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A Lore of the Corps

Lawyering in the Empire of the Shah—"The Rest of the Story"¹

Fred L. Borch
Regimental Historian & Archivist

In April 2012, *The Army Lawyer* published a *Lore of the Corps* about judge advocates who had served in Iran in the 1960s and 1970s. That article ended by stating that the assignment of Army lawyers "to Iran apparently ended in the mid-1970s."² This was incorrect. The truth is that military attorneys continued to be stationed in Tehran until 1979; the last judge advocate in-country departed on July 15, 1979, only months before a group of Iranian students seized the U.S. Embassy and took fifty-two Americans hostage for 444 days. What follows is the 'rest of the story' about lawyering in the Empire of the Shah. It focuses on three of the last Army attorneys in Tehran: Captains (CPTs) Kenneth J. "Ken" Densmore, Theodore F.M. "Ted" Cathey, and Thomas G. "Tom" Fierke.³

From the mid-1970s until late January 1979, when the Shah fled Iran and large-scale evacuations of U.S. personnel began, there were roughly 45,000 Americans living in Iran. Most were military and civilian technicians and their dependents.⁴ Of these, about 1,500 were Department of Defense personnel assigned to the U.S. Embassy, the U.S. Military Mission with the Iranian Army, or the U.S. Military Assistance Advisory Group to Iran (MAAG).⁵ Most of these U.S. military and civilian personnel were involved in training Imperial Iranian forces on the aircraft, warships and other military hardware sold to Iran by the United States

under the Foreign Military Sales program.⁶ This was a lucrative arrangement for the United States in the 1970s, since Iran "paid cash for its arms purchases and covered the expenses" of American technical advisors "indispensable for weapons operations and maintenance."⁷

There were a variety of legal issues arising out of these foreign military sales contracts and the "down country" technical assistance field teams associated with them.⁸ This explains why judge advocates serving in Tehran during this period were heavily involved in contract matters—in addition to the various administrative and civil law, claims, and legal assistance issues that naturally arose in a military and civilian community of 5,000.⁹ Since courts-martial could not be convened in Iran, there was little in the way of a criminal law practice.¹⁰

This was certainly the case with CPT Densmore, who was stationed in Iran from April 1976 to July 1978. Densmore was intimately familiar with Armed Services

¹ With a 'tip of the hat' to conservative talk show host Paul Harvey, whose "The Rest of the Story" was a Monday-through-Friday radio program that aired from 1976 until Harvey's death in 2009. *Paul Harvey, Talk-Radio Pioneer, Dead at 90*, http://www.nytimes.com/2009/03/01/nyregion/01harvey.html?_r=0 (last visited Oct. 27, 2014). Each broadcast ended with the phrase, "And now you know the rest of the story." PAUL HARVEY, <http://www.paulharvey.com/> (last visited Oct. 27, 2014).

² Fred L. Borch, *Lawyering in the Empire of the Shah*, ARMY LAW., Apr. 2012, at 3.

³ In addition to Densmore, Cathey and Fierke, the following judge advocates served in Tehran between 1975 and 1979: Majors (MAJ) Holman J. "Jim" Barnes, Jr. and Warren Taylor (who replaced Barnes), and Captain's Stanley T. "Stan" Cichowski, John E. Dorsey, Charles L. Duke, Stephen Moore and Mark H. Rutter. Rutter was the last judge advocate to arrive in country. OFFICE OF THE JUDGE ADVOCATE GENERAL, PERSONNEL DIRECTORY (1975); Telephone Interview with Theodore F. M. Cathey (Oct. 27, 2014) (on file with author).

⁴ <http://www.country-data.com/cgi-bin/query/r-6526.html> (last visited Oct. 28, 2014).

⁵ *Id.* In addition to these 1,500 personnel, there were another roughly 3,500 family members, for a total official community of about 5,000 individuals. In 1978, the U.S. military mission in Iran was the largest in the world.

⁶ The Foreign Military Sales (FMS) program is a form of security assistance authorized by the Arms Export Control Act (AECA) and a fundamental tool of U.S. foreign policy. Defense Security Cooperation Agency, Foreign Military Sales, <http://www.dsca.mil/programs/foreign-military-sales-fms> (last visited Oct. 30, 2014) [hereinafter FMS]; Arms Export Control Act, 22 U.S.C. ch. 39 (2012). Under the Act, the U.S. may sell defense articles and services to foreign countries and international organizations when the President formally finds that to do so will strengthen the security of the U.S. and promote world peace. FMS, *supra*. Under FMS the U.S. Government and a foreign government enter into a government-to-government sales agreement. The State Department determines which country will have a FMS program while the Defense Department executes the program. *Id.*

⁷ FMS, *supra* note 6. Iran could pay cash because of moneys it earned from the export of oil. The Shah's government bought F-4 "Phantom" fighter bombers, C-130 "Hercules" cargo airplanes, M-60 "Patton" main battle tanks, AH-1 "Cobra" helicopters, radar equipment, mortars and machine guns.

⁸ The term "down country" referred to geographic location of these technical teams; they were located south of Tehran or 'down' on a map of Iran.

⁹ Although judge advocates in Iran supported the mission of the U.S. Military Assistance Advisory Group to Iran (MAAG), they were not a part of it. Rather, they were assigned to the U.S. Support Activity-Iran (USSA-I), a part of U.S. Army, Europe.

¹⁰ As explained in *Lawyering in the Empire of the Shah*, the United States was prevented by its agreements with Iran from holding any judicial proceedings on Iranian soil. Judge advocates in Tehran did, however, advise commanders on the imposition of non-judicial punishment under Article 15, Uniform Code of Military Justice. Most of these Article 15s were for blackmarketing, i.e., the improper sale (or transfer) to Iranians of goods purchased through the Army and Air Force Exchange Service. See Borch, *supra* note 2, at 1.

Procurement regulations and Army implementing regulations, as he had prior experience in procurement law at the Army Missile Command, Redstone, Alabama.¹¹ This no doubt explains why, shortly after arriving in Tehran, Densmore was informed by Colonel (COL) Milton Sullivan, Commander, U.S. Support Activity-Iran (USSA-I), that he was the new Contracting Officer (KO) for the command. Since the mission of the USSA-I was to support the MAAG and its down country teams, this meant that CPT Densmore would not only do a legal review of contract solicitations and awards but, as the KO, would also be administering (and interpreting) the many contracts already in place. Since USSA-I also ran the club system, the Morale, Welfare and Recreation program, the commissary and the hospital, Densmore also was involved with contracts for these operations. His KO warrant was for \$100,000 and, while this does not seem like much money today, it was adequate to do most of the work of the USAA-I. As Densmore remembers, most of the contracts he awarded “were for minor construction projects in and around the military facilities in Tehran,” such as plumbing, electrical and carpentry work.¹² Densmore took a special interest in the hospital, which was located on the U.S. Embassy compound, especially after his youngest son was born there in 1978. As for his two years in Tehran, Densmore remembers that “my KO duties quickly overwhelmed me and I was not of much further utility in the JAG office.”¹³ At least, that is, for non-contract issues.



Army Colonel Keith Barlow presents Captain Ken Densmore with the Meritorious Service Medal, Tehran, Iran, 1977

In July 1978, as CPT Densmore was leaving after slightly more than two years in Iran,¹⁴ CPT Ted Cathey was

just arriving—to replace Major Warren H. Taylor and assume duties as the Staff Judge Advocate (SJA) for the MAAG. As Cathey remembers, he and his youngest son arrived on a Pan American flight at the Mehrabad airport near Tehran. But it was “not a good sign because tires were burning on the runway” and Iranians in the streets were shouting “Death to the Shah” and “Yonky [sic] go Home.”¹⁵ Prior to volunteering for duty in Tehran, Cathey had been an instructor in contract law at The Judge Advocate General’s School, U.S. Army. Just as CPT Densmore had discovered, CPT Cathey also quickly learned that the many issues arising from the sale of American military equipment to the Shah’s armed forces meant that procurement law was an important component of the delivery of legal services to the MAAG.

While Cathey was the senior military lawyer in Iran, he had a Deputy SJA, CPT Charles L. Duke, and two more judge advocates on his staff: CPTs Tom Fierke and Mark H. Rutter. Rounding out his legal office were two legal clerks, Sergeant First Class Bobby Saucier and Specialist Six Paul Burch. There also were two Iranian advisors, two local national drivers, and a translator who ensured accurate transcription of Farsi and English language documents, especially private residential leases.

But ‘legal business as usual’ was short-lived. The Shah’s government had imposed martial law (which included a curfew) on 7 September 1978 and by November 1978, with insurgent activity putting Americans and their families in danger, the MAAG began preparing evacuation plans for family members.¹⁶ After military personnel in Iran began receiving hostile fire pay in early December 1978, it was only a matter of time before evacuations would begin.¹⁷

Captain Cathey and his office prepared a legal annex to the MAAG’s evacuation plan, and did periodic briefings to family members on the legal aspects of evacuation. These briefings occurred in the auditorium on the “Gulf District” compound upon which USSA-I was located. Cathey remembers that the briefings advised family members that

assumed command of the 2d Legal Services Organization, New Orleans, Louisiana. Coincidentally, CPT Fierke, discussed *infra*, had previously commanded this same unit. Densmore relinquished command in 2001 and retired from the Army Reserve in 2002. Today, Densmore serves as Counsel, Naval Education and Training Command, Pensacola, Florida (the Navy’s close equivalent to Army Training and Doctrine Command). He has 44 years of civilian and military service.

¹¹ E-mail from Kenneth J. Densmore, to author (Oct. 30, 2014, 4:46 PM) (on file with author).

¹² *Id.*

¹³ E-mail from Kenneth J. Densmore, to author (Sept. 25, 2012, 8:47PM) (on file with author).

¹⁴ After departing from Iran, Densmore left active duty and transferred to the Army Reserve. He subsequently served with the 350th Civil Affairs Brigade, and deployed with it to Bosnia-Herzegovina in 1996 as part of Operation Joint Endeavor/Constant Guard. In 1998, now COL Densmore

¹⁵ Interview with Cathey, *supra* note 3.

¹⁶ *Id.*

¹⁷ Colonel Thomas G. Fierke, *Recollections (of the Last JAG in Tehran 1978–1979)*, at 52 (1999) (unpublished thesis, U.S. Army War College Strategy Research Project) (on file with author). All military personnel received hostile fire pay in December 1978 and January and February 1979. The evacuations of Defense Department and State Department family members and other U.S. civilians ultimately occurred in December 1978, and January and February 1979.

they were being evacuated to a ‘safe haven’ for thirty to sixty days, with return to Tehran to occur as soon as the situation had stabilized. But they were advised to have up-to-date wills and powers of attorney, and to make a complete inventory of their household goods. At the time, the Army paid no more than \$15,000 for any claim for missing or damaged household goods, which meant that Americans in Iran were advised to consult their insurance companies to see if they could obtain additional coverage.¹⁸

Some Americans, recognizing that they might depart Iran and never return, began mailing personal items (photographs, papers) and high value items (jewelry, antiques, collectibles) to the United States through the Army Post Office system. Some of these mailings were successful; others were not. Cathey’s wife had left Iran in December; she never returned because of the increasing instability. The following month, CPT Cathey and his three children boarded a C-141 and flew from Tehran to Athens, Greece, to Rhein Main, Germany. They then flew on a civilian charter to McGuire Air Force Base, New Jersey, and, after landing there, CPT Cathey took his children to Charlottesville for a rendezvous with his wife. Cathey then returned to Tehran.¹⁹

Near the end of his tour of duty in Tehran, CPT Cathey was heavily involved in arranging for “termination for the convenience” or “T4C” of the U.S. Government contracts with the Iranian government. The Pentagon’s ‘czar’ for military assistance, Erich von Morbod,²⁰ flew to Iran and sat down with CPT Cathey to T4C a whole host of contracts for equipment that had been sold to the Iranians.²¹ Much of the hardware—artillery, tanks, ships—had been paid for and these terminated contracts were later the subject of much litigation involving the United States and the new Iranian government that emerged after the Shah fled Iran in January 1979.²² In addition to these contracts, CPT Cathey also was involved in the termination of rental leases—as the American tenants had been evacuated and would not be returning. When CPT Cathey left Tehran in February 1979, it was “pandemonium” and Cathey thought he would be the

last judge advocate out of Iran; after all, CPTs Mark Rutter and Tom Fierke had already departed.²³

But he was not: CPT Fierke, who had been the Chief of Administrative Law and Claims, had volunteered to return to Iran on temporary duty. Fierke had previously been in Iran from June 1978 until 19 February 1979, when he and CPT Rutter boarded a Pan Am Boeing 747 and flew to Frankfurt. Now, on 18 March 1979, he returned to Tehran because the MAAG and USSA-I commanders needed an experienced claims judge advocate to help wind down the American military presence in Iran.²⁴

Initially, Fierke was one of roughly fifteen American military and State Department personnel during this twilight of the U.S. presence in the Shah’s empire. In the following days and weeks however, the numbers of Americans in Iran did increase until there were more than fifty.²⁵



An Iranian national (left) with then Captain Tom Fierke (right), in front of the U.S. Embassy gate, Tehran, 1979.

After arriving in Tehran—carrying a “black” diplomatic passport and immediately hearing the sound of gunfire and revolutionary fervor—Fierke lived on the fifteenth floor of the Royal Tehran Hilton. This was considered to be the safest location for the American military personnel still in-country because its height offered the best protection from sniper fire.²⁶

¹⁸ The statutory aggregate maximum for the loss of household goods was \$15,000. No private insurance company, however, would pay claims for household goods lost in the Iranian Revolution of 1979. The event was considered to be a ‘war’ or ‘civil disturbance’ excluded from policy coverage.

¹⁹ Cathey e-mail, *supra* note 3.

²⁰ From 1978 to 1981, von Marbod was the Deputy Director, Defense Security Assistance Administration. In this position, he was the senior U.S. Defense Department representative to Iran, and was a key player in the Shah’s purchase of American weaponry. JOSEPH J. TRENTO, *PRELUDE TO TERROR: EDWIN P. WILSON AND THE LEGACY OF AMERICA’S PRIVATE INTELLIGENCE NETWORK* 262 (2005).

²¹ Cathey e-mail, *supra* note 3.

²² *Id.*

²³ For their work in support of the December 1978 evacuations, CPTs Cathey, Duke, Fierke and Rutter were awarded the Humanitarian Service Medal.

²⁴ Fierke, *supra* note 17, at 61.

²⁵ Letter from Captain Thomas G. Fierke, U.S. Defense Representatives IRAN, to Colonel Wayne E. Alley, Judge Advocate, Headquarters, U.S. Army–Europe & 7th Army, APO N.Y. 09403 and Colonel James A. Mounts, Chief, USA Claims Service, Fort Meade, Md. 20755 (June 11, 1979) (The subject of the letter was Iran Judge Advocate update).

²⁶ Letter from Captain Thomas G. Fierke, U.S. Dep’t of Army, Office of the Staff Judge Advocate, Fort Devens, Mass., to Headquarters, U.S. Dep’t of the Army, ATTN: DAJA-PT (LTC Barry P. Steinberg), subj: Iranian Adventure: FIERKE, Thomas G., CPT JAGC, at 4 (3 Apr.1980).

Within days of his arrival in Tehran, Fierke was the “Staff Judge Advocate, USSA-I.” But he also had the title of “Chief Legal Counsel, MAAG/U.S. Embassy.” His mission was to “insure proper conclusion of all lease and procurement contracts” with the Iranians. This included the settlement of private leases between Americans and their Iranian landlords. As the Defense Department saw it, these leases could not be terminated until household goods were removed from the premises and any damages to the premises could be assessed. Consequently, CPT Fierke became the USSA-I “operations” and “transportation” officer who, with a small staff, arranged for the packing and pick-up of household goods and their movement to U.S. custody. In June 1979, for example, Fierke was arranging for the pick-up of six sets of household goods a day, six days a week. In the ever present turmoil on the streets of Tehran, this was a difficult mission to accomplish: there were no street maps of Tehran, which made it difficult to locate the apartments and houses that had been rented by American personnel. Additionally, the Revolutionary Guards, landlords, and movers were tempted to steal the household goods of the now departed U.S. personnel if they had the opportunity. Fierke also had much difficulty in negotiating for the lease terminations with the Iranian landlords, as many were not inclined to be reasonable in their dealings with the U.S. Government.²⁷

In addition to these landlord-tenant and household goods issues, Fierke had to ‘close-out’ a variety of contracts between the Iranians and the American government. He had an unlimited warrant as a Termination Contracting Officer (TCO) for the Department of Defense, Department of State, and several agencies conducting classified intelligence work. As a result, it was CPT Fierke who terminated the multi-million dollar contract that the Imperial Armed Forces had with the Bell helicopter subsidiary in Iran.²⁸

Fierke also had a smaller dollar warrant as a TCO for lower dollar value contracts involving Iranian nationals. A major problem with terminating these contracts for the convenience of the government was that many local nationals were unable to gain access to him and other U.S. Embassy personnel in the “Gulf District” (where the procurement office was located) in order to demand payment.²⁹

²⁷ Fierke, *supra* note 17, at 77.

²⁸ E-mail from Thomas G. Fierke, to author (Nov. 9, 2014, 7:29 PM) (on file with author).

²⁹ *Id.*

Captain Fierke worked long days; his typical workday was 6:00 A.M. to 7:00 P.M., seven days a week.³⁰ Additionally, as the only American government attorney in post-Revolutionary Iran, Fierke advised not only Defense Department personnel, but also the U.S. ambassador to Iran and his staff.

Fierke also faced considerable personal danger. He was arrested four times. On one occasion, he was stopped while driving a pick-up truck, pulled from the vehicle at gunpoint, and then handcuffed and blindfolded. Three hours later, he was released. Apparently his offense had been driving the truck without license plates.³¹ Fierke also heard gunfire on a routine basis while in Tehran, and some of the bullets came very close to him.

Tom Fierke left Tehran on 15 July 1979; he flew “first class” on a Swiss Air airliner to Frankfurt, Germany. As Air Force Major General Philip C. Gast,³² the Chief, MAAG-Iran, put it, CPT Fierke had “braved the hostility in Iran after the Revolution with calm and resolution” and was a “man of unflinching devotion to duty.”³³

With CPT Fierke’s departure, the judge advocate presence in Iran ceased. Timing is everything; Fierke made it out. The fifty-plus Americans in the U.S. Embassy were not so lucky: After being taken captive by Iranian students in November, they did not see freedom for another 444 days.³⁴

³⁰ Fierke, *supra* note 17, at 81.

³¹ *Id.* at 5.

³² Philip C. Gast retired as a lieutenant general in 1987. He had a long and distinguished career as an airman, including a Silver Star for downing a North Vietnamese MiG fighter during the war in Southeast Asia.

³³ U.S. Dep’t of Army, DA Form 67-7, Officer Evaluation Report, FIERKE, Thomas G., pt. VII.b (Indorser) (15 Jan. 1980). After earning an engineering degree and a regular Army commission through Reserve Officer Training Corps at Iowa State University in 1971, Fierke received a J.D. from the University of Minnesota in 1974 and a LL.M. (tax) from Boston University in 1978. Initially, CPT Fierke served as a trial counsel and administrative law officer in the Office of the Staff Judge Advocate, Fort Devens, Massachusetts. At the same time, he was the Group Judge Advocate, 10th Special Forces Group (Airborne). Fierke was one of the first judge advocates to complete the resident Special Forces (SF) Officers Course, earning the SF “long tab” in 1978. In 1980, he left active duty and transferred to the Army Reserve. In 1991, Fierke deployed to Saudi Arabia with the Third U. S. Army; he subsequently served with U.S. Army Forces, U.S. Central Command during the first Gulf War. When COL Fierke retired in 2002, he had more than thirty years of active and Reserve service and had been the SJA, 377th Theater Support Command, New Orleans, for four years. He recently retired as the General Counsel, Lockheed Martin Manned Space Systems, where he was involved with America’s space program for twenty-eight years.

³⁴ For more on the take over of the U.S. Embassy in Tehran, see MARK BOWDEN, GUESTS OF THE AYATOLLAH (2006).

Regimental History Announcement: World War II-era Boards of Review Holdings and Opinions are now available on-line. From 1942 to 1946, Boards of Review (the forerunner of today's Army Court of Criminal Appeals) operated in the European Theater of Operations. They also operated in the Mediterranean Theater of Operations (MTO) and the North African Theater of Operations (NATO) from 1943 to 1945. The decisions of these Boards have been digitized and added to the LCS Library's Military Legal Resources Web site at the Library of Congress (http://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html). Board of Review decisions from the India-Burma Theater (originally China-Burma-India Theater), the South West Pacific Area Theater, the Pacific Ocean Areas Theater, and the Pacific Theater are scheduled to be digitized and added to the Military Legal Resources site in the future.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

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

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

Managing an Installation's Utilization of a Civilian Confinement Facility: A Primer

Major Marc Wm. Zelnick*

*If a thing like this is worth doing at all, it's worth doing right.*¹

I. Introduction

It is a frustrating event for any chief of justice (CoJ) or trial counsel (TC) to witness an accused's time in pretrial confinement result in a large credit against confinement because of conditions at the civilian confinement facility (CCF)² contracted by the installation. Confinement credit in this instance disrupts good order and discipline by altering court-adjudged punishment meant to fully address an accused's criminal activity. It also shines light on the government's failure to provide proper conditions to a Soldier accused of a crime. No judge advocate wants to find himself in the unenviable position of bringing a greatly diminished, or nonexistent, sentence of post-trial confinement to his staff judge advocate or—what may be more harrowing—to a commander.

Within the Department of the Army (DA), there are eighteen jurisdictions contracting with CCFs to confine pretrial and post-trial Soldiers.³ These facilities are located off the installations (sometimes are many miles away) and managed by civilians who may have no knowledge of the Army Confinement System (ACS) as established in Army Regulation (AR) 190-47. The lack of military control at CCFs can lead to violations of law or military regulations.

* Judge Advocate, U.S. Army. Presently assigned as Chief, Military Justice, 1st Cavalry Division, Fort Hood, Texas. This article was submitted in partial completion of the Master of Laws requirements of the 62d Judge Advocate Officer Graduate Course.

¹ HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM 9 (1971).

² Civilian confinement facility (CCF) describes a confinement facility contracted by an installation to confine servicemembers in accordance with Department of Defense (DoD) standards. The acronym is not to be confused with an identical acronym used to denote the term *correctional* confinement facility as found in paragraph 2-3.a, Army Regulation (AR) 190-47, *The Army Corrections System*. A correctional confinement facility as described in AR 190-47 is a U.S. Army-managed program to discipline Soldiers for minor infractions not warranting a court-martial. U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 2.3.a (15 June 2006) [hereinafter AR 190-47].

³ U.S. ARMY CORRECTIONS COMMAND, 10 DECEMBER 2013 INMATE COUNT TRACKER (2013) [hereinafter ACC TRACKER] (on file with author). (The Department of the Army currently contracts with CCFs in the following eighteen jurisdictions: (1) Carlisle Barracks, (2) Fort Benning, (3) Fort Bliss, (4) Fort Bragg, (5) Fort Campbell, (6) Fort Carson, (7) Fort Drum, (8) Fort Gordon, (9) Fort Hood, (10) Fort Huachuca, (11) Fort Knox, (12) Fort Lewis (in the event that the Northwest Joint Regional Confinement Facility located on Fort Lewis is at capacity), (13) Military District of Washington [as of Dec. 2014 this contract is no longer active], (14) Fort Polk, (15) Fort Richardson, (16) Fort Riley, (17) Fort Sill, and (18) Fort Stewart. The Army Corrections Command maintains current numbers of confined Soldiers on this tracker and may be contacted for the most current figures.) *Id.*

Besides hindering good order and discipline by detracting from adjudged sentences, such violations can have other, deleterious effects upon the military justice system. Regulatory violations can endanger Soldier welfare, waste government counsels' time, deteriorate the relationship between commanders and their judge advocates, and anger a judge with of a long memory and wide discretion to award confinement credit.

Fortunately for the beleaguered CoJ, properly understanding an installation's use of a CCF can help him implement enduring systems to confine servicemembers safely and in accordance with Army regulations. This article first provides the CoJ with the legal and regulatory framework governing the confinement of servicemembers in CCFs. Second, this article describes some common pretrial confinement problems with conditions in CCFs that can result in confinement credit under Article 13, Uniform Code of Military Justice (UCMJ) and Rule for Courts-Martial (RCM) 305. Finally, this article proposes a guide for the CoJ in assessing, improving, and maintaining an installation's use of a CCF in accordance with AR 190-47. Specifically, this last section is designed to help with reviewing an installation's contract with a CCF, maintaining effective quality assurance and quality control (QA/QC) systems, developing relationships with the right installation and CCF personnel, and training counsel to spot pretrial confinement issues.⁴ With proper management, a CoJ should be able to coordinate installation assets to avoid an angry military judge awarding significant confinement credit to a convicted Soldier because of problems at a CCF.

Because pretrial detainees comprise a larger population of the Soldiers in CCFs than post-trial prisoners⁵ and the conditions of pretrial confinement are litigated at the trial level,⁶ this article focuses on the pretrial confinement of servicemembers.⁷

⁴ This article only covers CCFs housing detainees at the U.S. Army's request in compliance with military law. It will not discuss facilities of another jurisdiction holding Soldiers (e.g., a U.S. State or a foreign power).

⁵ ACC TRACKER, *supra* note 3.

⁶ Improper conditions for post-trial Soldiers may be addressed to a convening authority through post-trial matters submitted in accordance with Rule for Court-Martial (RCM) 1105. A Soldier whose sentence does not allow for review by the Army Court of Criminal Appeals (ACCA) under Article 66, Uniform Code of Military Justice (UCMJ), may petition his service's Judge Advocate General for relief under Article 69.

⁷ To maintain clear terminology, this article refers to servicemembers in pretrial confinement as "pretrial detainees" and servicemembers in post-trial confinement as "post-trial prisoners."

II. The Army Corrections System and the Use of a Civilian Confinement Facility

A. Military Confinement from 30,000 Feet

The authority to place servicemembers in confinement is found in the UCMJ⁸ and the RCM.⁹ Post-trial confinement—confinement adjudged as part of a sentence by a court-martial following a conviction—is inherently punitive. In the Army, post-trial confinement is the primary purpose of the ACS and is closely managed by the Army Corrections Command (ACC).¹⁰ Servicemembers who have been ordered into post-trial confinement by a competent authority after receiving a sentence of confinement or death are designated as “prisoners.”¹¹

Conversely, pretrial confinement is meant only to ensure a servicemember’s presence at a future judicial hearing and is inherently nonpunitive.¹² There are, expectedly, more strictures controlling when and how a command may confine a servicemember before trial than following a conviction at court-martial.¹³ The Department of Defense (DoD) classifies servicemembers held in pretrial confinement awaiting trial or rehearing as “detainees.”¹⁴

The primary pretrial provisions in the UCMJ are found in Article 12,¹⁵ expressly prohibiting the confinement of

servicemembers with foreign nationals, and Article 13,¹⁶ protecting servicemembers from punishment and harsh conditions. Within the RCM, Rule 304(f)¹⁷ protects servicemembers from pretrial punishment, and RCM 305(k)¹⁸ allows courts to award credit for any violations of servicemembers’ pretrial confinement procedural guarantees and conditions of confinement that involve “abuse of discretion or unusually harsh circumstances.”¹⁹ Military judges may award confinement credit as a remedy for violations of Articles 13 and RCM 305(f), (h), (i) or (j).²⁰

Where there is no nearby military confinement facility (MCF) for pretrial detainees and post-trial prisoners, DoD and the DA regulations allow an installation to contract with a local CCF.²¹ In the Army, most Soldiers confined in CCFs are pretrial detainees awaiting trial.²² Soldiers held in post-trial confinement by CCFs fall into two categories: those sentenced to less than thirty days confinement, and those with lengthy adjudged sentences awaiting transportation to a permanently assigned MCF.²³

B. Judicial Remedies for Illegal Pretrial Confinement²⁴

1. Article 13, Uniform Code of Military Justice²⁵

Article 13 prohibits the “punishment or penalty” of a servicemember in pretrial confinement.²⁶ It also prohibits conditions of a servicemember’s pretrial confinement from

⁸ The UCMJ is promulgated by the U.S. Congress under U.S. CONST. art. I, § 8, providing the Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” (Articles 9 and 10 of the UCMJ govern pretrial confinement and Article 58 governs the execution of adjudged confinement.)

⁹ The *Manual for Courts-Martial (MCM)*, which includes the RCM, also establishes rules for confinement and is promulgated by the President under his executive powers established by U.S. CONST., art. II, § 2, cl.1. See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 304, 305, 1003, and 1101 (2012) [hereinafter MCM].

¹⁰ ARMY CORRECTIONS COMMAND, <https://core.us.army.mil/c/downloads/319247.pdf> (last visited Feb. 16, 2014).

¹¹ U.S. DEP’T OF DEF., DIR. 1325.04, CONFINEMENT OF MILITARY PRISONERS AND ADMINISTRATION OF MILITARY CORRECTIONAL PROGRAMS AND FACILITIES para. E2.1.7. (23 Apr. 2007) [hereinafter DoDD 1325.04]. However, AR 190-47, paragraph 3-1.b designates individuals who have had their sentences announced but not approved by a convening authority as “adjudged prisoner(s),” and paragraph 3-1.c designates individuals whose sentences has been approved by a convening authority as “sentenced prisoner(s).”

¹² UCMJ art. 13 (2012).

¹³ The procedures for placing a servicemember in pretrial confinement are governed by RCM 305. This article focuses on the conditions of pretrial confinement in a CCF rather than the rules of pretrial confinement.

¹⁴ DoDD 1325.04, *supra* note 11, para. E2.1.3. However, AR 190-47 designates such individuals as “pretrial prisoner(s).” AR 190-47, *supra* note 2, para. 3-1.a.

¹⁵ UCMJ art. 12 (2012).

¹⁶ *Id.* art. 13.

¹⁷ MCM, *supra* note 9, R.C.M. 304(f).

¹⁸ *Id.* R.C.M. 305(k).

¹⁹ *Id.*

²⁰ Sentence credit under Article 13 and RCM 305(k) are not to be confused with other types of credit, such as day-for-day *Allen* credit awarded when an accused is detained in pretrial confinement. See *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984). Military justice practitioners must also be aware that good conduct time is applied against sentence credit; the more sentence credit an accused is awarded, the more good time credit he receives. See U.S. DEP’T OF ARMY, REG. 633-30, MILITARY SENTENCE TO CONFINEMENT (28 Feb. 1989).

²¹ See DoDD 1325.04, *supra* note 11; U.S. DEP’T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY (11 Mar. 2013) [hereinafter DoDI 1325.07]; and AR 190-47, *supra* note 2.

²² ACC TRACKER, *supra* note 3.

²³ AR 190-47, *supra* note 2, paras. 3-2.i, 10-19.b, and 16-5.b.

²⁴ A recommended primer for a better understanding of sentencing credit is Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., Oct. 2011, at 7.

²⁵ For a thorough study on Article 13, see Mr. Timothy Riley, *Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw*, ARMY LAW., Dec. 2006, at 36.

²⁶ UCMJ art. 13 (2012).

being “any more rigorous than the circumstances required to insure his presence.”²⁷ Pretrial confinement is only authorized when “required by the circumstances,”²⁸ and is not meant to punish or subject extreme conditions on servicemembers awaiting trial.²⁹

In *United States v. Suzuki*, the military’s highest court held that a judge could award confinement credit for violations of Article 13.³⁰ A military judge may award credit against an adjudged sentence³¹ where he determines a particular action taken against a pretrial detainee was made with a “purpose or intent to punish.”³² In ruling whether an action was punitive, the military judge conducts an analysis “examining the intent of detention officials or by examining the purposes served by the restriction or condition.”³³ If the court finds the intent or purpose of an act taken by the government was “reasonably related to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’”³⁴

A military judge is given broad discretion to grant “an appropriate remedy” in terms of credit against confinement for Article 13 violations.³⁵ Violations of Article 13 are ordinarily remedied by awarding RCM 305(k) administrative credit³⁶ against confinement, hard labor without confinement, restriction, fine, or forfeiture of pay.³⁷ In cases where “meaningful relief for violations of Article 13, UCMJ,” demands relief beyond that provided by RCM 305(k), a judge may apply Article 13 credit against a punitive discharge.³⁸

2. Rule for Courts-Martial 305(k)

Rule for Court-Martial 305(k) allows the military judge to award two types of confinement credit based upon pretrial confinement conditions. First, the judge may award day-for-day credit for the government’s violation of the pretrial confinement procedures found in RCM 305, sections (f), (h), (i) or (j).³⁹ Second, and important for jurisdictions confining servicemembers in CCFs, RCM 305(k) provides the judge discretion to award additional credit for “pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.”⁴⁰ “Rule for Court-Martial 305(k) codifies the credit prescribed in *Suzuki* for violations of Article 13.”⁴¹

Thus, RCM 305(k) “provides an independent basis” for a judge to award confinement credit for violations of service regulations governing conditions of servicemember confinement, making the protections of RCM 305(k) more expansive than those of Article 13.⁴² In *United States v. Adcock*, the Court of Appeals for the Armed Forces (CAAF) awarded RCM 305(k) credit to an Air Force officer when his pretrial confinement in a CCF violated conditions of confinement required by an Air Force instruction (regulation).⁴³ The court held “(v)iolations of service regulations prescribing pretrial confinement conditions provide a basis for a military judge, in his or her discretion, to grant additional credit under the criteria of RCM 305(k).”⁴⁴

An installation contracting with a CCF that is violating provisions of AR 190-47, runs the risk of seeing convicted servicemembers awarded sentence credit, though not all violations result in such credit. *Adcock* noted that “confinement in violation of regulations does not create a *per se* right to sentencing credit under the UCMJ.”⁴⁵ Instead, a military judge will look to RCM 305(k) “as a basis for pretrial confinement credit . . . when those regulations reflect a long-standing concern for the prevention of pretrial punishment and the protection of servicemembers’ rights.”⁴⁶ The court in *Adcock* determined “[a]dministrative relief under RCM 305(k) is appropriate where . . . confinement

²⁷ *Id.*

²⁸ MCM, *supra* note 9, R.C.M. 305(d)(3).

²⁹ See *Coffin v. United States*, 156 U.S. 432, 453 (1895) (holding that “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”). See also *United States v. Heard*, 3 M.J. 14, 17 (C.M.A. 1977).

³⁰ *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983).

³¹ Where there is a discrepancy between adjudged and approved sentences (e.g., in the instance of a pretrial agreement), awarded sentence credit is applied against whichever is less, i.e., whichever the servicemember will serve. See *United States v. Spaustat*, 57 M.J. 256 (C.A.A.F. 2002).

³² *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

³³ *Id.*

³⁴ *Bell v. Wolfish*, 441 U.S. 520, 539 (1979).

³⁵ *Suzuki*, 14 M.J. at 493.

³⁶ *Spaustat*, 57 M.J. at 26 (ruling that Article 13 *Suzuki* credit is “‘explicitly recognized’ in RCM 305(k)”) (quoting *United States v. Rock*, 52 M.J. 154, 156 (C.A.A.F. 1999)).

³⁷ MCM, *supra* note 9, R.C.M. 305(k).

³⁸ *Zarbatany*, 70 M.J. at 177.

³⁹ Procedural portions of the pretrial confinement rules dealing with access to counsel, actions by a commander, review of confinement by a neutral and detached officer, and review by a military judge, respectively.

⁴⁰ MCM, *supra* note 9, R.C.M. 305(k).

⁴¹ *Zarbatany*, 70 M.J. at 175. See *United States v. Crawford*, 62 M.J. 411, 414 (C.A.A.F. 2006).

⁴² See *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010).

⁴³ *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007).

⁴⁴ *Id.* at 21.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at 21.

officials have knowingly and deliberately violated provisions of service regulations designed to protect the rights of presumptively innocent servicemembers.⁴⁷ Furthermore, the military courts have also been careful not to strip confinement personnel of “discretionary authority” in managing military detainees, especially as authorized under AR 190-47.⁴⁸

3. Burden, Waiver, and Review

The burden of proof borne by the accused for any Article 13 or RCM 305(k) motion is a preponderance of the evidence standard.⁴⁹ The accused must also raise the issue of illegal pretrial confinement at or before trial or the issue is considered waived.⁵⁰ Appellate courts will review the matter of confinement credit *de novo*.⁵¹

C. The Regulatory Framework

1. Department of Defense Guidance

Department of Defense regulations governing servicemember confinement are contained within Department of Defense Directive (DoDD) 1325.04 and Department of Defense Instruction (DoDI) 1325.07. Department of Defense Directive 1325.04 directs the secretaries of each military department to “(i) issue regulations on the confinement of military prisoners.”⁵² The secretary must “(p)rovide military correctional facilities or enter into such agreements as are necessary to provide for the incarceration of members of the Military Departments who have been ordered into pretrial confinement or who have received sentences to confinement as a result of court-martial.”⁵³ The directive also stipulates that a department’s policies must observe “national accreditation standards issued by the American Correctional Association.”⁵⁴

⁴⁷ *Id.* at 25.

⁴⁸ See *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005); AR 190-47, *supra* note 2, ch. 12 (Administrative Disciplinary Measures and Disciplinary Action Procedures). Discretionary provisions may also be found in the contract between the installation and the Civilian Confinement Facility (CCF) (e.g., stipulating that a confinee may be segregated if deemed necessary by prison managers for the safety of the confinee or others).

⁴⁹ See *MCM*, *supra* note 9, R.C.M. 905(c) and *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005).

⁵⁰ *United States v. Inong*, 58 M.J. 460, 463–64 (C.A.A.F. 2003).

⁵¹ *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

⁵² DoDD 1325.04, *supra* note 11, para. 5.3.1.

⁵³ *Id.* para. 5.3.3.

⁵⁴ *Id.* para. 4.9

Finally, the secretaries must ensure their policies adhere to the Defense Incident-Based Reporting System (DIBRS).⁵⁵

Department of Defense Instruction 1325.07 expands upon the requirements set forth in DoDD 1325.04. It authorizes the confinement of Soldiers in civilian facilities where a MCF is not available. If a MCF is unavailable, DoDI 1325.07 permits servicemembers to be confined in facilities used by the U.S. Marshals Services or “accredited by the American Correctional Association (ACA) or [accredited by the State in which the prisoner is to be confined].”⁵⁶ The ACA “is the oldest and largest international correctional association in the world,” and its standards represent “the world-wide authority on corrections.”⁵⁷ Ordinarily, Level 1 (“minimum security”) MCFs within the DoD correctional systems provide for pretrial confinement of Soldiers awaiting trial and post-trial confinement for Soldiers sentenced to a brief confinement or “pending transfer” to a higher, more secure level of MCF for the completion of a long sentence.⁵⁸

2. Department of the Army Guidance

Army Regulation 190-47, *The Army Corrections System*, is the Department of the Army’s regulation governing confinement of Soldiers. It focuses primarily on DOD-managed MCFs within the ACS. However, like DoDI 1325.07, the regulation permits an installation to “contract to incarcerate pretrial prisoners in federally approved local civilian jails when military facilities are not available. Federally approved is defined as a facility used or approved by the Federal Bureau of Prisons, U.S. Marshals, or Immigration and Customs Enforcement and it is accredited by ACA.”⁵⁹ For post-trial Soldiers, AR 190-47 authorizes installation commanders to “contract with [sic] local jails for prisoners with sentences to confinement of 30 or fewer days, followed by notification of [the Department of the Army Provost Marshal] DAPM of such action. Local jails may not be used to confine sentenced prisoners beyond 30 days without prior approval from DAPM.”⁶⁰ Army Regulation 190-47 requires that all “[a]greements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and

⁵⁵ *Id.* & para. 5.3.9. For more information about DIBRS, see U.S. DEP’T OF DEF., DIR. 7730.47, DEFENSE INCIDENT-BASED REPORTING SYSTEM (DIBRS) (1 Dec. 2003) [hereinafter DoDD 17730.47].

⁵⁶ DoDI 1325.07, *supra* note 21, para. 2.a.(2).

⁵⁷ The Am. Correctional Ass’n, <http://www.aca.org/> (last visited Feb. 17, 2014).

⁵⁸ DoDI 1325.07, *supra* note 21, para. 4.a.(1).

⁵⁹ AR 190-47, *supra* note 2, para. 3-2.i.

⁶⁰ *Id.*

enlisted, sex, and post trial status. Copies of agreements will be forwarded to DAPM.”⁶¹

Given the highly-regimented conditions necessary to run a well-ordered prison, it should be no surprise that AR 190-47 covers a wide variety of standards set for Soldier health, welfare, and discipline. Notably, AR 190-47 establishes rules for segregation of detainee,⁶² medical⁶³ and mental health⁶⁴ care, custody and control procedures,⁶⁵ disciplinary procedures,⁶⁶ complaint processing,⁶⁷ access to mail⁶⁸ and visitors,⁶⁹ work restrictions,⁷⁰ chaplain services,⁷¹ space allocated detainee,⁷² limits on (solitary) confinement,⁷³ and use of photographs of detainee.⁷⁴ While these standards regulate conditions in MCFs, they are also applicable to conditions in CCFs through RCM 305(k).

D. The Army Corrections Command and Installation Directorates

The use of a CCF by an installation involves both the installation command and the DAPM. U.S. Army installation (or garrison) commands will ordinarily have a Directorate of Emergency Services (DES). The DES or installation Provost Marshal’s Office (PMO), which also falls under a garrison commander, may provide a liaison function between an installation and a CCF. The DAPM is responsible for the Army Corrections Command (ACC), which is, in turn, responsible for the management of the

⁶¹ *Id.*

⁶² *Id.* paras. 3-2.i., 9-4.d.(1), 11-1.b.(1), 11-1.b.(2), and 16-7.a.

⁶³ *Id.* para. 7-2 (outlining healthcare services necessary for inmate care).

⁶⁴ *Id.* para. 7-6 (requiring mental healthcare for inmates either on site or from a “supporting medical facility”).

⁶⁵ *Id.* ch. 11 (detailing custody and control procedural requirements for Army Corrections System (ACS) facilities).

⁶⁶ *Id.* para. ch.12 (governing ACS disciplinary procedures).

⁶⁷ *Id.* para. 10-14 (permitting inmates to file grievances and request interviews with ACS officials).

⁶⁸ *Id.* para. 10-10 (ACS mail procedures, including inspection restrictions of attorney mail).

⁶⁹ *Id.* para. 10-13 (covering ACS visitation procedures).

⁷⁰ *Id.* para. 5-6.j.(1) (“A pretrial prisoner will not be assigned work details with posttrial prisoners.”).

⁷¹ *Id.* para. 7-4 (mandating access to religious support to ACS inmates).

⁷² *Id.* para. 9-6 (setting minimum standards for inmate space in ACS facilities).

⁷³ *Id.* para. 11-1 (establishing ACS levels of inmate custody).

⁷⁴ *Id.*, para. 10-12.a (Limiting public access to ACS facilities, including tours.).

ACS.⁷⁵ The ACC is commanded by the Deputy Provost Marshal General of the U.S. Army.⁷⁶ The ACC advises U.S. Army Installation Management Command (IMCOM) and installations on the use of MCFs and CCFs.⁷⁷

As part of its advising function, the ACC developed the Local Civilian Confinement Facility Contract Guidance (LCCFCG) to “ensure [a] contracted correctional facility meets basic life, health, and safety standards.”⁷⁸ The LCCFCG is a three-page checklist meant “to serve as a guide to installations who have or are considering entering into a local contract for confinement needs.”⁷⁹ This contract guidance addresses the important legal and regulatory requirements for confining Soldiers addressed above. Therefore, a judge advocate can expect a contract that does not contain necessary LCCFCG provisions—or a CCF that violates these provisions in a contract—to result in defense motions for confinement credit.

E. Local Standard Operating Procedures

Many installations have developed Standard Operating Procedures (SOPs) for managing the confinement of pretrial and post-trial servicemembers in CCFs. If these SOPs exist, they are usually promulgated by the installation’s DES or PMO. The SOP should synthesize AR 190-47, AR 27-10,⁸⁰ and the contract between the installation and the CCF.⁸¹

Large installations contracting with CCFs may have a Confinement Liaison Branch (CLB) within the installation’s DES or PMO with an SOP providing “uniform guidance and procedures for confining military personnel assigned” to the installation.⁸² Such an SOP should detail responsibilities for

⁷⁵ Headquarters, U.S. Army Correction Command, Gen. Order No. 2008-05 (31 Mar. 2008). For more information on the Army Corrections Command, an information paper may be found at <https://core.us.army.mil/c/downloads/319247.pdf> (last visited Feb. 16, 2014).

⁷⁶ ARMY CORRECTIONS COMMAND, STANDING OPERATING PROCEDURES #1: ORGANIZATION & ADMINISTRATIVE FUNCTIONS AND RESPONSIBILITIES (27 May 2010).

⁷⁷ E-mail from Lieutenant Colonel Beth C. Richardson, Army Corrections Command Plans & Operations Officer, to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen’s Sch., U.S. Army (Nov. 19, 2013, 14:16 EST) (on file with author).

⁷⁸ U.S. ARMY CORRECTIONS COMMAND, LOCAL CIVILIAN CONFINEMENT FACILITY CONTRACT GUIDANCE 1 (7 Nov. 2012) [hereinafter LCCFCG].

⁷⁹ *Id.*

⁸⁰ U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (3 Oct. 2011) [hereinafter AR 27-10].

⁸¹ *E.g.*, U.S. ARMY GARRISON, FT. HOOD, CONFINEMENT LIAISON BRANCH STANDARD OPERATING PROCEDURES 1 (19 Oct. 2013) [hereinafter CONFINEMENT LIAISON SOP].

⁸² *Id.*

the CLB, unit commanders, Trial Defense Counsel, servicing CCFs, and military magistrates concerning the processing of servicemembers in and out of a CCF. The SOP should cover procedures for transporting detainees, appointment and visitation scheduling, processing inmate mail, transferring post-trial prisoners, and discharging confined personnel.⁸³ A comprehensive SOP should contain indices including checklists, memoranda, Department of Defense and DA Forms, and maps to the servicing CCFs.⁸⁴

III. Survey of Common Problems Confining Soldiers in CCFs

A. Case Study: *United States v. Zarbatany*

A case study of how things can go wrong with a CCF is *United States v. Zarbatany*.⁸⁵ The CAAF noted in *Zarbatany* that “meaningful relief” for violations of Article 13, UCMJ, may require awarding credit applied against a punitive discharge.⁸⁶ Yet beyond the CAAF’s specific ruling, the facts at trial clearly demonstrate how problems at a CCF can result in the government successfully convicting a servicemember for serious crimes only to see him walk out of the courthouse a free man because of awarded sentence credit.

Airman Zarbatany was stationed at Elmendorf Air Base, Alaska. While awaiting trial on unauthorized absence and drug charges, he was confined in the Anchorage Correction Complex. Elmendorf Air Base contracted with the Anchorage Correction Complex through a memorandum of agreement (MOA) to confine pretrial detainees.⁸⁷

Conditions for Airman Zarbatany at the Anchorage Correction Complex failed to comply with AFI 31-205,⁸⁸ the Air Force’s equivalent of AR 190-47.⁸⁹ Substandard conditions at the CCF included housing Zarbatany in maximum (solitary) confinement for 119 days despite being a “model prisoner with no disciplinary infractions,” housing him for six days with civilian post-trial prisoners (“one of whom was a convicted sex offender”), refusing him adequate recreation time, locking him in a shower for 30 minutes to an hour between four and eight times, denying him medical care for 24 hours after he was exposed to

pepper spray used on another inmate, forcibly weighing him after he complained about his conditions, denying him hygienic services, denying him mental health counseling despite repeated requests, and making him pay for medical care.⁹⁰ Airman Zarbatany’s commander also refused to provide Airman Zarbatany with mental health care when his request was made known to the command.⁹¹

The military judge awarded Airman Zarbatany a total of 476 days of RCM 305(k) administrative credit for illegal conditions during his 119 days of pretrial confinement.⁹² The grand total of Airman Zarbatany’s confinement credit, including *Allen* credit, was 595 days. His adjudged sentence was a bad-conduct discharge, six months of confinement, forfeiture of all pay and allowances, and reduction to E-1.⁹³

Though on remand the Air Force Court of Criminal Appeals found Airman Zarbatany had received meaningful relief and no credit need be applied to his punitive discharge,⁹⁴ the CAAF’s opinion makes clear that this course of action is an option when there are egregious pretrial punishment conditions found by a court.⁹⁵

Zarbatany is also of interest because Elmendorf Air Base had been experiencing problems with its CCF for some time. At trial, the court “noted two prior cases involving illegal pretrial conditions at [the Anchorage Correction Complex].”⁹⁶ The military judge expressed his displeasure with this fact on the record. “[T]his installation [Elmendorf] has been aware of the deficiencies of using local confinement since at least 8 December 2005, at the time Airman Junior was court-martialed. Three years. So my guidance to this installation, the NAF, and MAJCOM is that they fix this.”⁹⁷

B. Recurring Problems with Civilian Confinement Facilities

The conditions of confinement described in *Zarbatany* are not unique to the Anchorage Correction Complex. Other CCFs throughout the ACS suffer similarly. Avoiding motions for sentence credit based upon illegal conditions of confinement in a CCF requires more than the ability of a

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011).

⁸⁶ *Id.* at 177.

⁸⁷ *Id.* at 171.

⁸⁸ U.S. DEP’T OF AIR FORCE, INSTR. 31-205, THE AIR FORCE CORRECTIONS SYSTEM (17 MAY 2010) [hereinafter AFI 31-205].

⁸⁹ *Zarbatany*, 70 M.J. at 171.

⁹⁰ *Id.* at 171–72.

⁹¹ *Id.* at 172.

⁹² *Id.*

⁹³ *Id.* at 170.

⁹⁴ *United States v. Zarbatany*, 2012 CCA Lexis 8.

⁹⁵ *Zarbatany*, 70 M.J. at 177.

⁹⁶ *Id.* at 172.

⁹⁷ *Id.*

judge advocate to know what right looks like. He must also know what wrong looks like. Below are some of the more common problems experienced by jurisdictions using CCFs—issues involving segregation, uniform and work detail, medical and psychological care, suicide watch, maximum security, pay problems, and unauthorized publication of mugshots.

One of the more common problems with confining U.S. Army personnel in CCFs is a failure to segregate as required by the UCMJ, RCM, and AR 190-47. Article 12 prohibits “foreign nationals not members of the armed forces” from being confined with servicemembers.⁹⁸ Additionally, AR 190-47 dictates that “[a]greements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and enlisted, sex, and post trial status.”⁹⁹ This segregation pertains to “employment and recreational areas” as well as to billeting.¹⁰⁰ Army Regulation 190-47 uses absolute language in discussing the comingling of pretrial and post-trial Soldiers, stating clearly that servicemembers in pretrial confinement “will not reside, work, or be permitted to mingle with prisoners who have been sentenced to confinement.”¹⁰¹

A CCF’s violation of rules regarding pretrial detainee uniforms and work details also presents problems. A servicemember in pretrial confinement may not be made to wear the uniform “prescribed only for post-trial prisoners.”¹⁰² Rule for Courts-Martial 304(f) prohibits a pretrial detainee from serving “punitive duty hours or training” or “perform[ing] punitive labor.”¹⁰³ Army Regulation 190-47 states that “[a] pretrial prisoner will not be assigned work details with posttrial prisoners.”¹⁰⁴

A judge advocate must monitor servicemember access to medical and mental health treatment in a CCF.¹⁰⁵ Army Regulation 190-47 requires a confined servicemember to be provided healthcare services¹⁰⁶ and mental health support.¹⁰⁷ When a pretrial detainee requires hospitalization, “[p]roperly trained guards of the prisoner’s assigned unit will secure pretrial prisoners,”¹⁰⁸ as “[c]ustody and control of hospitalized pretrial prisoners . . . are the responsibility of the prisoner’s parent unit commander.”¹⁰⁹ If a CCF is not equipped to provide certain levels of mental healthcare, an installation may need to coordinate the movement of the pretrial detainee to a MCF where such care is available, such as the Joint Regional Confinement Facility at Fort Leavenworth, Kansas.¹¹⁰

Suicidal servicemembers present particular difficulty in confinement.¹¹¹ In the event a CCF restricts a servicemember by placing him on suicide watch, Article 13 credit may be awarded if the CCF did not have a legitimate concern for the Soldier’s mental and physical health and was determined to be punishing him.¹¹² If placing a servicemember on suicide watch is ruled an “abuse of discretion”—e.g., neglecting to follow service regulations regarding mental health treatment—the Soldier may be entitled to RCM 305(k) credit.¹¹³

⁹⁸ UCMJ art. 12 (2012).

⁹⁹ AR 190-47, *supra* note 2, para. 3-2.i (“Agreements with civilian jurisdictions will provide for the segregation of pretrial Army prisoners by officer, noncommissioned officer, and enlisted, sex, and post trial status.”). *Id.* para. 11-1.b.(2) (“A noncommissioned officer in pretrial status will be segregated from other pretrial prisoners unless he or she voluntarily waives, in writing, the right to be segregated and the waiver is approved by the facility commander.”).

¹⁰⁰ *Id.* para. 11-1.b.(1).

¹⁰¹ *Id.* para. 16-7.a.

¹⁰² MCM, *supra* note 9, R.C.M. 304(f). See also AR 190-47, *supra* note 2, para. 10-6 (“Pretrial prisoners will wear a different color badge than posttrial prisoners.”).

¹⁰³ MCM, *supra* note 9, R.C.M. 304(f).

¹⁰⁴ AR 190-47, *supra* note 2, para. 5-6.j.(1).

¹⁰⁵ See Gregg Zoroya & Meghan Hoyer, *Mental Health Leading Cause of Military Hospital Stays*, USA TODAY (Sep. 25, 2013, 7:19 PM), <http://www.usatoday.com/story/news/nation/2013/09/25/hospitalization-troops-record-army-ptsd-patients/2868421/> (“Through 2012, mental illness in the military took up more days for hospitalization than any other mental or physical problems, including war wounds, accidents, illness or pregnancies.”). Mental illness is a particularly important problem facing the U.S. military after more than a decade of fighting in contingency operations.

¹⁰⁶ AR 190-47, *supra* note 2, para. 7-2.

¹⁰⁷ *Id.* para. 7-6.

¹⁰⁸ *Id.* para. 5-10.g.(3).

¹⁰⁹ *Id.* para. 11-12.a.

¹¹⁰ E-mail from then Captain (Promotable) Christopher D. Coleman, Chief, Admin. Law, 101st Airborne Div., to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen’s Sch., U.S. Army (Feb. 06, 2014, 16:12 EST) (on file with author) (Pretrial detainees confined to the CCF for Fort Campbell, Kentucky, who suffer from certain psychological conditions must be moved to the Joint Regional Confinement Facility at Fort Leavenworth, Kansas, for continued pretrial confinement.).

¹¹¹ U.S. DEP’T OF DEF, SUICIDE EVENT REPORT: CALENDAR YEAR 2011 ANNUAL REPORT (2012) (In 2011, 301 servicemembers committed suicide and 915 servicemembers attempted suicide.).

¹¹² *United States v. Williams*, 68 M.J. 252, 257–58 (C.A.A.F. 2010).

¹¹³ *Id.* at 257.

The practice of placing pretrial detainees in maximum custody (e.g., solitary confinement) has been addressed by the military courts, most notably in *United States v. Crawford*.¹¹⁴ Ordinarily, “confinement of pretrial prisoners will be limited to those facilities with cell areas that provide a minimum of 72 square feet per prisoner.”¹¹⁵ Sometimes, however, a detainee must be isolated for the protection of himself or other detainees. While the court in *Crawford* was unwilling to question the “security determinations of confinement officials,” it warned against “arbitrary policies imposing ‘maximum custody.’”¹¹⁶ The court also stated that Article 13 credit may be warranted where a pretrial detainee is placed in maximum custody “solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of a case.”¹¹⁷

Pay problems are also a common occurrence when a Soldier is placed in pretrial confinement. Such problems are especially relevant to cases where a Soldier has recently returned to military control after an extended absence, (e.g., absence without leave in violation of Article 86, UCMJ). In some cases, units mistakenly stop the pay of a servicemember when he is placed in pretrial confinement. The military courts have made clear that, absent an intent to punish a Soldier, issues regarding pay while confined will not amount to an Article 13 violation.¹¹⁸

There is a growing practice at CCFs of placing mugshots of inmates—including military members pretrial detainees and post-trial prisoners—on their websites.¹¹⁹ Third party websites will post these photos along with inmate information and charge a fee to take the photos down.¹²⁰ Such photography is strictly prohibited by AR 190-47 which clearly directs “[p]risoners will not be photographed, except in support of medical documentation and for official identification purposes.”¹²¹

¹¹⁴ *United States v. Crawford*, 62 M.J. 411 (C.A.A.F. 2006) (The court ruled that detention officials were justified in placing an accused in solitary confinement based upon his determined level of dangerousness.).

¹¹⁵ AR 190-47, *supra* note 2, para. 16-6.b.

¹¹⁶ *Crawford*, 62 M.J. at 417.

¹¹⁷ *Id.*

¹¹⁸ *United States v. Fischer*, 61 M.J. 415 (C.A.A.F. 2005) (The Court in *Fischer* addressed the nonpunitive regulatory rule ceasing a servicemember’s pay at the end of his service obligation while still in confinement.). See also *United States v. Jauregui*, 60 M.J. 885 (A. Ct. Crim. App. 2004).

¹¹⁹ See, e.g., CHRISTIAN CNTY. JAIL ONLINE INMATE SYSTEM, <http://www.ccjail.org/qcms/index.asp?Page=Inmate%20Information> (last visited Mar. 2, 2014).

¹²⁰ See, e.g., Mugshots.com, <http://www.mugshots.com> (last visited Mar. 2, 2014). See also Jose Pagliery, *Mug Shot Extortion Sites Still Up and Running . . . For Now*, CNNMONEY (Oct 16, 2013, 9:29 AM), <http://money.cnn.com/2013/10/16/technology/mug-shot-websites/>.

¹²¹ AR 190-47, *supra* note 2, para. 10-12.a.

IV. Implementing and Maintaining Management Systems for Civilian Confinement Facility Utilization

A. Initial Assessments and Establishing an Installation Civilian Confinement Facility Working Group

1. Assessing an Installation’s Civilian Confinement Facility From “Go”

Confinement, especially pretrial confinement, is an important part of a CoJ’s military justice practice. As such, the CoJ arriving at an installation which contracts with a CCF should make early inquiries into any confinement problems during the handover with his predecessor. In particular, the CoJ should ask his predecessor (and others in the military justice shop) what issues have been litigated under Article 13 and RCM 305 and what military judges have said on record regarding the CCF. An understanding of past problems and what corrective actions—if any—have been taken to address these problems will allow the CoJ to form an initial assessment of his installation’s relationship with the servicing CCF. Additionally, the CoJ should identify the individuals with responsibilities under the CCF contract and ask his predecessor how responsive he found them.

2. Reviewing the Existing Contract¹²²

The CoJ should next investigate the contractual relationship between the installation and the CCF by reviewing the existing contract, along with all enclosures and allied documents.¹²³ The CoJ’s initial review of the contract will not only show him what is contractually required of the CCF, but will identify the Contracting Officer Representative (COR) managing the contract for the installation. The contract will also detail contractual responsibilities of individual units and installation departments (e.g. a civil liaison branch within the DES or PMO). If the CCF must create certain QA/QC products as part of the contract, the CoJ should ask the COR for copies of these to review.¹²⁴

After the CoJ collects the full contract and completes his initial review, he should request a full review of the contract by the servicing Administrative Law (AdLaw) office to ensure compliance with AR 190-47 and the ACC’s

¹²² Some installations contract with CCFs using a memorandum of agreement (MOA), performance work statement (PWS), statement of work (SOW), etc. For the purposes of this article, the author uses the term “contract” to represent all types of binding agreements between an installation and a CCF.

¹²³ These documents should be kept on file at both the Criminal Law and Administrative Law offices for reference, discovery, and litigation.

¹²⁴ Such products might include quality control plans (QCP), quality assurance surveillance plans (QASP), or periodic data reports.

LCCFCG. The installation may be exercising an option of a base contract made several years before the LCCFCG was released in 2012. The AdLaw review should pay particular attention to any incongruities between the contract, Army regulations, or ACC contractual guidance. Where incongruities exist, it may be helpful for the reviewing AdLaw attorney to contact the ACC for guidance on achieving future compliance.¹²⁵

The CoJ should also ask the AdLaw office to review their records for any prior investigations conducted into conditions at the contracted CCF. If investigations exist, they may provide a history of the CCF's compliance (or noncompliance) with contractual obligations and Army regulations.¹²⁶ Past investigations may also demonstrate systemic failures on the part of the installation.

3. *Civilian Confinement Facility Working Group*

After the CoJ has familiarized himself with the CCF contract, he should establish an installation CCF working group in coordination with the installation command. Members should include the COR, DES (or PMO) personnel with contractual roles, a representative from the installation medical facility, and the installation chaplain. The creation of this working group will allow the CoJ to identify roles and responsibilities of installation offices and establish a working group to quickly identify, report, and resolve future issues.

Establishing a working group permits the CoJ to review installation systems in place to adhere to the contract and AR 190-47. The first meeting should include a review of all installation and CCF SOPs and any CCF QA/QC programs. The working group should also establish notification requirements for serious incidents that occur in the CCF.

4. *Inspecting the Civilian Confinement Facility*

The CoJ should conduct a site visit to the CCF as soon as practicable with the CCF working group, his trial counsel and military justice paralegals, as well as other interested individuals, such as brigade judge advocates and commanders. Meeting the CCF officials early is critical to a good working relationship. The inspection will give the CoJ an honest appreciation for the confinement conditions and facility.

The inspection should involve a discussion of how each provision of the contract is executed at the CCF, with particular focus on segregation, disciplinary procedures,

¹²⁵ LCCRCG, *supra* note 78, at 3.

¹²⁶ This material may also be discoverable to the Defense. *See* MCM, *supra* note 9, RCM 701(6)(C).

access to healthcare, and complaint processing. The inspection should include a review of the CCF's QA/QC program. Finally, the CCF management should be asked what problems, if any, exist in confining military members under the contract.

B. Trial Counsel Responsibilities

Trial counsel play an important role in pretrial confinement. First, they must advise a command regarding the wisdom of placing a servicemember in pretrial confinement. If there are problems with a servicing CCF—e.g. distance creates travel issues or conditions within the CCF will result in the military judge awarding sentence credit—the TC's best advice may be not to place the servicemember in pretrial confinement.¹²⁷ Second, if there are problems with a CCF that will result in confinement credit, the TC should inform the command so that a cost analysis may be applied to placing the servicemember in pretrial confinement. Sometimes pretrial confinement is the right call despite significant confinement credit to the accused, but the TC must help the command and the CoJ make that determination. Third, the TC is ultimately responsible for quickly informing the CoJ of any problems associated with a servicemember's confinement when they come to the attention of the unit.

The CoJ may wish to supplement his pre-trial confinement SOP with CCF-specific checks for TC and paralegals. The SOP might include a check for the TC to e-mail defense counsel requesting that any problems with his client's confinement be brought to the TC's attention immediately for remedial action. The SOP may also detail unit paralegals to ensure the unit regularly visits the Soldier to check on his health and welfare. Paralegal responsibilities under the SOP might also include checking with the unit to identify and solve any problems regarding a confined Soldier's pay, prescription medication, and spiritual needs.

C. Fixing Problems

If, after consulting the ACC, the CoJ and AdLaw attorney believe the current contract is substantially deficient, the CoJ should schedule a meeting with the CCF working group to develop solutions. If an issue appears easily solvable (e.g., uniform problem),¹²⁸ the COR may be able to solve the matter with the CCF quickly. If an issue appears to require a

¹²⁷ The trial counsel (TC) should guard against the unit placing restrictions upon an accused that are tantamount to confinement. *See* United States v. Mason, 19 M.J. 274 (C.M.A. 1985) and United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985). The TC must also make certain his command does not punish the servicemember while awaiting trial. *See* United States v. Smith, 53 M.J. 168 (C.A.A.F. 2000).

¹²⁸ *See* MCM, *supra* note 9, R.C.M. 304.

larger solution (e.g., Soldiers' prescription medications are prohibited within the facility by CCF policy, or CCF has too little space to properly segregate pretrial detainees and post-trial prisoners),¹²⁹ the contract may need to be modified or re-bid as soon as possible in coordination with the installation contracting office.

Where a CCF is continually costing an installation administrative confinement credit and no contractual alteration can bring the CCF into compliance with AR 190-47, it may be time for the installation to look elsewhere. Installations can enter into an MOA with a nearby Air Force, Navy, or Marine base to confine Soldiers.¹³⁰ The installation can also look to another local jail during its next bidding of the CCF contract. Working with AdLaw and the installation contracting office, the CoJ can look for ways to increase invitations for bids by local jails eager to secure a lucrative federal contract.

V. Conclusion

Doctrinally, the proper use of a CCF by an installation is not a function of a CoJ. Practically, however, the CoJ's ultimate responsibility to his jurisdiction's military justice program means he must take an active role in ensuring the CCF is adhering to the law and AR 190-47 through a properly drafted contract. Just as a CoJ must actively participate in the investigative mission of Criminal Investigation Command to guarantee successful prosecutions of a serious crimes, so too must he actively participate in the contractual mission of his installation to guarantee safe, compliant, and credit-free confinement.

¹²⁹ E-mail from Major Jennifer M. Healy, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Sch., U.S. Army, to Major Marc Wm. Zelnick, Student, 62d Judge Advocate Officer Graduate Course, The Judge Advocate Gen.'s Sch., U.S. Army (Dec. 04, 2014, 12:48 EST) (on file with author). Major Healy, a former Senior Defense Counsel at Fort Polk, Louisiana, was describing conditions at a Christian Confinement Jail used by Fort Polk that resulted in significant RCM 305(k) credit.

¹³⁰ Telephone Interview with Major Brian R. Sykes, Chief, Military Justice, Joint Reg'l Training Facility and Fort Polk (Jan. 23, 2014). Major Sykes was discussing his installation's determination to house pretrial detainees at Barksdale Air Force Base through an MOA as the installation works through contractual issues with the servicing CCF.

Lawyers as Leaders¹

Reviewed by Major Eldon W. Beck*

I. Introduction

Why are so many lawyers in leadership positions? Why does the profession that provides a majority of our nation's leaders do so little to train its people for leadership responsibilities? How can lawyers better prepare to lead? What does it really mean for a lawyer to lead? In her book *Lawyers as Leaders*, Deborah Rhode, a distinguished Stanford Law School professor,² aggressively analyzes these and many other compelling questions.³ Rhode's "central claim is that the legal profession attracts a large number of individuals with the ambition and analytic capabilities to be leaders, but frequently fails to develop other qualities that are essential to effectiveness."⁴

Using this book to fill the apparent gap in leadership training and education for lawyers,⁵ Rhode addresses leadership styles, traits, and development; leadership ethics; and the unusual leadership contexts applicable to lawyers.⁶ By infusing a lawyer-specific leadership discussion with myriad facts and anecdotes, thought-provoking academic rhetoric, and even some political advocacy, *Lawyers as Leaders* shows the tensions between competing leadership concepts, the challenge of ethical leadership in a climate of moral relativism, and the conflicting loyalties that lawyer-leaders have to clients, causes, and the public.

* Judge Advocate, U.S. Marine Corps. Presently assigned as Student, 63d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. This book review was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

¹ DEBORAH L. RHODE, *LAWYERS AS LEADERS* (2013).

² Deborah L. Rhode, Ernest W. McFarland Professor of Law, STAN. LAW SCH. DIR. (Aug. 30, 2014 10:00 AM), <http://www.law.stanford.edu/profile/deborah-l-rhode>. Rhode is the Ernest W. McFarland Professor of Law at Stanford Law School and the Director of Stanford's Center on the Legal Profession. Her areas of expertise are Antidiscrimination Law, Ethics and Professional Responsibility, and Sex and the Law. After graduating from Yale Law School and "clerking for Supreme Court Justice Thurgood Marshall, she joined the Stanford faculty." *Id.*

³ RHODE, *supra* note 1, at 1.

⁴ *Id.*

⁵ *Id.* ("Although leadership development is now a forty-five billion dollar industry, and an Amazon search reveals close to 80,000 leadership books in print, the topic is largely missing in legal education."). *But cf.* BARBARA KELLERMAN, *THE END OF LEADERSHIP* (2012) (emphasizing changing dynamics between leaders/followers and challenging a leadership industry which is growing rapidly while producing fewer effective leaders).

⁶ RHODE, *supra* note 1, at 1–2.

II. Overview

Lawyers as Leaders is an intricately structured, busy, and provocative book.⁷ Lawyers, all of whom are leaders of some sort, can benefit by critically analyzing and discussing this book, not because it presents a comprehensive or conclusive leadership guide (though it makes an attempt), but because it exposes several significant tensions between being a lawyer and a leader. Throughout the book, Rhode "[draws] on a broad array of interdisciplinary research, as well as biographical and autobiographical profiles" to "explore leadership competencies that are too often missing in practice."⁸

Rhode provides a succinct summary of her book on page one and sticks to her outline. First, she "offers an overview of leadership traits, styles, and development."⁹ Second, she addresses "ethics in leadership" with a focus on scandal.¹⁰ Finally, she focuses on lawyer leadership in context by addressing diversity, law firm leadership, social movements, and legacy development.¹¹

The critical reader should be aware of three detractors before choosing to read this book. First, Rhode openly displays her political preferences and personal loyalties in this book.¹² Readers who do not share her ideology may find this distracting or offensive. Second, the book at times has an anachronistic tone because Rhode illustrates many points using examples from the political and civil rights leaders of earlier decades.¹³ Readers looking for contemporary examples of good lawyer leadership will find this book lacking. Third, frequent typographical and grammatical errors provide an unexpected distraction which may, to some readers, diminish the credibility of the author.¹⁴ Despite the exhaustive research reflected in the

⁷ *See, e.g., id.* at 1–2, 203–07.

⁸ *Id.* at 1.

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *See, e.g., id.* at 102–04 (juxtaposing Obama's ethical inconsistency with Romney's unethical inconsistency as presidential candidates); 21, 32, 34, 62, 133, 189, 190, 208 (consistently praising Thurgood Marshall, for whom she clerked); 196–202 (providing effusive support of "The Gay Marriage Campaign").

¹³ *See, e.g., id.* at 14, 69, 83 (Joseph McCarthy); *id.* at 17, 35, 52, 179, 190–96 (Robert Kennedy); and *id.* at 36, 70, 73–74, 83, 98–99, 114, 126, 193 (Richard Nixon).

¹⁴ The following pages of the text contain obvious typographical and/or grammatical errors: 6, 8, 15, 34, 35, 50, 87, 91 (x2), 107, 118 (x2), 125,

1,422 endnotes,¹⁵ the author's lack of attention to detail may lead a skeptical reader to doubt the overall legitimacy and reliability of the book's more substantive points.

Because *Lawyers as Leaders* moves from being relatively objective, empirical, and straightforward to being increasingly subjective, complex, and controversial, each of the book's three sections receives separate consideration below.

III. Part I: Lawyer Statistics and Leadership Traits, Styles, and Development

Lawyers as Leaders is premised on the "dual paradoxes" of trust and power.¹⁶ Lawyers are greatly trusted, yet severely distrusted.¹⁷ Similarly, lawyers frequently become prominent leaders, yet are often untrained and unprepared for leadership.¹⁸ A recurring theme throughout the book is that the skills that make excellent lawyers often create obstacles to effective leadership.¹⁹ Rhode uses a variety of research and theories to recommend many ways for lawyers to overcome the most common and critical obstacles to effective leadership.

Because "there are almost as many definitions of leadership as there are persons who have attempted to define the topic,"²⁰ Rhode never defines "leader" or "leadership."²¹ Rather, she illustrates the nature of these terms by presenting them in many different contexts. By the end of the book, Rhode has used "leader" in so many different ways that it can mean almost anything: politician, mentor, power seeker, position holder, honest example, scandal manager, and activist for social change, to note just a few.²² And that is

one of Rhode's many points: "Leadership is a process, not a position, a relationship, not [sic] a status."²³ Because lawyers are leaders in many settings, they need to think and learn about leadership so they can influence the people and institutions around them in a way that drives positive change.²⁴

Rhode displays extensive research and many different ideas as she presents a nearly inexhaustible laundry list of leadership lessons. For instance, while acknowledging that there is "no uniform profile of the ideal leader," Rhode nevertheless identifies six forms of "emotional intelligence" which are most required of leaders.²⁵ After showing the strengths and limitations of individual leadership styles, she proposes that the ideal leader is flexible enough to employ the various leadership styles in a contextual and sensitive way, with a sense of humor and humility.²⁶ Additionally, Rhode extensively analyzes five basic leadership capabilities which she claims are essential for successful leaders and, in the process, illustrates a variety of ways lawyers can improve themselves.²⁷ Recognizing that all developing leaders have different strengths, weaknesses, and opportunities to learn leadership,²⁸ Rhode calls on experienced lawyers to take the time and effort to mentor others.²⁹ Though she asserts that "honest and informed" advice and mentoring is an essential means of developing leadership, she also warns that lawyers must ultimately become more self-aware and learn when to disregard advice and follow their own moral compass.³⁰

Rhodes' initial discussion about leadership provides insightful conclusions that are extensively researched and compellingly presented. *Lawyers as Leaders*' intensive exploration of leadership traits, style, and development is likely to prompt critical introspection and inspire renewed commitment to personal leadership development.

130, 133 ("Assistant General" should be "Assistant Attorney General"), 135, 137, 141, 143, 147, 158, 164, 175 (x2), 188, and 192 (x2) ("Federal Bureau of Information") ("Herbert Hoover" should be "J. Edgar Hoover"). This does not include additional errors, inconsistencies, and incomplete citations in the endnotes.

¹⁵ *Id.* at 209–87.

¹⁶ *Id.* at 2–6.

¹⁷ *Id.* at 2–5.

¹⁸ *Id.* at 1–2, 5–6, 203.

¹⁹ *See, e.g., id.* at 5–6, 11–12, 28. *See also* Susan Daicoff, *Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1348, 1390–91 (1997) (finding that lawyers tend to be more aggressive, competitive, and achievement-oriented than other people and other professionals).

²⁰ BERNARD BASS, BASS AND STOGDILL'S HANDBOOK OF LEADERSHIP: THEORY, RESEARCH, AND MANAGERIAL APPLICATIONS 11 (3d ed. 1990).

²¹ *See* RHODE, *supra* note 1, at 7.

²² *See, e.g., id.* at 3 (politician); 151–52 (mentor); 5, 37 (power seeker and position holder); 83–84 (honest example); 109–10, 128 (scandal manager); 176, 202 (activist).

²³ *Id.* at 203. *But cf. id.* at 7 ("Although popular usage sometime equates leadership with power or position, most contemporary experts view it rather as a relationship.").

²⁴ *See id.* at 203–08.

²⁵ *Id.* at 12 (citing empirical research identifying six forms of "emotional intelligence" which underlie the primary "leadership styles": Coercive, Authoritative, Affiliative, Democratic, Pacesetter, and Coaching). *See* Daniel Goleman, *Leadership That Gets Results*, HARV. BUS. REV. Mar.-Apr. 2000, at 78–80.

²⁶ *See* RHODE, *supra* note 1, at 22–24.

²⁷ *Id.* at 40–81 (exploring the following leadership capabilities: decisionmaking, influence, fostering innovation and managing change, conflict management, and communication).

²⁸ *Id.* at 30–39 (citing differences in the following as factors that affect developing leaders: skills, understanding, cultural biases, family connections, self-awareness, and chance).

²⁹ *Id.* at 37–39.

³⁰ *Id.*

IV. Part II: Leadership Application to Lawyers

Rhode's leadership message becomes more complex as she focuses on lawyers by addressing leadership ethics and scandals. After warning that "a range of individual self-interests, cognitive biases, and organizational dynamics can often trump moral concerns,"³¹ she evaluates each of these three areas in depth and shows how difficult ethical decisionmaking is in large, complicated organizations with fragmented information.³² Rhode's realist discussion about ethical behavior leads to the rather Machiavellian conclusion that "a defining feature of moral leaders is that they never lose touch with the compromises that they have made and they constantly assess the price they have paid."³³ Rhode dissects the concept of ethics in several different ways, revealing questions and paradoxes that many lawyers have likely faced, but never thought about in ethical terms.³⁴ This may make some readers squirm. Though Rhode exposes the moral hazards of increasingly complicated organizations, where "fragmentation of information," complex issues, and "rule by Nobody" is becoming the norm,³⁵ she does not provide a coherent solution for this widespread problem, nor does she address the growing idea that organizations will need to become increasingly decentralized and adaptable to instability.³⁶ Instead, by concluding a complicated discussion about ethics with the claim that "[a]nother mark of ethical leadership is commitment to service pro bono publico,"³⁷ Rhode leaves the impression that lawyers can do whatever is expedient as long as they provide public service and present a positive public image. Rhode's perplexing attempt to reconcile institutional complexity with individual ethical behavior highlights the crux of the leadership challenge for the modern legal profession: ensuring ethical behavior and maintaining an ethical climate in an increasingly complex, dynamic, amorphous, and fast-paced operating environment that allows lawyers to more easily conceal or avoid responsibility for their unethical actions.

³¹ *Id.* at 84.

³² *Id.*

³³ *Id.* at 102 (paraphrasing Michael Walzer). See Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973). See also C. A. J. Coady, *The Problem of Dirty Hands*, THE STAN. ENCYCLOPEDIA OF PHIL. (Sep. 2, 2014, 4:30 PM), <http://plato.stanford.edu/archives/spr2014/entries/dirty-hands/> (analyzing the history and philosophy of the "Problem of Dirty Hands" in depth).

³⁴ See RHODE, *supra* note 1, at 82–108.

³⁵ *Id.* at 93.

³⁶ See, e.g., ORI BRAFMAN & ROD A. BECKSTROM, *THE STARFISH AND THE SPIDER: THE UNSTOPPABLE POWER OF LEADERLESS ORGANIZATIONS* (2008) (describing the power and recent growth of decentralized and leaderless organizations); JOSHUA COOPER RAMO, *THE AGE OF THE UNTHINKABLE: WHY THE NEW WORLD DISORDER CONSTANTLY SURPRISES US AND WHAT WE CAN DO ABOUT IT* (2010) (asserting that taking advantage of future opportunities will require adaptation to instability).

³⁷ See RHODE, *supra* note 1, at 105.

With an entire chapter dedicated to the nature and management of scandals, Rhode further reinforces the idea that ethics and morality are more about public image than they are about principle. Conceding that scandals are part of being a lawyer and a leader, Rhode instructs on how to manage scandal and minimize its impact.³⁸ She gives leaders guidance on how to address scandals publicly, to include specific strategies for making either denials or apologies more convincing.³⁹ Even while concluding that "[o]ne of the distinguishing characteristics of leaders is a willingness to assume some accountability for addressing misconduct by others,"⁴⁰ Rhode's carefully qualified description of a leader's responsibility sets a low standard that is geared more toward damage control than real personal accountability. True leaders who are committed to ethical and moral conduct consistently hold themselves and their subordinates accountable for misconduct.⁴¹

On the surface, Rhode's book describes the importance of ethics in leadership and explores the proper handling of scandals. However, beneath the surface, the structure, tone, and logical implications of Rhode's instruction cast ethical leadership in a subjective and situational light, making it largely a matter of perception and image management. Rhode's treatment of this subject creates a complicated, yet largely superficial image of the responsibilities inherent in leadership, leaving the reader with the unsettling impression that lawyer leadership has more to do with politics than principle.

V. Part III: Challenges for Lawyer Leaders

In the latter part of *Lawyers as Leaders*, Rhode gives some attention to leadership in law firms, but focuses more on the power lawyers have to change society.⁴² A chapter on "Leadership in Law Firms" provides historical background to firm leadership, explores contemporary challenges, recommends strategies for leaders, and draws a variety of useful lessons from some examples of leadership failure.⁴³ However, a corresponding section with examples of leadership successes is noticeably absent. As a result, the chapter that could be one of the most useful and practical for lawyers instead feels truncated and underdeveloped.

³⁸ *Id.* at 109–28.

³⁹ *Id.* at 124–28.

⁴⁰ *Id.* at 128 (emphasis added).

⁴¹ See, e.g., U. S. MARINE CORPS, MARINE CORPS WARFIGHTING PUB. 6-11, *LEADING MARINES 101* (27 Nov. 2002) (including the following within the definition of "Honor," one of the Marine Corps' three core values: "The quality of maturity, dedication, trust, and dependability that commits Marines to act responsibly; to be accountable for actions; to fulfill obligations; and to hold others accountable for their actions.").

⁴² See, e.g., RHODE, *supra* note 1, at 176–208.

⁴³ *Id.* at 154–75.

A more persistent theme through the latter part of the book is that lawyers need to aggressively pursue increased diversity and do whatever it takes to coordinate and advance social change and political causes.⁴⁴ By doing this, lawyers will build legacies consistent with their values.⁴⁵ To do otherwise, in her view, is irresponsible leadership.⁴⁶ In urging lawyers to promote social change, Rhode directly challenges the notion that controversial clients with politically unpopular causes deserve representation.⁴⁷ In contravention of recognized professional standards,⁴⁸ Rhode calls upon lawyers to make social and political causes paramount in their professional decisions, arguing that they essentially have a duty to not represent clients who will undermine social movements with their cases.⁴⁹ Similarly, she argues that responsible lawyer-leaders will coordinate the timing and strategy of their cases with movement leaders, regardless of the contrary needs, desires, or individual interests of their clients.⁵⁰

Rhode's points are salient and provocative given the complexity of law and politics today, but many readers will disagree with her prescribed courses of action. The later chapters of *Lawyers as Leaders* attempt to entice readers into accepting controversial leadership theories after they have been softened up by the more gentle persuasion, objective evidence, and palatable theories that started the book.

VI. Conclusion

Those seeking a clear or concise guide to leadership for lawyers will not find it in this book. However, those seeking to better understand the vast and varied leadership challenges and opportunities of lawyers will find *Lawyers as Leaders* to be a thought-provoking resource. Though the book is written for students and practitioners of the law, its extensive discussion on leadership and analysis of ethical issues may also be interesting or useful to non-lawyers. In this book, Deborah Rhode provides an exhaustively researched, robustly organized, and intensely presented set of information, issues, and ideas that teaches leadership fundamentals, applies leadership concepts to the unique moral and ethical problems of lawyers, and challenges conventional ideas about the nature and scope of leadership. As a result, *Lawyers as Leaders* informs, provokes, and inspires lawyers to learn about leadership, to view and manage ethical issues as both lawyers and leaders, and to thoughtfully nurture their leadership capacity to become people who can effectively fulfill increasingly complex leadership responsibilities.

⁴⁴ *Id.* at 129–53, 176–208.

⁴⁵ *Id.* at 205–08.

⁴⁶ *See, e.g., id.* at 202 (“In declining even to consult with gay leaders before filing suit [challenging the Defense of Marriage Act (DOMA)], Olson and Boies hardly set an example of responsible leadership.”).

⁴⁷ *Id.* at 162–64 (emphasizing the importance of firm leaders having buy-in from all firm members before committing to represent a controversial client whose cause may offend some firm members, thus avoiding the awkwardness of “withdrawing after pressure arises”).

⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1983) (“[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.”).

⁴⁹ RHODE, *supra* note 1, at 162–64, 202.

⁵⁰ *Id.* at 196–202 (discussing external coordination and consistency with a case's larger political or social cause).

A Higher Call: An Incredible True Story of Combat and Chivalry in the War-Torn Skies of World War II¹

Reviewed by Major Marcia Reyes Steward*

“In the moment when I truly understand my enemy, understand him well enough to defeat him, then in that very moment I also love him.”²

I. An Act of Love in a World of War

The purpose of combat operations is to seek out and destroy the enemy.³ Such purpose could not be more clearly demonstrated than during World War II combat operations, where nearly 6,000,000 American and German soldiers lost their lives.⁴ Yet in the midst of such a destructive war, a German soldier takes a chance for the simple sake of humanity—for the love of a fellow human being. Instead of seeking out to destroy his enemy, on 20 December 1943, German Air Force Pilot Franz Stigler chooses to spare the lives of and protect the American Soldiers aboard a B-17 bomber.⁵

Through the eyes of Franz Stigler, *A Higher Call* recounts the effects of war on the human spirit and the resulting resilience and courage it cultivates. The author skillfully takes the reader through World War II from the perspective of a young German boy who grows into a seasoned and decorated fighter pilot. An experienced author of World War II accounts,⁶ Adam Makos, who himself

underwent a life-changing event,⁷ artfully narrates the experience of being an Air Force pilot during World War II. While he uses descriptive prose to bring readers into the details of World War II, there are drawbacks that take away from the overall reading experience. However, with its lessons on leadership, reference of international law topics, and most importantly, the revelation of the deep connection that can exist between human beings on two different sides of a war, *A Higher Call* is a book that deserves its place on any judge advocate’s reading list.

II. Benefits and Drawbacks

Makos is clearly a gifted storyteller. His use of vivid imagery,⁸ intense descriptions of suspenseful events,⁹ and brief moments of humor¹⁰ make anyone forget they are reading a historical account of World War II. However, one expects a book recounting historical events to contain sufficient sources and citations as an indication of accuracy and reliability. Such citing is lacking in *A Higher Call*, making it difficult for readers or history students to verify

* Judge Advocate, U.S. Army. Student, 63d Judge Advocate Officer Graduate Course, The Judge Advocate General’s Legal Center & School, U.S. Army, Charlottesville, Virginia.

¹ ADAM MAKOS, AN INCREDIBLE TRUE STORY OF COMBAT AND CHIVALRY IN THE WAR-TORN SKIES OF WORLD WAR II (2012).

² ORSON SCOTT CARD, ENDER’S GAME 238 (1986). *Ender’s Game* is a novel about the training of military geniuses in the arts of war. *Id.*

³ See generally U.S. DEP’T OF ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM para. 1-1 (14 Sept. 2010); U.S. DEP’T OF ARMY, FIELD MANUAL 3-21.20, THE INFANTRY BATTALION para. 1-1 (13 Dec. 2006); U.S. DEP’T OF ARMY, FIELD MANUAL 1-100, ARMY AVIATION OPERATIONS para. 1-5d(2), at vii (21 Feb. 1997). “As soldiers, we must kill or be killed, but once a person enjoys killing, he is lost.” MAKOS, *supra* note 1, at 66.

⁴ *By the Numbers: World-Wide Deaths*, NAT’L WWII MUSEUM, <http://www.nationalww2museum.org/learn/education/for-students/ww2-history/ww2-by-the-numbers/world-wide-deaths.html> (last visited Dec. 8, 2014). The United States lost 416,800 American Soldiers and 418,500 civilians during World War II. Germany lost 5,533,00 soldiers. Between 6,600,000 and 8,800,000 German civilians lost their lives. *Id.*

⁵ MAKOS, *supra* note 1, at 1, 199–208.

⁶ *Id.* at 1–7 (Introduction). Adam Makos began his writing career at age fifteen when he decided to start a newsletter on World War II aviation. The newsletter, entitled *Valor*, developed into a magazine through college, and Makos began working full-time for the magazine upon college graduation in 2003. *Id.*; Adam Makos, LYCOMING COLL., <http://www.lycoming.edu/profile/alumni/makosAdam.aspx> (last visited Dec. 8, 2014); see also ADAM MAKOS, VOICES OF THE PACIFIC: UNTOLD STORIES FROM THE MARINE

HEROES OF WORLD WAR II (2013); ADAM MAKOS, DEVOTION: AN EPIC STORY OF HEROISM, BROTHERHOOD, AND SACRIFICE (forthcoming May 2015) (detailing the experiences of two Navy pilots in North Korea and a sixty-three-year-old promise).

⁷ MAKOS, *supra* note 1, at 2–3. Makos had intended on traveling to France with his high school French club the summer following his freshman year. Instead, he changed his mind and traveled to Walt Disney World with his family that same week. The 747 jetliner that carried his teacher and sixteen classmates to France exploded midair off the coast of Long Island. *Id.*

⁸ See *id.* at 78 (“Then he slid under his blankets and pulled them over his head so spiders would not crawl across his face.”); *id.* at 84 (“Banking westward, he wove through the heavenly white river, following his compass until he popped into the blue, alone, above his desert home.”); *id.* at 93 (“The engine whined, coughed, and belched white smoke before settling into a powerful rhythm.”).

⁹ *Id.* at 56–57 (describing Franz’s first combat flight as he would “dive, hit, climb, repeat”); *id.* at 81 (“He panicked. Hauling back on the stick, he pulled his fighter into a screaming climb, up and away from the onrushing enemy . . . [H]e saw a terrifying sight behind his tail.”); *id.* at 122 (“From six feet under water, Franz looked up and saw the waves above him.”); *id.* 306 (“He felt himself grow cold as the thought struck him. I just killed myself.”); *id.* at 320–21 (describing a plane explosion and the gruesome injuries suffered as a result).

¹⁰ *Id.* at 24, 32–33, 91, 113 (“[He] mentioned he had a brother in the Navy and said that he ‘had no idea where he went wrong.’”); *id.* at 132, 138 (“You’re too nice a kid for this army. Check out the Air Corps.”); *id.* at 217, 288 (“Hitler, Goering, Himmler, and all of their friends are out on a boat at sea . . . There’s a big storm and their boat sinks! Who’s saved? . . . ‘Germany!’”); *id.* at 351.

the accuracy of the events Makos describes.¹¹ For instance, Makos claims that a small and unknown percentage of American pilots would shoot German pilots who were in their parachutes or after they landed.¹² Makos provides no support for such a strong allegation.¹³

Additionally, distracting to the reader is the heavy use of asterisks instead of footnotes, along with the style choice to separate sections by date or time instead of clear labels.¹⁴ Despite these drawbacks, the book is replete with lessons on leadership and camaraderie that any Army officer is sure to benefit from.

III. Leadership, Duty, and Camaraderie

As the book expertly portrays, the principles and ideals of leadership, duty, and camaraderie transcend national boundaries. Throughout the pages, examples of leadership within the German Air Force remind readers what the true focus of leadership is: taking care of subordinates.¹⁵ After having flown 300 combat missions and becoming leader of his own squadron, Franz no longer strives for victories or prays for himself. Instead, he prays that he will lead well and “get his boys home.”¹⁶

A further leadership message emerges in the discussion of Colonel Maurice Preston’s command of the American 379th Bombardment Group. Colonel Preston’s innovative leadership skills included the welcoming of ideas from his subordinates through feedback forms passed out after every mission.¹⁷ The use of feedback to improve leadership ability is the concept envisioned behind the Army’s Multi-Source Assessment and Feedback (MSAF) 360 program.¹⁸ General Ray Odierno, U.S. Army Chief of Staff, considers feedback as a tool to increase self-awareness, thereby facilitating leadership growth.¹⁹ He states, “[M]ulti-dimensional feedback is an important component to holistic leader development.”²⁰

More pointedly outlined throughout the book is the sense of camaraderie that develops between soldiers that fight together in combat, whether they are friends or adversaries.²¹ This concept is evident when the American crew of a badly damaged bomber decides to stay aboard to assist their pilot instead of parachute out to safety;²² when a German Air Force pilot saves an American from execution by Schutzstaffel (SS) officers;²³ and when a Russian pilot parachutes out of a badly damaged plane at the encouragement of a German pilot.²⁴ It is not uncommon for combat soldiers to feel more of a bond with an enemy soldier than with their own countrymen.²⁵ Through shared hardship and risk of death, the bonds created between

¹¹ Compare MAKOS, *supra* note 1, at 385–92 (showing a lack of sources in the notes and bibliography pages for some chapters and listing only one to three sources for others), with STEPHEN AMBROSE, CITIZEN SOLDIERS: THE U.S. ARMY FROM THE NORMANDY BEACHES TO THE BULGE TO THE SURRENDER OF GERMANY JUNE 7, 1944, TO MAY 7, 1945, at 493–514 (1997) (listing eighty-two sources for cites that begin in the prologue and run through all nineteen chapters), and LAURA HILLENBRAND, UNBROKEN: A WORLD WAR II STORY OF SURVIVAL, RESILIENCE, AND REDEMPTION 417–67 (2010) (listing sources for cites on nearly every page of the book).

¹² MAKOS, *supra* note 1, at 301 (describing law of war violation in an asterisk statement at the bottom of the page in Chapter 21).

¹³ If support was provided for this fact, it was not clear in either the main text nor in the Notes section listing the four different sources cited in Chapter 21.

¹⁴ Makos uses asterisks throughout the book to annotate additional information or give further explanation. Some of the asterisk statements should have been in the main text of the book, MAKOS *supra* note 1, at 82, 123, 230, while others state unusual collateral facts, *id.* at 107, 195. If fully engrossed in the reading, it is easy to lose sight of the small asterisks within the text. Additionally, Makos’s use of footnotes within the asterisk statements was unusual. *Id.* at 66, 100, 117, 126, 127, 131, 159. Further, every section was labeled chronologically, but in a distracting way: “Nearly five years later, 1937;” “Several Nights Later;” “Three Weeks Later;” “One Month Later;” “Several Days Later;” “That Same Evening;” “Three and a half hours later, 11AM.” *Id.* at 68, 71, 80, 98, 175. Similar section-labels span the entire book.

¹⁵ *Id.* at 120 (“[The pilots] had not abandoned their mechanics.”) (describing an air field evacuation); *id.* at 217 (“Son, your men are okay, you did your job. What can we do for you?”).

¹⁶ *Id.* at 250 (“Now his mission was to get his boys home.”).

¹⁷ *Id.* at 60.

¹⁸ U.S. DEP’T OF ARMY, REG. 350-1, ARMY TRAINING AND LEADER DEVELOPMENT app. K (18 Dec. 2009) (RAR, 4 Aug. 2011) (Multi-Source Assessment and Feedback).

¹⁹ MULTI-SOURCE ASSESSMENT AND FEEDBACK, <http://msaf.army.mil/LeadOn.aspx> (last visited Sept. 5, 2014).

²⁰ *Id.*

²¹ MAKOS, *supra* note 1, at 63 (“Nowhere has it been demonstrated more plainly that no one person can survive without the other as it has here in the desert.”); *id.* at 221 (“So you and your crew stayed for just one man?”); *id.* at 317 (“We wanted desperately to be free from the Gestapo and the SS and in the hands of men who still honored the brotherhood of fellow aviators.”); *id.* at 329 (“[He] had reported to JV-44 out of duty to his comrades.”).

²² *Id.* at 203.

²³ *Id.* at 309 (“The man might have worn a different uniform but he was still a fellow human-being.”) (quoting German Air Force officer Major Werner Roell).

²⁴ *Id.* at 314 (“[Y]ou must remember that one day that Russian pilot was the baby son of a beautiful Russian girl. He has his right to life and love the same as we do.”) (quoting German Air Force pilot Gerhard Barkhorn).

²⁵ John Blake, *Two Enemies Discover a “Higher Call” in Battle*, CNN LIVING (Mar. 9, 2013), <http://www.cnn.com/2013/03/09/living/higher-call-military-chivalry/> (“In many ways, a soldier feels more of a bond with the enemy they’re fighting than with the countrymen back home. The enemy they’re fighting is equally risking death.”) (quoting Steven Pressfield, author of *The Warrior Ethos*).

enemies can induce a sense of duty to the principles of humanity.²⁶

IV. International Law Topics

In the course of reading the book, several topics in international law emerge through the pages. Discussions between soldiers concerning the appropriateness of shooting at enemies in parachutes and the steadfast resistance to the mere idea are a reflection of how deeply the roots of customary international law run.²⁷ What international law practitioners may refer to as the law of armed conflict is on the battleground merely a soldiers' code. One German soldier states, "You fight by the rules to keep your humanity."²⁸ The treatment of prisoners of war, the Geneva Convention, and the targeting of cities and civilians are topics that appear throughout the book,²⁹ reminding legal practitioners that international law concepts are a very real subject for soldiers during war.

V. War, Humanity, and a Reunion of Enemies

*Their code said to fight with fearlessness
and restraint, to celebrate victories, not
death, and to know when it was time to
answer a higher call.*³⁰

"Dear Jesus."³¹ These are the words of the American B-17F ball turret gunner on 20 December 1943, as he sees Franz Stigler approach in his FW-190 on an attack run. But instead of firing on the American bomber, Franz shows unheard of restraint during a time of war. He sees the badly injured crewmembers, the inability of the bomber to fire weapons, and the severe damage to the structure of the plane, making Franz wonder how it was even still flying. Instead of firing, Franz flies alongside the B-17 named *Ye Olde Pub* and escorts American pilot Charlie Brown and his crew—who were on their first combat mission—over a

²⁶ *Id.*

²⁷ MAKOS, *supra* note 1, at 54, 301. Customary international law is the law "resulting from the general and consistent practice of States followed from a sense of legal obligation . . ." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 4 (2014).

²⁸ MAKOS, *supra* note 1, at 54. While an enlisted soldier in the Jagdgeschwader 27 (JG-27), a lieutenant tells Franz, "Every single time you go up, you'll be outnumbered . . . Those odds may make a man want to fight dirty to survive. . . . But let what I'm about to say to you act as a warning. Honor is everything here." *Id.*

²⁹ *Id.* at 41, 54, 153, 168, 301, 316.

³⁰ *Id.* at 202.

³¹ *Id.* at 200.

German defended flak zone, sparing *The Pub* from the flak gunners who held their fire due to the German plane that was flying at its side. Franz escorts them to the edges of the Atlantic Ocean, salutes Charlie, and flies back to Germany.³²

The heart of *A Higher Call* is not only in the compassion of Franz Stigler's decision to let his enemy go knowing it was considered treason,³³ but also in the events that transpired forty-six years later. With both soldiers having unanswered questions about the event—for Franz, "Was it worth it?" and for Charlie, "Why did he do it?"—they embark on a journey to find one another. In 1990, Franz and Charlie meet for the first time since Franz's salute to Charlie over the Atlantic.³⁴ In the lobby of a hotel in Seattle, Washington, where they had planned to meet, Franz sees Charlie and runs to him, and "[t]he two former enemies hug[] and cr[y]."³⁵ Two months later, Franz meets two of the crewmembers who were aboard *The Pub* on that fateful day in December, one of them being the ball turret gunner who thought he was going to die the moment he first saw Franz approaching on his attack run.³⁶ Sam "Blackie" Blackford shakes Franz's hand and through sobs of gratefulness, thanks Franz for sparing his life, having allowed his children and grandchildren to experience life.³⁷

VI. A Must Read

A Higher Call has rightfully garnered much praise.³⁸ It is a beautifully written account of the many human facets of

³² *Id.* at 164, 199–208.

³³ *Id.* at 218. Franz knew that he could face a firing squad for his actions. The SS were executing soldiers and civilians for making mere statements that were considered contrary to National Party principles, in violation of the Subversion Law. For example, a war widow was executed for telling the joke, "Hitler and Goering are standing atop the Berlin radio tower. Hitler says he wants to do something to put a smile on Berliners' faces. So Goering says: "Why don't you jump?"" *Id.*

³⁴ A video taken during this first meeting can be found at <http://www.valorstudios.com/In-the-presence-of-my-enemy.htm>. A *CBS This Morning* segment filmed in 1990 at the reunion of Charlie Brown's bomb group and a video of Charlie and Franz discussing the 20 December 1943 event can be found at <http://www.valorstudios.com/franz-stigler-photos-and-video.htm>.

³⁵ MAKOS, *supra* note 1, at 363.

³⁶ *Id.* at 367.

³⁷ *Id.*

³⁸ *A Higher Call* spent thirteen weeks on the *New York Times* bestseller list. *Best Sellers*, N.Y. TIMES, Apr. 28, 2013, <http://www.nytimes.com/best-sellers-books/2013-04-28/hardcover-nonfiction/list.html?pagewanted=print&module=Search&mabReward=relbias%3Aw>. See generally Franz Stigler, *Public Figure*, FACEBOOK, <https://www.facebook.com/pages/Franz-Stigler/178339628938799> (last visited Dec. 8, 2014); John D. Shaw *Historic Aviation Art*, LIBERTY STUDIOS, http://www.libertystudios.us/painting/a_higher_call/ (last visited Dec. 8, 2014) (depicting art inspired by the book that is currently sold out). The storyline is being considered for

war, and underscores the impact that a single act of love can have in an ugly world of war. Though many stories of courage and valor have been written concerning World War II soldiers and events,³⁹ *A Higher Call* gives emphasis to the kinships that develop between human beings within the deep recesses of our soul—a love of fellow man, whether friend or enemy. Through his actions, Franz demonstrated his love

of fellow man on that fateful day in December 1943, five days before Christmas. Forty-six years later, Franz tells Charlie the day they reunite, “I love you.”⁴⁰

a potential play or movie. *A Stricken Allied Bomber, the German Ace Sent to Shoot it Down, and a Truly Awe Inspiring Story of Wartime Chivalry*, MAIL ONLINE (Aug. 11, 2014), <http://www.dailymail.co.uk/news/article-2370933/A-Higher-Call-A-stricken-Allied-bomber-German-ace-sent-shoot-truly-awe-inspiring-story-wartime-chivalry.html>; MOVIE INSIDER, <http://www.movieinsider.com/m11841/a-higher-call/> (last visited Dec. 8, 2014).

³⁹ See, e.g., STEPHEN HARDING, *THE LAST BATTLE: WHEN U.S. AND GERMAN SOLDIERS JOINED FORCES IN THE WANING HOURS OF WORLD WAR II IN EUROPE* (2013); PHIL NORDYKE, *FOUR STARS OF VALOR: THE COMBAT HISTORY OF THE 505TH PARACHUTE INFANTRY REGIMENT IN WORLD WAR II* (2006); PATRICK K. O'DONNELL, *INTO THE RISING SUN: WORLD WAR II'S PACIFIC VETERANS REVEAL THE HEART OF COMBAT* (2002).

⁴⁰ MAKOS, *supra* note 1, at 364.

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 TJAGLCS 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. U.S. Army Reserve (USAR) and Army National Guard (ARNG) Soldiers 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 3172.

d. The ATRRS 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 ATRRS 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 ATRRS 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
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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 the career progression and promotion eligibility for all Reserve Component company grade JA's. 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 December.

b. Phase I (nonresident online): Phase I is limited to USAR and ARNG 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, 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 enrollment 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 December at TJAGLCS. Students must have submitted by 1 October all Phase I subcourses, to include all writing exercises, and have received a passing score to be eligible to attend the two-week resident Phase II in December of the following year.

d. Students who fail to submit all Phase I non-resident subcourses by 2400 hours EST, 1 October 2015, will not be allowed to attend the December 2015 Phase II resident JAOAC. Phase II includes a mandatory APFT and height and weight screening. Failure to pass the APFT or height and weight may result in the student's disenrollment.

e. If you have additional questions regarding JAOAC, contact MAJ T. Scott Randall, commercial telephone (434) 971-3359, 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 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) 971-3307 if you have questions or require additional information.

Current Materials of Interest

1. The USALSA Information Technology Division and JAGCNet

a. The USALSA Information Technology Division operates a knowledge management, and information service, called JAGCNet. Its primary mission is dedicated to servicing the Army legal community, but alternately provides Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGLCS publications available through JAGCNet.

b. You may access the “Public” side of JAGCNet by using the following link: <http://www.jagcnet.army.mil>. Do not attempt to log in. The TJAGSA publications can be found using the following process once you have reached the site:

(1) Click on the “Legal Center and School” link across the top of the page. The page will drop down.

(2) If you want to view the “Army Lawyer” or “Military Law Review,” click on those links as desired.

(3) If you want to view other publications, click on the “Publications” link below the “School” title and click on it. This will bring you to a long list of publications.

(4) There is also a link to the “Law Library” that will provide access to additional resources.

c. If you have access to the “Private” side of JAGCNet, you can get to the TJAGLCS publications by using the following link: <http://www.jagcnet2.army.mil>. Be advised that to access the “Private” side of JAGCNet, you MUST have a JAGCNet Account.

(1) Once logged into JAGCNet, find the “TJAGLCS” link across the top of the page and click on it. The page will drop down.

(2) Find the “Publications” link under the “School” title and click on it.

(3) There are several other resource links there as well. You can find links the “Army Lawyer,” the “Military Law Review,” and the “Law Library.”

d. Access to the “Private” side of JAGCNet is restricted to registered users who have been approved by the Information Technology Division, and fall into one or more of the categories listed below.

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

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

(4) FLEP students;

(5) 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.

e. Requests for exceptions to the access policy should be e-mailed to: itdservicedesk@jagc-smtp.army.mil.

f. If you do not have a JAGCNet account, and meet the criteria in subparagraph d. (1) through (5) above, you can request one.

(1) Use the following link: <https://www.jagcnet.army.mil/Register>.

(2) Fill out the form as completely as possible. Omitting information or submitting an incomplete document will delay approval of your request.

(3) Once you have finished, click "Submit." The JAGCNet Service Desk Team will process your request within 2 business days.

2. The Judge Advocate General's Legal Center and School (TJAGLCS)

a. The Judge Advocate General's Legal Center and School (TJAGLCS), Charlottesville, Virginia, continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 7 Enterprise and Microsoft Office 2007 Professional.

b. The faculty and staff of TJAGLCS are available through the Internet. Addresses for TJAGLCS 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 the Information Technology Division at (703) 693-0000. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS 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. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, <http://www.jt.cnet.army.mil/tjagsa>. Click on "directory" for the listings.

d. Personnel desiring to call TJAGLCS can dial via DSN 521-3300 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 TJAGLCS Information Technology Division at (434) 971-3264 or DSN 521-3264.

3. Additional Materials of Interest

a. Additional material related to the Judge Advocate General's Corps can be found on the JAG Corps Network (JAGCNet) at www.jagcnet.army.mil.

b. In addition to links for JAG University (JAGU) and other JAG Corps portals, there is a "Public Doc Libraries" section link on the home page for information available to the general public.

c. Additional information is available once you have been granted access to the non-public section of JAGCNet, via the "Access" link on the homepage.

d. Contact information for JAGCNet is 703-693-0000 (DSN: 223) or at itdservicedesk@jagc-smtp.army.mil.

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Captain Michelle E. Borgnino
The Judge Advocate General's Legal Center and School
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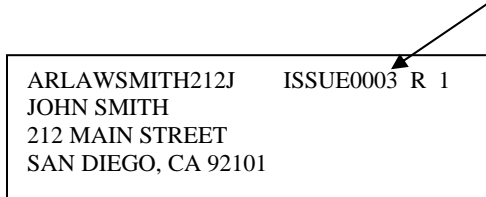
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