Jul 11 (San Diego)

850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (070) Legal Clerk Course (080)	6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (030)	18 – 29 Jul 11
NA	Iraq Pre-Deployment Training (020)	12 – 14 Jul 11
NA	Legal Specialist Course (030)	29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (030)	13 – 17 Jun 11
NA	Legal Service Court Reporter (030)	22 July – 7 Oct 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (070) Legal Clerk Course (080)	18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following cou Legal Clerk Course (070)rses, 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 11-04	25 Apr – 8 Jun 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11
Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

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
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 1220 North Fillmore Street, Suite 444 Arlington, VA 22201 (571) 481-9100
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 Law School 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
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
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 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@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. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
2 – 5 Jun 2011	Yearly Training Brief and Senior Leadership Course	Gaithersburg, MD	Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr	NA	LTC Dave Barrett David.barrett1@us.army.mil SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

2. 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.

3. 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 Legal Technology Management Office 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.

4. 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.