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Lore of the Corps

Articles

Notes from the Field

Book Reviews

Lore of the Corps

The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dickenson

Fred L. Borch
Regimental Historian & Archivist

On 4 May 1954, a court-martial sitting at Fort McNair, Virginia, convicted Corporal (CPL) Edward S. Dickenson of "collaborating with the Reds"[1] while held as a prisoner of war (POW) in North Korea. Dickenson was also found guilty of "informing on his prison camp buddies"[2] while a POW. As a result of this conviction for aiding the enemy and misconduct while a POW, Dickenson was sentenced to ten years confinement at hard labor, total forfeitures, and a dishonorable discharge. Dickenson's trial was the first court-martial of a Soldier for misconduct as a POW to come out of the Korean War, and the proceedings received widespread coverage in the media. While this alone makes it a story worth telling, *United States v. Dickenson* also is worth examining for a second reason: for the first time in military legal history, an accused sought an acquittal on the basis that he had been so mistreated and "brainwashed" while a POW that he was not responsible for any acts of collaboration with the enemy.

Born and raised in Cracker's Neck, Virginia, Edward S. Dickenson enlisted in the Army on 31 March 1950. He might have hoped for a tour as a peace-time Soldier but this was not to be, as some 75,000 North Korean People's Army troops crossed the 38th parallel into the Republic of Korea on 25 June 1950. For Dickenson, this meant that after completing basic training, he shipped out to join the fight on the Korean peninsula. Arriving on 22 September 1950, just a week after successful Allied amphibious landings at Inchon, Dickenson joined Company K, 8th Cavalry Regiment. Less than two months later, on 4 November 1950, he was captured by the enemy. He spent the remainder of the Korean War as a POW at a Chinese-run camp in North Korea.[3]

After fighting in Korea ceased, however, Dickenson did not immediately return to U.S. control. On the contrary, during *Operation Big Switch*, when Allied prisoners were repatriated, CPL Dickenson was one of a group of American Soldiers who refused to return, preferring instead "to throw in their lot with the Communists."[4] Two months later, however, twenty-three-year old Dickenson "changed his mind about staying with the Reds."[5] On 21 October 1953, he "appeared at a United Nations camp"[6] and asked to be sent home. He was the first of twenty-three Americans who initially decided to stay behind with their Chinese captors but then changed their minds and asked to return home.[7] Dickenson was finally returned to U.S. control on 20 November 1953.

On 22 January 1954, Dickenson was charged with committing various offenses while being held as a POW. About 500 U.S. military personnel had been held captive in the same camp as Dickenson and statements about their POW experience were taken from each of them after they were repatriated. Some ninety-five[8] of these statements mentioned the accused and this provided the basis for charging him with a variety of offenses under the Uniform Code of Military Justice (UCMJ) Articles 104 and 105,[9] including "aiding the enemy to influence prisoners of war to accept communism," "corresponding with the enemy by informing him of a fellow prisoner's failure to sign a peace petition," and "reporting escape plans of fellow prisoners of war for the purpose of securing favorable treatment."[10] Since the UCMJ had only been in effect since 1951, Dickenson was the first Soldier to be charged under the new military criminal code with the military equivalent of treason.[11]

When trial began at Fort McNair on 19 April 1954, Colonel (COL) Walter J. Wolfe presided over the eight-

[1] *Dickenson Is Guilty; Gets 10 Years in Jail*, WASH. POST, May 5, 1954, at 1.

[2] *Id.*

[3] Dickenson was held at Camp Number Five, Pyoktong, Korea. United States v. Dickenson, 17 C.M.R. 438, 443 (C.M.A. 1954).

[4] *Army Orders Dickenson to Stand Trial*, WASH. POST, Feb. 19, 1954, at 12.

[5] *Id.*

[6] Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957).

[7] *Dickenson*, 17 C.M.R. at 443.

[8] *Id.* at 444.

[9] *Id.* at 441–43.

[10] *Id.* at 438–40.

[11] Treason is not an enumerated offense under the Uniform Code of Military Justice (UCMJ); the closest similar offense is aiding the enemy, Article 104. *See* Fred L. Borch, *Tried for Treason: The Court-Martial of Private First Class Maple*, ARMY LAW., Nov. 2010, at 4.

member panel of officers;[12] they were assisted with legal matters by COL Richard F. Scarborough, the judge advocate law officer. The lead trial counsel was COL C. Robert Bard, a West Point graduate who had gained considerable court experience from prosecuting war crimes trials in Heidelberg after World War II.[13] Assisting Bard were two judge advocates: Captain (CPT) Harvey S. Boyd and First Lieutenant Andrew K. McColpin.

While the prosecution was formidable, the defense team was no less impressive. Dickenson-lead defense counsel was civilian attorney R. Guy Emery. A West Point graduate, Emery was a decorated Soldier who had lost a leg in combat. After the war, he had graduated from the University of Virginia's law school and was practicing law in the District of Columbia when he was retained by Dickenson to represent him.[14] Emery was assisted by Lieutenant Colonel William Fleischaker and CPT Wilton B. "Will" Persons Jr. For Persons, who had only recently graduated from Harvard Law School but had considerable experience prosecuting and defending special courts as an armored cavalry officer in post-war Austria and Germany, it was a memorable event: *United States v. Dickenson* was the first general court-martial that Persons had seen. As the junior defense lawyer on the team, Persons interviewed witnesses, including some of Dickenson's fellow POWs, and did legal research.[15]

The prosecution's case was fairly straightforward; it relied chiefly on the testimonies of Dickenson's fellow POWs. The evidence presented showed that during his three years as a POW, Dickenson repeatedly relayed information about his fellow POWs to his captors in order to get cigarettes and better food. One witness told the eight-officer panel that Dickenson was "sneaky" and a "rat." Others testified that Dickenson had told the Chinese about the escape plans of fellow POW Edward M. Gaither. As a result of this information, Gaither was severely beaten with clubs and "was placed by the enemy before a mock firing squad on three occasions." Gaither also spent seven months in solitary confinement.[16]

As for aiding the enemy, one witness testified that Dickenson asked his fellow POWs to sign a "peace petition" critical of American involvement on the Korean peninsula and that Dickenson had tried to convince at least eight fellow POWs "to accept and follow the philosophies and tenets of Communism."[17] The prosecution also introduced evidence that Dickenson had recorded pro-communist speeches intended for later radio broadcasts to United Nations forces. This evidence complemented testimony from CPL Billy L. Rittenberry, who related under oath that Dickenson had pledged to "overthrow the United States Government so that it would follow socialist principles."[18]

To counter this evidence of misconduct, R. Guy Emery adopted a two-pronged strategy. First, Emery hoped to generate sympathy for his client by showing that Dickenson, an uneducated farm boy who hailed from the hill country of Virginia, had suffered greatly as a POW. He had not only been exposed to bitter cold and "starvation rations" but also had been threatened with death if he did not cooperate with his Chinese captors.[19] Additionally, Dickenson's seventy-eight year old father and his mother (said to be in her forties) attended the trial at Fort McNair, and their presence let the

[12] The members of the panel were: Colonel (COL) Wolfe (president); COLs Alcorn B Johnson and Ralph R. Burr, Lieutenant Colonel (LTC) Owen D. Boorom; Majors Paul M. Martin, Edwin D. Bowman and John W. Reser; and Captain Harold H. Hartstein. Note that although the new UCMJ permitted Dickenson to have a court-martial panel consisting of at least one-third enlisted members, Dickenson elected to have an all-officer panel hear his case. There was no possibility for trial by judge alone; this option did not exist until enactment of the Military Justice Act of 1968.

[13] Born in New York in February 1907, Charles Robert Bard graduated from the U.S. Military Academy in 1931 and was commissioned in the Coast Artillery Corps. He transferred to the Judge Advocate General's Department prior to World War II, and subsequently served as Staff Judge Advocate (SJA), XV Corps, and SJA, 7th Army, in the European Theater of Operations. Colonel Bard was serving in the Office of The Judge Advocate General when he was assigned to prosecute the *Dickenson* case. Bard retired from active duty in 1958 and died in 1980. ASS'N OF GRADUATES, REGISTER OF GRADUATES (1992) (Class of 1931).

[14] Born in North Dakota in July 1909, Russell Guy Emery graduated from West Point in 1930 and qualified for his wings in the Army Air Corps. He then transferred to the Infantry, and was serving as the commander of an infantry regiment in Luxembourg in January 1945 when he lost a leg and was awarded the Silver Star for saving a fellow Soldier from a minefield. After being medically retired with the rank of colonel, Emery entered law school at the University of Virginia and, after graduating in 1949, was recalled to active duty to serve as an Assistant Professor of Law at West Point. He remained on active duty until 1952, when he retired a second time and moved to the District of Columbia. From 1953 to 1958, he was associated with the firm of Ansell and Ansell (the same Ansell who had been a Judge Advocate brigadier general and served as acting The Judge Advocate General during World War I). In 1958, Emery left that firm to create his own firm, Emery and Wood. Emery "died quite suddenly at his home" in Falls Church, Virginia, in November 1964. He was fifty-five-years old.*Guy Emery*, ASS'N OF GRADUATES, ASSEMBLY 96 (Spring 1965) [hereinafter ASSEMBLY].

[15] Telephone Interview with Major General (Retired) Wilton B. Persons Jr. (Feb. 11, 2013) [hereinafter Persons Telephone Interview]. As assistant defense counsel, Persons interviewed Corporal (CPL) Claude J. Bachelor, who was subsequently court-martialed for similar prisoner of war (POW) misconduct. *See* United States v. Bachelor, 19 C.M.R. 452 (C.M.A. 1955). For more on Persons, see Michael E. Smith, *Major General Wilton Burton Persons, Jr. United States Army (Retired) The Judge Advocate General of the Army (1975–1979)*, 153 MIL. L. REV. 177 (1996).

[16] United States v. Dickenson, 17 C.M.R. 442 (C.M.A. 1954).

[17] *Id.*

[18] *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[19] Don Olesen, *2 Doctors Say Reds Could Break Anyone*, WASH. POST, Apr. 29, 1954, at 3.

panel members see that they stood by their son. Both father and mother also gave statements to the press. The older Dickenson indicated that he believed his son's three years of captivity was punishment enough. Dickenson's mother insisted that her son, whom she described as "the little fellow" was sick. She certainly did not believe that her son had sought favorable treatment at the expense of his fellow POWs. "I don't understand what he could have done to any of them boys," she told a newspaper reporter.[20]

While sympathy for Dickenson would almost certainly benefit him at sentencing, Emery realized that it might also help his client on the merits, as the second prong of the defense case, to show that Dickenson's freedom of will had been so overcome by "brainwashing" and mistreatment that the young Soldier lacked the mens rea necessary to support a conviction under Articles 104 and 105. Emery certainly had good reason to believe he might be successful: Colonel Scarborough would later instruct the panel that it must acquit Dickenson if it found that "the Reds forced him to collaborate with them" and that "mental irresponsibility" was a "complete defense" to the charges.[21]

This explains why Emery presented expert testimony from psychiatrists who had examined the accused. Dr. Morris Kleinerman, who had been a psychiatrist at hospitals in Belgium, England, and the United States during World War II, testified that Dickenson had a "passive-aggressive personality" and was "basically emotionally unstable." He also was the kind of person who was "easily intimidated." Kleinerman's testimony buttressed the defense theory that Dickenson was not responsible for his actions while a POW because his long period of imprisonment made him "interested solely in his own survival." Similarly, Dr. Winfred Overholser, the superintendent of St. Elizabeth's Hospital in Washington, D.C., testified that the treatment Dickenson had received from his Chinese captors "could be pushed to a point where almost anyone would submit."[22]

At the close of an eleven-day trial, and after the accused declined to take the stand on his own behalf, the panel heard arguments from both sides. Colonel Bard argued that Dickenson was a "willing collaborator" who had aided the enemy because of inherent "character defects."[23] In an argument of "nearly two hours," R. Guy Emery countered the government's case was "plainly contemptible" in that it "created an atmosphere of assumed guilt." For Emery, the court-martial was "not so much a trial of law as preparation for a crucifixion."[24] Dickenson had been "mentally incapable of resisting Red pressure in Korea" and consequently lacked the criminal intent necessary to support a finding of guilty.[25] Interestingly, Emery told the panel that Dickenson had not testified in his own behalf because he had suffered too much "mental damage" in Korea—damage from which he had not yet recovered.[26] Certainly Dickenson looked the part; then–CPT Persons remembered that he "looked scared to death" sitting at the defense table and reminded Persons of a "whipped dog."[27]

After instructions from the law officer, the court closed to deliberate. The following day, after a total of ten and one-half hours behind closed doors, COL Wolfe and the members were back with a verdict: guilty of one specification of aiding the enemy in violation of Article 104, and guilty of one specification of misconduct as a POW, in violation of Article 105, UCMJ.[28] While the maximum penalty was death, the panel sentenced Dickenson to ten years confinement at hard labor, total forfeitures of all pay and allowances, and a dishonorable discharge.

The Army Board of Review and the Court of Military Appeals affirmed the findings and sentence. R. Guy Emery, "without a fee, and often at his own expense, fought the decision to the Supreme Court on what he considered to be a matter of principle."[29] While Dickenson's writ of habeas corpus was quashed by the U.S. District Court for the District of Kansas, and Dickenson's appeal from that order was denied by the Tenth Circuit Court of Appeals, Emery did get some relief for his client: Dickenson was paroled after serving five years of his ten-year sentence. Dickenson, who was married, re-entered civilian life and raised a family. He died in 2002.[30]

The story of Korean War "turncoat" CPL Edward S. Dickenson is now almost forgotten. But the issues raised by

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[20] *Dickenson Family 'Shocked' at News of Ed's Arrest*, WASH. POST, Jan. 24, 1954, at M4.

[21] *Dickenson Verdict Debate Is Recessed*, WASH. POST, May 4, 1954, at 7.

[22] Olesen, *supra* note 19.

[23] *Dickenson Verdict Debate Is Recessed*, *supra* note 21, at 7.

[24] Don Olesen, *Attorney Accuses Army of 'Crucifying' Dickenson*, WASH. POST, May 1, 1954, at 3.

[25] Olesen, *supra* note 19.

[26] *Dickenson Family 'Shocked' at News of Ed's Arrest*, *supra* note 20.

[27] Persons Telephone Interview, *supra* note 15.

[28] The law officer had previously entered a finding of not guilty to a second specification alleging a violation of Article 105 at the close of the government's case-in-chief; apparently COL Scarborough determined that the government's evidence was insufficient to support the specification alleging that Dickenson had informed on fellow POW CPL Martin Christensen by telling the Chinese that Christensen had a hidden .45 caliber pistol. Arthur Kranish, *Dickenson Acquitted on One Charge That He Informed on Fellow Prisoner*, WASH. POST, Apr. 27, 1954, at 1.

[29] ASSEMBLY, *supra* note 14.

[30] Dickenson was married during the trial. *Psychiatrist Testifies in Dickenson Defense*, ASSOCIATED PRESS, Apr. 28, 1954.

his case and others[31]—most notably the effect of enemy coercion and propaganda on free will—greatly concerned the Army, resulting in a number of official studies and the creation of formal guidance on how U.S. POWs should conduct themselves in captivity.[32] The issues raised by *Dickenson* were again relevant during the Vietnam War, when some Americans held as POWs by the Viet Cong and North Vietnamese collaborated with their captors to the detriment of their fellow POWs.[33] But that story, and how the U.S. Government handled allegations of misconduct by Vietnam War POWs, must be told another day.[34]

More historical information can be found at

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[31] The Army ultimately court-martialed a total of fourteen Soldiers for misconduct while POWs in North Korea. Eleven were convicted and three were acquitted. *See* EUGENE KINKAID, IN EVERY WAR BUT ONE (1959).

[32] Julius Segal, *Factors Related to the Collaboration and Resistance Behavior of U.S. Army PW's in Korea*, HUM. RESOURCES RES. OFFICE TECHNICAL REP. 33 (1956); Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958), *available at* http://www.archives.gov/federal-register/codification/executive-order/10631.html (establishing the Code of Conduct for U.S. servicemembers), *amended by* Exec. Order No. 12,633, 3 C.F.R. 561 (1988) [hereinafter Code of Conduct]; U.S. DEP'T OF ARMY, PAM. 360-512, CODE OF THE U.S. FIGHTING FORCE (1 June 1998) [hereinafter DA PAM. 360-512] (providing the Code of Conduct as well as setting forth its principles and standards).

[33] *See, e.g.*, United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983), *aff'd* 20 M.J. 148 (C.M.A. 1985). While Garwood was the only POW to be court-martialed for misconduct committed while a POW, more than a few were investigated for violating Articles 104 and 105.

[34] For an overview of the problem of POW misconduct and an analysis of the Code of Conduct, see Rodney R. LeMay, Collaboration or Self-Preservation: The Military Code of Conduct (unpublished M.A. thesis, Louisiana State University, 2002). *See also* Captain Charles L. Nichols, *Article 105, Misconduct as a POW*, 11 A.F. L. REV. 393 (1969).

The Disposition of Intoxicated Driving Offenses Committed by Soldiers on Military Installations

Major Aaron L. Lykling[*]

I. Introduction

In the early morning of December 7, 2012, John Evans was driving his Chevy Tahoe the wrong way on Interstate 25 when he collided head-on with a Ford Focus driven by college freshman Samantha Smith. She died at the scene. State police say that alcohol was a contributing factor in the crash. Evans, 33, is an Army sergeant at Fort Carson. He has three prior arrests for DWI, the most recent of which occurred at Fort Carson in September. Post officials say that Evans received "nonjudicial punishment" for this incident—a sanction commanders use to punish so-called "minor offenses." Civilians arrested for drunk driving on Fort Carson are routinely prosecuted in federal court. It is unclear why Evans was treated differently.[1]

Every Friday afternoon, leaders across the Army tell Soldiers not to drink and drive at unit safety briefings. However, Soldiers are arrested for driving while intoxicated (DWI)[2] at an alarming rate.[3] While few DWI incidents are as outrageous as the Sergeant Evans example, it raises the question of whether nonjudicial punishment is an appropriate response to an on-post DWI.

Army regulations provide detailed guidance on administrative actions in Soldier DWI cases,[4] but limited guidance concerning punitive actions.[5] As a result, duty station determines disposition.[6] At some installations, Soldiers are treated the same as civilians arrested for DWI—judge advocates appointed as special assistant U.S. attorneys (SAUSAs) prosecute them in federal court.[7] At other installations, Soldiers receive nonjudicial punishment for this offense.[8]

This article examines the merits of each approach and concludes that federal court is the optimal forum for adjudicating on-post Soldier DWIs. Unlike nonjudicial punishment, federal prosecution results in a criminal

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[1] This example is loosely based on a real case involving Army Staff Sergeant Jesse Leon Evans, Jr. *See* Ashley Kelly, *Driver in Fatal CNU Crash Stopped Three Times on DUI Charges*, DAILY PRESS, Dec. 21, 2011, *available at* http://articles.dailypress.com/2011-12-21/news/dp-nws-evans-cnu-bond-hearing-20111221_1_dui-conviction-dui-charges-wrong-way-crash.

[2] States refer to intoxicated driving by various terms, including driving under the influence (DUI), operating under the influence (OUI), operating while intoxicated (OWI), and driving while intoxicated (DWI). *See, e.g.*, ALA. CODE § 32-5A-191 (2012) (DUI); CONN. GEN. STAT. ANN. § 14-227a (West 2012) (OUI); IND. CODE ANN. § 9-30-5-1 (West 2012) (OWI); TEX. PENAL CODE ANN. § 49.04 (West 2012) (DWI). This article uses the term DWI throughout for the sake of consistency.

[3] *See infra* Part II.A.

[4] *See infra* app. A.

[5] *See* U.S. DEP'T ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 4-9 (22 May 2006) [hereinafter AR 190-5] ("Most traffic violations occurring on DoD [Department of Defense] installations (within the United States or its territories) should be referred to the proper U.S. Magistrate."). The advisory guidance in Army Regulation (AR) 190-5 is identical to that found in part 634 of Title 32, Code of Federal Regulations. 32 C.F.R. § 634.32(a) (2012). For reasons unknown, these authorities mandate referral of DWI offenses to the Federal Magistrate for the Navy only. *See id.* § 634.32(c).

[6] *See* 32 C.F.R. § 634.32(c) (2012) ("Installation commanders will establish procedures used for disposing of traffic violation cases through administrative or judicial action consistent with the Uniform Code of Military Justice (UCMJ) and Federal law."); *see also* AR 190-5, *supra* note 5, para. 4-9c (same).

[7] *See* 28 U.S.C. § 543 (2011) (authorizing the appointment of special assistants "to assist United States attorneys when the public interest so requires"); *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 23-4 (3 Oct. 2011) [hereinafter AR 27-10]; U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS RESOURCE MANUAL § 3-2.000 (2012), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title3/2musa.htm ("Attorneys employed in other departments or agencies of the federal government may be appointed as Special Assistants to United States Attorneys, without compensation other than that paid by their own agency, to assist in the trial or presentation of cases when their services and assistance are needed.").

[8] Soldiers are also subject to court-martial for DWI pursuant to Article 111, Uniform Code of Military Justice (UCMJ). MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 35 (2012) [hereinafter MCM]. However, few intoxicated driving cases that occur within the United States are referred to court-martial. *See* Major R. Peter Masterton, *The Military's Drunk Driving Statute: Have We Gone Too Far?*, 150 MIL. L. REV. 353, 376 (1995). Another reason for the lack of courts-martial is the complexity and expense of DWI cases, particularly for a misdemeanor-level offense. *See, e.g.*, THE CENTURY COUNCIL, NATIONAL HARDCORE DRUNK DRIVER PROJECT SOURCEBOOK 47 (n.d.) [hereinafter DRUNK DRIVER PROJECT SOURCEBOOK], *available at* http://www.centurycouncil.org/sites/default/files/files/HardcoreDrunkDrivingSourcebook.pdf ("Prosecuting a DWI case may well be one of the most difficult in the criminal law field."). Accordingly, this article does not address the efficacy of courts-martial in adjudicating on-post Soldier DWIs.

conviction and allows state authorities to file enhanced DWI charges if a Soldier reoffends. Federal prosecution better protects society, furthers good order and discipline, and ensures consistency between civilians and Soldiers charged with DWI. Most importantly, it signals to Soldiers and society that the Army will not tolerate intoxicated driving.

This article proceeds in five parts. Part II provides background on the problem of DWI in the Army. Next, it reviews the available punishments in DWI cases adjudicated in civilian courts and under the Uniform Code of Military Justice (UCMJ). This part concludes by surveying the inconsistent treatment of on-post DWI offenses across the Army.

Part III considers the effectiveness of nonjudicial punishment in dealing with on-post Soldier DWIs. It first outlines the contours of nonjudicial punishment and explains its appeal in addressing "minor offenses."[9] This part then examines the drawbacks of Article 15, UCMJ, in DWI cases, including its harmful impact on state repeat offender statutes, license suspension schemes, and federal sentencing. This discussion highlights the central flaw of nonjudicial punishment in DWI cases—its disregard for public safety. Part III argues that commanders have a duty to consider this factor before imposing nonjudicial punishment.

Part IV evaluates the utility of federal prosecution. First, it describes how a Soldier is prosecuted for DWI in federal court under the Assimilative Crimes Act (ACA). Next, it analyzes the pros and cons of this approach. This analysis shows how a federal conviction and probation conditions further the ends of good order and discipline and public safety. Part IV also explains how federal prosecution insulates the Army from public criticism concerning the disparate treatment of civilian DWI offenders.

Part V addresses some of the expected criticisms levied against prosecuting Soldiers in federal court, including the perceived inability of a commander to personally address the misconduct and the impact of pretrial diversion or plea agreements. This part explains why each of these concerns is ultimately misguided. Sentencing disparity is a more valid criticism, but one that Congress could remedy by empowering the Secretary of Defense (SECDEF) to issue a federal regulation criminalizing DWI.

The article concludes with a proposal for an explicit Army-wide policy recommending federal prosecution of on-post Soldier DWIs. Requiring this disposition is impractical since almost every installation deals with a different U.S. Attorney's Office (USAO), some of which may decline prosecution.[10] Nevertheless, the Army should encourage installation commanders to refer Soldier DWI cases to the local U.S. magistrate when possible.

II. Background: The Problem of Intoxicated Driving in the Army

A. Statistics and Preventive Efforts

As one commentator noted over twenty-five years ago, "Drunk driving . . . is a national social problem and, unfortunately, the Army has not been spared this calamity."[11] This observation remains accurate today. According to the U.S. Army Crime Records Center (USACRC),[12] from fiscal years (FY) 2006 through 2011 over 20,000 Soldiers assigned to CONUS installations were arrested for DWI.[13] Although the precise breakdown between on- and off-post arrests is unavailable,[14] DWIs occur at every post and surrounding community.[15] Offenders represent every rank, ethnicity, and gender, but junior enlisted Soldiers account for approximately seventy-five percent of arrests.[16] This result is unsurprising since most of these individuals are eighteen- to twenty-four year-old males—the demographic most likely to drink and drive.[17]

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[9] *See infra* text accompanying note 38.

[10] *See* U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 9-27.140 (2012) [hereinafter DOJ MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm (stating that each U.S. Attorney "may modify or depart from the principles [of Federal prosecution] as necessary in the interests of fair and effective law enforcement within the district").

[11] Major Phillip L. Kennerly, *Drunk Driving: The Army's Mandatory Administrative Sanctions*, ARMY LAW., Jan. 1985, at 19, 19.

[12] The U.S. Army Crime Records Center (USACRC) "receives, safeguards, maintains and disseminates information from Army law enforcement records." *Crime Records Center*, U.S. ARMY CRIMINAL INVESTIGATION COMMAND, http://www.cid.army.mil/crc.html (last visited June 3, 2013). *See generally* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para. 5-1 (15 May 2009) (C1, 6 Sept. 2011).

[13] E-mail from David E. Willis, Criminal Intelligence Analyst, USACRC, U.S. Army Criminal Investigations Command (CID) to author (Nov. 15, 2012, 16:20 EST) [hereinafter Willis E-mail] (on file with author). Despite the continued prevalence of DWI, the situation has improved markedly since the 1980s. For example, 19,000 Soldiers were arrested for DWI in just one twelve-month period from 1983 to 1984. Kennerly, *supra* note 11, at 19.

[14] Although the USACRC tracks the total number of Soldier DWI arrests per installation, it does not distinguish between off- and on-post arrests. Telephone Interview with David E. Willis, Criminal Intelligence Analyst, USACRC, CID, Quantico, Va. (Dec. 3, 2012).

[15] Willis E-mail, *supra* note 13.

[16] *Id.*

[17] *See, e.g.*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (NHTSA), TRAFFIC TECH, TECHNOLOGY TRANSFER SERIES NO. 392, NATIONAL SURVEY OF DRINKING AND DRIVING ATTITUDES AND BEHAVIORS 2 (Aug. 2010), *available at* http://www.nhtsa.gov/staticfiles/traffic_tech/tt392.pdf; LIISA ECOLA ET AL., RAND NAT'L DEF. RESEARCH INST., UNDERSTANDING AND REDUCING OFF-DUTY VEHICLE CRASHES AMONG MILITARY PERSONNEL, TR-820-DCOC, at 15 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR820.pdf ("Young adults have the highest rates of drunk driving and alcohol-related crashes of any age group.").

Army leaders at every echelon have implemented policies and practices to prevent DWI. At the unit level, leaders stress the dangers of DWI at safety briefings and training events. Many units also have designated driver programs.[18] Installations, in turn, discourage intoxicated driving through safety stand-down days, public awareness campaigns,[19] or publication of DWI statistics in the post newspaper.[20] The Department of Defense also devotes substantial attention to DWI prevention.[21] While the deterrent effect of these measures is open to debate,[22] leaders clearly recognize the scope of the problem. Nevertheless, DWI continues to plague the Army just as it plagues society.[23]

B. Disposition and Punishment of DWI Offenses Throughout the Army

In the Army, as in the civilian community, the potential consequences of a DWI arrest are significant. Depending on the location of the offense, a Soldier faces either nonjudicial punishment or prosecution in state, federal, or military court. In addition, a DWI arrest triggers a host of adverse administrative actions.[24] This section first outlines the available punishments for DWI offenses adjudicated in civilian courts and under the UCMJ. It then surveys current practices for addressing on-post Soldier DWIs.

1. Punitive Consequences of DWI

The punitive consequences of a DWI arrest depend on the location of the offense and local installation policy. First, Soldiers prosecuted by civilian authorities following an off-post arrest are subject to the punishments provided for under the relevant state statute.[25] These punishments also apply when a Soldier is prosecuted for an on-post DWI in federal district court pursuant to the ACA.[26] Both state and federal prosecution can result in a criminal conviction and accompanying collateral consequences.[27] Next, for offenses resolved under Article 15, the possible penalties include reduction in rank, forfeiture of one-half of one month's pay for two months, restriction for sixty days, extra duty for forty-five days, and thirty days correctional custody.[28]

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[18] Unfortunately, at least in the author's experience, these programs frequently involve the improper use of a government vehicle. *See generally* 31 U.S.C. § 1344 (2011); U.S. DEP'T OF DEF., DIR. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. C2.5 (16 Mar. 2007); U.S. DEP'T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES para. 2-4 (10 Aug. 2004).

[19] For example, several installations hosted the "Save a Life Tour" in 2012, an interactive training experience that educates Soldiers about the dangers of drinking and driving. *See, e.g.*, Kenneth A. Foss, *Save a Life Tour*, WWW.ARMY.MIL (Apr. 12, 2012), http://www.army.mil/media/242644/ (last visited Mar. 6, 2013).

[20] *See, e.g.*, *Fiscal 2013 DWIs by Brigade/Unit*, FORT BLISS MONITOR, Nov. 29, 2012, at 5A, *available at* http://fbmonitor.com/2012/11november/112912/pdf/112912part1a.pdf (last visited Mar. 6, 2013).

[21] *See generally* U.S. DEP'T OF DEF., DIR. 6055.04, DOD TRAFFIC SAFETY PROGRAM app. 1 to encl. 3 (20 Apr. 2009) [hereinafter DODD 6055.04] (establishing policy and assigning responsibilities for the DoD Impaired Driving Prevention Program).

[22] From fiscal years (FY) 2006 through 2011, the number of total DWI arrests remained fairly constant (approximately 3,100 arrests in FY 2006; 3,400 in FY 2007; 3,250 in FY 2008; 3,800 in FY 2009; 3,500 in FY 2010; and 3,300 in FY 2011). Willis E-mail, *supra* note 13.

[23] According to the NHTSA, in 2010, more than 10,000 people were killed "in crashes involving a driver with a BAC of .08 or higher—31 percent of total traffic fatalities for the year." NHTSA, U.S. DEP'T OF TRANSP., DOT HS 811 606, TRAFFIC SAFETY FACTS: 2010 DATA, ALCOHOL IMPAIRED DRIVING 1 (Apr. 2012), *available at* http://www-nrd.nhtsa.dot.gov/Pubs/811606.pdf. The financial cost of alcohol-related crashes is equally damaging, estimated at $37 billion per year. *Driving Safety, Impaired Driving*, NHTSA, U.S. DEP'T OF TRANSP., http://www.nhtsa.gov/Impaired (last visited June 3, 2013). What these remarkable statistics do not convey, of course, is the pain that drunk drivers inflict on the families of their victims.

[24] Appendix A outlines the Army's administrative framework for DWI, which provides for both mandatory and discretionary adverse administrative actions.

[25] *See, e.g.*, GA. CODE ANN. § 40-6-391 (West 2012); N.C. GEN. STAT. ANN. § 20-138.1 (West 2012). Additionally, portions of certain installations, such as Joint Base Elmendorf–Richardson and Fort Lee, are subject to concurrent jurisdiction between state and federal authorities. Telephone Interview with Captain (CPT) Joseph Eros, Special Assistant U.S. Attorney (SAUSA), Joint Base Elmendorf–Richardson, Alaska (Mar. 1, 2013) [hereinafter Eros Interview]; Telephone Interview with CPT Katharine Adams, SAUSA, Fort Lee, Va. (Mar. 4, 2013) [hereinafter Adams Interview]. Under this scheme, "both sovereigns retain the right to legislate, giving the United States the advantages of state enforcement while reserving to it the power to prosecute whenever the state fails to do so." Captain John B. Garver III, *The Assimilative Crimes Act Revisited: What's Hot, What's Not*, ARMY LAW., Dec. 1987, at 12, 14. *See generally* Lieutenant Colonel William K. Suter, *Juvenile Delinquency on Military Installations*, ARMY LAW., July 1975, at 3, 9 (describing the four possible types of jurisdiction—exclusive, concurrent, partial, and proprietorial—and explaining that "[o]n any one military installation, the type of jurisdiction can vary, depending on the particular parcel of land involved and how and when it was acquired. Thus, some installations might include lands where all four types of jurisdiction apply."). Thus, state authorities could prosecute DWI offenders arrested on portions of installations subject to concurrent jurisdiction. However, traffic enforcement by state authorities on military installations is rare. Eros Interview, *supra*; Adams Interview, *supra*.

[26] 18 U.S.C. § 13 (2011). *See generally* William G. Phelps, *Assimilation, Under Assimilative Crimes Act (18 U.S.C.A. § 13), of State Statutes Relating to Driving While Intoxicated or Under Influence of Alcohol*, 175 A.L.R. FED. 293 (2002) (collecting and analyzing federal DWI cases involving the ACA).

[27] *See infra* text accompanying note 54.

[28] *See* MCM, *supra* note 8, pt. V, ¶ 5b. The maximum punishments vary based on the Soldier's rank and service regulations. *Id*. pt. V, ¶ 5a. Additionally, as one commentator has noted, "The specific forms of punishment available to a commanding officer are merely the short-term consequences of NJP [(nonjudicial punishment)]." Captain Shane Reeves, *The Burden of Proof in NJP: Why Beyond A Reasonable Doubt Makes Sense*, ARMY LAW., Nov. 2005, at 28, 34. Possible long-term consequences include diminished "social standing within the military hierarchy" and limited prospects for promotion. *Id.* Simply put, a Soldier who received an Article 15 may suffer career consequences, but not criminal ones.

Finally, although courts-martial for DWI are rare,[29] the maximum punishments under Article 111, UCMJ, are significant: six months confinement, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge.[30]

2. Disposition of On-Post DWIs

The Army has no mandatory policy regarding the punitive disposition of on-post Soldier DWIs.[31] Installation commanders set their own policies;[32] however, two general approaches prevail: federal prosecution and nonjudicial punishment.

The majority of CONUS installations refer on-post Soldier DWI cases to the local USAO for prosecution in federal court.[33] Judge advocates and civilian attorneys appointed as SAUSAs generally prosecute these cases under the supervision of an assistant U.S. attorney.[34] Some installation policies are set forth formally in local regulations.[35] Other installations have informal arrangements with the local USAO.[36] A minority of CONUS installations—Fort Carson, Fort Gordon, Fort Stewart, Fort Wainwright, Joint Base Elmendorf-Richardson, and Fort Riley—adjudicate all on-post Soldier DWI offenses chiefly under Article 15.[37] As explained in Parts III and IV *infra*, the forum choice has far-reaching implications in a DWI case.

III. Evaluating the Effectiveness of Nonjudicial Punishment in Soldier DWI Cases

A. Overview of Nonjudicial Punishment

Article 15 allows commanders to address "minor offenses"[38] in their units without resorting to trial by court-

[29] *See* Masterton, *supra* note 8, at 376.

[30] MCM, *supra* note 8, pt. IV, ¶ 36e(2). If the crime involved personal injury, the maximum punishment increases to confinement for 18 months and a dishonorable discharge. *Id.* pt. IV, ¶ 36e(1). Additionally, an officer found guilty of violating Article 111 at a general court-martial is subject to a dismissal, not a punitive discharge. *Id.* R.C.M. 1003(b)(8)(A)).

[31] *See* AR 27-10, *supra* note 7, para. 4-9a.

[32] *See id.* para. 4-9c; *see also* U.S. DEP'T ARMY, REG. 190-45, LAW ENFORCEMENT REPORTING para. 11-30 (30 Mar. 2007) [hereinafter AR 190-45] ("Installation commanders should establish policies on how to refer Army personnel to the U.S. Magistrate for disposition when the violator's conduct constitutes a misdemeanor within the magistrate's jurisdiction and is also a violation of the UCMJ.").

[33] E-mail from CPT Megan Mueller, SAUSA, Fort Rucker, Ala., to author (19 Feb. 2013, 13:31 EST) (on file with author); E-mail from Major (MAJ) Yolanda Schillinger, SAUSA, Fort Huachuca, Ariz., to author (Mar. 4, 2013, 4:24 EST) (on file with author); E-mail from CPT Robert Aghassi, SAUSA, Fort Irwin, Cal., to author (Feb. 19, 2013, 10:40 EST) (on file with author); Telephone Interview with CPT Robert Pruitt, SAUSA, Presidio of Monterey, Cal. (Feb. 19, 2013); E-mail from CPT Natalie West, SAUSA, Fort Benning, Ga., to author (Feb. 26, 2013, 9:46 EST) (on file with author); Telephone Interview with CPT Alec Rice, SAUSA, Schofield Barracks, Haw. (Mar. 4, 2013); Telephone Interview with CPT Joshua Mickelson, SAUSA, Fort Leavenworth, Kan. (Mar. 1, 2013); Telephone Interview with CPT Katherine Griffis, SAUSA, Fort Campbell, Ky. (Feb. 22, 2013); U.S. ARMY CADET COMMAND & FORT KNOX, REG. 27-10, MILITARY JUSTICE para. 2-1b (17 May 2012) [hereinafter FORT KNOX REG. 27-10], *available at* http://www.knox.army.mil/garrison/dhr/asd/regs/R27-10.pdf; *Magistrate Court*, STAFF JUDGE ADVOCATE, JRTC & FORT POLK, http://www.jrtc-polk.army.mil/SJA/Mag_Court.html (last updated May 9, 2013) ("The only cases for which Soldiers are prosecuted in Magistrate Court are DWI. . . ."); Telephone Interview with CPT John Caulwell, SAUSA, Fort Leonard Wood, Mo. (Feb. 22, 2013); E-mail from CPT Emily Roman, SAUSA, While Sands Missile Range, N.M., to author (Feb. 25, 2013, 9:45 EST) (on file with author); Telephone Interview with CPT Justin Talley, SAUSA, Fort Drum, N.Y. (Mar. 6, 2013) [hereinafter Talley Interview]; E-mail from MAJ Yolanda McCray-Jones, Chief, Fed. Litig., Fort Bragg, N.C., to author (Mar. 8, 2013, 12:43 EST) (on file with author) [hereinafter McCray-Jones E-mail]; U.S. ARMY FIRES CTR. OF EXCELLENCE & FORT SILL, SUPP. 1 TO AR 27-10, para. 3-2d (1 Dec. 2011), *available at* http://sillwww.army.mil/USAG/DHR/publications/Suppls/FSSuppl1toAR_27-10.pdf [hereinafter FORT SILL SUPPLEMENT]; E-mail from CPT Adam Wolrich, SAUSA, Fort Jackson, S.C., to author (Mar. 11, 2013, 13:05 EST) (on file with author); E-mail from Stephanie Lewis, SAUSA, Fort Bliss, Tex., to author (Feb. 21, 2013, 10:37 EST) [hereinafter Lewis E-mail] (on file with author) ; III CORPS & FORT HOOD, REG. 27-10, MILITARY JUSTICE, para. 4-11 (10 Nov. 2008) [[hereinafter FORT HOOD REG. 27-10], *available at* http://www.hood.army.mil/dhr/pubs/fhr27-10.pdf; E-mail from CPT May Sena, SAUSA, Fort Belvoir, Va., to author (Mar. 11, 2013, 13:13 EST) (on file with author); Adams Interview, *supra* note 25; Telephone Interview with Amanda O'Neil, SAUSA, Joint Base Myer–Henderson Hall, Va. (Mar. 4, 2013); Telephone Interview with Robert Chilton, SAUSA, Joint Base Langley–Eustis, Va. (Mar. 4, 2013); Telephone Interview with MAJ Margaret Kurz, Chief, Fed. Litig., Joint Base Lewis–McChord, Wash. (Mar. 5, 2013). The Fort Hood policy captures the common rationale for federal prosecution: "An adjudication of guilt by . . . the Federal Magistrate triggers enhanced penalties for multiple DUI and DWI offenses under Texas law, whereas NJP under Article 15, UCMJ and administrative sanctions do not." FORT HOOD REG. 27-10, *supra*, para. 4-11c.

[34] *See* AR 27-10, *supra* note 7, para. 23-4.

[35] *See, e.g.*, FORT HOOD REG. 27-10, *supra* note 33, para. 4-11; FORT KNOX REG. 27-10, *supra* note 33, para. 2-1b; FORT SILL SUPPLEMENT, *supra* note 33, para. 3-2d. These policies usually permit lower-level commanders to request an exception to policy through the general court-martial convening authority on a case-by-case basis. *See, e.g.*, FORT HOOD REG. 27-10, *supra* note 33, para. 4-11a ("In exceptional cases where disposition of DUI and DWI driving offenses under the UCMJ is deemed essential to good order and discipline, commanders may seek to retain jurisdiction over such offenses. . . . In these cases, the Soldier's brigade level commander will request, in writing, authority to exercise UCMJ to the Commander, III Corps and Fort Hood through the OSJA."); FORT KNOX REG. 27-10, *supra* note 33, para. 2-1c.

[36] *See, e.g.*, Lewis E-mail, *supra* note 33 (Fort Bliss, Tex.).

[37] E-mail from CPT Joshua Krupa, SAUSA, Fort Carson, Colo., to author (Feb. 22, 2013, 9:47 EST) (on file with author); E-mail from CPT Colin Nisbet, SAUSA, Fort Gordon, Ga., to author (Feb. 22, 2013, 2:39 EST) (on file with author); Eros Interview, *supra* note 25 (Joint Base Elmendorf–Richardson, Alaska); E-mail from CPT Florence Cornish-Mitchell, SAUSA, Fort Wainwright, Alaska, to author (Feb. 22, 2013, 9:47 EST) (on file with author); Telephone Interview with CPT Rob Mactaggart, SAUSA, Fort Stewart, Ga. (Mar. 1, 2013); Telephone Interview with CPT Anne-Marie Vazquez, SAUSA, Fort Riley, Kan. (Mar. 6, 2013) [hereinafter Vazquez Interview].

[38] The *MCM* does not explicitly define "minor offenses." Rather, it states:

> Whether an offense is minor depends on several factors: the nature of the offense and the

martial.[39] As the *Manual for Courts-Martial* explains, Article 15 "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court-martial conviction."[40] In other words, Article 15 is intended as both a disciplinary and a rehabilitative tool,[41] and it often succeeds in achieving these goals.

Nonjudicial punishment is mutually appealing to Soldiers and commanders. By accepting an Article 15,[42] a Soldier reduces his punitive exposure and, more importantly, avoids a conviction. For commanders, nonjudicial punishment is a quick, inexpensive way to deal with minor misconduct. Article 15 proceedings also benefit the Army as a whole by reducing the number of courts-martial.

The appeal of nonjudicial punishment in DWI cases is understandable. Commanders rightfully perceive DWI as an affront to unit discipline, so they want to address the misconduct swiftly and personally. As explained below, however, using Article 15 to dispose of DWI cases is detrimental to public safety.

B. Drawbacks of Resolving On-Post Soldier DWIs through Nonjudicial Punishment

Air Force Major Marshall Wilde has cogently described what he calls the "unintended consequences" of nonjudicial punishment in DWI and other types of cases, stating:

> The decision to dispose of misconduct through nonjudicial punishment has greater practical effects in certain categories of cases. Few people would argue that society suffers greatly from resolving chronic lateness or an AWOL incident through nonjudicial punishment, nor is a rational commander likely to attempt to dispose of a rape or murder case through nonjudicial punishment. However, in . . . driving while intoxicated . . . cases, nonjudicial punishment results in significantly different outcomes for victims, society and the Treasury than civilian prosecution or court-martial.[43]

A number of factors militate against the use of nonjudicial punishment in DWI cases. Wilde's article discusses two of these factors: the failure to trigger state recidivism laws and license suspension schemes.[44] This section revisits those topics, but adds to Wilde's analysis by tailoring it to the Army. It also explains how nonjudicial punishment undermines sentencing in federal criminal cases and disregards public safety.

1. Impact on Repeat Offender Statutes

Most states have enhanced punishment laws for DWI recidivists.[45] Unfortunately, the use of nonjudicial punishment in DWI cases undermines these laws. Since an Article 15 is not a conviction,[46] "local District Attorneys

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> circumstances surrounding its commission; the offender's age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial. The decision whether an offense is 'minor' is a matter of discretion for the commander imposing nonjudicial punishment.

MCM, *supra* note 8, pt. V, ¶ 1e. Likewise, neither the Supreme Court nor the Court of Appeals for the Armed Forces (CAAF) has provided concrete guidance on what constitutes a "minor offense." *See, e.g.*, Parker v. Levy, 417 U.S. 733, 750 (1974) (failing to define the term); United States v. Gammons, 51 M.J. 169, 182 (C.A.A.F. 1999) ("there is no precise formula, however, for determining whether an offense is "minor"). Army Regulation 27-10 is more helpful in this regard. It states:

> Generally, the term 'minor' includes misconduct not involving any greater degree of criminality than is involved in the average offense tried by summary court martial (SCM). It does not include misconduct of a type that, if tried by GCM, could be punished by dishonorable discharge or confinement for more than 1 year (see para 1e, part V, MCM, 2008). This is not a hard and fast rule; the circumstances of the offense might indicate that action under UCMJ, Art. 15 would be appropriate even in a case falling outside these categories.

AR 27-10, *supra* note 7, para. 3-9.

[39] 10 U.S.C. § 815(b) (2011). Nonjudicial punishment is a long-standing cornerstone of military justice, having had "statutory sanction" since 1916. *See* Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37, 37 (1965). However, commanders had limited NJP authority until Congress amended Article 15 in 1962. *See* Captain Burress M. Carnahan, *Comment—Article 15 Punishments*, 13 A.F. L. REV. 270, 271 (1971).

[40] MCM, *supra* note 8, pt. IV, ¶ 1c.

[41] *See, e.g.*, AR 27-10, *supra* note 7, para. 3-2a ("Nonjudicial punishment may be imposed to—Correct, educate, and reform offenders").

[42] A servicemember facing a nonjudicial punishment always has the right to demand trial by court-martial in the Army. *See* 10 U.S.C. § 815(a) (2011).

[43] Major Marshall L. Wilde, *Incomplete Justice: Unintended Consequences of Military NJP*, 60 A.F. L. REV. 115, 121–22 (2007).

[44] *Id.* at 132–36.

[45] For example, forty-five states have enacted felony DWI statutes for offenders with prior convictions. *See, e.g.*, Overview from Mothers Against Drunk Driving (MADD) on DUI Felony Laws (Aug. 2011), *available at* http://www.madd.org/laws/law-overview/DUI_Felony_Overview.pdf. These laws vary, but generally require two or more prior DWIs within a given time. *Id.*

(DAs) who prosecute soldiers for [subsequent] drunk driving offenses occurring off post will be unaware of the existence of any prior offenses."[47] Accordingly, they cannot file enhanced charges for Soldiers who reoffend.

To illustrate, assume that Private (PVT) Smith receives an Article 15 for DWI at Fort Carson in 2008. He then is assigned to Fort Bliss in 2011 and receives another Article 15 for driving under the influence on the installation. In 2012, PVT Smith is arrested again for DWI, this time off-post in El Paso. An offender with two prior DWI convictions would face a third-degree felony and two to ten years in prison under Texas state law.[48] However, the local DA must prosecute PVT Smith as a first-time offender,[49] since his prior Article 15s are not convictions. The outcome of this case would be the same in every jurisdiction.

The upshot of this scenario is that a commander who imposes nonjudicial punishment for DWI may unwittingly insulate a habitual offender from felony, or enhanced misdemeanor, prosecution. Enhanced penalties for repeat DWI offenders exist to protect society.[50] Given the high recidivism rate for this offense,[51] addressing DWI through nonjudicial punishment is irresponsible.

2. License Sanctions and Off-Post Driving Privileges

Another drawback of resolving DWIs through Article 15 proceedings involves the failure to curtail a Soldier's off-post driving privileges. Restriction of driving privileges is not an authorized penalty under Article 15. While on-post privileges are administratively revoked for one year following an on-post DWI,[52] off-post driving privileges remain intact. As Major Wilde fittingly observed, "on-base drunk drivers may have no off-base sanctions."[53] Soldiers and civilians prosecuted for DWI in state court are not so fortunate.

A civilian DWI conviction is accompanied by collateral consequences, including administrative license suspension or revocation.[54] Forty-one states impose these sanctions pre-conviction if a driver fails or refuses to take a breath alcohol test. [55] In almost every state, judges can also suspend or revoke licenses post-conviction.[56] These measures are designed to further public safety,[57] and studies have validated their effectiveness in reducing recidivism and alcohol-related fatalities.[58]

License suspension is unavailable when a Soldier receives an Article 15 for an on-post DWI. Although federal and Army regulations both provide for notification of the Soldier's state driver's license agency following a DWI,[59] it is unclear whether this notification occurs, and, if so, whether the state ever acts on the information. Considering the administrative burdens involved, common sense suggests that states rarely impose license sanctions following an Article 15. As a result, Soldiers with a proven disregard for the safety of others drive freely outside the installation.

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[46] Federal, state, and military courts almost uniformly hold that an Article 15 is not a criminal conviction. *See, e.g.*, United States v. Trogden, 476 F. Supp. 2d 564, 568–69 (E.D. Va. 2007); State v. Myers, 58 P.3d 643, 644–47 (Haw. 2002); United States v. Gammons, 51 M.J. 169, 173–74 (C.A.A.F. 1999) (collecting cases). *Cf.* Middendorf v. Henry, 425 U.S. 25, 31–32 (1976) ("Article 15 punishment . . . is an administrative method of dealing with the most minor offenses."). *But cf.* State v. Ivie, 961 P.2d 941 (Wash. 1998) (treating NJP as a criminal prosecution for purposes of state law).

[47] Major Michael J. Hargis, *Three Strikes and You Are Out—The Realities of Military and State Criminal Record Reporting*, ARMY LAW., Sept. 1995, at 3, 9.

[48] TEX. PENAL CODE ANN. §§ 12.34(a), 49.09(b) (Vernon 2012).

[49] A first-time offender in Texas faces a class B misdemeanor. Upon conviction, the offender receives a mandatory minimum sentence of 72 hours confinement and faces a maximum punishment of 180 days imprisonment. *Id.* § 49.04(b). A second DWI offense carries a mandatory 30-day term of confinement. *Id.* § 49.09(a).

[50] *See, e.g.*, Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Regulations to Protect New Yorkers from Dangerous Drivers (Sept. 25, 2012), http://www.governor.ny.gov/press/09252012dwiregulations (last visited June 3, 2013).

[51] *See* NHTSA, U.S. DEP'T OF TRANSP., DOT HS 810 879, REPEAT INTOXICATED DRIVER LAWS 1 (Jan. 2008) (stating that one-third of annual DWI arrests involve offenders with prior DWI convictions).

[52] *See infra* app. A (discussing the available administrative sanctions for DWI in the Army).

[53] Wilde, *supra* note 43, at 135.

[54] The terms "license suspension" and "license revocation" are often used interchangeably, since both actions prevent an offender from driving for a given time period. The difference is that "suspended licenses are automatically reinstated at the termination of the suspension, whereas revoked licenses must be replaced through renewed applications after the revocation period has expired." DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 64. Individuals convicted of DWI also face other collateral consequences, often financial, that are beyond the scope of this article. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 1199 (McKinney 2012) (levying a $250 "Driver Responsibility Assessment" on persons convicted of DWI in the past three years); TEX. TRANSP. CODE ANN. § 708.102 (West 2012) (levying a $1,000 driver's license surcharge on persons convicted of DWI in the past three years).

[55] Fact Sheet, Nat'l Highway Traffic Safety Admin., DOT HS 810 878, Administrative License Revocation (Jan. 2008), *available at* http://www.nhtsa.gov/Laws+&+Regulations/Traffic+Safety+Legislative+Fact+Sheets.

[56] *See* James L. Nichols & H. Laurence Ross, *The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers*, *in* U.S. DEP'T OF HEALTH & HUMAN SERVS., SURGEON GENERAL'S WORKSHOP ON DRUNK DRIVING: BACKGROUND PAPERS 93, 95 (1989), *available at* http://profiles.nlm.nih.gov/nn/b/c/y/b/_/nnbcyb.pdf.

[57] *See* DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 64.

[58] *See, e.g.*, NICHOLS & ROSS, *supra* note 56, at 102–07 (summarizing studies).

[59] *See* 32 C.F.R. § 634.8(c) (2012); AR 190-5, *supra* note 5, app. B, para. B-1.

Considering the high rate of recidivism for DWI offenders, this risk is unacceptable.[60]

3. Impact on Federal Sentencing

A less obvious drawback of imposing nonjudicial punishment for DWI involves its effect on sentencing in subsequent federal criminal cases. Although the U.S. Sentencing Guidelines (Guidelines) are advisory following the Supreme Court's landmark decision in *United States v. Booker*,[61] federal courts must still consider the guideline range and policy statements in fashioning an appropriate sentence.[62] A defendant's criminal history is an integral part of this calculus. However, if a Soldier with an Article 15 for DWI is later prosecuted in federal court for an unrelated offense, his criminal history will not reflect the prior DWI. Before discussing how nonjudicial punishment adversely impacts federal sentencing, it is necessary to explain briefly how the Guidelines operate.

a. Summary of the Federal Sentencing Guidelines

The Guidelines are promulgated by the U.S. Sentencing Commission, an independent entity that establishes "sentencing policies and practices for the federal courts, including guidelines to be consulted regarding the appropriate form and severity of punishment for offenders convicted of federal crimes."[63] Application of the Guidelines is notoriously complex,[64] but the process generally works as follows. Before sentencing, a probation officer prepares a presentence investigation report for the court, which includes information about the defendant's background, criminal history, and a calculation of the Guidelines sentencing range.[65] In determining this advisory range "[t]he guidelines take into account both the seriousness of the criminal conduct and the defendant's criminal record."[66] While courts are no longer bound to sentence a defendant within this advisory range, the Guidelines remain influential,[67] and judges impose Guidelines' sentences more often than not.[68]

b. Article 15s Do Not Affect Criminal History Under the Guidelines

The 2012 *U.S. Sentencing Commission Guidelines Manual* clarified that prior convictions for DWI always count toward the defendant's criminal history score, regardless of how the offense is classified.[69]

The Sentencing Commission explained that "convictions for driving while intoxicated and other similar offenses are sufficiently serious to always count toward a defendant's criminal history score."[70] Thus, if a Soldier with a misdemeanor DWI conviction is later prosecuted in federal court for an unrelated offense, the guideline range will include additional points for the DWI. [71] More importantly, the court will have a better picture of "the history and characteristics of the defendant," a key factor in determining a sentence.[72]

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[60] To remedy this problem, Major Wilde proposes that "a commander can and should prohibit a member who commits DWI from driving off base as well." Wilde, *supra* note 43, at 152–53. This article does not explore the dubious legality of such an order. *See, e.g.*, MCM, *supra* note 8, pt. IV, ¶ 14(c)(2)(a)(iv) (a lawful order "must relate to military duty. . . . The order may not, without such a valid military purpose, interfere with private rights or personal affairs."). Instead, it argues that federal prosecution provides a simpler alternative for restricting a Soldier's off-post driving privileges through probation conditions. *See infra* Part B.2.

[61] 543 U.S. 220 (2005).

[62] *Id.* at 259–60 (requiring judges to consider these factors along with the factors set forth in 18 U.S.C. § 3553(a): the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the need to avoid unwarranted sentencing disparities and provide restitution).

[63] *See* U.S. Sent'g Comm'n, An Overview of the United States Sentencing Commission, http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf (last visited May 21, 2013) [hereinafter USSC Overview]; 28 U.S.C. § 991 (2011).

[64] As one commentator wryly remarked, "Computation of the Sentencing Guidelines could be a thesis in itself." Major Tyesha E. Lowery, *One "Get Out of Jail Free" Card: Should Probation Be an Authorized Courts-Martial Punishment?*, 198 MIL. L. REV. 165, 175 n.43 (2008).

[65] 18 U.S.C. § 3552(a) (2011); FED. R. CRIM. P. 32(c)–(d).

[66] USSC Overview, *supra* note 63, at 2. The Guidelines are arranged in a sentencing table. The vertical axis represents the severity of the offense and lists 43 "Offense Levels"; the horizontal axis represents the defendant's criminal history and lists six "Criminal History Categories." The guideline range is listed at the intersection of the Offense Level and Criminal History Category. *See* U.S. SENT'G COMM'N GUIDELINES MANUAL ch. 5, pt. A (2012) [hereinafter SENTENCING GUIDELINES]; *see also id.* ch. 5, pt. A, cmt. n.1.

[67] The Supreme Court has stated that "the Guidelines should be the starting point and initial benchmark" at sentencing. Gall v. United States, 552 U.S. 38, 49 (2007).

[68] *See, e.g.*, U.S. SENT'G COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.N (2012) [hereinafter SENTENCING STATISTICS] (showing that 52.4 percent of sentences imposed in FY 2012 were within the advisory guideline range), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/TableN.pdf.

[69] *See* SENTENCING GUIDELINES, *supra* note 66, § 4A1.2, cmt. n.5. This amendment resolved a circuit split regarding whether misdemeanor or petty DWI offenses always count toward the criminal history score. The Sentencing Commission sided with the majority view. *See* U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 35–36 (Apr. 30, 2012), *available at* http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf.

[70] *Id.*

[71] *See, e.g.*, SENTENCING GUIDELINES, *supra* note 66, § 4A1.1.

[72] 18 U.S.C. § 3553(a)(1) (2011).

Imposing nonjudicial punishment in DWI cases frustrates this scheme. If a Soldier with an Article 15 for DWI is prosecuted in federal court for an unconnected offense, his guideline range will not reflect the Article 15.[73] The sentencing court will have little, if any, awareness of the prior offense. Nonjudicial punishment therefore undermines the federal sentencing process by effectively erasing part of the defendant's criminal past.

C. The Commander's Obligation to Consider Public Safety

The *Manual for Courts-Martial* directs commanders to consider a host of factors in deciding whether to offer nonjudicial punishment, but public safety is not one of them.[74] Even so, commanders arguably have a moral obligation to consider society's interest,[75] especially in DWI cases. As one commentator contends, "the military justice system exists to enhance discipline within the armed forces, as well as to protect society—a dual focus."[76] Disposing of DWI cases through nonjudicial punishment fails to protect society. Army Regulation (AR) 27-10 instructs that "[i]f it is clear that will not be sufficient to meet the ends of justice, more stringent measures must be taken."[77] As explained below, federal court is a preferable forum for adjudicating Soldier DWIs that occur on the installation.

IV. Prosecuting On-Post Soldier DWIs in Federal Court

In order to properly assess the merits of the federal forum in Soldier DWI cases, it is necessary to understand the salient characteristics of a federal DWI prosecution.

A. The Framework for Prosecuting a Soldier in Federal Court

1. Memorandum of Understanding Between the Departments of Justice and Defense

When a Soldier commits an offense that violates both the UCMJ and Title 18 of the U.S. Code, prosecution is proper either in the federal district courts or at courts-martial.[78] As a result, in order "[t]o avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding (MOU) relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction."[79] Under this policy agreement, crimes committed by servicemembers on military reservations, such as DWI, are normally resolved through military justice channels.[80] However, the MOU sensibly "permits civil investigation and prosecution in Federal district court in any case when circumstances render such action more appropriate."[81] Army Regulation 27-10

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[73] An Article 15 does not count towards a defendant's criminal history score. *Id.* § 4A1.2(g). Incidentally, twenty-one states also have sentencing guideline systems. *See* NEAL B. KAUDER & BRIAN J. OSTROM, NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/NCSC%20Sentencing%20Guidelines%20profiles%20July%202008.pdf. In at least one state, Article 15s are not counted towards a defendant's "Prior Record Score." *See* 204 PA. CODE § 303.8(f)(2) (2012).

[74] MCM, *supra* note 8, pt. V, ¶ 1e.

[75] *See* Wilde, *supra* note 43, at 154.

[76] Captain Denise K. Vowell, *To Determine an Appropriate Sentence: Sentencing in the Military Justice System*, 114 MIL. L. REV. 87, 103 (1986).

[77] AR 27-10, *supra* note 7, para. 3-2. Similarly, the Preamble to the MCM states in part, "the purpose of military law is to promote justice . . ." MCM, *supra* note 8, pt. I, ¶ 3.

[78] *See* United States v. Duncan, 34 M.J. 1232, 1240 (A.C.M.R. 1992). The *Duncan* court explained the jurisdictional relationship between the federal courts and courts-martial as follows:

> Congress has created two separate criminal justice systems, one civilian and one military. Federal district courts have original jurisdiction over offenses against the laws of the United States, but have no jurisdiction over offenses prescribed by the [UCMJ]. Court-martial jurisdiction is limited to those offenses prescribed by the [UCMJ]. . . . While the subject-matter jurisdiction of federal district courts and courts-martial is not concurrent in the technical sense, crimes committed by servicemembers are often susceptible to prosecution either in federal district courts and at courts-martial because the substantive provisions of the [UCMJ] closely parallel the codified offenses against the laws of the United States.

Id. (internal citations and quotation marks omitted); *see also* DOJ MANUAL, *supra* note 10, § 667, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00667.htm.

[79] DOJ MANUAL, *supra* note 10, § 9-20.115; *see also* U.S. DEP'T OF DEF., DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 Jan. 1985). The MOU is incorporated in the *Manual for Courts-Martial*. *See* MCM, *supra* note 8, app. 3.

[80] *See* MCM, *supra* note 8, at A3-2. A servicemember does not have a right to demand court-martial in lieu of federal prosecution. *See* United States v. Verch, 307 F. App'x 327, 329 (11th Cir. 2009) (unpublished). The MOU provides that it "is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals. . . ." *See* MCM, *supra* note 8, at A3-2. As the First Circuit has stated, the guidelines in the MOU "were promulgated for administrative convenience, and defendants cannot rely on them to deprive [a] district court of jurisdiction." United States v. Mariea, 795 F.2d 1094, 1102 n.22 (1st Cir. 1986).

[81] DOJ MANUAL, *supra* note 10, § 9-20.115; *see also* MCM, *supra* note 8, at A3-2. For example, the DOJ often prosecutes Soldiers for child pornography and procurement fraud offenses. *See, e.g.*, United States v. Caldwell, 586 F.3d 338 (5th Cir. 2009) (Soldier convicted of receipt and possession of child pornography); Press Release, U.S. Attorney Robert Pitman, W. Dist. Tex., U.S Army Major Sentenced to Federal Prison for Accepting Gratuities (June 6, 2012), http://www.justice.gov/usao/txw/press_releases/2012/Bradley%20_EP_SIGIR_sen.pdf (last visited June 3, 2013).

empowers general court-martial convening authorities to coordinate issues relating to the MOU with the local USAO.[82] Under this authority, most installations have arranged for federal prosecution of on-post Soldier DWI offenses.[83]

2. Prosecuting On-Post DWI Offenses Under the Assimilative Crimes Act

a. Overview of the ACA

Federal Magistrate Judge Brian Owsley has neatly summarized the mechanism by which DWI offenders are prosecuted in federal court:

> On federal land, such as a military base, there are often no specific regulations addressing how some crimes are charged and penalized for civilian defendants. For example, there is no specific offense charging driving while intoxicated on a military base as a crime. Instead, Congress has assimilated state laws criminalizing driving while intoxicated to cover similar offenses on military bases through the Assimilative Crimes Act.[84]

The ACA thus serves as a gap-filler for offenses occurring within a federal enclave but "not made punishable by any enactment of Congress."[85] It adopts both the "crimes and corresponding punishments of the state surrounding a particular enclave, and applies them to supplement the federal criminal code."[86] Simply put, the ACA "gives U.S. Attorneys the ability to federalize state criminal law."[87]

b. Assimilation of State Criminal Punishments

The ACA provides that an individual who commits an assimilated state crime on a federal enclave "shall be guilty of a like offense and *subject to a like punishment*."[88] This latter provision generally means that "the sentence imposed [in an ACA prosecution] may not exceed any maximum sentence and may not fall below any mandatory minimum sentence that is required under the law of the state in which the crimes occur."[89] The assimilation of other available state penalties is more problematic.[90] As a general rule, however, federal judges will adopt state penalty provisions unless they conflict with federal sentencing law or policy.[91] To the extent that a conflict exists between the federal probation provisions at 18 U.S.C. §§ 3561–3566 and the applicable state law, federal law prevails.[92]

c. Applicability of the ACA to Servicemembers

Several active duty military defendants have unsuccessfully challenged application of the ACA in DWI cases. For example, in *United States v. Mariea*, two Sailors argued that they could not be prosecuted under the ACA for DWI offenses that occurred at Naval Air Station Brunswick (Maine).[93] The defendants contended that the ACA did not apply since DWI was already made punishable by an

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[82] *See* AR 27-10, *supra* note 7, para. 2-2.

[83] *See supra* note 33.

[84] Hon. Brian L. Owsley, *Issues Concerning Charges for Driving While Intoxicated in Texas Federal Courts*, 42 ST. MARY'S L.J. 411, 421 (2011).

[85] 18 U.S.C. § 13 (2011); *see also* United States v. DeWater, 846 F.2d 528, 530 (9th Cir. 1988) ("[T]he purpose of the Assimilative Crimes Act is to afford the federal government an opportunity to adopt state penal laws to meet federal ends; the prosecution of various crimes on federal enclaves."). Federal prosecutors charge a wide range of offenses under the ACA. *See, e.g.*, Nikhil Bhagat, Note, *Filling the Gap? Non-Abrogation Provisions and the Assimilative Crimes Act*, 111 COLUM. L. REV. 77, 89 n.63 (2011) (listing recent federal cases assimilating state offenses for DWI, trespass, telephone harassment, speeding, cockfighting, threats against a public servant, attempted petit larceny, illegal taking of fish, use of profane language inciting breach of the peace, and parking a motor home without valid permit).

[86] Garver, *supra* note 25, at 12. Captain Garver observes that "[t]he 'law,' as applied on federal lands, thus varies between an Army post in North Carolina, for example, and a Navy submarine base in the State of Washington." *Id.* This statement is accurate with respect to the elements of the assimilated state crime. However, "[p]rosecution under the ACA is not for enforcement of state law but for enforcement of federal law assimilating a state statute." United States v. Brown, 608 F.2d 551, 553 (5th Cir. 1979). As a result, federal rules of evidence and procedure govern ACA cases. *See* United States v. Garner, 874 F.2d 1510, 1512 (11th Cir. 1989); FED. R. CRIM. P. 1(a)(1) ("These rules apply to all criminal proceedings in the United States District Courts . . . .").

[87] Bhagat, *supra* note 85, at 83.

[88] 18 U.S.C. § 13(a) (2011) (emphasis added).

[89] United States v. Garcia, 893 F.2d 250, 251–52 (10th Cir. 1989). In fashioning a sentence within the state range, federal judges are bound by the Sentencing Reform Act (SRA) and the advisory Sentencing Guidelines. *See, e.g.*, United States v. Reyes, 48 F.3d 435, 437 (9th Cir. 1995) (describing a 1990 amendment to 18 U.S.C. § 3551 in which Congress "made explicit the applicability of the Sentencing Guidelines to ACA offenses"). However, most DWI offenses committed on military installations are federal "petty offenses" (i.e., Class B misdemeanors in which the maximum term of imprisonment is six months or less but more than thirty days), so the Guidelines do not apply. *See* SENTENCING GUIDELINES, *supra* note 66, § 1B1.9. Petty offenses are defined as "a Class B misdemeanor, a Class C misdemeanor, or an infraction." 18 U.S.C. § 19 (2006). The nine classes of federal crimes are classified by punishment range in 18 U.S.C. § 3559(a).

[90] *See generally* Phelps, *supra* note 26, §§ 24–35 (cataloguing cases involving the assimilation of state penalty provisions).

[91] *See, e.g.*, United States v. Pierce, 75 F.3d 173, 176–77 (4th Cir. 1996); United States v. Smith, 574 F.2d 988, 992–93 (9th Cir. 1978); United States v. Kendrick, 636 F. Supp. 189, 191 (E.D.N.C. 1986).

[92] *See* United States v. Gaskell, 134 F.3d 1039, 1042–45 (11th Cir.) (five-year maximum term of probation under federal law trumps maximum state term of one year); United States v. Duncan, 724 F. Supp. 286, 287–88 (D. Dela. 1989) (same). *But see* United States v. Peck, 762 F. Supp. 315, 318–20 (D. Utah 1991) (maximum term of probation under state law controlled).

[93] 795 F.2d 1094 (1st Cir. 1986),

enactment of Congress, specifically, Article 111, UCMJ. The court disagreed, holding that the phrase "'any enactment of Congress' in the ACA refers to penal enactments of general applicability, not to the UCMJ."[94] Other federal courts have reached the same result.[95]

Thus, ample precedent exists for prosecuting on-post Soldier DWI offenses under the ACA.[96] The forum choice rests with each installation and its local USAO, not with the Soldier-defendant.

B. Advantages of Prosecuting On-Post Soldier DWIs in Federal District Court

1. Establishing a Criminal Record

The most compelling reason for prosecuting on-post Soldier DWI cases in federal court is the possibility of securing a conviction. State prosecutors can use prior federal DWI convictions to charge an enhanced offense if a defendant reoffends.[97] Therefore, federal prosecution furthers the public safety and punishment objectives of state repeat offender laws. The high recidivism rate among DWI offenders[98] underscores the necessity of establishing a criminal record.[99] Unlike nonjudicial punishment, federal prosecution achieves this goal.

2. Preserving Good Order and Discipline Through Federal Probation

Although federal judges rarely grant probation,[100] it is a common sanction for DWI offenders in certain federal districts.[101] This part discusses how probation confers a significant benefit on good order and discipline.

a. Types of Probation Conditions in DWI Cases

Probation is a versatile disciplinary tool, as federal magistrates have wide latitude to impose a range of onerous conditions. [102] A non-exhaustive list of discretionary conditions appears at 18 U.S.C. § 3563(b), including orders to support dependents, maintain employment, refrain from drinking alcohol, report to a probation officer, perform community service, reside in a specified place, and "refrain[] from frequenting specified kinds of places or from associating unnecessarily with specified persons."[103] The statute also contains a catch-all provision authorizing the court to impose "such other conditions"[104] as it sees fit.

[94] *Id.* at 1094–02. The court noted that "the history of the ACA strongly suggests that the present phrase 'any enactment of Congress' means only those criminal laws of general applicability, and not a specialized, internal disciplinary code like the UCMJ which covers only military personnel." *Id.* at 1098.

[95] *See* United States v. Debevoise, 799 F.2d 1401, 1403 (9th Cir. 1986); United States v. Walker, 552 F.2d 568 n.3 (4th Cir. 1977). *Cf.* United States v. Thunder Hawk, 127 F.3d 705 (8th Cir. 1997) (holding that the Indian Country Crimes Act did not preclude application of the ACA in DWI case). Unlike UCMJ offenses, "[f]ederal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law." DOJ MANUAL, *supra* note 10, § 9-20.115 (citing United States v. Adams, 502 F. Supp. 21 (S.D. Fla. 1980) (carrying concealed weapon in federal courthouse) and United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978) (DWI on national park land)).

[96] Appendix B describes the basic progression of a federal DWI case.

[97] *See* Bell v. State, 201 S.W.3d 708, 711 (Tex. Crim. App. 2006). In the same way, federal courts can also use prior state DWI convictions to charge enhanced offenses under the ACA. *See, e.g.*, United States v. Finley, 531 F.3d 288, 289–90 (4th Cir. 2008) (assimilating Virginia DWI enhancement for a third offense).

[98] *See supra* text accompanying note 51.

[99] *Cf.* Hargis, *supra* note 47, at 3–4 ("Because of the high rate of recidivism, criminal history information is critical so that the criminal justice system can make appropriate decisions regarding these repeat offenders.").

[100] *See* SENTENCING STATISTICS, *supra* note 68, fig.D (showing that in FY 2012, straight probation was imposed in just 7.1 percent of federal cases), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_ Reports_ and_Sourcebooks/2012/FigureD.pdf. There is no statutory definition of probation; however, it is essentially "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." BLACK'S LAW DICTIONARY 1220 (7th ed. 1999). In the federal system, probation is unavailable in the following circumstances: (1) for Class A or Class B felonies; (2) for offenses that expressly preclude probation; and (3) for a defendant who is sentenced to imprisonment for a non-petty offense. 18 U.S.C. § 3561(a) (2011).

[101] For instance, first-time DWI offenders in the Western District Texas, El Paso Division, routinely enter into plea agreements pursuant to *Fed. R. Crim. P.* 11(c)(1)(B), in which the prosecutor agrees to recommend a defendant's request for a sentence of twelve months probation and a $250 fine. The court is not obligated to follow the parties' recommendation. *See* FED. R. CRIM. P. 11(c)(3)(B). However, magistrate judges in the Western District of Texas almost always followed the recommended sentence. This information is based on the author's personal experience as the SAUSA for Fort Bliss, Texas, from 2011–2012. Federal probation is also a common sentence for on-post DWI offenders at Fort Lee, Fort Irwin, Fort Benning, and Fort Bragg. Adams Interview, *supra* note 25; E-mail from CPT Robert Aghassi, SAUSA, Fort Irwin, Cal., to author (4 Mar. 2013, 14:32 EST) (on file with author) [hereinafter Aghassi E-mail]; McCray-Jones E-mail, *supra* note 33 (Fort Bragg); E-mail from CPT Natalie West, SAUSA, Fort Benning, Ga., to author (Mar. 4, 2013, 14:32 EST) (on file with author) [hereinafter West E-mail].

[102] *See* Lowery, *supra* note 64, at 178 ("Federal judges now have almost unfettered discretion in sentencing a defendant to probation.").

[103] 18 U.S.C. § 3563(b) (2011). In addition to discretionary conditions, certain conditions are mandatory in any case where a judge grants probation, such as an order to obey the law, possess no controlled substances, submit to drug testing, and pay any adjudged fines. *See id.* § 3563(a); SENTENCING GUIDELINES, *supra* note 66, § 5B1.3.

[104] 18 U.S.C. § 3563(b)(22); *see also* SENTENCING GUIDELINES, *supra* note 66, § 5B1.3(b).

Appellate courts are deferential in scrutinizing these court-created conditions so long as they are "reasonably related to the nature and circumstances of the offense, the history and characteristics of the defendant, and the goals of sentencing."[105]

Unlike nonjudicial punishment, a host of special probation conditions are available "that impinge on a defendant's driving privileges."[106] For example, although magistrates cannot suspend or revoke a defendant's state-issued driver's license,[107] they can restrict a defendant's driving privileges as long as the condition is reasonably related to the offense, promotes the purposes of federal sentencing, and "involve[s] only those deprivations of liberty or property that are reasonably necessary for purposes of the sentence.[108] Thus, the court in *United States v. Martinez* upheld a probation condition allowing the defendant "to drive during the course of his employment as required by his job, and to drive to and from the court, the probation office, and the alcohol education program."[109]

Judges can also restrict driving privileges as they relate to alcohol consumption. For instance, U.S. Magistrate Judge Norbert Garney imposes a standard probation condition prohibiting the defendant from driving if he has consumed any amount of alcohol.[110] Similarly, a court could require DWI offenders to install an ignition interlock device in their vehicle as a condition of probation.[111] In sum, the realm of possible probation conditions in a DWI case is limited only by the judge's imagination.

Another powerful aspect of federal probation is the potential duration of the probationary term. A federal judge can impose probation conditions for up to five years for misdemeanor offenses.[112] Although a term of this length would be unusual in a DWI case, some federal judges sentence first-time DWI offenders to probation for at least one year.[113]

b. The Consequences of Violating Federal Probation

The array of available probation conditions is complemented by a robust supervisory and enforcement scheme. Each DWI offender sentenced to a term of probation is supervised by a federal probation officer.[114] The probation officer has several duties,[115] but essentially serves as the "eyes and ears" [116] of the court and ensures that the defendant complies with his or her conditions. Congress has vested probation officers with considerable authority. They are permitted to "use all suitable methods, not inconsistent with the conditions specified by the court to aid a probationer . . . , and to bring about improvements in his conduct and condition."[117] If a probationer violates a condition, the officer must immediately notify the court.[118] A probationer who "violates a condition of probation at any time prior to expiration . . . of the term of probation" may

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[105] *Probation*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 784, 791 (2011). *See, e.g.*, United States v. Allen, 312 F.3d 512, 515 (1st Cir. 2002) (condition prohibiting defendant convicted of tax evasion from possessing alcohol or visiting establishments serving it not overbroad); United States v. Ofchinick, 937 F.2d 892, 898 (3d Cir. 1991) (condition requiring defendant to pay restitution, making his monthly church donation unaffordable, was reasonable). *But see, e.g.*, United States v. Bello, 310 F.3d 56, 61–63 (2d Cir. 2006) (condition prohibiting defendant from watching television to promote self-reflection overbroad).

[106] Owsley, *supra* note 84, at 451.

[107] No federal law or regulation permits suspension or revocation of state-issued drivers' licenses for persons convicted of an assimilated DWI offense in federal court. *See id.* at 446. Thus, several appellate courts have held that federal judges lack the power to impose this sanction under the ACA. *See id.* at 446–50 (collecting cases); *see also* United States v. Snyder, 852 F.2d 471 (9th Cir. 1988). *But see* United States v. Webster, 2009 WL 2366292, at *6 (D. Md. July 30, 2009) (upholding a condition of probation ordering in which the defendant was ordered to forfeit her state-issued driver's license and refrain for driving for five years). The ACA does, however, provide for suspension of driving privileges on federal enclaves. *See* 18 U.S.C. § 13(b).

[108] United States v. Martinez, 988 F. Supp. 975, 979 (E.D. Va. 1998).

[109] *Id.* at 977 n.3; *see also* United States v. Crawford, 166 F.3d 335, No. 98-4135, 1998 WL 879036, at *1 (4th Cir. July 31, 1998) (unpublished) (upholding a condition of probation ordering the defendant to refrain from driving for three years).

[110] The author tried several DWI cases before Judge Garney while assigned as the Fort Bliss SAUSA.

[111] *See generally* Jay M. Zitter, *Validity, Construction, and Application of Ignition Interlock Laws*, 15 A.L.R. 6th 375 (2006). Although the use of these devices is controversial, "studies have shown that ignition interlocks reduce recidivism from 50 to 90 percent while installed on vehicles." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 811 246, IGNITION INTERLOCKS–WHAT YOU NEED TO KNOW: A TOOLKIT FOR POLICYMAKERS, HIGHWAY SAFETY PROFESSIONALS, AND ADVOCATES 3 (Nov. 2009), *available at* www.nhtsa.gov/staticfiles/nti/impaired_driving /pdf/811246.pdf. Installation of an ignition interlock system is a frequent condition of probation for DWI offenders at Fort Lee, Virginia. Adams Interview, *supra* note 25.

[112] 18 U.S.C. § 3561(c)(2).

[113] *See, e.g.*, United States v. Pierce, 75 F.3d 173, 176 (4th Cir. 1996) (defendant sentenced to a one-year term of probation for DWI on Fort Bragg); Adams Interview, *supra* note 25); McCray Jones E-mail, *supra* note 33; West E-mail, *supra* note 101.

[114] *See* 18 U.S.C. § 3601. *See generally Probation and Pretrial Services-Mission*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/ ProbationPretrialServices/Mission.aspx [hereinafter PROBATION AND PRETRIAL] (last visited Jan. 5, 2013).

[115] *See* 18 U.S.C. § 3603 (outlining the duties of a probation officer).

[116] PROBATION AND PRETRIAL, *supra* note 114.

[117] 18 U.S.C. § 3603(3). Additionally, 18 U.S.C. § 3606 allows a probation officer to conduct a warrantless arrest if "there is probable cause to believe that a probationer . . . has violated a condition of his probation . . . ." *Id.*

[118] *See id.* § 3603(8)(B); *see also* SENTENCING GUIDELINES, *supra* note 66, § 7B1.2.

have the probation revoked and be resentenced.[119] A post-violation sentence could include imprisonment.[120]

The specter of revocation, and potential confinement, therefore provides a strong incentive for compliance. When a Soldier is prosecuted in federal court for DWI and sentenced to a term of probation, his commander directly benefits from a good order and discipline standpoint. For the term of probation, at least, the Soldier is more likely to obey the law and keep out of trouble.

Although nonjudicial punishment can be an effective tool for enforcing good order and discipline in DWI cases, it pales in comparison to federal probation.[121] To illustrate, assume that a junior enlisted Soldier accepts a field grade Article 15 for DWI and receives forty-five days extra duty as part of his punishment. If the Soldier habitually arrives late to extra duty and tests positive for marijuana, the commander cannot revoke the Article 15 punishment and resentence the Soldier. The commander can, of course, impose nonjudicial punishment for the new offenses, or even place the Soldier in pretrial confinement[122] and prefer charges. However, most commanders would probably impose additional conditions on liberty[123] and administratively separate[124] the Soldier instead. In contrast, if a Soldier-probationer regularly fails to report to his federal probation officer, the magistrate can revoke probation and resentence him, to confinement if necessary. If the Soldier tests positive for a controlled substance, revocation is mandatory.[125] Thus, it stands to reason that Soldiers-probationers have more incentive to obey the law—during the term of their probation at least—than Soldiers who receive nonjudicial punishment for the same offense.

c. The Downside: Federal Probation is Rarely Imposed at Certain Installations

Despite the benefits of imposing federal probation in DWI cases, magistrate judges at some installations rarely, if ever, impose this versatile sanction.[126] For example, the typical sentence for a first-time DWI offender at Fort Leonard Wood, Missouri, is a $250 fine. Probation is never imposed, mainly because the nearest federal court is located over 90 miles away in Springfield, Missouri.[127] Other remote installations, such as Fort Drum, New York, face the same problem.[128] Even where probation is unavailable, however, DWI offenders still receive a conviction—the principal advantage of federal prosecution.[129]

3. Insulation from Public Criticism of Lenient and Disparate Treatment

Federal prosecution of on-post Soldier DWIs has the added benefit of insulating the Army from public criticism. Unlike Soldiers at certain installations, civilians arrested for DWI on military installations are prosecuted in federal court and receive a conviction.[130] Although the Supreme Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society" with "laws and traditions of its own,"[131] DWI is arguably an offense for which Soldiers should be treated the same as civilians. As explained in Part IV.B.1. *supra*, establishing a criminal history in these cases is imperative given the deadly nature of the offense and the high rate of recidivism.

[119] 18 U.S.C. § 3565(a); *see also id.* § 3564(e). A full explanation of the probation revocation process is beyond the scope of this article. The process is governed by FED. R. CRIM. P. 32.1. In general, the probationer is entitled to notice of the violation and a limited hearing before a court can revoke probation. The standard of proof is not specified by statute, but a court need only be "reasonably satisfied that the probation conditions have been violated." United States v. Gordon, 961 F.2d 426, 429 (3d Cir. 1992). Few constitutional protections apply to revocation hearings. *Probation*, *supra* note 105, at 803. Moreover, the standard of appellate review for probation revocation decisions is abuse of discretion. *See* Burns v. United States, 287 U.S. 216, 222 (1932).

[120] *See, e.g.*, United States v. Moulden, 478 F.3d 652, 658 (4th Cir. 2007); United States v. Locke, 482 F.3d 764, 768–69 (5th Cir. 2007).

[121] Federal probation also should not burden the probationer's unit or interfere with its mission. In the author's experience as the SAUSA at Fort Bliss, Texas, U.S. probation officers are flexible in accommodating Soldier-probationers' training schedules. Additionally, if a Soldier receives orders to PCS during his term of probation, the court can transfer jurisdiction to the district court in which the new installation is located. *See* 18 U.S.C. § 3605.

[122] *See generally* MCM, *supra* note 8, R.C.M. 305.

[123] *Id.* R.C.M. 304(a)(1) ("Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.").

[124] *See generally* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS para. 14-12b (6 June 2005) (C1, 6 Sept. 2011) [hereinafter AR 635-200].

[125] *See* 18 U.S.C. § 3565(b).

[126] E-mail from CPT Katherine Griffis, SAUSA, Fort Campbell, Ky., to author (Mar. 4, 2013, 13:20 EST) (on file with author); Talley Interview, *supra* note 33.

[127] E-mail from CPT John Caulwell, SAUSA, Fort Leonard Wood, Mo., to author (Mar. 4, 2013, 13:02 EST) (on file with author).

[128] Talley Interview, *supra* note 33. *But see* Aghassi E-mail, *supra* note 101 (probation regularly imposed at Fort Irwin, Cal., despite significant distance from nearest federal court).

[129] *See supra* notes 97–99 and accompanying text.

[130] *See, e.g.*, Press Release, U.S. Attorney Robert Pitman, W. Dist. Tex., El Paso Police Detective Charged Federally with Driving While Intoxicated on Fort Bliss (Nov. 18, 2011), http://www.justice.gov/usao/txw/press_releases/2011/Flores_DWI_FtBliss_information.pdf (last visited Jan. 22, 2013).

[131] Parker v. Levy, 417 U.S. 733, 743 (1974).

While the majority of the public is probably unaware of the Army's disparate treatment of DWI offenders, a single high-profile incident could ignite a controversy. For example, if a Soldier with a prior Article 15 for DWI reoffends and kills someone—and the disposition of his prior offense comes to light—the public would be outraged.

4. Deterrence: Sending the Message that the Army Takes DWI Seriously

Finally, federal prosecution of on-post DWIs court signals to society, and to Soldiers, that the Army will not tolerate intoxicated driving on its installations. As explained in Part II.A above, commanders expend considerable effort combating DWI, yet it remains one of the most prevalent types of Soldier misconduct. Prevention is necessary, but so is meaningful punishment. Article 15 falls short in this regard. The optimal solution for deterring DWI is to prosecute offenders in federal court and pursue more aggressive administrative actions.[132]

V. Criticisms of Prosecuting Soldier DWIs in Federal Court

A. The Commander's Perceived Inability to Address the Misconduct

Battalion and company commanders are the most likely critics of federal prosecution, since it arguably removes their ability to personally enforce good order and discipline through nonjudicial punishment. As one commentator observes: "Many commanders today believe, just as Honorable John Kenney, the Under Secretary of the Navy stated in 1949, that '[t]o subtract from the commanding officer's powers of discipline . . . can only result in a diminution of his effectiveness as a commander.'"[133] For this reason, "[t]he military has jealously guarded the distinctive aspects of its system of justice,"[134] such as a commander's authority under Article 15. Outsourcing a commander's responsibility for maintaining good order and discipline is a valid concern.[135] With respect to DWI, however, commanders are not powerless to address the misconduct when a case is prosecuted in federal or state court.

Commanders have an arsenal of administrative actions at their disposal, ranging from administrative reduction to administrative separation.[136] These actions are not considered punishment,"[137] but they can be effective tools for promoting good order and discipline. A more rigorous application of administrative sanctions in DWI cases, especially administrative separation, [138] would send a strong message that DWI will not be tolerated.

B. The Impact of Pretrial Diversion and Plea Agreements

Critics may also argue that federal prosecution will rarely result in the desired DWI conviction, since many defendants will negotiate a plea deal for a lesser offense, or receive pretrial diversion.[139] While these outcomes are possible, they are unlikely in most cases.

First, with respect to plea bargaining, defense counsel know that "[a]lthough many prosecutors and courts claim to have 'uniform' policies in drunk driving cases, plea bargaining is almost always a viable possibility."[140] Indeed, depending on the strength of the evidence, a prosecutor may agree to reduce a DWI charge to a lesser offense, such as reckless driving[141] or exhibition of speed,[142] which "will not count as a prior conviction if the client is subsequently convicted of drunk driving."[143]

In the author's experience as the SAUSA at Fort Bliss, Texas, federal DWI defendants rarely receive this type of deal. The DOJ's plea agreement policy requires that a defendant "plead to a charge . . . [t]hat is the most serious readily provable charge consistent with the nature and extent

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[132] *See infra* app. A.

[133] Lowery, *supra* note 64, at 197.

[134] Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3, 3 (1970).

[135] *See, e.g.*, Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 946–47 (2010) ("As the commander of a unit, he has a strong incentive to use the military justice system to maintain order and discipline within his unit so that it maintains peak effectiveness; indeed, the need for the commander to maintain discipline is the justification for granting him great discretion over charging.").

[136] *See infra* app. A.

[137] AR 27-10, *supra* note 7, para. 3-3a.

[138] Increased administrative separation of Soldier DWI offenders would also help reduce the Army's end strength. *See, e.g.*, Jim Tice, *Army to Cut Nearly 50,000 Soldiers Over 5 Years*, ARMY TIMES, Sept. 25, 2011, http://www.armytimes.com/news/2011/09/army-to-cut-nearly-50000-soldiers-over-5-years-092511/ (last visited Jan. 24, 2013) (describing the Army's "five-year, nearly 50,000-soldier drawdown, using a combination of accession cuts and voluntary and involuntary separations").

[139] *See* DRUNK DRIVER PROJECT SOURCEBOOK, *supra* note 8, at 43 ("[P]lea-bargaining and pre-trial diversion programs can result in a conviction on a reduced charge, which in turn, avoids a drunk driving conviction on the driver's record.").

[140] LAWRENCE TAYLOR & ROBERT TAYAC, CALIFORNIA DRUNK DRIVING § 6:11 (4th ed. 2008).

[141] *See, e.g.*, NEV. REV. STAT. ANN. § 484B.653 (West 2012); S.C. CODE ANN. § 56-5-2920 (West 2012).

[142] *See, e.g.*, CAL. VEH. CODE § 23109 (2012).

[143] TAYLOR & TAYAC, *supra* note 140, § 6:11. It should be noted that in some states, a prior reckless driving conviction does count as a prior conviction for purposes of charging an enhanced offense. *See e.g.*, CAL. VEH. CODE §23103.5(c) (2012); WASH. REV. CODE ANN. § 46.61.5055(14)(a)(v) (West 2012).

of his/her criminal conduct."[144] In the vast majority of on-post DWI arrests the evidence against the defendant is strong,[145] so the government has little incentive to reduce the charge.[146]

Next, it is possible, but exceedingly rare,[147] for a federal defendant to have his case resolved through the DOJ Pretrial Diversion (PTD) Program. The DOJ describes this program as:

> an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. . . . Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.[148]

Like nonjudicial punishment, PTD precludes application of an enhanced penalty if the defendant commits a subsequent offense. However, the requirements of the program are stringent[149] and the consequences of breaching a PTD agreement are potentially severe.[150] Therefore, a divertee is similar to a probationer, since both individuals have incentive to stay out of trouble.[151]

In sum, DOJ policy and practice restrict the availability of plea bargaining and PTD. Concerns that Soldier DWI cases will be bargained away or expunged are largely overblown.

C. Disparity in Sentencing

The most legitimate criticism against prosecuting on-post Soldier DWIs in federal district court involves the inconsistent sentences imposed at different installations for the same offense.[152] This inconsistency stems from the fact that magistrate judges apply a unique assimilated DWI statute in every state.[153]

As one commentator explains, "[u]nwarranted sentence disparity exists when individuals convicted of similar crimes receive unequal sentences."[154] While sentence uniformity is a goal of most criminal justice systems,[155] it remains elusive.[156] To address this concern in the federal DWI context, Congress should authorize the SECDEF to issue regulations criminalizing DWI on military installations.[157] Alternatively, Congress could pass a federal DWI statute to replace the current state law assimilation structure.

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[144] *See* DOJ MANUAL, *supra* note 10, § 9-27.430(a)(1), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm.

[145] The sequence of events usually looks like this: a Soldier pulls up to an installation access control point and shows his ID card to a security guard; the guard detects signs of intoxication (e.g., slurred speech, bloodshot eyes, an odor of an unknown alcoholic beverage), instructs the suspect to turn off his vehicle, and notifies the military police; an officer arrives and administers field sobriety tests, which the suspect fails; the suspect is placed under arrest and transported to the station; finally, the suspect consents to submit breath samples, which register well above the legal limit of 0.08.

[146] Despite the DOJ's plea agreement policy, SAUSAs at some installations occasionally allow defendants to plead to a lesser offense. For instance, at Fort Drum, New York, first-time DWI offenders often plead down to Driving While Ability Impaired (DWAI) from the greater offense of DWI. Talley Interview, *supra* note 33; *see also* N.Y. VEH. & TRAF. LAW § 1192(1) (McKinney 2012) (DWAI); *id.* § 1192(2) (DWI).

[147] *See, e.g.*, Joseph M. Zlatic et al., *Pretrial Diversion: The Overlooked Pretrial Services Evidence-Based Practice*, FED. PROBATION, June 2010, at 28 ("Of the 98,244 pretrial services cases activated nationwide in FY 2008, 1,426 were PTD [Pretrial Diversion] cases."); Susannah Nesmith, *Iraq Veteran Offered Deal in Passport Violation Case*, N.Y. TIMES, June 28, 2011, http://www.nytimes.com/2011/06/http://www.nytimes.com/2011/06/29/us/29veteran.html?_r=0 (noting that U.S. Federal District Judge Cecilia Altonaga had "seen the government use the pretrial diversion program only twice before in her eight years on the bench"). Interestingly, first-time civilian DWI offenders at Fort Riley, Kan., routinely receive PTD (Fort Riley adjudicates on-post Soldier DWIs via Article 15). Vazquez Interview, *supra* note 37.

[148] *See* DOJ MANUAL, *supra* note 10, § 9-22.000, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/22mcrm.htm (last visited June 3, 2013). Many states have similar diversion, or deferred prosecution, programs. *See, e.g.*, KAN. STAT. ANN. § 22-2907 (West 2012); WASH. REV. CODE ANN. § 10.05.010 (West 2012); OR. REV. STAT. ANN. § 813.200 (West 2012). However, entrance requirements for these programs are usually stringent. *See, e.g.*, OR. REV. STAT. ANN. § 813.215 (West 2012).

[149] *See* Zlatic et al., *supra* note 147, at 30.

[150] *See* DOJ MANUAL, *supra* note 10, § 9-22.200.

[151] *See* discussion *supra* Part IV.B.2.b.

[152] *Compare supra* note 113, *with supra* notes 127–28.

[153] *See supra* notes 84–87 and accompanying text. Additionally, judges often struggle to resolve issues involving the assimilation of state DWI penalties. *See generally* Phelps, *supra* note 26, §§ 24–34 (collecting cases).

[154] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159, 160 (2000).

[155] *Id.* at 231 (noting that "the federal system and a majority of the states seek sentence uniformity. . ."). The military justice system addresses sentencing uniformity more indirectly. *See id.* at 172–73 ("While sentence uniformity is no longer a sentencing goal addressed in the [*MCM*], sentence uniformity is a matter subject to review by the Court of Criminal Appeals. Congress has tasked the Court of Criminal Appeals with maintaining 'relative' sentence uniformity.") (internal citations omitted).

[156] *See, e.g.*, Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES, Mar. 5, 2012, http://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html?pagewanted=all&_r=0. The military justice system is also plagued by sentence disparities. *See* Immel, *supra* note 154, at 186–94 (analyzing the pervasive sentence disparity in the military justice system); *see also* Scott Sylkatis, *Sentencing Disparity in Desertion and Absent Without Leave Trials: Advocating a Return of "Uniform" to the Uniform Code of Military Justice*, 25 QUINNIPIAC L. REV. 401, 407–09 (2006).

[157] Appendix C briefly explores the contours of this proposal.

VI. Conclusion

> *If it is clear that nonjudicial punishment will not be sufficient to meet the ends of justice, more stringent measures must be taken.*[158]

Drinking and driving is one of the most prevalent and deadly types of Soldier misconduct.[159] While the Army's preventive response to this problem is robust, its punitive response is disjointed. Commanders at some installations continue to resolve on-post DWIs through nonjudicial punishment—undoubtedly with good intentions. However, the negative consequences of this approach far outweigh the benefits. When a Soldier receives an Article 15 for DWI and later reoffends, civilian courts must treat him as a first-time offender. Enhanced penalties for DWI offenders exist to protect society. Resolving on-post Soldier DWI cases through nonjudicial punishment undermines these important laws.

Federal prosecution is a better forum for adjudicating these cases, not only because it results in a conviction, but also because it furthers "the interest of the military command in preserving good order and discipline,"[160] ensures consistent treatment of Soldier and civilian offenders, and sends a forceful message that the Army will not tolerate intoxicated driving.

To that end, this article proposes a more explicit Army-wide policy recommending federal prosecution of on-post Soldier DWIs at all CONUS installations.[161] Chapter Two of AR 27-10 sets forth policy regarding investigation and prosecution of crimes with concurrent jurisdiction between military and federal authorities.[162] This chapter empowers installation commanders to coordinate these matters with local federal authorities.[163] To encourage federal prosecution of on-post Soldier DWIs, a paragraph should be added to the end of the chapter that reads: "Whenever possible, a person subject to the UCMJ who commits an intoxicated driving offense within a military installation will be prosecuted in Federal court by a Special Assistant U.S. Attorney."[164] Mandating federal prosecution is impractical, since almost every installation deals with a different USAO, some of which may decline prosecution in Soldier DWI cases.[165] Thus, installation commanders should be encouraged, but not required, to maximize federal prosecution of Soldier DWI offenders.

In conclusion, an old Army regulation once proclaimed that "[i]ntoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, and readiness, and is a serious threat to the health and welfare of the Army Community. . . ."[166] This timeless observation underscores the need to address on-post Soldier DWI cases in the most effective way possible—through federal prosecution.

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[158] AR 27-10, *supra* note 7, para. 3-2.

[159] *See* discussion *supra* Part II.A.

[160] Major E. John Gregory, *The Deployed Court-Martial Experience in Iraq 2010: A Model for Success*, ARMY LAW., Jan. 2012, at 6.

[161] Similar policy guidance already appears in AR 190-5, Motor Vehicle Traffic Supervision. *See* AR 190-5, *supra* note 5 ("Most traffic violations occurring on DoD installations (within the United States or its territories) should be referred to the proper U.S. Magistrate."). However, this language should explicitly state that "traffic violations" includes DWI. Additionally, the proponent of AR 190-5 is the Provost Marshal General, so judge advocates may not be familiar with this provision. For this reason, AR 27-10 should be amended to clarify this policy. *See infra* text accompanying note 164.

[162] *See generally* AR 27-10, *supra* note 7, ch. 2.

[163] *See id.* para 2-2; *see also* AR 190-45, *supra* note 32, para. 11-30.

[164] Army Regulation 27-10 implicitly acknowledges the suitability of the federal forum for prosecuting DWI cases. AR 27-10, *supra* note 7, para. 23-5 ("The magistrate system is particularly well-adapted to dispose of *traffic* cases.") (emphasis added). It also appears to suggest that Soldier DWIs will be prosecuted in magistrate court, stating: "Routine traffic violations, whether the offender is military or civilian, are referred to the local U.S. Magistrate Division." *Id.* para. 23-1b. This provision should be amended to clarify that "routine traffic violations" includes intoxicated driving offenses.

[165] *See supra* note 10.

[166] *See* Kennerly, *supra* note 11, at 20 n.4.

Appendix A

Administrative Consequences of DWI

In addition to the punitive consequences of DWI, Soldiers are subject to a host of adverse administrative actions. Army Regulation 190-5, *Motor Vehicle Traffic Supervision*, provides for both mandatory and discretionary adverse administrative actions in DWI cases. Commanders may impose these actions regardless of whether the Soldier is prosecuted by civilian authorities or receives UCMJ action. Mandatory administrative actions include the following: (1) suspension of post driving privileges pending resolution of DWI charges; (2) withdrawal of on-post driving privileges upon conviction, imposition of nonjudicial punishment, or refusal to submit to a lawfully requested blood, breath, or urine sample; and (3) a general officer letter of reprimand.[167] Discretionary actions for DWI include administrative reduction, bar to reenlistment, and administrative separation.[168]

Although robust on its face, this administrative framework is often weak in its implementation. For instance, commanders routinely harp on the seriousness of DWI, but they rarely initiate administrative separation, or actually separate, first-time offenders.[169] Moreover, while commanders separate repeat DWI offenders more often, they are not required to do so. Army policy only mandates initiation of administrative separation following a second DWI conviction.[170] As such, this requirement does not apply to a repeat offender who receives nonjudicial punishment, since an Article 15 is not a conviction.[171] In sum, the administrative sanctions for DWI are powerful in theory but weak in practice.

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[167] AR 190-5, *supra* note 5, para. 2-7a. For an excellent overview of these provisions, including their historical development, *see* Kennerly, *supra* note 11, at 19. With respect to the general officer letter of reprimand, the filing determination is governed by U.S. DEP'T ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986).

[168] AR 190-5, *supra* note 5, para. 2-7b. The Department of the Army created this administrative framework nearly thirty years ago following publication of U.S. DEP'T OF DEF., DIR. 1010.7, DRUNK AND DRUGGED DRIVING BY DOD PERSONNEL, (10 Aug. 1983) [hereinafter DODD 1010.7]. This directive established policy regarding intoxicated driving and required the military departments to "establish procedures for mandatory suspension of driving privileges on military installations" in DWI cases. *Id.* para. 5.2. Although DODD 1010.7 is no longer in effect, its policy on intoxicated driving remains instructive:

> Intoxicated driving is incompatible with the maintenance of high standards of performance, military discipline, DOD personnel reliability, and readiness of military units and supporting activities. It is DOD policy to reduce significantly the incidence of intoxicated driving within the Department of Defense through a coordinated program of education, identification, law enforcement, and treatment. . . . Persons who engage in intoxicating driving, regardless of the geographic location of the incident have demonstrated a serious disregard for the safety of themselves and others.

Id. para. 4.1.

[169] A commander can administratively separate a Soldier for a single DWI, since this offense constitutes "commission of a serious offense." *See* AR 635-200, *supra* note 124, para. 14-12c. Of course, the Soldier may be entitled to an administrative separation board. *See id.* para. 9-1a. The lenient treatment of first-time offenders is a relatively recent phenomenon. *See, e.g.*, Masterton, *supra* note 8, at 378 ("As a practical matter, a drunk driving conviction usually results in the termination of a service member's career.").

[170] *See* U.S. DEP'T OF ARMY, DIR. 2012-07, ADMINISTRATIVE PROCESSING FOR SEPARATION OF SOLDIERS FOR ALCOHOL OR OTHER DRUG ABUSE para. 3.5(5) (13 Mar. 2012), *available at* http://www.apd.army.mil/pdffiles/ad2012_07.pdf. This recently-issued policy weakens the preexisting guidance regarding separation of Soldiers with two DWI convictions. *See* U.S. DEP'T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM para. 1-7c(7) (2 Feb. 2009) (C1, 2 Dec. 2009) ("[W]hen a Soldier . . . is convicted of driving while intoxicated/driving under the influence a second time during his/her career, the separation authority *shall* administratively separate the Soldier unless the Soldier is recommended for retention by an administrative separation board or show cause board . . ."). The policy also requires initiation of administrative separation when a Soldier is "[i]nvolved in two serious incidents of alcohol-related misconduct within a 12-month period." *Id.* para. 3.5(1). A "serious incident of alcohol-related misconduct" is defined as any offense punishable under the UCMJ by confinement in excess of one year. *Id.* Thus, a Soldier would have to commit two felony-level DWI offenses in a twelve-month period to satisfy this criterion. Under Article 111, only DWI offenses resulting in personal injury meet this definition. Likewise, state DWI felonies generally involve death, bodily injury, or commission of a third offense. *See, e.g.*, TEX. PENAL CODE § 49.04 (West 2012). It is difficult, to envision a scenario in which a Soldier commits two felony DWIs within a twelve-month period.

[171] *See supra* note 46.

Appendix B

Steps in a Federal Misdemeanor DWI Prosecution

Most on-post DWI cases prosecuted under the ACA are classified as federal petty offenses.[172] As such, they fall within the jurisdiction of U.S. Magistrate Judges.[173] The life of a DWI case in federal magistrate court generally proceeds as follows. After an on-post DWI incident, the Military Police furnish a copy of the police report and other evidence to the post SAUSA. If the case warrants prosecution, the SAUSA files an information[174] alleging a violation of an assimilated state DWI statute. The defendant then receives a summons to appear before a magistrate judge at a designated time and place.[175] Judge Owsley sums up the remaining steps in a DWI prosecution:

> All defendants have an initial appearance during which they are advised of the charge against them, their right to remain silent, their right to an attorney, and their right to a bench trial. Moreover, during the pendency of the criminal action, each defendant typically receives a bond, has an arraignment, has either a trial or enters a plea of guilt, and is informed of the right to appeal (first to the district judge and then to the [circuit court of appeal]).[176]

A defendant is only entitled to a jury trial if the charged offense is a Class A misdemeanor or higher.[177] However, a magistrate judge has discretion to order a jury trial in petty offense cases upon a defendant's request.[178] As with most federal crimes, however, trials are exceedingly rare in DWI cases.[179]

Several variables affect the length of a federal DWI case, including the diligence of law enforcement officers and federal prosecutors, the complexity of the case, and the size of the local federal docket. While federal DWI cases cannot be resolved as quickly as Article 15 proceedings, in the author's experience, they usually conclude within a few months.

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[172] *See supra* note 89 and accompanying text.

[173] *See* 18 U.S.C. § 3401 (2011); FED. R. CRIM. P. 58 (2012). *See generally* Honorable Jacob Hagopian, *United States Magistrate Judges and Their Role in Federal Litigation*, ARMY LAW., Oct. 1999, at 19. A second DWI offense under the ACA qualifies as a Class A misdemeanor, so the magistrate judge will not have jurisdiction unless the defendant consents. *See* 18 U.S.C. § 3401(b). Felony DWI charges must be tried before a U.S. district judge. United States v. Teran, 98 F.3d 831, 834 (5th Cir. 1996).

[174] FED. R. CRIM. P. 7.

[175] *Id.* 4(c)(3)(B).

[176] Owsley, *supra* note 84, at 438.

[177] *See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (right to jury trial exists only when the defendant faces more than six months imprisonment).

[178] Owsley, *supra* note 84, at 438.

[179] Statistics on guilty plea rates in federal DWI cases are unavailable. However, the overall rate for felony and Class A misdemeanor offenses was 96.9 percent in 2011—the most recent year for which statistics are available. *See, e.g.*, SENTENCING STATISTICS, *supra* note 68, fig.C, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.htm. In the author's experience, this rate is comparable in petty offense DWI cases.

Appendix C

Authorizing the SECDEF to Promulgate DWI Regulations

Precedent exists for congressional authorization of federal agency DWI regulations. For example, Congress granted the Secretary of the Interior power to issue regulations "necessary or proper for the use and management of the parks . . . under the jurisdiction of the National Park Service."[180] This authorization resulted in the following regulation criminalizing DWI on National Parks:

> Operating or being in actual physical control of a motor vehicle is prohibited while:
>
> (1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or
>
> (2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.[181]

The maximum punishment for this offense is six months confinement,[182] a $5,000 fine,[183] and a $10 special assessment.[184] In addition, a defendant may be sentenced to probation for a term of up to five years.[185] Prosecutions under this regulation are routinely upheld by federal appellate courts.[186] Congress has granted similar rulemaking authority to the U.S. Postal Service (USPS) and the Department of Veterans Affairs (VA),[187] and both organizations have issued federal regulations prohibiting DWI.[188]

Considering the staggering amount of federal property administered by the DoD[189] and the frequency of DWI on military installations,[190] it is perplexing that Congress has not authorized the SECDEF broader rulemaking authority. Prosecuting

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[180] 16 U.S.C. §3 (2011).

[181] 36 C.F.R. § 4.23(a) (2012). Prosecutions under this regulation are routinely upheld by federal appellate courts. *See, e.g.*, United States v. Smith, 701 F.3d 1002, 1004 (4th Cir. 2012); United States v. French, 468 F. App'x 737, 738 (9th Cir. 2012) (unpublished); United States v. Jackson, 273 F. App'x 372, 374 (5th Cir. 2008) (unpublished).

[182] 36 C.F.R. § 1.3(a) (2012); *see also* 18 U.S.C. § 3551(b) (2011) (stating that federal defendants may be sentenced to a term of probation, to pay a fine, or to receive a term of imprisonment).

[183] Federal offenses with a maximum penalty of six months or less are classified as Class B misdemeanors. 18 U.S.C. §§ 3559(a)(7), 3581(b)(7). A Class B misdemeanor not resulting in death carries a maximum fine of $5,000. *Id.* § 3571(b)(6); *accord* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (per curiam) ("[T]he federal [driving under the influence] offense carries a maximum fine of $5,000.").

[184] 18 U.S.C. § 3013(a)(1)(A)(ii).

[185] *Id.* §3561(c)(2).

[186] *See, e.g.*, *Smith*, 701 F.3d at 1004; *French*, 468 F. App'x at 738; *Jackson*, 273 F. App'x at 374.

[187] 39 U.S.C. § 401(2) (2011) (granting the U.S. Postal Service (USPS) the authority "to adopt, amend, and repeal such rules and regulations, not inconsistent with this title, as may be necessary in the execution of its functions under this title and such other functions as may be assigned to the Postal Service under any provisions of law outside of this title."); 38 U.S.C. § 901(a)(1) (2011) ("The Secretary [of Veterans Affairs] shall prescribe regulations to provide for the maintenance of law and order and the protection of persons and property on Department property.").

[188] 39 C.F.R. § 232.1(g)(1) (2012) (USPS) ("A person under the influence of an alcoholic beverage . . . may not . . . operate a motor vehicle on postal property."); 38 C.F.R. § 1.218(b)(7) (2012) (Department of Veterans Affairs). The maximum punishment for DWI on property administered by the USPS is up to one month confinement, a $5,000 fine, a $10 special assessment, and five years probation. 39 C.F.R. §232.1(g)(1) ("Whoever shall be found guilty of violating the rules and regulations in this section while on property under the charge and control of the Postal Service is subject to fine of not more than [that allowed under Title 18 of the United States Code] or imprisonment of not more than 30 days, or both."); *see also* 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2), 3571(b)(6) (2006) (special assessment, probation, and fine, respectively). Defendants convicted of violating the Veterans Affairs DWI regulation face up to six months confinement, a $500 fine, a $10 special assessment, and five years probation. 38 C.F.R. §1.218(b)(15) (confinement and fine); *see also* 18 U.S.C. §§ 3013(a)(1)(A)(ii), 3561(c)(2) (special assessment and probation, respectively).

[189] The DoD administers over nineteen million acres at 4,127 separate military bases and training ranges within the fifty states. *See* ROSS W. GORTE ET AL., CONG. RES. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 11–13 (2012), *available at* http://www.fas.org/sgp/crs/misc/R42346.pdf.

DWIs in federal court pursuant to the ACA results in sentencing disparities,[191] and judges struggle to apply consistently the various state DWI statutes.[192] Authorizing the SECDEF to promulgate DWI regulations for military installations would simplify the prosecution and appellate review of these cases. The Department of Interior's DWI regulation could provide a useful template. Alternatively, Congress could pass a federal DWI statute that applies to all areas within the special maritime and territorial jurisdiction of the United States.[193]

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[190] *See supra* note 13 and accompanying text.

[191] *See supra* notes 151–52 and accompanying text.

[192] *See generally* Phelps, *supra* note 26, §§ 24–35 (cataloguing cases involving the assimilation of state penalty provisions).

[193] *See* 18 U.S.C. § 7 (2011).

Multinational Rules of Engagement: Caveats and Friction

Major Winston S. Williams, Jr.[*]

I. Introduction

Multinational operations have become the standard for engagement worldwide. From the Army's beginnings in the revolution through most of the 20th century and into the 21st century, we've seen the complexity of operations magnified by the increasing numbers of nations committing resources for the cause of stability and peace in the world. Commanders at all levels must be skilled at dealing with these multinational partners.[1]

Modern military operations are rarely unilateral efforts, and multinational rules of engagement are an important aspect of these operations. Multinational operations are on the rise as nations seek multinational support and multinational legitimacy to resolve threats to peace and security. Oftentimes, these operations involve new partnerships with nations outside of traditional alliances. This dynamic creates additional challenges for commanders and their legal advisors.[2] In particular, multinational operations are fraught with friction related to rules of engagement (ROE).

National governments may place restrictions on how their country's forces support a particular operation with ground troops or air support.[3] These restrictions, also known as caveats, cover a broad range of areas including rules of engagement and types of operations. In addition to caveats, nations may have differing interpretations of international law, especially in the realm of self defense.[4] With these national law and policy influences in mind, nations often experience substantial difficulty in drafting and applying a common set of rules of engagement. Judge advocates deployed to a multinational operation must be aware of the caveats and interpretation issues, as well as know how to assist the commander in alleviating the corresponding friction to enable mission accomplishment.

This article provides guidance for judge advocates to alleviate this friction by focusing on three key areas. First, judge advocates must understand the shifting nature of caveats, both declared and undeclared, and the impacts these have on mission planning and execution. Next, judge advocates must be cognizant of other countries' different interpretations and policies related to self defense. Finally, judge advocates supporting a multinational operation must be prepared to assist commanders[5] with ROE training related to national caveats and multinational self defense policies and interpretations.

II. Multinational ROE Friction Point—National Caveats, Declared and Undeclared

While there will be nuances particular to each country's rules of engagement, the "strings" attached to one nation's forces unfairly burden others and have done real harm in Afghanistan.[6]

Nations may be willing to support multinational military operations, but such support often comes with restrictions commonly known as national caveats. National caveats are restrictions imposed by national governments on their armed forces' operations.[7] Caveats are common in NATO

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[1] U. S. DEP'T OF ARMY, FIELD MANUAL 3-16, THE ARMY IN MULTINATIONAL OPERATIONS foreword (20 May 2010) [hereinafter FM 3-16].

[2] *Id.* More nations are starting to contribute to stability operations and contributions of Jordan, Mongolia, Korea, and Singapore to the NATO Training Mission-Afghanistan reinforce this trend. *See* INT'L SEC. ASSISTANCE FORCE, http://www.isaf.nato.int/subordinate-commands/nato-training-mission-afghanistan/index.php (last visited May 13, 2013).

[3] VINCENT MORELLI & PAUL BELKIN, CONGRESSIONAL RESEARCH SERV. RL 33627, NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE 10 (2009).

[4] COMMANDER ALAN COLE ET AL., RULES OF ENGAGEMENT HANDBOOK 3 (2009), *available at* http://www.usnwc.edu/getattachment/7b0d0f70-bb07-48f2-af0a-7474e92d0bb0/San-Remo-ROE-Handbook.aspx.

[5] The commanders are responsible for training their Soldiers on Rules of Engagement (ROE) for military operations. Judge advocates, however, should assist the commanders with empowering small unit leaders with the ability to train Soldiers at the platoon and squad levels. *See* Major Winston S. Williams, Jr., *Training the Rules of Engagement for the Counterinsurgency Fight*, ARMY LAW., July 2012, at 42, 45.

[6] Donna Miles, Armed Forces Press Serv., *Gates: NATO Must Increase Assets, Cut Caveats in Afghanistan*, U.S. DEP'T OF DEF. (Oct. 25, 2007), www.defense.gov/newsarticle.aspx?ID=47936.

[7] North Atlantic Treaty Org., P.A. Res. 336, Nov. 15, 2005 [hereinafter P.A. Res. 336], *available at* http://www.nato- pa.int/Default.asp?CAT2=1458&

operations and can be a source of friction.[8] Commanders have to work within the constraints of previously known and declared caveats and quickly adjust their plans when an undeclared caveat arises during the mission planning process.

Most caveats are declared but even these pose challenges for commanders. Declared caveats are established up front by a national government and are known by the multinational commander early on in the deployment.[9] Examples of declared caveats include geographical limitations and combat operation prohibitions. In Afghanistan, "[a]s many as nineteen nations impose[d] geographic limits on where their troops can operate."[10] These limits create "planning and execution problems for commanders on the ground."[11] Even if a nation's government does not impose a geographic limit on its forces, it may prohibit its forces from conducting offensive operations. This type of prohibition allows them to use force only in self defense.[12]

Many nations involved in Afghanistan are not allowed to participate in offensive combat operations. This may lead to dire consequences for commanders. In Afghanistan, for example, *Operation Medusa*[13] nearly failed when Canadian forces could not get the necessary support from other nations because of their national caveats related to combat operations.[14] In another example, a routine provincial reconstruction mission experienced the calamitous consequences of national caveats. In this example,

> [a]n attack on the Norwegian-Finnish PRT in normally tranquil Meymaneh, in western Afghanistan, in February 2006 had given an indication of an emerging problem: the need for a rapid military response capability for rescue operations. When the PRT was attacked, no NATO combat forces were in the region to protect the ISAF personnel. Other NATO forces that were nearby had caveats prohibiting their use in combat operations. Eventually a British force was found to help end the attack on the PRT.[15]

In contrast to declared caveats, undeclared caveats are those caveats that are not well documented in advance and often emerge during an operation.[16] The commander may not know of an undeclared caveat until time for mission execution. For example, a commander may give an order to "move a given set of national forces only to be refused unexpectedly"[17] as a result of a previously undeclared caveat. Undeclared caveats may also result from differing interpretations of host nation policies and the international law of self defense.[18]

III. Multinational ROE Friction Point—Differing Interpretations of Self Defense

Self-defence is available in all situations, including armed conflict. National laws differ on the definition and content of the right of self-defence [sic]*. As a consequence, individuals and units will exercise this right in accordance with their respective national law.*[19]

CAT1=16&CAT0=576&SHORTCUT=828&SEARCHWORDS=caveats. *See also* FM 3-16, *supra* note 1, para. 1-16.

[8] MORELLI & BELKIN, *supra* note 3, at 10 (stating "[w]hile caveats in themselves do not generally prohibit the kinds of operations NATO forces can engage in, caveats do pose difficult problems for commanders who seek maximum flexibility in utilizing troops under their command"). National caveats were a point of friction in Kosovo when the caveats prevented the commander from deploying NATO forces to confront ethnic riots, which led to many casualties. Daniel Sewer, *Kosovo: Status with Standards*, U.S. INST. OF PEACE, Apr. 2004, *available at* http://www.usip.org/resources/kosovo-status-standards (stating that "national caveats in some cases prohibited crowd control or deployment outside a predefined area").

[9] P.A. Res. 336, *supra* note 7.

[10] FRANK COOK, NATO PARLIAMENTARY ASSEMBLY COMMITTEE REPORT, NATO OPERATIONS: CURRENT PRIORITIES AND LESSONS LEARNED (2008) [hereinafter NATO PARLIAMENTARY ASSEMBLY COMM. REP.], *available at* http://www.nato-pa.int/Default.asp?SHORTCUT=1476.

[11] *Id.*

[12] MORELLI & BELKIN, *supra* note 3, at 10.

[13] *Operation Medusa* was a "two-week offensive to push Taliban remnants from southern Afghanistan and pave the way for reconstruction and development." David McKeeby, *NATO's Operation Medusa Pushing Taliban from Southern Kandahar*, IIP DIGITAL: U.S. DEP'T OF STATE (Sep. 18 2006), http://iipdigital.usembassy.gov/st/english/article/2006/09/20060918160151idybeekcm0.9616358.html#axzz2U2ImKvGA.

[14] 453 PARL. DEB., H.C. (2006) 1249 (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm061130/debtext/61130-0009.htm.

[15] MORELLI & BELKIN, *supra* note 3, at 16.

[16] NATO PARLIAMENTARY ASSEMBLY COMM. REP., *supra* note 10.

[17] *Id.*

[18] Ctr. for Law & Military Operations, The Judge Advocate Gen.'s Sch., U.S. Army, After Action Report, 10th Mountain Division, Operation Enduring Freedom, 2010–2011, at 4 (15 Nov. 2011) [hereinafter 10th Mtn. Div. AAR].

[19] COLE ET AL., *supra* note 4, at 5.

All nations recognize the right of self defense in armed conflict.[20] The nations that provide support to multinational operations generally agree on a common definition of self defense, which is "the use of force to defend against *attack* or imminent *attack*."[21] Within this common definition, however, there are multiple interpretations of what the words mean.

The difficulty arises for U.S. forces with the definition of *imminent* and hostile act/hostile intent terminology. Specifically, the U.S. Standing Rules of Engagement (SROE)[22] defines "imminent," "hostile act" and "hostile intent" differently from the way many other nations do. Although multinational ROE govern many of the operations, U.S. forces still follow the SROE for self defense.

When U.S. forces are under the operational control (OPCON) or tactical control (TACON) of a multinational force, they follow the multinational ROE for mission accomplishment, if authorized by the Secretary of Defense.[23] The SROE, however, state that "U.S. forces retain the right of self defense," and the United States will continue to use its own rules and the SROE definitions for self defense.[24] Judge advocates must understand the SROE definitions of these terms and how these definitions differ from those of many multinational partners.

The SROE define "hostile act" as "an attack or other use of force against the United States, U.S. forces or other designated persons or property."[25] Hostile intent is the "threat of imminent use of force against the United States, U.S. forces or other designated persons or property."[26] The SROE, however, does not directly define "imminent" but states:

> [t]he determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all the facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.[27]

Although the SROE do not describe what constitutes an imminent threat, they do indicate that "imminent" need not mean immediate or instantaneous. This distinction conflicts with most multinational partners' rules.

The NATO ROE's definition of "imminent," which is the consensus definition for most nations, defines "imminent" as creating a need to defend that is "manifest, instant, and overwhelming."[28] This difference may hinder a multinational partner's ability to support U.S. forces. For example, if a U.S. force has close air support from a NATO partner, the NATO partner will only respond to immediate threats even if the U.S. force perceives less immediate threats to be "imminent" as defined in the SROE.

Nations also use the terms "hostile act" and "hostile intent" differently. Some nations, like the United States, use these terms as the basis for the use of force in self defense. Other nations use them to justify offensive military operations.[29] So, if a U.S. force observes a hostile act and reports this information to the NATO ally providing close air support, the U.S. force may not receive immediate lethal support. The ally may interpret the term according to its own definitions and be seeking approval for an offensive operation instead of responding immediately in self defense. This situation is easy to remedy by using the right terminology, but a unit supporting multinational operations must be prepared through proper training and planning to avoid these perilous situations.

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[20] *Id.* (stating that "[i]nternational law and the domestic laws of all nations recognise a right of self-defence . . .").

[21] *Id*.

[22] The SROE provides "implementation guidance on the application of force for mission accomplishment and the exercise of self defense." CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES (13 June 2005) [hereinafter CJCSI 3121.01B].

[23] *Id*. Operational Control gives the commander "authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission . . . ." U.S. DEP'T OF DEF., JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 206 (15 Apr. 2013) [hereinafter JOINT PUB. 1-02]. Tactical Control gives the commander "authority over forces that is limited to the detailed direction and control of movements or maneuvers within the operational area necessary to accomplish missions or tasks assigned . . . ." *Id*.

[24] CJCSI 3121.01B, *supra* note 22. When U.S. forces respond to a hostile act or hostile intent, they will follow the SROE and not the multinational ROE.

[25] *Id.* at A-3.

[26] *Id*.

[27] *Id*.

[28] Major John J. Merriam**,** *Natural Law and Self-Defense*, 206 MIL. L. REV. 43, 78 (2010) **(**citing North Atlantic Treaty Organization, NATO MC 362/1, NATO Rules of Engagement (2003)). Most nations follow this definition of imminence which derives from customary international law related to national self defense.

[29] COLE ET AL., *supra* note 4, at 3. Basically, these nations use hostile act and hostile intent as basis to conduct offensive operations. Offensive operations often require higher level approval that is not within the authority of the commander on the scene.

IV. Multinational Rules of Engagement Training and Planning Lessons Learned

Judge Advocates should ensure ROE training includes reference to multinational partner ROE, where relevant. Where security caveats permit, Judge Advocates should consider assisting other multinational Judge Advocates in their ROE training by sharing vignettes . . . .[30]

This article has identified two primary sources of multinational ROE friction; national caveats (declared and undeclared), and differing interpretations and national policies related to self defense. Judge advocates can assist their commanders with alleviating these frictions with proper ROE training and mission planning. Pre-deployment ROE training that incorporates routine national caveats and multinational partner interpretations is the first step in alleviating this friction.

Although the multinational ROE may not be available to units for pre-deployment phase training, several resources are available to help judge advocates prepare vignettes prior to deployment. First, the NATO ROE is a good resource, containing many of the definitions our allies use for self defense. Second, the San Remo's *Handbook on Rules of Engagement* contains good background information on multinational views on self defense and ROE.[31] These sources, along with the *ROE Vignettes Handbook*,[32] can help commanders and judge advocates develop "realistic and rigorous scenario- or vignette-driven training exercises"[33] for staffs and Soldiers.

Soldiers must understand the different constraints multinational partners have related to self defense. Thus, ROE training should incorporate vignettes that explain the caveats of partner nations and the terminology these nations use for actions in self defense. Also, staff at each level needs multinational ROE training for mission planning and execution. The staff is the entity that synchronizes assets, which often include multinational air support and soldiers. For this reason, judge advocates should develop vignettes that are unique to staff operations, especially as these relate to self defense/troops-in-contact situations.[34] These vignettes should include situations where caveats restrict a multinational partner to specific geographical areas and preclude offensive operations. This training will help the staff develop battle drills[35] and standard operating procedures (SOPs) for operations in theater.

Standing operating procedures are indispensible for successful interoperability in a multinational operation. The staff should develop SOPs that are easy to understand and address multinational procedures, not single-nation procedures.[36] These SOPs must be flexible to account for changes to multinational assets and their national caveats.

For example, most U.S. forces arrive in theater with a set of SOPs that cover a range of actions to include reacting to troops-in-contact situations. One SOP will have a set of steps for the staff to go through to provide close air support or other indirect fire support to the unit on the ground. This type of SOP needs to be modified to incorporate the multinational terminology required by whichever multinational partner provides close air or indirect fire support. To properly assist the staff with preparing for these situations, judge advocates should play an active role in both pre-deployment and in-theater planning.

To accomplish this proactive support, judge advocates must know their role in the unit's planning cycle. Although units have different procedures for planning, all Army units use the military decision making process (MDMP)[37] for pre-deployment and in-theater planning. One of the first steps in this process is mission analysis, and identifying constraints is key to this phase. A constraint is a restriction placed on the command that inhibits its freedom of action.[38] A caveat to the multinational ROE is a constraint the commander needs to know during mission analysis to properly visualize

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[30] CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCHOOL, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS, VOL. I: MAJOR COMBAT OPERATIONS (1994–2008), at 347 (1 Sept. 2008).

[31] COLE ET AL., *supra* note 4, at 5.

[32] CTR. FOR ARMY LESSONS LEARNED, U.S. ARMY COMBINED ARMS CTR., ROE VIGNETTES, NO. 11-26 (May 2011), *available at* https://call.army.mil.

[33] FM 3-16, *supra* note 1, para. 3-8.

[34] Troops-in-contact (TIC) is "an unplanned engagement occurring when US or NATO ground forces unexpectedly come into contact with insurgent forces." Marc Garlasco, *Troops in Contact*, *in* HUM. RTS. WATCH 29, 30 (Brad Adams et al. eds., Sept. 2008). These situations often involve attacks or imminent attacks on U.S. forces, which justify the use of force in self defense.

[35] A battle drill is

> a collective action, executed by a platoon or smaller element, without the application of a deliberate decision-making process. The action is vital to success in combat or critical to preserve life. The drill is initiated on a cue, such as an enemy action or your leader's order, and is a trained response to the that stimulus.

U. S. DEP'T OF ARMY, FIELD MANUAL 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS para. 1-7 (28 Jan. 2008).

[36] FM 3-16, *supra* note 1, para. 2-42.

[37] U. S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 5-0, THE OPERATIONS PROCESS para. 32 (17 May 2012).

[38] U. S. DEP'T OF ARMY, ARMY TACTICS, TECHNIQUES AND PROCEDURES NO. 5-0.1, COMMAND AND STAFF OFFICER GUIDE para. 4-8 (14 Sept. 2011).

the situation. The judge advocate, as the command's ROE expert, is responsible for providing this information during mission analysis. Without it, the plan may be derailed by an unforeseen constraint. Unfortunately, the unit may not know the full set of national caveats during the pre-deployment planning; therefore, the unit will have to incorporate these caveats during the in-theater planning cycle.

Most units continue to use MDMP in theater but in an expedited manner. The process is still the same, but judge advocates must continue to provide the most accurate list of national caveats and changes to them during each planning cycle. In order to accomplish this, judge advocates must know where to find the current list of national caveats. In Afghanistan, ISAF maintained a database of caveats but multinational partners did not always agree on its accuracy.[39] Thus, judge advocates have to maintain situational awareness on caveats by tracking the caveat database and working directly with multinational legal advisors.[40]

Also, subordinate units at the battalion and company level may experience mission impediments due to undeclared caveats raised during the execution of a particular mission. Judge advocates should encourage their commanders to include undeclared caveats or new interpretations of declared caveats in the list of Friendly Force Information Requirements (FFIR).[41] By doing this, the judge advocate and the commander will get bottom-up feedback on the challenges Soldiers are experiencing in working with multinational partners. This type of proactive legal support by judge advocates in training and planning can provide the commander the necessary tools to mitigate the friction from multinational ROE.

V. Conclusion

> *Multinational operations are affected by the political agendas of participating countries. Many nations will not, or are reluctant to, relinquish command of their forces to other countries.*[42]

Multinational operations are the modern approach to eliminating threats to peace and security and bringing stability to war-torn regions. The domestic political landscape will affect the support a particular nation brings to the multinational fight and can influence the multinational rules of engagement. Differing national restrictions and policy interpretations on self defense will continue to cause friction amongst allied nations. Alleviating ROE frictions must be a priority for commanders and judge advocates. As the commander's subject matter expert on the ROE,[43] judge advocates play a key role in mitigating this friction. They can do so by assisting commanders with pre-deployment training and planning to prepare their units for the complex multinational environment. Also, in theater, judge advocates must diligently keep track of changes to existing caveats, new interpretations of multinational ROE by coalition partners, and other unforeseen changes. Once U.S. forces are able to alleviate the friction, they can refocus on what the multinational partners *can* do to support the fight and not on their limitations.

[39] 10th Mtn. Div. AAR, *supra* note 18, at 4.

[40] *Id*.

[41] FFIR is "information the commander and staff need to understand the status of friendly force and supporting capabilities." JOINT PUB. 1-02, *supra* note 23, at 206.

[42] FM 3-16, *supra* note 1, para. 2-21.

[43] U. S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 7-8 (18 Mar. 2013).

Notes from the Field

Making Justice Flat: A Challenge to the View That Deploying Commanders Must Relinquish Command and General Court-Martial Convening Authority Over Non-Deploying Forces

Colonel George R. Smawley[*]

Unity of command results in unity of effort by coordinated action of all forces toward a common goal. Coordination may be achieved by direction or by cooperation. It is best achieved by vesting a single commander with requisite authority.[1]

—*Principles of War*, 1954

It is now possible for more people than ever to collaborate and compete in real time with more other people on more different kinds of work from more different corners of the planet and on a more equal footing than at any previous time in the history of the world—using computers, e-mail, networks, teleconferencing, and dynamic new software. . . . When you start to think of the world as flat, a lot of things make sense in ways they did not before.[2]

—Thomas Friedman

I. Introduction

It was a simple question. "Why," asked the Commanding General of the 25th Infantry Division (25ID) in advance of its 2010 deployment to Iraq, "am I required to relinquish my general court-martial convening authority (GCMCA) over personnel at Schofield Barracks merely because the headquarters deploys? What law mandates I abdicate this aspect of command—oversight of discipline within my assigned formations?" "What prevents me," he asked, "from retaining unitary justice over a geographically bifurcated command?"

The answer was nothing. There is nothing in the Uniform Code of Military Justice (UCMJ), Article 22, or otherwise at law requiring a commanding officer to transfer authority over courts-martial to another commander simply because he is deploying to a contingency operation, regardless of the duration. It makes no difference whether the commander is geographically separated by a nation (e.g., Bosnia), or one or more continents (e.g., Iraq and Afghanistan); it matters not whether a week, a month, or a year. The decision to transfer GCMCA or to establish an equivalent provisional authority is a *choice*.

The Criminal Law Branch, Office of The Judge Advocate General, U.S. Army, provides deploying staff judge advocates (SJAs) and chiefs of military justice with a superb handbook on how to transfer authority to other convening authorities.[3] The guide outlines a "six step framework for analysis and action"[4] for deploying units, and specifically considers a scenario where a deploying convening authority retains jurisdiction over rear units, but finds:

> Although this course of action may be appropriate for short deployments, or in

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Special thanks to the judge advocates and paralegals whose distinctive service, creativity, focus, and commitment to mission enabled the successful implementation of the unitary justice concept during the 25ID's 2010–2011 deployment in support of *Operation New Dawn*, Iraq, in particular: Captain (CPT) Joanne Gordon, Chief of Military Justice, 25ID and U.S. Division–Center (USD–C), 2010–2012; CPT Hannah Kaufman, Command Judge Advocate, 25ID (Rear-Provisional), Schofield Barracks, 2010–2012; Chief Warrant Officer Three Carolyn Taylor, Legal Administrator, 25ID and USD–C; Master Sergeant Dean Neighbors, Noncommissioned Officer-in-Charge (NCOIC), Military Justice, 25ID & USD–C; Staff Sergeant (SSG) Christopher McCollum, NCOIC, 25ID (Rear-Provisional), Schofield Barracks; SSG Paulette Prince, Senior Court Reporter, 25ID and USD–C; Sergeant Major Cyrus Netter, Command Paralegal NCO, 25ID and USD–C and Lieutenant Colonel Emily Schiffer, Deputy Staff Judge Advocate.

[1] U.S. DEP'T OF ARMY, FIELD MANUAL 100-5 OPERATIONS 26 (27 Sept. 1954), *available at* http://cgsc.contentdm.oclc.org/utils/getfile/collection/p contentdm.4013coll9/id/79/filename/80.pdf (last visited Mar. 4, 2013).

[2] THOMAS L. FRIEDMAN, THE WORLD IS FLAT, A BRIEF HISTORY OF THE 21ST CENTURY 8 (2005).

[3] OFFICE OF THE JUDGE ADVOCATE GENERAL, DEPLOYING JUSTICE: A HANDBOOK FOR THE CHIEF OF MILITARY JUSTICE (2008).

[4] *Id.* at 3.

> situations where the convening authority returns to home station regularly to meet with key staff and review documents, this option is usually not appropriate in the current environment where units are typically deploying for 12–15 months.[5]

This otherwise invaluable guide, therefore, does little for those legal offices with commanders contemplating retention of their command and UCMJ authority over non-deploying personnel for extended periods of time. There has never been a model—until now.

As the final combat division to serve in the final year of the American experience in Iraq, the 25ID, under the command of Major General (MG) Bernard S. Champoux,[6] retained GCMCA of three special court-martial convening authorities (SPCMCAs) and some 8,000 Soldiers at Schofield Barracks, Hawaii, during the division's thirteen-month tour as the headquarters for U.S. Division–Center (USD–C), *Operation New Dawn*, 2010–2011.

This note details the 2010–2011 experience of the 25ID, and suggests that commanders and their SJAs should not automatically reject the idea of retaining UCMJ authority over non-deployed personnel during contingency operations. It advocates a fresh look at how GCMCA *can* be retained over the challenges of space and time during extended operational deployments.

II. Background

The long-standing bias for deploying Army headquarters is that non-deploying units and personnel are, with rare exception, assigned to a new or different GCMCA for the duration of the operation. There are several reasons for this, primarily associated with proximity and practicality: proximity of the convening authority to subordinate units and the practicality inherent in the local administration of military justice. A third issue concerns the willingness of deployed commanders and staff to underwrite and respond to legal issues far from the immediacy of contingency operations. Staff judge advocates and the Judge Advocate General's Corps have traditionally reinforced these concerns and developed a mature process for the transition of non-deploying personnel to home station GCMCAs.

But in late 2010, the 25ID Commander openly questioned the necessity for this, and the idea of transferring GCMCA over 25ID Soldiers to another commander within U.S. Army Pacific (USARPAC). Given that the Commander, USARPAC, did not himself exercise military justice in a way that would allow jurisdiction over 25ID personnel to be kept within the chain of command, MG Champoux decided to retain his GCMCA during the 2010–2011 deployment to central Iraq inclusive of all the prerogatives and associated authority for the maintenance of good order and discipline over non-deploying personnel.

This included the equitable administration of military justice, responsible and accountable military discipline including adverse administrative actions, separations, approval of pertinent investigations, and the continuity of each before, during, and immediately following his headquarters' deployment to Baghdad. It was also an integrated part of a larger effort to remain fully engaged with the Schofield Barracks community, the 25ID units stationed there, their families, and the local Hawaiian civilian community.

Major General Champoux was committed to the application of his command philosophy, values, and priorities toward ALL Soldiers in his assigned formation, whether in Hawaii or 8,200 miles away in Iraq. He felt accountable for them regardless of where his headquarters was located. The Army had selected him to command the 25ID and its subordinate brigades, and he intended to do it, so long as justice could be achieved and high standards met.

An issue, however, was a USARPAC execution order (EXORD) which expressly required the transition of non-deploying 25ID personnel to the GCMCA of the adjacent 8th Theater Support Command (8th TSC), based at Fort Shafter, Hawaii. The 8th TSC previously assumed GCMCA during the Division's 2008–2009 deployment in support of *Operation Iraqi Freedom*.

Eight weeks before the deployment, after lengthy discussions between the USARPAC and 25ID SJAs, the USARPAC Commanding General, Lieutenant General Benjamin R. Mixon,[7] agreed to MG Champoux's request for jurisdiction over non-deploying 25ID personnel. He gave the 25ID ninety days to make it work. If not, the rear provisional GCMCA would revert to the Commander, 8th TSC, on or about 1 March 2011.

III. Making the World Flat

The concept of "unitary justice" while deployed was informed by Thomas Friedman's observations in his bestselling book, *The World Is Flat: A Brief History of the 21st Century*. Citing an interview with the chief executive officer of Indian technology giant Infosys Technologies, Nandan Nilekani, Friedman highlights the immeasurable way information technology has altered and liberated the manner in which intellectual work is conducted.

[5] *Id.* at 4.

[6] Promoted to Lieutenant General, 1 January 2013.

[7] Lieutenant General (LTG) Benjamin R. Mixon; succeeded by LTG Francis J. Wiercinski in March 2011.

> [C]omputers became cheaper and dispersed all over the world, and there was an explosion of software—email, search engines like Google, and proprietary software that can chop up any piece of work and send one part to Boston, one part to Bangalore, and part to Beijing, making it easy for anyone to do remote development. When all of these things suddenly came together around 2000, added Nilekani, they "created a platform where intellectual work, intellectual capital could be delivered from anywhere. It could be disaggregated, delivered, distributed, produced, and put back together again—and gave a whole new degree of freedom to the way we do work, especially work of an intellectual nature . . . ."[8]

What the 25ID set out to do was no different from what hundreds of corporate enterprises and multinational organizations have done for the past decade or longer—flatten collaboration, administrative, and decision–making functions of the organization by leveraging communications between and among critical stakeholders. Why was it that American business, medical, and accounting firms successfully conduct core professional services across the continental United States and from New York to Bangalore, and an Army headquarters could not do the same from Hawaii to Iraq? What are the material limitations? What makes us different? Where are the crucial similarities?

The answer is that the differences are surprisingly modest. While there is little point debating the inherent power of physical presence and proximity within an office or command, as a practical matter the vast majority of legal work conducted by judge advocates and military paralegals can be supervised and migrated across space and time without regard to the actual location of the players. The key enabler is technology, combined with sound business practices and properly empowered people who know how to use it.

Unified processes, systemic communication, and a common operating picture were central to the leadership of a bifurcated SJA office in the administration of a GCMCA. In the same way a tactical command post requires ready communication with a division operations center (DOC), the SJA office in Baghdad had to have unequivocal access to the Hawaii office.

The elements were rather basic. For example, in the early 1990s the 6th Infantry Division GCMCA was located at Fort Wainwright (Fairbanks), Alaska, while half the command was 364 miles south at Fort Richardson (Anchorage); with a judiciary located at Fort Lewis, Washington. The SJA and chief of military justice were co-located with the convening authority and supervised military justice with two separate panels some six hours apart. This, in an age without access to the Internet, e-mail, digital scanners, web portals, Adobe readers, Microsoft, or plain paper facsimile machines. Legal services were supervised and administered via rotary dial phones, the U.S. Postal Service, and a C12 aircraft that routinely moved staff actions and records of trial over the Alaska Range to and from the convening authority.[9]

And it worked.

It also worked for shorter durations of two to five months for the 10th Mountain Division (Afghanistan), and 1st Infantry Division (Bosnia), among others.[10]

So why, in 2010–2011, with nearly every commercially available information technology system and the reliable network access afforded by the mature Iraq theater of operations, could we not do the essentially the same thing over even greater distances for the duration of a twelve-month deployment?

IV. The 25th Infantry Division General Court-Martial Convening Authority, 2010-2012 . . . The Sun Never Set . . . .

The planning assumptions for the establishment and support of a large, geographically bifurcated GCMCA included the following facts:

> (1) Schofield Barracks, Hawaii—three SPCMCAs with approx. 8,000 Soldiers;
> (2) U.S. Division–Center, Iraq—nine SPCMCAs (peak) with approx. 23,000 Soldiers;
> (3) 8,200 miles of separation;
> (4) Thirteen hour time difference;
> (5) Three Tandbergs; seven digital scanners; one Army Knowledge Online (AKO) team site with unlimited storage;
> (6) Minimal military augmentation;

[8] FRIEDMAN, *supra* note 2, at 6–7.

[9] The author served as a trial counsel with the 6th Infantry Division while assigned there from 1992–1995, and witnessed firsthand the operation of military justice in Alaska during that time.

[10] Interviews with Colonel (COL) Charles Pede, former SJA of the 10th Mountain Division, and COL Mark Cremin, former SJA of the 1st Infantry Division. (on file with author).

(7) No mid-grade officers; eleven captains with an average 2.3 years of active duty experience; and
(8) Twelve-month deployment to Camp Liberty, Iraq.

With that, the SJA concept of the operation was based on five principle lines of effort: staff, standards, systems, technology, and resources.

A. Staff

As the SJA, I considered the commanding general the center of gravity, and therefore deployed the deputy staff judge advocate, command paralegal noncommissioned officer (NCO), legal administrator, chief of justice, and chief paralegal NCO to Iraq where most of the post-trial and associated work, collaboration, and coordination would occur—Camp Liberty, Victory Base Complex, outside Baghdad. Assisting were the division trial counsel, fiscal attorney, administrative law attorney, two operational law/rule of law attorneys, and a client services attorney. They were supported by eight paralegals. The Schofield office was run by a gifted second-term captain, Captain (CPT) Hannah Kaufman, and her team of nine judge advocates and paralegals.

While it is common for a deploying headquarters to leave the deputy staff judge advocate behind to lead the office in the rear, the challenges of the Army's final year in Iraq required the full complement of SJA leadership forward to deal with the issues associated with the reposturing of 50,000+ Soldiers and tens of thousands of civilians out of the country, closing dozens of installations, transitioning facilities and relationships to the Embassy, all while conducting engagement and force protection operations. Had things changed, or the initial model not worked, it would have been easy to transition key leaders between the two offices.

As with most deployments, the decision of who deployed and who remained was driven by a number of considerations, including prior deployments, temperament, demonstrated ability, and cognitive and emotional intelligence. Personalities mattered; peer-to-peer leadership among captains over distances within Iraq and to Hawaii was one of the great achievements for an office without any majors (albeit authorized two).

Under a concept of "one office, two locations," it was also important that the deployed branch chiefs continued in their role for both offices: the chiefs of justice, administrative law, and fiscal law continued to supervise, rate, reach-back, and were accountable for their respective disciplines/portfolios in both Iraq and Schofield Barracks. Uniformly maintaining office leadership integrity reinforced a common operational picture, ensured appropriate management and supervision of actions, simplified communication, and fortified important relationships between the two offices and associated division staff sections. This was done for a number of reasons, not the least of which was the thin green line of the SJA formation.

B. Standards

The one non-negotiable characteristic for the unitary justice concept—its fundamental precondition—was that basic standards of professional competence, responsiveness, timeliness, and accuracy would not be compromised. Major General Champoux was fully prepared to abandon the effort if the SJA leadership deemed it untenable. This applied across the spectrum of legal services including fiscal law, ethics, administrative law and investigations, and basic command counsel. But nowhere did it matter more than in military justice, and at no time were the basic tenets of "legally correct and letter perfect" ever compromised. Post-trial processing, in particular, was the subject of great attention.

C. Systems

Great effort was put into the development of systems and processes reinforcing the vision of how the unitary justice concept should work, particularly regarding the flow of information between Iraq (and within it) and Hawaii. Standards and business practices for pre- and post-trial processing were published and widely disseminated, as were the relationships among the brigades and the division. Standard operating procedures for uploading actions, including minor details like enumerated pages to ensure nothing was missed, were adopted to ensure quality control over the transmitted actions.

D. Technology

The basic tools, previously noted, were: three dedicated Tandbergs (one each for the SJA, chief of justice, and the Schofield command judge advocate); six high-end digital scanners (two in Hawaii, two for the SJA office, and two for military justice); the 25ID SJA AKO team site; and the obvious enablers of e-mail, NIPR/SIPR phones, and a common division web portal for hanging documents and references. The approximate cost for the hardware was less than $30,000. A talented young NCO, Staff Sergeant (SSG) Christopher McCollum, developed a highly effective AKO team site used by the two offices, with unlimited storage, where actions could be organized, digitized and uploaded in Schofield, and downloaded and printed in Iraq, and vice versa. This effectively facilitated "cloud computing" for the

office and enabled it to move huge amounts of data from one location to another, file sharing, etc.[11]

E. Resources

At the onset in the fall of 2010, the commanding general committed to doing whatever was required to enable the legal support mission, including unfettered movement of SJA staff between the two locations, temporary duty in support of training and litigation, and sustained resourcing for courts, counsel, experts, and assistance from the Trial Counsel Assistance Program (TCAP) including the travel of highly qualified experts to Hawaii to advise and assist with certain criminal cases. In particular, the SJA office had the unfettered fiscal support of the command to ensure the responsible and effective administration of criminal litigation.

V. Mission Readiness Exercise (MRX)

In September 2010, the SJA office incorporated the migration of GCMCA actions into the division's MRX. Actions flowed from the brigades to the division SJA military justice office, where they were reviewed for completeness and accuracy. A junior paralegal then digitized and transmitted the entire packet to the SJA AKO team site. At the MRX location on the opposite end of Schofield Barracks, another paralegal downloaded the entire packet, reassembled it, and provided it to the military justice NCOIC who supervised the appropriate GCMCA correspondence or action.

The final packet was reviewed by the chief of justice before forwarding to the command paralegal NCO and deputy staff judge advocate, with final review and consideration by the SJA. The commanding general then took action during a real-world SJA update, and the entire process would happen again only in reverse: GCMCA actions were digitized by a military justice paralegal, uploaded to AKO, downloaded at the other end, and distributed as appropriate. The system was applied to administrative separations, reprimands, referrals, post-trial actions, investigations, and a variety of affiliated general officer actions.

It worked. Major General Champoux's only significant comment—and perhaps his greatest compliment, was that the actions looked no different from the ones compiled conventionally. If the transfer and migration of documents could move via the AKO team site across Schofield Barracks, what difference would a couple of oceans make? Technically, the leveraging of digitized data from one location to the other made the actual distances almost irrelevant.

VI. United States Division–Center, Iraq

Upon deployment, a generally tight battle rhythm of weekly Tandberg and video teleconferences (VTCs) meetings, updates, and consultations among all SJA sections was established, particularly involving military justice, to facilitate routine communication with the SJA rear office and the Schofield-based special victim prosecutor (SVP), brigade judge advocates, trial counsels, and senior paralegal NCOs.

This was particularly important in advance of trial. The 25ID GCMCA conducted twenty-two courts-martial during the period of the deployment, including the rare case of a Soldier killing an American contractor in Iraq. In all there were fifteen trials in Hawaii and seven in Iraq; the majority were contested. Some may consider twenty-two cases low for a GCMCA with multiple brigades, and it is a fair observation that had the 25ID conducted twice as many courts-martial the administrative demands could have become unsustainable. What we found was that the reality of the modular Army—the constant brigade-level transitions in and out of the command, some for as few as 100 days—had a governing effect on cases mature enough for trial, with available witnesses, lab results, experts, etc. In two cases, the 25ID transferred New York National Guardsmen accused on armed robbery to the division's headquarters and headquarters battalion (HHBN) to prevent loss of jurisdiction, and tried them in theater accordingly. But otherwise, units with near-term redeployments often took their cases with them, as was the case elsewhere.

The Tandbergs, particularly the one maintained by military justice, allowed the chief of justice to routinely collaborate with Schofield's trial counsel, assist with trial strategy, and conduct impromptu and lengthy discussions with Schofield's SVP, as well as defense counsel, law enforcement officials, and others. It was a critical enabling tool and an enormously valuable investment by the Office of The Judge Advocate General, which funded them.

However, despite the coordination afforded by communications technology, some travel was required. In February 2011, in advance of the trial of a Schofield Soldier

[11] *Cloud Computing*, INVESTOPEDIA, http://www.investopedia.com/terms/c/cloud-computing.asp#ixzz1r7mK42LK (last visited May 22, 2013) (A model for delivering information technology services in which resources are retrieved from the internet through web-based tools and applications, rather than a direct connection to a server. Data and software packages are stored in servers. However, cloud computing structure allows access to information as long as an electronic device has access to the web. *This type of system allows employees to work remotely*. . . . Cloud computing is so named because the information being accessed is found in the "clouds", and *does not require a user to be in a specific place to gain access to it*.") (emphasis added).

accused of reckless homicide, the chief of justice and legal administrator were redeployed to Hawaii from Iraq on temporary duty to assist counsel and manage the forty-plus (mostly off-island) witnesses and associated logistics. While there they also conducted several hours of training, coordinated with budget/contracting officials, and attempted to bring value to their temporary duty at Schofield office. In a separate matter tried in July 2011, the command funded the travel of two Highly Qualified Experts from TCAP (Washington, D.C.) to Hawaii to assist with a difficult date rape case. These costs of travel, a consideration for any litigation, may therefore be more pronounced when key leaders are not immediately available to observe, consult, or assist junior officers.

VII. The Challenges

Despite the success of the 25ID's experience with unitary justice, it would be a mistake to suggest the enduring, geographically bifurcated GCMCA was easy. There was a point in the first month when the SJA office was moving some two dozen actions back and forth each week—as many as two thousand pages' worth—when some voiced concerns that the process was unsustainable. But over time, as systems matured and staff developed a comfort zone with the process and their own abilities, an important leveling occurred by mid-January 2011 where the consensus view was that the concept was entirely doable: a living, breathing, adaptable process in need of occasional adjustment but absolutely doable.

First among the challenges was the obvious lack of presence and diminished visibility by the leadership over officers and paralegals at Schofield Barracks. Quality time on video teleconferences, telephones, and e-mail is important, but it can never be an absolute substitute for immediate access or the important moments in-between during daily interaction, walking the halls, ad hoc conversations, and impromptu meetings. But over time those subsidiary interactions mattered less and less; communication became routine and was planned and purposeful.

Second, the 25ID assumed risk with post-trial processing. This required an almost unnatural vigilance by the chief of justice, CPT Hannah Kaufman and the SJA leadership, particularly the command paralegal NCO, Sergeant Major Cyrus Netter, who was hard on paralegals and court reporters with regard to the movement, timeliness, and accuracy of records. There were multiple panels in Hawaii and Iraq, the military judges (Hawaii has no resident judge) stretched from Kuwait, Fort Lewis, Fort Carson, and Korea, as did trial defense counsel. The process of errata and authentication alone consumed hundreds of man hours coordinating, tracking, and mailing records (some as long as 3,000 pages) across the planet, all supervised by the extraordinary efforts of the senior court reporter, SSG Paulette Prince, and her exceptional team who seamlessly cross-leveled cases from one office to the other. In one memorable instance in early October 2011, after mail services ceased in Iraq due to the closure of facilities, an NCO was flown roundtrip from Baghdad to Kuwait with a record of trial, for the sole purpose of coordinating with Army Central Command (ARCENT) SJA personnel, who put it in the mail. The promise of Military Justice Online and digital records of trial will dramatically simplify this, making the post-trial process from locations without resident judges far more efficient.[12]

Third, there was a constant struggle against the tyranny of time zones. Depending on the time of year, Hawaii is twelve to thirteen hours behind Iraq. The standard meeting would start at 2000 in Iraq, or 0700 at Schofield Barracks. But more often than not crucial discussions happened much later, or earlier, and required staff at both locations to abandon any notion of a normal duty day. Weekend hours for the Schofield team were the norm, as it was for those deployed. The chief of justice and her NCOIC worked tirelessly, and were available during the day for the brigades and associated work in Iraq, and at night for the three brigades and associated work in Hawaii. The command judge advocate for the Schofield office, who worked similar hours, became that rare judge advocate captain authorized a Blackberry to accommodate 24/7 communications.

Fourth, technology has its limits. In mid-October 2011, as U.S. forces were re-posturing out of Iraq consistent with the 2008 Security Agreement, broadband connectivity ceased at Camp Liberty. A month later the division headquarters jumped to Contingency Operating Base (COB) Adder in the south (Tallil Air Base, located near Nasiriyah) where the staff was limited to two enhanced tactical joint network nodes (JNNs), affording connectivity roughly equivalent to dial-up (for those who remember). Put another way, connectivity speed and capacity was reduced by over 80%. This had a profound impact on the SJA office's ability to move actions to and from the AKO team site. It was not impossible, but certainly much slower. To compensate, coordination was made with the ARCENT SJA for support on an as-needed basis—as with the 6th Infantry Division twenty years prior—where actions were hand-carried aboard rotating U.S. aircraft. This was done on a couple of

[12] *See* Memorandum from The Deputy Judge Advocate General, U.S. Army, to All Staff Judge Advocates, subject: Exclusive Use of Military Justice Online (MJO) (Phase One) as Enterprise Application (8 June 2009); Memorandum from The Deputy Judge Advocate General, U.S. Army, to All Staff Judge Advocates, subject: Use of Military Justice On-Line as an Enterprise Application (17 Jul 2012). The Army's military justice regulation, recently updated in October 2011, provides for the preparation and transmittal of electronic records of trial, but does not replace the original record of trial. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 5-41h, 5-48 (3 Oct. 2011); *see also* Captain Virginia Tinsley, Criminal Law Div., Office of The Judge Advocate Gen., *DEC 12 OTJAG Criminal Law Monthly Newsletter*, MILSUITE (Feb. 4, 2013, 10:20 AM), https://www.milsuite.mil/book/message/103976#103976.

occasions, and would have been necessary for Iraq cases regardless but was exacerbated by the requirements for timely post-trial processing of Hawaii-based litigation.

Fifth, it is important to recognize that there are other issues and responsibilities associated with GCMCA besides military justice. First and foremost are the many Army Regulation 15-6 investigations. During the thirteen-month deployment, MG Champoux retained jurisdiction over investigations dealing in senior leader misconduct, suicides, high-value financial liability investigations, the loss of sensitive items, and an investigation alleging detainee abuse and war crimes by an officer recently returned from duty in Iraq. All required close supervision, tracking, and coordination between the chief of administrative law and the Schofield office.

Lastly, there was the constant leadership challenge of managing people from great distances, facilitating cooperation between them, and monitoring the peer-to-peer leadership that is invariably an issue. Without the ballast of either of the two mid-career field grade officers the division OSJA was authorized, the two offices were susceptible to a mild sort of tribalism: the Schofield tribe verses the Iraq tribe; one surrounded by beaches, the other by desert. The relationship was no different than between any headquarters and a field or branch office, and required the same kind of leadership attention able to enfranchise people in a common mission, with a shared purpose.

VIII. Did It Work?

Over the duration of the nearly thirteen-month deployment, from 1 December 2010 thru 18 December 2011, the 25ID was as busy as any similarly situated deployed command in what proved to be the concluding chapter of the Army's nine-year experience in Iraq. During the year the military justice office "jumped" a total of five times—in 2010 from Schofield Barracks to West Camp Liberty; from West Camp Liberty to East Liberty; from the East Liberty legal center to the division headquarters building (commensurate with the loss of broadband); from there to COB Adder; and from COB Adder back to Schofield Barracks. The junior officers and paralegals, without exception, were creative, adaptable, innovative, and exceptionally hard-working despite the physical and logistical challenges of providing legal services, which afforded the commanding general with a unity of command over good order and discipline that was seamless, consistent, effective, and responsive.

The numbers reveal much. The 25ID conducted twenty-two courts-martial and took post-trial action in twenty-eight cases during the *Operation New Dawn* deployment. The average processing time for general courts was 165 days and for a special court it was eighty-three; within the Army mean and standard, particularly for jurisdictions without a resident military judge. As late at 16 December 2011, a day before the command group's redeployment and following the redeployment of all but one member of the Iraq SJA office, MG Champoux referred Hawaii-based cases, initiated Article 15s, and made reprimand filing determinations that were transmitted back to Schofield Barracks for action via the JNN connection with the support of the Hawaii office, proving the capability of today's technology to flatten and multiply the capacity for legal support.

Throughout the year the commanding general conducted seventeen Article 15, UCMJ, hearings for senior leaders, including several at Schofield Barracks via VTC, including the relief of a commander. A total of 152 general officer reprimands were prepared and issued, including an associated number of filing determinations. Most of these were Hawaii-based driving under the influence and related misconduct. There were over eighty-four chapter eliminations including fourteen as the result of a board recommendation; ten involving officers.

For administrative law, the division completed 101 general officer-level investigations, fifty-four ethics reviews, and ninety-three unrelated actions resulting in a written legal opinion. Fiscal and contracting law produced forty-nine written opinions and some 172 Financial Liability Investigation of Property Loss reviews, among other actions. Also worthy of mention were the client services conducted by the division including 820 powers of attorney, 350 notaries, 72 passport applications processed through the embassy, and over 300 scheduled client appointments.

IX. Summary

In his closing chapter of *The World Is Flat*, Thomas Friedman considers the national economic and security implications, good and bad, of the flattening of the world through technology, and the associated revolutions in collaborative information sharing. He concludes that "[o]n such a flat earth, the most important attribute you can have is creative imagination—the ability to be the first on your block to figure ways to create products, communities, opportunities . . . and that has always been America's strength."[13]

The promise and power of collaboration between and among Army legal offices via information technology has simply never been greater. E-mail, smart phones and tablets, teleconferencing, digitized relays of data, cloud computing, file sharing, and mature online legal resources have all inextricably altered the way legal professionals conduct their work domestically, and over thousands of miles. Friedman

[13] FRIEDMAN, *supra* note 2, at 469.

refers to these advanced technologies as "the steroids" because of their ability to

> Amplify[] and [turbocharge] . . . the other flatteners. They are taking all forms of collaboration . . . and making it possible to do each and every one of them in a way that is "digital, mobile, virtual, and personal," as former Hewitt Packard CEO Carly Fiorina put it in her speeches, thereby enhancing each one and making the world flatter by the day. . . .[14]
>
> . . . .
>
> . . . These steroids . . . will enable more individuals to collaborate with one another in more ways and from more places than ever before.[15]

The experience of the 25ID in 2011 offers an important example of how this collaboration can support the administration of military justice and related legal support during a deployment. It is not something that can or should be done everywhere, particularly in cases where communications networks are immature. But for developed contingency environments where a commander and SJA are willing to underwrite the risks and challenges, unitary justice offers a worthy model for the retention of jurisdiction and administration of a consistent approach to command responsibility across a formation, no matter where it sits.

[14] *Id.* at 161.

[15] *Id.* at 171. Friedman, writing of technology—"steroid"-driven collaboration in a business context with clear analogies to the way the Army operates, continues,

> They will enhance outsourcing, because they will make it so much easier for a single department of any company to collaborate with another company. They will enhance supply-chaining, because headquarters will be able to be connected in real time with every individual employee stocking the shelves, every individual package, and every Chinese factory manufacturing the stuff inside them. They will enhance insourcing—having a company like UPS come deep inside a retailer and manage its whole supply chain, using drivers who can interact with its warehouses, and with every customer, carrying his own PDA. And most obviously, they will enhance informing—the ability to manage your own knowledge supply chain.

Id.

The Beauty and the Sorrow: An Intimate History of the First World War[1]

Reviewed by *Lieutenant Commander David M. Sherry*[*]

It may be that the only value to mankind coming out of World War I was to provide the ultimate test of what human beings can endure under monstrously inhuman conditions and yet maintain their humanity.[2]

I. Introduction

Wars are led by nations, but endured by people. World War I impacted millions,[3] and there are countless individual stories of heroism, adventure, patriotism, and simple survival from the conflict. Yet in teaching the history of war, these types of stories are often forgotten or buried in the mire of the larger themes of leadership, strategy, and international engagement. While the grand lessons are vital, the individual stories are just as important. They provide essential understanding and context for how and why major historical events occurred. True students of history must seek out these accounts. If the right stories are found, not only are they engaging, but they provide a deeper understanding of the roots of significant events.

In *The Beauty and the Sorrow: An Intimate History of the First World War*, Swedish historian Peter Englund[4] provides the opportunity to learn and appreciate history through the individual accounts of those who experienced it. He presents World War I through the stories of twenty different people who endured the hostilities.[5] There is a German sailor, an American doctor, a Hungarian cavalryman, a Belgian pilot, a Scottish nurse, and fifteen others of varying nationalities and from all sides of the conflict.[6] In gathering their stories, England's goal is not to re-tell a precise history of the war, but to convey what it felt like to be in the middle of the conflict.[7] The author's concentration is not on great lessons in leadership, military strategy, or other similar themes typically addressed in historical books.[8] Rather, the work focuses squarely on what individuals experienced under the utter turmoil of total war.[9] With this refreshing approach he has created a history book that, in spite of minor flaws, is equally entertaining and educational.

II. Positives—There Are Many

A. Technical Aspects

From a technical standpoint, the book is excellent. The individual stories are clearly told through direct quotes and summarized journal accounts that are interspersed with historical context collected from secondary sources.[10] The book moves seamlessly from a diary account style to a more formal prose and vice versa, providing both emotion and information without losing the tremendous effect of either.[11] His discussion of the funeral of Canadian John McCrea in France provides a superb example of this style in action. Englund first educates the reader on McCrea's importance as the drafter of the famous World War I poem *In Flanders Fields*, and then provides a moving image of the funeral via the words of Harvey Cushing, the American doctor, that describe battle guns fired coincidentally as McCrea is lowered into the ground.[12]

The author is also very proficient at succinctly explaining military history, tactics, and technology, which assists the reader in understanding the journal accounts.[13] In each case the background information is just the right length and always enhances the reader's understanding of what is transpiring. His experience as a historian, member of the Swedish military, and years as a war correspondent no doubt make this an easy task.[14] As he provides this information,

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[1] PETER ENGLUND, THE BEAUTY AND THE SORROW: AN INTIMATE HISTORY OF THE FIRST WORLD WAR (2011).

[2] JOSEPH E. PERISCO, ELEVENTH MONTH, ELEVENTH DAY, ELEVENTH HOUR (2004).

[3] The Great War, as it is also known, involved twenty nations from five continents. *Id*. at xviii.

[4] PETER ENGLUND, http://www.peterenglund.com/english_top.htm (last visited May 8, 2013).

[5] ENGLUND, *supra* note 1, at xii.

[6] *Id*. at xv–xvi (presenting a list of all persons followed throughout the book).

[7] *Id*. at xii.

[8] *See id*.

[9] *Id*.

[10] *See id*. at 431–32.

[11] *See id*.

[12] *Id*.

[13] *See id*. at 449 (listing one example of dozens throughout the book where the author gives an excellent synopsis of the Brest-Litovsk Treaty between Germany and the Bolsheviks as part of the background on how Andrei Lobanov-Rostovsky, the Russian army engineer, came to fight under the French army).

[14] *See* ENGLUND, *supra* note 4.

Englund does a marvelous job avoiding excessive and unnecessary political history and technical jargon.[15]

The level of research is impressive; the author utilizes over 150 primary and secondary sources from multiple international works to develop each person's account.[16] This comprehensive level of investigation led to many gems one would not expect to find in a study of World War I: the American doctor who enters the war to gain more medical experience,[17] the Australian ambulance driver in the Serbian army,[18] the Danish soldier in the German army,[19] and many other diverse characters that show the depth of the research just by their presence in the book.

The quality of research is also evident in the diversity of events presented. There are, as to be expected, plenty of perspectives regarding noteworthy ground battles during the war.[20] But the author also found stirring observations on many other significant events related to the war, making the book that much more enjoyable. The accounts of Rafael de Nogales, an Ottoman army officer during the Armenian genocide, are shocking and highly informative,[21] and the description of Cushing's ocean transit through the bodies and wreckage of the RMS *Lusitania* provides a poignant reminder of America's impetus to enter the war.[22] Among the vastness of the conflict, he has even found characters who have come nearly halfway around the world and managed to almost cross paths.[23] It was simply amazing to see how, after all his travels, Rafael de Nogales was resting on the Tigris River while at the same time Edward Mousley, a British artilleryman from New Zealand, was enduring a bombardment just on the horizon at Kut al-Amara in Mesopotamia.[24]

B. Entertainment and Learning Aspects

The organization of the book is deceptively superb and contributes to its easy flow. At first glance it may appear that arranging a war tale chronologically, as done here, is a simple task; however, the author has tackled a sweeping scope—he set out to follow twenty characters though four years of the war and managed to give their accounts in a compelling fashion that allowed the pace of the book to proceed like a good fiction novel. The tension for most characters builds as the war progresses and does not end until the reader learns the fate of each person.[25] Following this format helps propel the narrative forward and adds to the feeling that this is not simply a history book.

Although the author's intent is to knit together as many individualized experiences as possible,[26] there is quite a bit of interesting and fun historical knowledge[27] present in the book as well. Not only is quality of the historical information terrific, but the style in which it is presented is noteworthy as well. It all neatly fits with the character accounts when provided as backdrop and context. As the characters reach certain points in their stories, the author takes the opportunity to pass along relevant historical information that augments the reader's picture of what these chosen narrators experienced. An excellent example is the presentation of the new Russian tactics used in the Brusilov offensive as they became relevant to the experiences of Russian soldier Andrei Lobanov-Rostovsk.[28] Englund flawlessly accomplishes this throughout the book with multiple characters,[29] and each time he avoids the appearance of simply forcing the background information in. His style works in synergy with the first person accounts to bring the history to life—it is in these moments in which the book is at its best.

[15] *See* ENGLUND, *supra* note 1, at 174–77 (providing just the right amount of information on the status of the war between Austria-Hungary and Serbia to set the stage for Pal Kelemen, the Hungarian cavalryman, pursing the retreating Serbian forces).

[16] *Id*. at 509–14.

[17] *Id.* at 97–98.

[18] *Id*. at 127, 331.

[19] *Id*. at 29–30.

[20] *See id*. at 267 (where American doctor Harvey Cushing gives his observations on the war at Ypres, Belgium); *see also id*. at 398–99 (where British soldier Edward Mousley discusses the British surrender at Kut al-Amara).

[21] *See id*. at 111–15.

[22] *See id*. at 357.

[23] *Id*. at 222.

[24] *Id*. at xvi, 222.

[25] The story of pilot Willie Coppens is a good example of this progression. The reader experiences his transition from trainee, to decorated pilot, and finally to an amputee uncertain of what the world holds for him when the war is over. *See id*. at 190–92, 257–59, 456–57, 504.

[26] *Id.* at xii.

[27] *See, e.g.*, *id*. at 300 (explaining that the builders of the tank attempted to keep its purpose secret by describing it as a "water tank" carrying water to troops and the "description stuck" as its nomenclature).

[28] *Id*. at 294–96 (educating the reader on the significance of Alexi Brusilov and his unorthodox approach to warfare that allowed the Russians to make significant territorial advances in 1916).

[29] *Id* at 19–21 (noting, as Lobanov-Rostovski describes his experience on a train, the new developments in railroad logistics which both modernized warfare and contributed to the tensions between Germany and Russia).

III. Downsides—There Are a Few

A. Lack of Geographic Aids

The complete absence of a map to assist the reader with following the characters is the only major disappointment. With the amount of people, areas, and time covered, only readers with an intimate knowledge of European, African, and Middle Eastern historical geography could understand where the characters were located at all times.[30] Margaret Macmillian's *Paris 1919: Six Months that Changed the World* contains a comprehensive set of maps that serve as an outstanding example of what visual information should accompany a book with such great geographic scope.[31] Knowing the locations of the characters is crucial to evaluating their experience—in particular the effect of their travels and surroundings upon their viewpoints. Mentioning the location of a city in the text is not enough;[32] there is no substitute for visualizing the region in the context of the surrounding territory. The author may have left them out in an effort to ensure technical items did not take away from his emotional focus; however, maps need not take away from the personal tone of a historical work.

B. Other Minor Improvements

The book contains extensive narratives from many characters under the precept of providing a complete view of World War I. There is, however, a notable absence of perspective in certain aspects of the conflict. This is most visible in the naval realm. At the start of the book, it is expected that German sailor Richard Stumpf will provide a naval viewpoint,[33] as he is the only nautical representative in the narration. He spent most of the war out of the action, and even when he experiences an event worth discussing (the Battle of Jutland), he only offers a brief and unsatisfying account.[34] Englund should have chosen a German U-Boat sailor or different ship crewmember to expound more on what seagoing life was like during the war. In his review of the book, critic Geoff Dyer also comments on this phenomenon on a larger scale, noting that character choices can lead to the reader missing the opportunity to learn about significant events.[35]

Other characters might feel unnecessary to the reader and at times slow the pace without much benefit. Scottish nurse Sarah Macaughtan is the best example of this.[36] She is certainly admirable for wanting to assist people in need during the war.[37] But her entries are short, are not accompanied by extensive or interesting background material, and do not provide much effect that the reader would not obtain from other characters.[38] She is another example reflecting the need to ensure correct character choice in this type of book. Notably, Englund himself understands the importance of character selection.[39] For various translations of the book, he inserted a few different characters that he expected would appeal more to readers of a particular country.[40] In line with this, he should also consider replacing duplicative and uninteresting characters like Macnaughtan in future publications.

Two other minor flaws are worthy of brief mention. First, because the secondary and primary source material are intermingled so well, and because the sources are only cited at the end, it is impossible to know whether or not the author is presuming the thoughts of the characters when he writes what they are thinking.[41] It is assumed he is not doing this; whenever the author puts forth the beliefs or direct thoughts of a character, that statement is usually accompanied by sufficient context to support the notion that the sentiment

[30] The lack of a map is most notable during the discussions on Africa. There are generalized discussions of territorial aims on this continent throughout the book, but without a map to reference, the reader is lost. *See id*. at 149–50 (discussing the strategic accomplishments and goals of the Germans, French, and British as a backdrop for Angus Buchanan's deployment to East Africa).

[31] *See* MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD, at introductory maps (2003).

[32] *See* ENGLUND, *supra* note 1, at 180 (E.g., where the author does happen to mention Salonica is in Greece.)

[33] *See id*. at 11–14.

[34] *Id*. at 259–60. Stumpf, however, does provide useful insight into German domestic unrest at the end of the war. *Id.* at 429–31.

[35] *Geoff Dyer on Unusual Histories*, FIVE BOOKS, http://fivebooks.com/interviews/geoff-dyer-on-unusual-histories?page=full (last visited May 8, 2013).

[36] Michael Corday is another example. As the only civil servant in the book, one would hope for more insight into non-military government perspectives from him, but the majority of his observations simply center on civilian life during the war. While his observations are unique, an opportunity was missed by not including commentary on the political process during the war from a different politician. *See, e.g.*, ENGLUND, *supra* note 1, at 282 (providing a typical example of Corday's contributions (where he states his observations on prostitution)).

[37] *See id.* at 26.

[38] *Compare id.* at 37–38 (showing a typical Macnaughtan entry via her experience as a nurse in Antwerp), *with id*. at 210–13 (describing Florence Farmborough's experience as a nurse after a failed Russian raid and detailing interesting background regarding war casualties and other information).

[39] PETER ENGLUND, http://www.peterenglund.com/beauty_and_sorrow_FAQ.htm (last visited May 8, 2013).

[40] *Id*.

[41] *See* ENGLUND, *supra* note 1, at 98 (discussing Cushing's opinions on the Germans and stating Cushing's belief that "He thinks he can see through the empty pathos.").

was not invented by the author.[42] An explanation of how the author managed this process would bolster the faith of the reader that the he is stating the direct beliefs of the subjects.[43]

Lastly, the title itself is a bit misleading. There is very little beauty in the book, unless the word is also meant to be a metaphorical reference to the beauty of the persevering human spirit.[44] There is adventure, personal growth, and great infatuation with the war[45]—but even the book's jacket liner states that there is only occasional beauty present.[46] A better title may have been "The Awe and the Sorrow," which reflects the sentiments of the characters toward the war and the impressive situations they encountered during their experiences.

IV. Conclusion

The work is overall a great success. Mr. Englund has crafted a book that is essential to any serious history student's full understanding of this conflict and the impacts of war on the individual and beyond. But it is far more than that—he has created a work that fans of military tactics and political history can enjoy just as much as those simply looking for a good story. The flaws are few in proportion to the positives. They are not raised to argue that the book is not enjoyable or excellent overall, but merely to say it would have been even better without them.

Remaining true to his purpose, the author ends the book by merely telling the reader the characters' final thoughts at the close of the war. There is no ultimate analysis, no grand lesson learned, and no theme that emerges suddenly at the end. The individual experiences themselves are the lesson. The knowledge gained from this book regarding how the war impacted those going through it at their level is important, for all great geopolitical events are inextricably tied to individual experience. Effects on individuals can lead to drastic impacts on the larger world. Students of the past should seek to learn about these individual experiences and perspectives to supplement their traditional textbook knowledge; the author's book provides an excellent vehicle for this undertaking. The envoi providing Hitler's reaction to the armistice is the ultimate example Englund uses to highlight the importance of personal perceptions and experiences in relation to larger historical events.[47] In his own words, Hitler describes how his personal disappointment with the conditions of the armistice drove him into politics.[48] Look no further than this for a better argument in support of the need to learn about individual wartime experiences.

[42] *See id*. at 88–89 (stating that nurse Florence Farmborough is afraid of the Russian troops she is with, and the reader can find it easy to believe this is her genuine sentiment, given the description of harassment she is enduring).

[43] Contrast the absence of such an explanation with Perisco's work. *See* PERISCO, *supra* note 2, at xvi (noting that he only used phrases in his book explaining what the speaker thought or believed when it was clear from the primary source that the sentiment reflected was what the character actually thought or believed).

[44] *See* ENGLUND, *supra* note 1, at 290 (showing one of the few times a character is able to note the beauty of the land around him).

[45] *See id*. at 126 (pointing out Olive King's sense of adventure and need for change as factors leading her to the war); *see also id*. at 260 (expressing Richard Stumpf's excitement during and after the Battle of Jutland).

[46] *Id*. at front jacket notes.

[47] *See id*. at 507–08.

[48] *Id*. (quoting ADOLF HITLER, MEIN KAMPF (1925)) ("[W]e had lost the war and were now dependent on the mercy of the victors our Fatherland would be exposed to harsh oppression and the fact was that the armistice would result in us having to rely on the nobility of our former enemies—at that point I could take no more. It was impossible for me to remain there. Everything went blank before my eyes and I fumbled my way back to the dormitory, threw myself down on my bed and buried my burning face in the covers and pillows. . . . The days that followed this were horrible and the nights worse—I knew that everything was lost. One would have had to be a simpleton—or a liar and criminal—to hope for mercy from the enemy. My hatred grew during these nights, my hatred for those responsible for this evil deed. During the days that followed I recognised [sic] what my mission was to be . . . . I decided to become a politician.").

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 servicemembers and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices.

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 ATRRS Self-Development Center and click on "Update" your ATRRS Profile (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. Continuing Legal Education (CLE)

The armed services' legal schools provide courses that grant continuing legal education credit in most states. Please check the following web addresses for the most recent course offerings and dates:

a. The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS).

Go to: https://www.jagcnet.army.mil. Click on the "Legal Center and School" button in the menu across the top. In the ribbon menu that expands, click "course listing" under the "JAG School" column.

b. The Naval Justice School (NJS).

Go to: http://www.jag.navy.mil/njs_curriculum.htm. Click on the link under the "COURSE SCHEDULE" located in the main column.

c. The Air Force Judge Advocate General's School (AFJAGS).

Go to: http://www.afjag.af.mil/library/index.asp. Click on the AFJAGS Annual Bulletin link in the middle of the column. That booklet contains the course schedule.

3. Civilian-Sponsored CLE Institutions

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 1815 H Street, NW, Suite 408 Washington, DC 20006-3697 (202) 638-0252
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University 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

4. 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, students 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 2014 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 hours, 1 November 2013 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3368, or e-mail Thomas.s.randall2.mil@mail.mil.

5. Mandatory Continuing Legal Education

a. 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).

b. 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.

c. 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.

d. Regardless of how course attendance is documented, it is the personal responsibility of Judge Advocates 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.

e. 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) 2013 RC On-Site Legal Training Conferences

The TY13 RC on-site program is pending policy and budget review at HQDA. To facilitate successful execution, if the program is approved, class registration is available. However, potential students should closely follow information outlets (official e-mail, ATRRS, websites, unit) about these courses as the start dates approach.

Date	Region, LSO & Focus	Location	POCs
19 – 21 Jul 13	Heartland Region 91st LOD Focus: Client Services	Cincinnati, OH	1LT Ligy Pullappally Ligy.j.pullappally@us.army.mil SFC Jarrod Murison jorrod.t.murison@usar.army.mil
23 – 25 Aug 13	North Western Region 75th LOD Focus: International and Operational Law	Joint Base Lewis-McChord, WA	LTC John Nibbelin jnibblein@smcgov.org SFC Christian Sepulveda christian.sepulveda1@usar.army.mil

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

a. The Judge Advocate General's School, U.S. Army (TJAGSA), 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 Vista™ Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGSA 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.

c. 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.

d. 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

a. 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.

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

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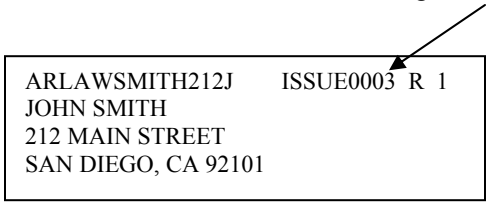

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