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Lore of the Corps

Articles

Book Reviews

Lore of the Corps

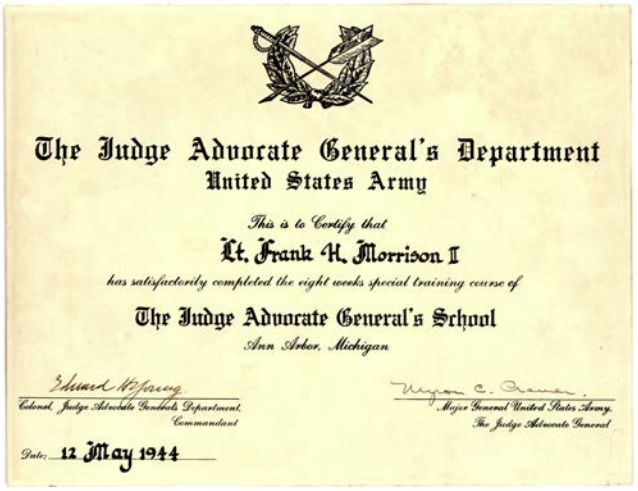
From Camp Judge Advocate to War Crimes Prosecutor: The Career of Captain Frank H. Morrison II, Judge Advocate General's Department[1]

Fred L. Borch
Regimental Historian and Archivist

Even attorneys who served briefly as Army lawyers in World War II had remarkable experiences, as illustrated by the two-year judge advocate career of Frank H. Morrison II. After "satisfactorily" completing "the eight week special training course" at The Judge Advocate General's School (TJAGSA) in May 1944[2], First Lieutenant (1LT) Morrison served as the lone "Camp Judge Advocate" at Camp Van Dorn in Mississippi until he was transferred to the Legal Section of General Douglas MacArthur's General Headquarters, Southwest Pacific Area, in February 1945.[3] For the next eighteen months, until he was discharged from active duty and returned to civilian life, now Captain (CPT) Morrison investigated war crimes in the Philippines and Japan. He also assisted in the prosecution of more than 300 Japanese war criminals, and was part of the "prosecution staff which sent Generals Yamashita and Homma to the gallows."[4] This is the story of his time as an Army lawyer in World War II.

Born on June 18, 1912 in Nashville, Tennessee, Frank Hamilton Morrison II graduated from Boys' High School in Atlanta, Georgia in 1931 and earned his law degree from Emory University in 1937. He was certainly popular with his classmates, as he was voted "wittiest" boy in his high school class and elected president of the law school while at Emory. Morrison also was a good athlete and was passionate about tennis.[5]

After passing the Georgia bar, Morrison joined the law firm of Howard, Camp and Tiller in Atlanta, where he practiced law until being inducted into the Army in October 1942. Morrison subsequently attended the 16th Officer Class at TJAGSA and, after receiving a diploma signed by Colonel Edward H. "Ham" Young, TJAGSA Commandant, and Major General Myron C. Cramer, The Judge Advocate General, reported for duty at Camp Van Dorn, Mississippi, in May 1944.



The Judge Advocate General's Department
United States Army

This is to Certify that

Lt. Frank H. Morrison II

has satisfactorily completed the eight weeks special training course of

The Judge Advocate General's School
Ann Arbor, Michigan

Colonel, Judge Advocate General's Department, Commandant

Major General United States Army, The Judge Advocate General

Date: 12 May 1944

For the next eight months, 1LT Morrison served as the "Camp Judge Advocate." He was the lone Army lawyer and consequently was responsible for the delivery of all legal services at Camp Van Dorn. This small installation, commanded by a colonel and located near Centreville, Mississippi, began training troops in November 1942. When Morrison arrived, the 63d Infantry "Blood and Fire" Division was still in training; the unit left Camp Dorn for New York in November 1944.[6] Prior to the departure of that division, however, 1LT Morrison was incredibly busy.

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[1] The author thanks Ms. Margaret "Nan" Morrison for her help in preparing this Lore of the Corps about her father.

[2] Diploma of Lieutenant Frank H. Morrison, II (May 12, 1944).

[3] *Frank H. Morrison II, Atlanta Attorney, Dies*, ATLANTA CONSTITUTION, January 5, 1959, at 7.

[4] *Id*.

[5] Email from Margaret Morrison to author, (June 24, 2015, 3:46PM) (on file with author)

[6] For more on the 63d Infantry at Camp Van Dorn, *see* 63D INFANTRY DIVISION, www.63rdinfdiv.com.

First Lieutenant Frank Morrison with a client at the Camp Van Dorn Judge Advocate Office, 1944.

Some of his work involved advising on military justice matters and reviewing courts-martial for legal sufficiency. Camp Van Dorn's commander was a special court-martial convening authority, and he convened about fifty courts-martial a year.[7] But it seems that the majority of 1LT Morrison's time was devoted to legal assistance matters.

According to an article published in the Camp Van Dorn newspaper in September 1944, the "Office of the Camp Judge Advocate" was heavily involved in providing legal counsel to soldiers stationed at the installation. The office had "over 250 divorce cases . . . pending in almost every state in the union." [8] But Morrison also assisted "in the naturalization of approximately 15 to 25 aliens a month." He had this large number of naturalization cases because of wartime changes made by Congress to the laws governing citizenship. In 1942, desiring to ease the naturalization process for non-U.S. citizens serving in the U.S. Armed Forces, Congress eliminated age, race, and residence requirements for American citizenship. [9] As if this were not sufficient incentive for non-citizen men and women in uniform to fill out naturalization paperwork, the Congress went even further in 1944, removing any requirement to prove that one had lawfully entered the United States.[10]

With this as background, 1LT Morrison's unusual, if not amusing, experiences with naturalization make sense. In one case, a Chinese national serving in the Army at Camp Van Dorn was filling out a form so that his petition for naturalization could be submitted to the local U.S. District Court. The Chinese soldier, however, spoke poor English and had only been in the United States for a short time. First Lieutenant Morrison needed an interpreter but the only person he could find was a Russian "who had a very meager knowledge of the Chinese language."[11] As a newspaper article explained:

> When asked how he entered the United States, the Russian informed Lt. Morrison that the Chinaman stated he swam in. Lt. Morrison, feeling that certainly the Russian had misunderstood, repeated the question several times and gesticulated with his arms and used all manner of sign language to elucidate the proper answer from the Chinese and the answer always came back that he swam in.
>
> After approximately one hour of cross examination on this one particular question . . . it was learned that this [Chinese] alien had been a cook on an oil tanker which had been torpedoed off the Atlantic coast and that he actually swam into this country. So the answer as it appears in his petition for naturalization to the question asked is "I swam into the United States."
>
> Needless to say, this petition was acted on favorably and the man is now a fully naturalized American citizen.[12]

First Lieutenant Morrison (far right) at the Camp Van Dorn Officers Club, 1944.

[7] HISTORICAL AND PICTORIAL REVIEW OF CAMP VAN DORN 2 (1944).

[8] *Van Dorn's Mr. Anthony*, THE VAN-GUARD (Vol. 1, No. 46), Sept. 9, 1944, at 2. From 1935 until 1953, millions of radio listeners tuned in to a popular show hosted by John J. Anthony. The show's format was for listeners to call in to the show to ask about family problems, and each show began with the preamble, "Mr. Anthony, I've got a problem . . . ." The phrase was a popular American saying during World War II, and the headline about 1LT Morrison's legal assistance work being akin to Mr. Anthony's show would have struck a responsive chord with readers. *See* Bob Thomas, *Radio's Mr. Anthony Has New Problem*, MIAMI NEWS, July 13, 1966, at 8.

[9] U.S. Citizenship and Immigration Services, Military Naturalization During WWII, http://www.uscis.gov/history-and-genealogy/our-story/agencyhistory /military-naturalization-during-wwii (last visited 22 June 2015).

[10] *Id.*

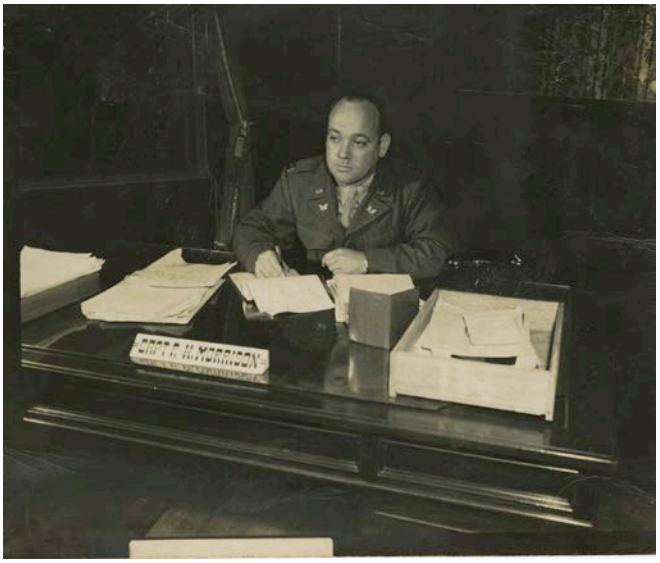
[11] *Van Dorn's Mr. Anthony*, *supra* note 5.

[12] *Id*.

In February 1945, with training operations at Camp Van Dorn winding down, Morrison was reassigned to the Pacific Theater. He "was one of the first members of General MacArthur's staff to investigate Japanese atrocities at Cabanatuan Prison and during the Bataan Death March."[13]

Now CPT Morrison started his work in Manila as part of a five-man team; this eventually grew to be a staff of 150. As Morrison explained to a newspaper reporter in May 1946, the "hardest part of the job in connection with the war crimes activities was to find those responsible for the atrocities, tortures, and other crimes and then apprehend them."[14] The American soon discovered, however, that Japanese soldiers suspected of war crimes would commit suicide rather than allow themselves to be apprehended by the Americans. After Japanese Emperor Hirohito was directed to order accused Japanese military personnel to report for hearings, however, these suicides ceased. As Morrison explained, "the Japanese believed hari-kari was honorable, but if they were ordered to report by the Emperor, they would obey rather than face disgrace and the wrath of their dead ancestors for refusing to comply with an order from their ruler."[15]

After months of investigative work in the Philippines—interviewing witnesses and visiting crime scenes—CPT Morrison served on the military commission prosecution teams that tried General Tomoyuki Yamashita, whose moniker was the "Tiger of Malaya," and General Masaharu Homma. These men were tried in Manila in late 1945 by a commission consisting of five general officers. Convicted of failing to provide effective control over his troops, who were committing horrific war crimes in the Philippines in late 1944, Yamashita was sentenced to be hanged. The sentence was carried out in 1946.[16] Homma, who was the commander in the Philippines at the time of the infamous Bataan Death March, was likewise convicted by a military commission; he was found guilty of allowing members of his command to commit "brutal atrocities and other high crimes."[17] Homma was executed by firing squad in April 1946.



Captain Morrison at his desk in Yokohama, Japan.

Some time after the Yamashita and Homma trials in Manila, CPT Morrison was reassigned to General Douglas MacArthur's General Headquarters in Tokyo, Japan. According to an article in *The Emory Alumnus*, Morrison was "selected by the chief of General MacArthur's legal section to assist in the prosecution of more than 300 accused war criminals in Yokohama."[18] As a result of his exemplary work as a war crimes prosecutor from May 1945 to March 1946, CPT Morrison was later awarded the Bronze Star Medal for meritorious achievement by the Commander in Chief, U.S. Forces, Pacific.[19]

[13] *Frank H. Morrison II, supra* note 2, at 7.

[14] *Obedience to Will of Emperor Halted Wave of Jap Suicides*, ATLANTA CONSTITUTION, May 20, 1946.

[15] *Id.*

[16] ALLAN A. RYAN, YAMASHITA'S GHOST-WAR CRIMES, MACARTHUR'S JUSTICE, AND COMMAND ACCOUNTABILITY (University Press of Kansas, 2012).

[17] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 384 (2010) (quoting Theater Staff Judge Advocate's Review of the Record of Trial by Military Commission of General Masaharu Homma, 5 March 1946, at 1).

[18] *Emory Soldier-Lawyers Prosecute Jap Thugs*, THE EMORY ALUMNUS, March 1946, at 13; *see also Capt. Morrison Aids Prosecutor in Jap Trial*, ATLANTA JOURNAL, January 7, 1946, at 5.

[19] *Georgians Get Army Awards for Service*, ATLANTA JOURNAL, August 18, 1946.

Captain Morrison's identification card used during war crimes investigations.

After being released from active duty in mid-1946, Frank Morrison returned to Atlanta, where he rejoined his old law firm.[20] He tried his hand at politics, and ran unsuccessfully for the Fulton County seat in the Georgia State Legislature in 1948.[21]

Shortly after Christmas in 1958, Morrison suddenly took ill. He died a week later on January 3, 1959 of cirrhosis of the liver.[22] He was only 46 years old. It was an untimely end for a man who had a remarkable career as an Army lawyer in World War II and who likely would have had an equally distinguished career as a civilian attorney in Atlanta.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website
https://www.jagcnet.army.mil/8525736A005BE1BE

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

[20] Although released from active duty in 1946, Morrison was not discharged from his Army Reserve obligation until 1950. Email from Margaret Morrison, *supra* note 3.

[21] *Frank H. Morrison II, supra* note 2.

[22] *Id.*

All The Process That is Due: An Article on Cadet Disenrollments From the United States Military Academy and the Army Reserve Officers' Training Corps

Major Justin P. Freeland[*]

If you let me write the procedure, and I let you write the substance, I'll screw you every time.[1]

I. Introduction

While the substantive issues involved in administrative actions are important, it is the responsibility of judge advocates to ensure government compliance with the procedural rules. This may be familiar to anyone who has advised a commander on an enlisted administrative separation.[2] Cadet disenrollment actions are no different; however, the United States Military Academy (USMA) and the Army Reserve Officers' Training Corps (ROTC) disenrollment processes have their own unique procedures that many judge advocates may not be familiar with.

Consider the following examples. In 201l, the Secretary of the Army approved Cadet Alan Spadone's disenrollment from USMA for plagiarism.[3] This ended a long administrative process involving a convened honor board, suspended disenrollment, remedial training, vacation of suspension, and finally disenrollment from the Acadamy with an order to active duty.[4] While this order ended the administrative process, Spadone filed a complaint in federal district court "challenging the Secretary's actions as arbitrary, capricious and in violation of due process," beginning the judicial review.[5] In 2014, the court granted a government motion to dismiss on the last surviving issue in the case, which finally concluded Spadone's disenrollment process.[6]

The ROTC disenrollment process can be equally complicated. In 1992, the Army initiated disenrollment against ROTC Cadet Jason Bush based on breach of contract due to misconduct following his conviction for criminal mischief.[7] Bush appeared before a board, and the board recommended disenrollment.[8] In 1993, the Commanding General (CG), U.S. Army ROTC Command, disenrolled Bush from his scholarship status, but retained him in his reserve status until he repaid his debt.[9] After Bush failed to make payments, the Army referred the debt to the Department of Justice for collection in 1998.[10] The government filed a motion in federal district court for summary judgment to recover the debt.[11] In 2002, the court granted the government's motion and dismissed Bush's counterclaims.[12]

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[1] WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 13 (8th ed. 2011) (quoting a statement of Representative John Dingell during a Hearing on H.R. 2327, the Regulatory Reform Act, before the Subcomm. on Admin. Law & Gov't Regulations of the H. Comm. on the Judiciary, 98th Cong. 312 (1983)).

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

[3] Spadone v. McHugh, 842 F. Supp. 2d 295, 299-300 (D.D.C. 2012).

[4] *Id*. at 300.

[5] *Id.* Spadone's complaint alleged eight counts of error and sought a preliminary injunction as relief. *Id*. at 298, 303. The allegations included a violation of the Administrative Procedures Act, 5 U.S.C. §§ 701-706, violations of the Due Process Clause, a violation of the Establishment Clause, and that the government's actions unjustly enriched the Army. *Id.* at 298. The district court denied the preliminary injunction because Spadone failed to show a likelihood of irreparable injury and success on the merits. *Id.*

[6] Spadone v. McHugh, 10 F. Supp. 3d 41, 42 (D.D.C. 2014). The only remaining claim was that the Secretary (Sec'y) of the Army violated the Establishment Clause when his agent ordered Spadone to recite the Cadet Prayer. *Id*. at 43. The district court held the issue was moot since Spadone was no longer a cadet at the United States Military Academy (USMA) due to disenrollment. *Id*. at 44. Previously, the district court dismissed Spadone's other claims when it granted summary judgment to the government. Spadone v. McHugh, 864 F. Supp. 2d 181, 184-85 (D.D.C. 2012).

[7] United States v. Bush, 247 F. Supp. 2d 783, 786 (M.D.N.C. 2002). Cadet Bush was convicted of criminal mischief for vandalizing cars in Potsdam, New York. *Id*. at 785. Bush's conviction was a breach of contract because prior to receiving his Reserve Officers' Training Corps (ROTC) scholarship he signed an ROTC contract. *See, e.g., infra* Appendix B (U.S. Dep't of Army, DA Form 597-3, Army Senior Reserve Officers' Training Corps (ROTC) Scholarship Cadet Contract (July 2005) [hereinafter DA Form 597-3]). Bush's contract stated misconduct was a breach of contract that may lead to disenrollment, and misconduct included criminal conduct. *Id*.

[8] *Id*. at 785-86.

[9] *Id*. at 786.

[10] *Id*.

[11] *Id*.

[12] *Id*. at 791.

These examples illustrate the complexities of cadet disenrollments. Failure to appreciate the specifics of the processes can limit an attorney's ability to fully support the command or effectively represent a cadet. The following sections will help practitioners understand and apply the legal and procedural frameworks unique to the cadet disenrollment processes. Part II will clarify key definitions and the scope of this article. Part III will present the legal background and framework. Part IV will review the disenrollment processes applicable to the USMA and the ROTC. Part V will offer practice pointers for attorneys working with disenrollments.

II. Definitions and Scope

The term "cadet" when used in this article refers to both U.S. citizens appointed to the USMA and enrolled in the Army ROTC.[13] It does not include foreign individuals at the USMA or participating students in ROTC.[14] Additionally, the term "enrolled" includes both scholarship and non-scholarship ROTC cadets. The term "disenrollment" refers to administrative separation under applicable statutes and regulations terminating an individual's status as a cadet at the USMA or as an enrolled member in the ROTC.[15]

Although the USMA and ROTC disenrollments occasionally involve both administrative and judicial components, this article's scope is mainly limited to the administrative component. The subsequent sections offer only a limited discussion on the direct and collateral avenues for judicial review of the disenrollment processes.[16] Furthermore, while the Army may disenroll a cadet for a variety of reasons, this article will concentrate on adverse separations based on some form of misconduct.[17]

III. Legal Background and Framework

A. General Overview of Procedural Due Process

The Fifth Amendment limits the federal government from depriving any person "of life, liberty, or property, without due process of law."[18] The concept of procedural due process, which *Black's Law Dictionary* defines as "[t]he minimal requirements of notice and a hearing," stems from the Fifth Amendment.[19] The notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[20] "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."[21] The specific protections required at the hearing depend on the situation's circumstances.[22]

To determine if procedural due process is adequate in a specific circumstance, an agency must consider three elements, which the Supreme Court set forth in *Mathews v. Eldridge*.[23] First, the agency identifies "the private interest that will be affected by the official action."[24] This includes considering the type of interest, hardship imposed, and action's finality.[25] Next, the agency evaluates the risk of error in the process, and the relative benefit of providing "additional or substitute procedural safeguards."[26] The

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[13] 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014) (providing the primary statutory authority applicable to the USMA); 10 U.S.C.S. ch. 103 Senior Reserve Officers' Training Corps (Lexis 2014) (providing the primary statutory authority applicable to Army ROTC).

[14] 10 U.S.C.S. § 4344 (Lexis 2014) (authorizing the Sec'y of the Army to allow foreigners to attend the USMA); U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING para. 3-26 (22 July 1996) (RAR 6 Sept. 2011) [hereinafter AR 145-1]. This regulation defines participating students as "students who participate in military science courses but are not fully enrolled in ROTC. They are divided into three categories: auditing students, conditional students, and alien students." *Id.* Even though many of the rules for the USMA foreign cadets or ROTC participating students are the same as other members, nuanced differences exist that are beyond the scope of this article.

[15] *See infra* Part IV for further explanation. When a specific category of cadet, USMA or ROTC, is relevant to the discussion, additional care will be taken to identify the specific type of cadet.

[16] *See generally* Wall v. Kholi, 131 S.Ct. 1278, 1284-85 (2011) (comparing collateral and direct review).

[17] U.S. DEP'T OF ARMY, REG. 210-26, U.S. MILITARY ACADEMY ch. 6 (9 Dec. 2009) (RAR 6 Sept. 2011) [hereinafter AR 210-26]. This chapter lists four categories that may lead to disenrollment from the USMA. They include misconduct, honor, disciplinary, and other grounds for separation. *Id.* AR 145-1, *supra* note 14, para. 3-43, lists sixteen grounds that may lead to disenrollment from ROTC. In addition to misconduct, other examples include personal hardship, medical reasons, or breach of contract. *Id.*

[18] U.S. CONST. amend. V. Additionally, "[t]he due process clause of the Fifth Amendment has generally been held to make the Fourteenth Amendment due process clause applicable to the federal government." Parrish v. Brownlee, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004) (citing Rostker v. Goldberg, 453 U.S. 57, 62 (1981)).

[19] BLACK'S LAW DICTIONARY 575 (9th ed. 2009).

[20] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[21] Morgan v. United States, 304 U.S. 1, 18 (1938).

[22] Cafeteria & Rest. Workers Union v. McElroy, 367 U.S. 886, 895 (1961). *See also* Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967) (discussing idea the that different protections apply in different situations).

[23] Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

[24] *Id.* at 335.

[25] *Id.* at 341-43.

[26] *Id.* at 335.

agency should evaluate this systemically, not focusing on particular instances.[27] Finally, the agency considers the government interest against providing additional safeguards to include "the fiscal and administrative burdens" and "other societal costs."[28] Another way to consider these elements is through notions of fundamental fairness given that disenrollment is an administrative proceeding.[29]

B. Procedural Due Process Applied to Cadet Disenrollments

The Supreme Court has not created an exception for applying the Due Process Clause to the military contrary to other constitutional rights.[30] Therefore, the legal framework for analyzing due process during disenrollments developed similar to non-military cases. In *Wasson v. Trowbridge*, the Merchant Marine Academy disenrolled a cadet for receiving excessive demerits.[31] On appeal, the Second Circuit held the Due Process Clause applied to disenrollments.[32] The court explained, "[T]o determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand."[33]

The Second Circuit recognized cadets as having a property interest in remaining at the Merchant Marine Academy, and then balanced this interest against the government interest of maintaining national security.[34] The court further explained that while due process is a flexible concept, at a minimum it requires notice, a fair hearing, and the "opportunity to present [a] defense both from the point of view of time and the use of witnesses and other evidence."[35] However, the court held due process did not require representation by counsel at the hearing because it was not criminal in nature and the cadet involved was mature and educated.[36]

Several other cases further developed the concept of procedural due process in cadet disenrollments. In *Hagopian v. Knowlton*, the USMA disenrolled a cadet for excessive demerits.[37] The Second Circuit found the facts in *Hagopian* were "strikingly similar" to *Wasson*.[38] Using *Wasson* as guidance, the court described what it meant by a fair hearing.[39] The hearing may be procedurally informal, but it does require the opportunity for the cadet to personally appear before the board so members can assess credibility and truthfulness.[40] Additionally, the court reminded the government it must substantially observe its own regulations to comply with due process.[41]

While both *Wasson* and *Hagopian* addressed cadet disenrollments based on excessive demerits, in *Andrews v. Knowlton*, the Second Circuit held its due process jurisprudence equally controlling when an academy disenrolled a cadet for other forms of misconduct.[42] In *Andrews*, two cadets appealed their disenrollment from the USMA following a determination that they each had violated the cadet honor code.[43] Because the proceedings met the minimum due process requirements established by previous cases, and the USMA followed its existing regulations, the court dismissed their appeals.[44]

Relying on the Second Circuit cases relating to due process in the USMA and other academy disenrollments, the district court in *Kolesa v. Lehman* addressed due process in a Navy ROTC (NROTC) disenrollment.[45] In *Kolesa*, NROTC disenrolled a cadet for illicit drug use and marginal military performance.[46] The district court held "the nature of [the] plaintiff's interest in avoiding disenrollment from the NROTC scholarship program, which he had pursued with the goal of becoming an officer, is sufficiently analogous to the interest of a cadet in avoiding expulsion from a military academy so as to warrant equivalent due process protection."[47] Likewise, in *Martinez v. United States*, the Court of Claims used analysis similar to the Second Circuit

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[27] *Id.* at 344.

[28] *Id.* at 335, 347. In *Eldridge*, the Supreme Court opined the government interest is equivalent to the public interest ("the Government's interest, and hence that of the public"), and the government interest must be balanced against the private interests in regard to providing additional protections. *Id.* at 348.

[29] *Id.*

[30] *See* Greer v. Spock, 424 U.S. 828 (1976) (limiting freedom of speech related to the military); Goldman v. Weinberger, 475 U.S. 503 (1986) (limiting the free exercise of religion related to the military).

[31] Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 812.

[35] *Id.*

[36] *Id.*

[37] Hagopian v. Knowlton, 470 F.2d 201, 203 (2d Cir. 1972).

[38] *Id.* at 209.

[39] *Id.* at 211.

[40] *Id.*

[41] *Id.* at 208 n.23; s*ee, e.g.*, AR 210-26, *supra* note 17.

[42] Andrews v. Knowlton, 509 F.2d 898, 905 (2d Cir. 1975).

[43] *Id.* at 900.

[44] *Id.*

[45] Kolesa v. Lehman, 534 F. Supp. 590, 593 (N.D.N.Y. 1982). *See generally* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); *Hagopian*, 470 F.2d 201; *Andrews*, 509 F.2d 898.

[46] *Kolesa*, 534 F. Supp. at 591.

[47] *Id.* at 593.

to dismiss a disenrolled Army ROTC cadet's claim, clarifying the legal framework of analysis applies beyond NROTC disenrollments.[48]

Shortly after *Kolesa*, in *Cody v. Scott*, the cadet disenrollment cases joined with the more general case law on procedural due process when the district court in *Cody* cited and followed the Supreme Court's analysis in *Mathews*.[49] *Cody* involved a cadet pending disenrollment from the USMA for using marijuana.[50] In addressing the due process elements in *Mathews*, the court followed the Second Circuit cases to conclude the process provided to the cadet was adequate.[51] Additionally, the court held that due process did not entitle the cadet to representation by counsel at the hearing.[52]

These cases clearly illustrate that procedural due process applies to disenrollments from both the USMA and the ROTC. At a minimum, this legal framework requires notice, a fair hearing, and the opportunity to present a defense.[53] A fair hearing does not include representation by counsel at the actual hearing.[54] However, the ability to present a defense does include a reasonable time to prepare and the ability to present evidence.[55] Furthermore, the services have a duty to follow their own regulations throughout the process.[56] Understanding this legal background should assist practitioners as they provide legal advice in specific cases.

IV. The Cadet Disenrollment Processes

The ability to understand the legal background and framework is important; however, the capability to navigate the disenrollment process is equally vital. As suggested in the opening quote, understanding the "procedure" may trump knowing the "substance."[57] This section provides a brief history of disenrollments, identifies applicable statutes and regulations, and explains the specific disenrollment procedures for the USMA and the Army ROTC.

A. Disenrollment Procedures for the USMA

The USMA was founded in 1802 by an act of Congress signed into law by President Thomas Jefferson.[58] Administrative separations from the USMA did not frequently occur until after the 1950s.[59] Prior to the 1950s, courts-martial were the primary means to separate a cadet for misconduct.[60] After World War II, the paradigm switched, and now the USMA generally disenrolls cadets for significant misconduct whereas only serious criminal offenses lead to court-martial.[61] The current USMA disenrollment process includes key individuals and provides fundamental rights to cadets based on longstanding statutes and multiple levels of regulatory guidance.[62]

1. Applicable Statutes and Regulations

The U.S.C. provides the fundamental legal authority applicable to the USMA disenrollments. Title 10, § 651, creates a minimum military service obligation (MSO) between six to eight years for those who attend the USMA.[63] Likewise, 10 U.S.C. chapter 403 controls most aspects of the USMA.[64] Specifically, Chapter 403, § 4348, requires cadets

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[48] Martinez v. United States, 26 Cl. Ct. 1471 (1992).

[49] Cody v. Scott, 565 F. Supp. 1031, 1034 (S.D.N.Y. 1983).

[50] *Id.* at 1032.

[51] *Id.* at 1035.

[52] *Id.* (citing to *Hagopian*, which relied on *Wasson*, to reach the conclusion that procedural due process does not entitle a cadet to representation by counsel at a hearing).

[53] *See generally* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975); Kolesa v. Lehman, 534 F. Supp. 590 (N.D.N.Y. 1982); *Martinez*, 26 Cl. Ct. 1471; *Cody*, 565 F. Supp. 1031.

[54] *Wasson*, 382 F.2d at 812.

[55] *Wasson*, 382 F.2d at 813; *Hagopian*, 470 F.2d at 210; *Cody*, 565 F. Supp. at 1034-35.

[56] *Hagopian*, 470 F.2d at 208 n.23 (citing Friedberg v. Resor, 453 F.2d 935, 938 (2d Cir. 1971), "[W]hen regulations prescribe specific steps to be taken to insure due process they must be substantially observed.") *Id.*; *See also* Parrish v. Brownlee, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004) (citing from Antonuk v. United States, 445 F.2d 592, 595 (6th Cir. 1971), which applied the rule presented in Schatten v. United States, "[W]here Congress or administrative agencies themselves lay down procedures and regulations, these cannot be ignored in deference to administrative discretion.") Schatten v. United States, 419 F.2d 187, 191 (6th Cir. 1969).

[57] OLESZEK, *supra* note 1.

[58] Military Peace Establishment, ch. IX, 2 Stat. 132 § 27 (enacted Mar. 16, 1802) (current version at 10 U.S.C.S. § 4331 (Lexis 2014)). *See generally* U.S. MILITARY ACADEMY: WEST POINT, A BRIEF HISTORY OF WEST POINT, http://www.usma.edu/wphistory/SitePages/Home.aspx (last visited May 11, 2015) (providing background on West Point).

[59] Robert P. Coyne & A. Robert Thorup, *West Point Honor Code Separations: Duty, Honor, Country . . . Fairness?*, 27 AM. U. L. REV. 823, 832 (1978).

[60] *Id.* at 831. Most commonly the USMA would charge cadets with violating "article 95 of the old Articles of War, 'Conduct Unbecoming an Officer and a Gentlemen.'" *Id.* The reason for this appears to be more historic than legal since the law permitted the President to separate a cadet without a court-martial. *Id.*

[61] *See id*. at 833.

[62] *See generally* 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014); U.S. DEP'T OF DEF., DIR. 1332.23, SERVICE ACADEMY DISENROLLMENT (19 Feb. 1988) (C1, 20 Sept. 2011) [hereinafter DoDD 1332.23]; AR 210-26, *supra* note 17.

[63] 10 U.S.C.S. § 651 (Lexis 2014). The Secretary of Defense sets the specific length of the Military Service Obligation. *Id.*

[64] 10 U.S.C.S. ch. 403 U.S. Military Academy (Lexis 2014).

to agree to serve on active duty as an officer if offered a commission.[65] The Army documents this agreement in USMA Form 5-50, which all cadets sign upon arrival.[66] Failing to graduate from the USMA due to a breach of this agreement may result in the Army either ordering a cadet to active duty as an enlisted Soldier or to repay the cost of his education.[67] Chapter 403 also requires the service secretaries to implement regulations explaining what constitutes a breach of agreement.[68]

Department of Defense Instruction (DoDI) 1304.25 implements 10 U.S.C. § 651 by requiring each person "who enters military service by enlistment or appointment [to] incur[] an MSO of 8 years from that entry date," subject to limited exceptions.[69] Likewise, Department of Defense Directive (DoDD) 1332.23 implements provisions of 10 U.S.C. chapter 403.[70] The DoD prefers active duty service to financial repayment for recoupment.[71] Also, DoDD 1332.23 directs the service secretaries to develop a written agreement for cadets to sign as well as regulations on how to process disenrollments.[72] Finally, DoDD 1332.23 provides specific rules related to recoupment, depending on the cadet's tenure.[73]

The Department of the Army (DA) implements DoDD 1332.23 through Army Regulation (AR) 210-26.[74] Chapters six and seven of AR 210-26 prescribe both the disenrollment grounds and procedures.[75] Specifically, chapter six permits the USMA to disenroll a cadet for misconduct, honor, disciplinary, and other grounds.[76] Chapter seven identifies the approval authority based on the type of disenrollment and basis of separation.[77] However, the DA modifies the approval authorities contained in chapter seven almost annually.[78]

For example, the DA modified the approval authorities through a January 10, 2014, memorandum from the Assistant Secretary of the Army for Manpower and Reserve Affairs to the Superintendent, USMA.[79] While generally the Secretary of the Army (or DA level delegate) is the approval authority for cadet separations, this memorandum delegated approval authority to the Superintendent for several types of separations related to misconduct.[80] Delegation memoranda commonly exist in relation to administrative actions. Ideally, an organization will publish them in a consolidated location, but often this may not occur. Therefore, coordination with staff individuals who have institutional knowledge should occur to determine if any additional guidance exists. This diverse range of statutes and regulations provides the procedural framework corresponding to the substantive legal framework explained by the courts.

2. Key Elements of the USMA Disenrollment Process

Having identified the statutes and regulations applicable to the USMA disenrollments, the next step is to examine the specific elements in the process. This section includes a brief description of the individuals involved and a more in-depth consideration of the rights afforded to a cadet. The main participants in the disenrollment process are the cadet, the investigating officer (IO) or board, the appointing and approving authorities, and the legal advisor and the attorney conducting the legal review.[81] Typically, an attorney in the administrative law office of the USMA acts as a legal advisor to the IO or board. The Staff Judge Advocate (SJA) conducts a legal review after completion of the investigation or hearing but prior to comment by the Commandant and action on the disenrollment by the Superintendent.[82] The Academy forwards the disenrollment to the DA for final approval when required.[83] The involvement of multiple senior officials during the process increases the likelihood that a disenrollment will follow all applicable rules.[84]

When the USMA decides to initiate disenrollment, the Academy must provide notice to the cadet and access to

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[65] 10 U.S.C.S. § 4348(a) (Lexis 2014).

[66] *See infra* Appendix A (U.S. Military Academy, USMA Form 5-50, Cadet Agreement (1 July 2014) [hereinafter USMA Form 5-50]).

[67] 10 U.S.C.S. § 4348(b) (Lexis 2014); 37 U.S.C.S. § 303a(e) (Lexis 2014).

[68] 10 U.S.C.S. § 4348(c) (Lexis 2014).

[69] U.S. Dep't of Def., Instr. 1304.25, Fulfilling the Military Service Obligation (MSO) para. 3 (31 Oct. 2013) [hereinafter DoDI 1304.25].

[70] DoDD 1332.23, *supra* note 62.

[71] *Id.* para. 4.1.

[72] *Id.* paras. 5.2.2-5.2.3.

[73] *Id.* para. 6.1.

[74] AR 210-26, *supra* note 17.

[75] *Id.* ch. 6 & 7.

[76] *Id.* ch. 6.

[77] *Id.* ch. 7.

[78] *See, e.g.*, Memorandum from Assistant Sec'y of Army (Manpower & Reserve Affairs) to Superintendent, U.S. Military Academy, subject: Limited Delegation of Separation and Discharge Authority Regarding U.S. Military Academy (USMA) Cadets (10 Jan. 2014) [hereinafter USMA Delegation Memo].

[79] *Id*.

[80] *Id.*

[81] *See generally* AR 210-26, *supra* note 17, ch. 7.

[82] *Id.* para. 7-3.

[83] USMA Delegation Memo, *supra* note 78, para. 3.

[84] *See* Mathews v. Eldridge, 424 U.S. 319, 339-47 (1976) (indicating that multiple levels of reviews, or process, make an administrative action more likely to comply with due process); AR 210-26, *supra* note 17, at i (explaining the "Proponent and exception authority").

counsel.[85] Case law requires the notice to be effective.[86] Often this occurs through personal service of a document informing a cadet of the grounds for disenrollment and of their existing rights. Upon receiving notice of disenrollment, a cadet may seek advice from a legal assistance attorney.[87] Additionally, a cadet may hire a civilian attorney to assist with explaining the process and preparing for the hearing.[88] However, due process does not require legal counsel to represent a cadet at the actual hearing, and AR 210-26 does not permit it.[89]

Depending on the facts in question, the USMA must hold a misconduct hearing, honor investigation hearing, or conduct investigation before disenrolling a cadet.[90] At the hearing, the cadet has the right to appear and present a defense.[91] This includes the ability to submit evidence, such as documents and witness testimony.[92] Critical to the hearing and the overall process is the government's substantial compliance with its own rules, especially in regard to issues adversely affecting a cadet.[93] After the hearing or investigation is complete, the Superintendent receives the record, the SJA's legal review, and the Commandant's comments.[94] The Superintendent may take action on disenrollments within his authority; otherwise, the USMA forwards the record to the DA for final action.[95]

At each level of review, a cadet may submit rebuttal matters to accompany the record to the next higher level.[96] Also, a cadet can appeal the final decision to the Army Board for Correction of Military Records (ABCMR).[97] After exhausting all administrative remedies, a cadet may bring a claim in federal court for violations of due process, disputes over the recoupment amount, assertions that the action was arbitrary or capricious under the Administrative Procedures Act, or allegations of other substantive grounds.[98] Absent an obvious error in the disenrollment process, the likelihood of success on a claim in federal court is normally low.[99]

B. Disenrollment Procedures for the Army ROTC

While individuals participated in military training at civilian colleges as early as 1819, the federal ROTC formally began in 1916 when President Woodrow Wilson signed the National Defense Act.[100] This act reorganized the military, established a reserve corps, and modified the National Guard's role, in addition to creating the ROTC.[101] Seventy years later, the Army formed the U.S. Army Cadet Command (USACC), standardizing the ROTC administration and training.[102] At the same time, the present framework for processing disenrollments emerged.[103] Although current ROTC disenrollments share many similarities with the USMA, several specific rules create unique procedures only applicable to the ROTC.

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[85] AR 210-26, *supra* note 17, paras. 6-4 (providing notice), 7-6 (describing access to legal counsel).

[86] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[87] AR 210-26, *supra* note 17, para. 7-6. *See generally* THE U.S. MILITARY ACADEMY, OFFICE OF THE STAFF JUDGE ADVOCATE, LEGAL ASSISTANCE OFFICE, http://www.usma.edu/sja/SitePages/Legal%20Assistance.aspx (last visited May 11, 2015) (discussing that Legal Assistance advises cadets on separation proceedings).

[88] AR 210-26, *supra* note 17, para. 7-6.

[89] Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); *see* AR 210-26, *supra* note 17, paras. 6-4, 7-6.

[90] AR 210-26, *supra* note 17, ch. 6.

[91] *Wasson*, 382 F.2d at 812; AR 210-26, *supra* note 17, ch. 6.

[92] *Wasson*, 382 F.2d at 812.

[93] Hagopian v. Knowlton, 470 F.2d 201, 208 n.23 (2d Cir. 1972).

[94] AR 210-26, *supra* note 17, para. 7-3.

[95] *Id.* paras. 7-2, 7-3; USMA Delegation Memo, *supra* note 78. Normally, an attorney at the Office of The Judge Advocate General (OTJAG) provides a legal review to the Department of the Army (DA) prior to action.

[96] *See* AR 210-26, *supra* note 18, para. 7-3; U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-2 (19 Dec. 1986) [hereinafter AR 600-37].

[97] *See generally* U.S. Dep't of Def., Dir. 1332.41, Boards of Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs) (8 Mar. 2004) (certified current 23 Apr. 2007) [hereinafter DoDD 1332.41]; U.S. Dep't of Army, Reg. 15-185, Army Board for Correction of Military Records (31 Mar. 2006) [hereinafter AR 15-185].

[98] Phillips v. United States, 910 F. Supp. 101, 106 (E.D.N.Y. 1996). Violations of procedural due process include defects in notice, inadequacy of hearing, or the agency failing to follow its rules. Id. Disputing the recoupment amount is essentially a claims action requiring a waiver of sovereign immunity by the government (*e.g.*, The Federal Tort Claims Act, 28 U.S.C.S. ch. 171 (Lexis 2014)). Id.

[99] *Compare*, *e.g.*, Spadone v. McHugh, 10 F. Supp. 3d 41 (D.D.C. 2014), *and* United States v. Bush, 247 F. Supp. 2d 783 (M.D.N.C. 2002) (cases resulting in favorable outcomes for the government), *with* Rameaka v. Kelly, 342 F. Supp. 303 (D.R.I. 1972), *and* Hagopian v. Knowlton, 346 F. Supp. 29 (S.D.N.Y. 1972) (obvious errors by the government resulting in favorable outcomes for cadets).

[100] National Defense Act, 39 Stat. 166 § 40 (enacted June 3, 1916). *See generally* U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, HISTORY, http://www.cadetcommand.army.mil/history.aspx (last visited May 11, 2015) (providing additional background on the Army ROTC program).

[101] National Defense Act § 166.

[102] U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, HISTORY, *supra* note 100.

[103] *Compare* U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING para. 3-43 (21 Jan. 1987) (earlier version of regulation), *with* AR 145-1, *supra* note 15, para. 3-43 (current version of regulation).

1. Applicable Statutes and Regulations

Similar to the USMA, 10 U.S.C. § 651—a minimum MSO—also applies to contracted ROTC cadets.[104] However, 10 U.S.C. chapter 103 is the main statute controlling the Army ROTC.[105] Specifically, 10 U.S.C. § 2104 requires cadets to sign a contract with terms that include enlisting, serving for a period of time, and accepting a commission if offered.[106] The Army documents the ROTC contract in DA Form 597-3.[107] Failing to meet its terms may lead to disenrollment and recoupment through active duty enlisted service or financial repayment.[108]

The DoD provides guidance on how to execute the statutes applicable to the ROTC. In accordance with 10 U.S.C. § 651, DoDI 1304.25 requires ROTC cadets to serve eight years, the same as the USMA cadets.[109] Likewise, DoDI 1215.08 implements 10 U.S.C. § 2105 by stating DoD's preference for active duty service over financial repayment for recoupment.[110] Department of Defense Instruction 1215.08 specifies ROTC cadets will sign a contract, and it gives guidance for how to process disenrollments.[111]

The Army expands on the guidance found in DoDI 1215.08 through AR 145-1.[112] Specifically, chapter three addresses cadet disenrollments, and paragraph 3-43 lists sixteen different grounds for disenrollment.[113] This regulation requires some interpretation because portions of it are not current. For example, the organizational structure of the USACC is different from when the Army published AR 145-1.[114] Currently, the USACC has Professors of Military Science (PMSs), brigade commanders, and a CG, but it no longer has region commanders.[115] A revision of AR 145-1 is pending, and the Army should complete the update in the near future to correct this and other issues.[116]

The USACC issued guidance to clarify AR 145-1. Cadet Command Pamphlet (CC PAM) 145-4 provides specifics related to disenrollments.[117] Unfortunately, parts of CC PAM 145-4 conflict with higher levels of guidance.[118] Practitioners should reference it with caution, and when it differs with higher-level regulations, the higher authority controls.[119] In contrast to CC PAM 145-4, a delegation of authority from the CG to the brigade commanders does clarify some of the outdated language in AR 145-1 by identifying the approval level for different types of disenrollments.[120] Prior to this memorandum, the issue was unclear due to AR 145-1 citing region commanders that no longer exist.[121] Collectively, these statutes and regulations provide the rules applicable to ROTC disenrollments.

2. Key Elements of the ROTC Disenrollment Process

In addition to the applicable rules, practitioners should be familiar with the elements of the ROTC disenrollment process. Similar to the USMA, the fundamental elements of the ROTC process relate to the individuals involved and the cadet's rights. The main actors in ROTC disenrollments include a cadet, IO or board, appointing and approving authorities, and legal advisor and attorney conducting the legal review.[122] The USACC legal office provides advice to the IO or board, and a different attorney from the legal office

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[104] 10 U.S.C.S. § 651 (Lexis 2014).

[105] 10 U.S.C.S. ch. 103 Senior Reserve Officers' Training Corps (Lexis 2014).

[106] 10 U.S.C.S. § 2104 (Lexis 2014).

[107] *See infra* Appendix B (DA Form 597-3, *supra* note 7).

[108] 10 U.S.C.S. § 2105 (Lexis 2014); 37 U.S.C.S. § 303a(e) (Lexis 2014).

[109] DoDI 1304.25, *supra* note 69.

[110] U.S. Dep't of Def., Instr. 1215.08, Senior Reserve Officers' Training Corps (ROTC) Programs para. 6.3.5.2 (26 June 2006) [hereinafter DoDI 1215.08].

[111] *Id.* paras. 5.2.3 (discussing contract requirement), 6.3.5 (discussing disenrollment procedures). DoDI 1215.08 is currently under revision, and a draft version exists at the DA level. U.S. DEP'T OF DEF., INSTR. 1215.08, SENIOR RESERVE OFFICERS' TRAINING CORPS (ROTC) PROGRAMS (3 Apr. 2014) (unpublished draft; version 2) (on file with author) [hereinafter Proposed DoDI 1215.08 Revisions].

[112] AR 145-1, *supra* note 14.

[113] *Id.* ch. 3 & para. 3-43.

[114] *Compare* U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, ORGANIZATION, http://www.cadetcommand.army.mil/brigades.aspx (last visited May 11, 2015) (current US Army Cadet Command (USACC) organization), *with* AR 145-1, *supra* note 14, para. 1-4 (focusing on USACC's organization at time of AR 145-1's publishing).

[115] *See* U.S. ARMY CADET COMMAND: THE OFFICIAL HOME OF ARMY ROTC, ORGANIZATION, *supra* note 114.

[116] U.S. DEP'T OF ARMY, REG. 145-1, SENIOR RESERVE OFFICERS' TRAINING CORPS PROGRAM: ORGANIZATION, ADMINISTRATION, AND TRAINING (4 Apr. 2013) (unpublished version 2 proposed revisions to AR 145-1) (on file with author) [hereinafter Proposed Revisions to AR 145-1].

[117] Cadet Command, Pam. 145-4, Enrollment, Retention and Disenrollment Criteria, Policy and Procedures (30 Dec. 2009) [hereinafter CC Pam. 145-4].

[118] *See, e.g.*, CC PAM. 145-4, *supra* note 117, para. 3-2d (stating that region commanders are the approval authority for offenses with fines over $250, but this is currently withheld to the CG, USACC, in accordance with Memorandum from Commanding General, U.S. Army Cadet Command, to Brigade Commanders, U.S. Army Cadet Command, subject: Delegation of Authority – Cadet Waiver and Disenrollment Authorities (28 Oct. 2014) [hereinafter ROTC Delegation Memo]).

[119] Andrews v. Knowlton, 509 F.2d 898, 905 (2d Cir. 1975).

[120] ROTC Delegation Memo, *supra* note 118.

[121] *See, e.g.*, AR 145-1, *supra* note 14, para. 1-4g (discussing responsibilities of region commanders).

[122] *See generally* AR 145-1, *supra* note 14, para. 3-43.

conducts a review of the record prior to it going to the CG for action.[123] The USACC forwards disenrollments to the DA for appeal or final decision when required.[124] Analogous to the USMA, the involvement of senior officials throughout the ROTC process increases the probability that a disenrollment will comply with all rules.[125]

When the USACC begins the disenrollment process, it must provide notice akin to that provided by the USMA since the same case law applies.[126] For an ROTC cadet, the USACC often serves process through certified mail.[127] Nevertheless, personal service may be appropriate at the senior military colleges where cadre interact more frequently with cadets.[128] Unlike the USMA disenrollments, AR 145-1 does not authorize ROTC cadets to receive government provided legal counsel.[129] However, AR 145-1 permits a cadet to receive assistance from "any reasonabl[y] available military officer" in preparing for the hearing.[130] Cadets may hire a civilian attorney to assist during the disenrollment process.[131] In either instance, AR 145-1 prohibits the individual from representing the cadet at the hearing.[132]

Depending on the basis for disenrollment, the Army must have a board or investigation before disenrolling a cadet.[133] In contrast to the USMA, the ROTC does not divide its processes between misconduct, honor, or conduct investigations.[134] For certain grounds of separation, AR 145-1 requires the USACC to appoint a formal board in accordance with AR 15-6.[135] For all other grounds, the PMS or brigade commander appoints an IO to conduct an informal investigation.[136] Even informal investigations entitle a cadet to a hearing.[137] At the hearing, the cadet has the opportunity to present a defense and the Army must comply with its regulations.[138] Additionally, AR 145-1 requires the ROTC to invite a representative from the school to observe the hearing.[139]

After the hearing is complete, the IO or board sends the record of proceedings through the chain of command to the CG, USACC.[140] An attorney at the USACC legal office completes a review before the CG receives the record.[141] The CG has the authority to retain or disenroll a cadet in most circumstances.[142] For disenrolled cadets, the CG may order recoupment through active duty enlisted service or financial repayment.[143] If the CG recommends no recoupment but approves the disenrollment, USACC forwards the action to the DA for a final decision.[144]

Following final action, an ROTC cadet has rights that are similar to a USMA cadet. The cadet may submit rebuttal matters if the Army includes additional comments in the record, such as when the CG forwards a recommendation to the DA.[145] Also, the cadet is able to appeal to the ABCMR to correct military records related to the disenrollment.[146] Finally, the cadet may file a claim in federal court after exhausting all administrative remedies.[147]

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[123] AR 145-1 does not specifically require a legal review. However, AR 15-6, para. 2-3b, arguably requires a legal review because the proceedings "may result in adverse administrative action . . . or will be relied upon in actions by higher headquarters." U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-3b (2 Oct. 2006) [hereinafter AR 15-6].

[124] *See* AR 145-1, *supra* note 14, para. 1-1 (explaining the DA is the approval authority for all waivers or exceptions to the policies contained in AR 145-1).

[125] *See* Mathews v. Eldridge, 424 U.S. 319, 339-47 (1976) (indicating that multiple levels of reviews, or process, make an administrative action more likely to comply with due process); AR 145-1, *supra* note 14, at i (explaining the "Proponent and exception authority").

[126] *E.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[127] CC Pam. 145-4, *supra* note 117, para. 6-2d. Certified mail is a common form of service because often the ROTC cadets do not interact with cadre on a daily basis.

[128] *Id.*; 10 U.S.C.S. § 2111a(f) (Lexis 2014). The six senior military colleges are Tex. A&M Univ., Norwich Univ., The Va. Military Inst., The Citadel, Va. Polytechnic Inst. and State Univ., and The Univ. of N. Ga. *Id.*

[129] AR 145-1, *supra* note 14, para. 3-43.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Compare* AR 210-26, *supra* note 17, ch. 6, *with* AR 145-1, *supra* note 15, para. 3-43.

[135] AR 145-1, *supra* note 14, para. 3-43; AR 15-6, *supra* note 123, ch. 5.

[136] AR 145-1, *supra* note 14, para. 3-43.

[137] *Id.*

[138] Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Hagopian v. Knowlton, 470 F.2d 201, 208 n.23 (2d Cir. 1972). Also, cadets may choose to waive their disenrollment board in writing. DoDI 1215.08, *supra* note 110, para. 6.3.5; AR 145-1, *supra* note 14, para. 3-43. CC PAM. 145-4, *supra* note 118, ch. 6, provides additional guidance on how to conduct the hearing.

[139] DoDI 1215.08, *supra* note 111, para. 6.3.5; AR 145-1, *supra* note 14, para. 3-43.

[140] AR 145-1, *supra* note 14, para. 3-43.

[141] *See supra* text accompanying note 124.

[142] *See, e.g.*, AR 145-1, *supra* note 14, para. 3-43 (explaining the CG may disenroll scholarship cadets, but the Professors of Military Science may disenroll a nonscholarship cadet).

[143] DoDI 1215.08, *supra* note 110, para. 6.3.5.2; AR 145-1, *supra* note 15, para. 3-43.

[144] DoDI 1215.08, *supra* note 110, para. 6.3.5.2. The Sec'y of the Army has not delegated the authority to waive reimbursement to the CG, USACC.

[145] AR 600-37, *supra* note 96, para. 3-2.

[146] *See generally* DoDD 1332.41, *supra* note 97; AR 15-185, *supra* note 97.

[147] Phillips v. United States, 910 F. Supp. 101, 106 (E.D.N.Y. 1996).

V. Practice Pointers

The previous sections explained the legal framework and provided an overview of the disenrollment processes that apply to the USMA and the ROTC. This section highlights positive and negative examples of disenrollments as they relate to government action. The positive examples for the government show what "right" looks like while the negative ones illustrate common issues that may occur during disenrollments.

A. When Things Go Right for the Government

1. Adequate Procedural Due Process Given

In *Tully v. Orr*, the Air Force Academy disenrolled a cadet based on his disciplinary history, which included issues of disrespect and plagiarism.[148] Procedurally, the disenrollment had several deficiencies, including the government's failure to provide all of the witnesses' names in accordance with regulations.[149] Despite the defects, the court found the cadet "was afforded the opportunity to present evidence and cross-examine, and to consult with counsel outside the hearing. The Academy [was] required to do no more."[150]

This case supports the idea that procedural due process considers the totality of the process and minor deficiencies will not undermine the overall process. As long as the agency provides notice, a hearing, and an opportunity to present a defense, a court will likely favor the agency and find sufficient due process existed. Practitioners should consider whether or not the error is serious enough to cause prejudice that would affect the outcome of the process when advising their client, regardless if it is a commander or a cadet. Short of this level of error, government corrective action is likely not necessary, nor are subsequent appeals by a cadet likely to be successful.

2. Minor Procedural Violations

In *White v. Knowlton*, the USMA disenrolled a cadet for violating the honor code by cheating on a physics exam.[151] The court opined "[w]hile separation is admittedly a drastic and tragic consequence of a cadet's transgression, it is not an unconstitutionally arbitrary one, but rather a reasonable albeit severe method of preventing men who have suffered ethical lapses from becoming career officers."[152]

White supports the premise that the services determine what qualifies as sufficient misconduct to warrant disenrollment. The courts will not look into the reasonableness of this determination as long as the agency followed its rules. Therefore, government attorneys should proactively provide counsel to both commanders considering initiation of a disenrollment action and the IOs or boards conducting the hearing. On the other hand, cadets' attorneys should consider seeking relief through administrative or judicial appeal whenever it appears the agency has not substantially complied with its rules.

B. When Things Go Wrong for the Government

While the previous two examples illustrate situations resolving in the government's favor, the following two examples demonstrate what happens when the government makes a critical mistake. The issue in the first case centers on the adequacy of the notice the government provided to the cadet. The second case addresses whether the government provided sufficient opportunity for the cadet to participate in a fair hearing. Together the concepts of adequate notice and a fair hearing form the foundational requirements of what the government must provide a cadet during the disenrollment process.

1. Inadequate Notice

In *Rameaka v. Kelly*, the Army disenrolled a cadet for willful evasion of his ROTC contract in 1962, and he filed a writ in federal district court to be released from his order to active duty.[153] In reviewing the claim, the court held that the notice given by the government "lacked specificity" and the writ "can hardly be denied when viewed in the totality of the circumstances in the order of their development."[154] Although the government provided notice to the cadet stating a board would consider his dismissal from the ROTC, it did not identify any specific grounds for the board to consider.[155] As a result, the court granted relief and ordered the Army to hold another hearing after first providing the cadet with the grounds it was considering as a basis for disenrollment.[156]

The learning point from *Rameaka* is the Army must provide notice to the cadet, stating specific grounds for disenrollment. This ties into the principle that the government must afford a cadet the opportunity to present a defense. Without knowing the specific grounds of the

[148] Tully v. Orr, 608 F. Supp. 1222, 1224 (E.D.N.Y. 1985).

[149] *Id.* at 1224-26.

[150] *Id.* at 1226.

[151] White v. Knowlton, 361 F. Supp. 445, 446-47 (S.D.N.Y. 1973).

[152] *Id.* at 449.

[153] Rameaka v. Kelly, 342 F. Supp. 303, 304-06 (D.R.I. 1972).

[154] *Id.* at 309.

[155] *Id.*

[156] *Id.* at 310.

disenrollment, a cadet cannot properly prepare a defense. Legal advisors should develop a positive working relationship with the command so the commander and staff feel comfortable seeking clarification on the most appropriate basis for separation.

2. Failure to Provide a Fair Hearing

Finally, in *Hagopian v. Knowlton*, the USMA disenrolled a cadet for receiving excessive demerits.[157] The court held the proceedings failed to provide adequate due process based on the cadet not having a fair hearing.[158] Specifically, the court held "[t]he plaintiff never received the opportunity to be personally present before the Academic Board or an impartial hearing officer, the opportunity to testify, or present evidence, or confront adverse testimony, or to examine and explain the adverse materials considered by the Board."[159] Consequently, the court granted an injunction allowing the cadet to stay at the USMA.[160]

The above list provided by the court highlights many elements required for a fair hearing. This list may seem like an excessive number of items, but the government can address all of them by having a hearing where the cadet appears and presents a defense. Therefore, the actual burden on the government is not excessively high. Again, proactive involvement by the legal advisor with the command and IO or board can eliminate or correct many potential issues before they undermine the disenrollment process.

VI. Conclusion

The ultimate purpose of this article is to facilitate a better understanding of the USMA and the Army ROTC disenrollments for legal practitioners. Adequate notice and a fair hearing are critical to meeting the requirements of due process in disenrollment proceedings. While similar, the disenrollment processes for the USMA and the ROTC have different steps the government must follow to comply with applicable rules. Attorneys practicing in the area of cadet disenrollments should remember some of the implementing guidance and many of the controlling regulations are under revision. Also, practitioners should recall that the DA, the USMA, and the USACC frequently modify the approval authorities through memorandums. The capability to understand and effectively apply the rules related to cadet disenrollments makes attorneys stronger assets to their client, whether it is their command or a cadet they represent.

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[157] Hagopian v. Knowlton, 346 F. Supp. 29, 30 (S.D.N.Y. 1972).

[158] *Id.* at 32.

[159] *Id.* at 33.

[160] *Id.* at 34.

Appendix A. USMA Form 5-50, Cadet Agreement

UNITED STATES MILITARY ACADEMY
WEST POINT, NEW YORK

I. Oath of Allegiance

I, _____do solemnly swear that I will support the Constitution of the United States, and bear true allegiance to the National Government; that I will maintain and defend the sovereignty of the United States, paramount to any and all allegiance, sovereignty, or fealty I may owe to any State or Country whatsoever; and that I will at all times obey the legal orders of my superior officers, and the Uniform Code of Military Justice.

II. Agreement to Serve

I, having been appointed a cadet of the United States Military Academy, do hereby agree, with the consent of my parents or guardian if I am a minor:

a. To complete the course of instruction at the United States Military Academy;

b. If tendered an appointment as a commissioned officer in one of the armed services upon graduation from the United States Military Academy, to accept such appointment and to serve under such appointment on active duty for at least five consecutive years immediately after such appointment; if my initial appointment hereunder is in a Reserve Component, to accept a commission in a Regular Component if subsequently tendered during the five consecutive years immediately after my initial appointment, and to serve on active duty for the remainder of such period under such appointment.

c. If I am permitted to resign my commission in a Regular Component of one of the Armed Services prior to the eighth anniversary of my graduation, to accept an appointment as a commissioned officer in a Reserve Component of one of the Armed Services and remain therein until such eighth anniversary.

d. To serve a total of eight (8) years from graduation from the United States Military Academy. Any part of that service not completed on active duty must be served in a Reserve Component (not on active duty), unless I am discharged from the Reserve Component by proper military authority.

e. That if I fail to complete the course of instruction of the United States Military Academy, breach my service agreement as defined in paragraph 1.g.(4), Statement of Policies, on the next page, or decline to accept an appointment as a commissioned officer, I will serve on active duty as specified in paragraphs 1.b. through 1.f., which are contained in the Statement of Policies on the next page;

f. That if I voluntarily fail, or because of misconduct fail, to complete the period of active duty specified in paragraphs II.b., c., d. or e. above, I will reimburse the United

States in an amount that bears the same ratio to the total cost of advanced education provided me as the unserved portion of active duty bears to the total period of active duty I have agreed to serve;

g. If I am obligated to reimburse the United States for the cost of my advanced education, any subsequent enlistment in an Armed Service will not relieve me of this debt.

h. Further, that if I am separated from the United States Military Academy for breach of

this service agreement, as defined in paragraph 1.g.(4), Statement of Policies on the next page, and the Army decides that I should not be ordered to active duty because such service would not be in the best interests of the Army, I shall be considered to have either voluntarily or because of misconduct failed to complete the period of active duty and may be required to reimburse the United States as described above;

i. For the purpose of this paragraph:

(1) The term "voluntarily fail" includes, but is not limited to, failure to complete the period of active duty because of conscientious objection, because of resignation from the United States Military Academy or United States Army, and marriage while a cadet.

(2) The term "because of misconduct" includes, but is not limited to, termination by the United States Army of my service because of criminal conduct, conduct violating the Cadet Honor Code, conduct deficiency under the Cadet Disciplinary System, and conduct violating regulations for the discipline of the Corps of Cadets.

(3) The term "course of instruction" is synonymous with the term "educational requirements" as the term is used in 10 USC 2005.

III. Marital Status

I am unmarried, do not presently have custody of a child, do not have a legal obligation of support from a prior marriage, and have no legal obligation to support a child or a former spouse. Furthermore, I understand that a cadet, who marries, has custody of a child, incurs a legal obligation of support from a prior marriage, or incurs a legal obligation to support a child or former spouse while a United States Military Academy cadet will be separated from the United States Military Academy. Divorce, annulment, or other dissolution of a cadet's marriage does not affect or preclude separation under this provision.

My signature constitutes the taking of the Oath of Allegiance, execution of the agreement to serve, my affirmation as to my marital status, the absence of child custody or a court-ordered child support obligation and my acknowledgment that I have read, understand, and agree to abide by the statement of policies on the next page. For all male cadets, signing this form also constitutes registration with the Selective Service System in accordance with the Military Selective Service Act. Incident thereto the Department of Defense may transmit my name, permanent address, Social Security Number, and birth date to the Selective Service System for recording as evidence of the registration.

_____

(Sign your full name as it appears in Paragraph I above.)

Sworn to and subscribed before me at West Point, New York, this_____Day of_____, two thousand and fourteen

_____

USMA Form 5-50 (Previous editions are obsolete) 1 July 2014

Information on Oath of Allegiance

An important consideration for you is the academy form you must swear to or affirm on your first day at West Point. A copy of this USMA Form 5-50 follows.

USMA Form 5-50 consists of the Oath of Allegiance, the Agreement to Serve and an Affirmation as to your marital status and child support and custody obligations. The reverse side of the form (on page 14) contains a Statement of Department of Defense Policies regarding separation of cadets prior to graduation and subsequent to graduation on refusal to accept an appointment as a commissioned officer.

Please read USMA Form 5-50, consider it carefully, and discuss it with your parents so you fully understand your military service obligation to the nation (Do not sign now).

You will sign 5-50 (Oath of Allegiance) on R-Day as part of your in processing.

Statement of Policies

1. Department of Defense Directive 1332.23, dated 19 February 1988, as implemented by Army regulations, provides the following direction concerning separation of cadets prior to the completion of the course of instruction or subsequent to graduation on refusal to accept an appointment as a commissioned officer.

a. A cadet who enters the United States Military Academy (USMA) directly from civilian status assumes a military service obligation of eight years (10 USC 651).

b. A cadet who is separated from the USMA because of demonstrated unsuitability, unfitness, or physical disqualification for military service will be discharged in accordance with the applicable Army regulations. Where such a discharge is caused by voluntary action or misconduct on the part of a cadet subject to an active duty obligation, the reimbursement provision of paragraph II.f. of the Agreement to Serve will apply.

c. A cadet who enters the USMA directly from a civilian status and resigns or is separated from the USMA prior to the commencement of the Second Class academic year will be discharged from the U.S. Army. A resignation tendered by a Fourth or Third Class cadet will be accepted when found to be in the best interest of the service. A cadet who tenders a resignation will be required to state a specific reason for the action.

d. A cadet who enters the Military Academy from the Regular or Reserve Component of any military service and who resigns or is separated from the USMA prior to the commencement of the Second Class academic year will revert to his or her former status for the completion of any prior service obligation. As an exception, Invitational Reservists (cadets who entered the United States Military Academy Preparatory School from a civilian status) who resign or are separated from the USMA prior to commencement of his or her second class academic year will be discharged from the Army. A cadet who entered the USMA from the Regular Army or any Reserve Component of the Army and who has at the time of separation a remaining prior service obligation of less than one year, may, upon the approval of the Secretary of the Army or his designee, be discharged with waiver of any prior service obligation. All service as a cadet is counted in computing the unexpired portion of the enlistment or period of obligated service.

e. A cadet who has commenced his or her Second Class academic year and who resigns or is separated prior to completing the course of instruction, except for physical disqualification, unfitness, or unsuitability, will normally be transferred to a Reserve Component in an enlisted status and, if deemed to have breached his or her service agreement, may be ordered to active duty for not less than two years (10 USC 4348(b)) but no more than four years. The Secretary of the Army or his/her designee will retain final authority to order the individuals to active duty. Completion or partial completion of service obligation acquired by prior enlistment in no way exempts a separated cadet from being transferred to a Reserve Component and ordered to active duty under these provisions.

f. Any First Class cadet who completes the course of instruction and declines to accept an appointment as a commissioned officer will be transferred to a Reserve Component in an enlisted status and ordered to active duty for four (4) years (10 USC 4348(b)).

g. The foregoing provisions will be applied in accordance with the following guidance:

(1) The Second Class academic year shall be deemed to have commenced at noon on the first day of regularly scheduled academic classes following the summer training period.

As an exception, the Second Class year for a cadet who is designated a potential mid-year graduate will commence at noon on the first day of regularly scheduled classes in the term following the advancement of that cadet into the second class.

(2) In cases where it is necessary to determine whether a cadet resigned prior to or following the commencement of the Second Class year, the critical date is the date the resignation action is initiated by the cadet.

(3) In cases in which the Academy discovers an incident giving rise to separation in one academic year, but separation is not initiated (or a resignation in lieu of the same is not forwarded by the chain of command) until the following year, the separation action will be deemed to have "started" on the date of discovery for purposes of computing the service obligation and pay grade under AR 612-205, table 3.

(4) "Breach of service agreement" includes separation resulting from resignation, for any of the bases for separation listed in AR 210-26, Table 7-1, including all additions to Table 7-1 subsequent to the date of this agreement, or from other willful acts or omissions (AR 210-26, paragraph 7-9).

2. Normally, all graduates of the USMA will be appointed by the President as commissioned second lieutenants on active duty in the United States Army. However, cadets may state a preference for appointment, upon graduation, as a commissioned officer in either the U.S. Navy, U.S. Air Force, or U.S. Marine Corps (10 U.S.C. 541 (a)). Such appointment will be contingent upon the approval of both the Secretary of the Army and the Service Secretary of the gaining military department.

3. Any First Class cadet, including potential mid-year graduates, in either of the two terms prior to their anticipated graduation, who resigns or is separated, if fully qualified, may be recommended by the Superintendent and approved by the Secretary of the Army to be commissioned in a Reserve component. Such action may be appropriate in cases of separation for marriage or child support or similar circumstances. The effective date of rank in the Reserve component will be no earlier than the graduation date of the individual's class at the time of resignation or separation. These cadets may:

(a) Be commissioned in the USAR for service with a Reserve Component unit. There will be an eight-year military service obligation associated with this appointment; or

(b) After receipt of a baccalaureate degree, be commissioned in the USAR and compete with Reserve Officer Training Corps graduates for active duty or active duty for training. The military service obligation for those selected for active duty under this provision will be eight years, three of which will be on active duty.

Appendix B. DA Form 597-3, Army Senior ROTC Scholarship Cadet Contract

ARMY SENIOR RESERVE OFFICERS' TRAINING CORPS *(ROTC)* SCHOLARSHIP CADET CONTRACT

For use of this form see AR 145-1; the proponent agency is DCS G-1

DATA REQUIRED BY THE PRIVACY ACT OF 1974

AUTHORITY:	Title 10, USC, Sections 2005, 2101 through 2111, and 3013. Title 5, USC, Section 301.
PRINCIPAL PURPOSE:	To specify the contractual agreements and obligations and to document contracting in the Army Senior Reserve Officers' Training Corps Scholarship Program.
ROUTINE USES:	This form will be maintained in the cadet's Military Personnel Records Jacket and becomes a permanent part of the official personnel records as confirmation of enrollment, contracting, obligation and agreements.
DISCLOSURE:	Disclosure of the information requested in this contract is voluntary. However, applicable portions must be completed if you desire to be enrolled in the Army ROTC Scholarship Program.

PREAMBLE

This contract represents an agreement entered into between the United States Army and the Reserve Officers' Training Corps *(ROTC)* scholarship recipient *(cadet)* named herein, with the consent of the parent or guardian if the cadet is under the age of 18, to effect the cadet's participation in the Army Reserve Officers' Training Corps Program. It is hereby agreed by both parties, the United States Army and the Cadet, that the sole purpose of the ROTC scholarship program is to produce officers for the United States Army. Entry into this program is a serious commitment. This commitment must be made with the resolve to attain a commission. If there are any doubts about the prospective cadet's ability or determination to fulfill the terms of this contract, then this contract should not be executed. In consideration of the mutual benefits, which will accrue to the parties hereto by reason of the cadet's participation in the Army ROTC and later service in the United States Army, the parties agree to the terms below.

CONTRACT

A. STUDENT'S NAME *(Last, First, MI)*		D. NAME OF EDUCATIONAL INSTITUTION	
B. SSN		E. ADDRESS OF EDUCATIONAL INSTITUTION	
C. DATE OF BIRTH *(YYYYMMDD)*			
F. DATE EDUCATION COMMENCES *(YYYYMMDD)*	G. COMPLETION DATE *(YYYYMMDD)*	H. ADDRESS OF RECORD *(Include ZIP Code)*	
I. ACADEMIC MAJOR IN WHICH DEGREE IS TO BE ATTAINED			
J. EXTENDED BENEFITS RECEIVED	K. PERIOD COVERED	L. DATE APPROVED *(YYYYMMDD)*	M. AUTHORIZED

PART I - AGREEMENT OF THE DEPARTMENT OF ARMY

1. DEPARTMENT OF THE ARMY AGREEMENTS. In consideration of the agreement in Part II below, the Department of the Army agrees to--

a. PAY SCHOLARSHIP BENEFITS. Pay for a period of_____ academic years *(provided funds are appropriated by Congress)* the following:

(1) TUITION AND FEES. Tuition and educational fees up to an annual amount of $_____.

(2) BOOKS AND LABORATORY EXPENSES. A flat rate of $_____, which may increase during the period of this contract, will be reimbursed as established on an annual basis by the U.S. Army Cadet Command, for textbooks, and laboratory expenses. This will be payable on the first day of enrollment for all returning or previously enrolled cadets. The flat rate for new award winners will be paid promptly upon completion of the 45-day requirement or upon validation of the scholarship contract whichever is later. *(Any items the cadet believes are needed that would exceed this rate must be purchased with other than Army funds.)*

DA FORM 597-3, JUL 2005 DA FORM 597-3, AUG 2004, IS OBSOLETE. Page 1 of 8

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PART I - AGREEMENT OF THE DEPARTMENT OF THE ARMY *(Continued)*

(3) PAYMENT TERMS.

(a) Scholarship payment for tuitions and fees will be made if the cadet remains actively enrolled as a scholarship student on the 45th day after the start of each academic year. The 45-day waiting period applies only to the first term of each academic year *(usually the Fall semester/quarter)*. The waiting period will not apply to the second semester or to second/third quarters. If the cadet enters into a scholarship contract after the 45th day of the first term of the academic year, he or she is immediately eligible for scholarship benefits payments.

(b) After the 45-day waiting period, payment for tuition and fees will be made to the beginning of the term, or the date the cadet began the term, whichever is later, provided that this contract is consummated before the end of that term.

(c) If the educational institution will not defer the payment of tuition and other fees until the 45th day after the start of classes, the cadet is responsible for payment of the tuition and fees. The Army is not obligated to pay any late fee incurred as a result of the cadet's failure to pay the costs of tuition and fees prior to the 45th day.

b. PAY MONTHLY SUBSISTENCE. Pay a subsistence allowance for participation in the scholarship program for 10 months of any academic year *(or the actual duration of the academic year, whichever is shorter)* at the rate of $_____ per month for MS I cadets; $_____ per month for MS II cadets; $_____ per month for MS III cadets; $_____ per month for MS IV cadets; and _____ for MS V cadets. These rates are generally prescribed by law and implemented by the Secretary of Defense and may change during the period of this contract. Entitlement is not to exceed--

(1) 50 months for a 5-year scholarship *(or extended benefits under 4-year scholarship)*.

(2) 40 months for a 4-year scholarship.

(3) 30 months for a 3-year scholarship.

(4) 20 months for a 2-year scholarship.

c. PAY FOR ATTENDANCE AT LEADER DEVELOPMENT AND ASSESSMENT COURSE ***(LDAC)***. Provide a daily rate of pay, which is prescribed by law for cadets of the United States Military Academy and implemented by the Department of Defense Military Pay and Allowance Entitlements Manual *(DODPM)*, for the period that the cadet attends LDAC.

NOTE: Payment for travel from the cadet's home of record to the school listed above is not authorized under this scholarship contract. *(EXCEPTION: The only exception is for four-year, Military Junior Colleges (MJC), and Green-to-Gold scholarship recipients who are paid for one time travel from home of record to school to accept an appointment as a scholarship cadet and to enlist in the USAR Control Group (ROTC))*.

d. PROVIDE TRAINING. Provide the cadet with U.S. Army-sponsored and -funded Reserve Officer Training.

e. DELAY ACTIVE DUTY FOR GRADUATE/PROFESSIONAL STUDY. The obligated period of active duty this contract requires may be delayed upon commissioning, if the cadet's application for resident graduate or professional study is approved, until completion of the authorized delay.

f. COMMISSION AS AN OFFICER. Upon satisfactory completion of the academic, military, and all other requirements of the Army ROTC program, a cadet may be appointed as a reserve officer in the Army in the grade of second lieutenant.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM

2. GENERAL CADET AGREEMENT. As the ROTC scholarship cadet named above, I hereby agree to do the following:

a. ENLISTMENT AGREEMENT. As a condition for membership in the Army ROTC Program, I agree to enlist in the Reserve Component of the United States Army *(with an assignment to the USAR Control Group (ROTC))* for a period prescribed by the Secretary of the Army.

b. ENROLLMENT AGREEMENT. I agree to enroll in the necessary courses and successfully complete, within the prescribed time, the requirements for the degree in the academic major stated above. I agree to remain enrolled in and successfully complete the ROTC program, including LDAC and all training as prescribed by the Secretary of the Army or his/her designee, as a prerequisite for commissioning.

c. FULL-TIME STUDENT AGREEMENT. I agree to remain a full-time student in good standing at the educational institution named above until I receive my degree. A full-time student is defined as one enrolled in sufficient academic courses to obtain sophomore, junior, and senior academic status at the end of each appropriate one-academic-year increment for the duration of the scholarship. This includes the required Army ROTC classes, which may be part of or in addition to those courses required for my degree. If I desire to transfer to another institution or take a leave of absence from the continuous performance of this contract, I agree to obtain prior written approval from the Professor of Military Science *(PMS)*.

d. ACADEMIC GRADE POINT AVERAGE AGREEMENT. I agree to maintain, at a minimum, a cumulative academic grade point average of 2.0 on a 4.0 or equivalent scale. This grade point average must also be maintained for each semester or quarter. If I am required by my academic major or by the school I am attending to maintain a higher cumulative and semester or quarter grade point average, I agree to maintain that higher standard until the completion of the academic requirements for my degree. I understand and agree that failure to maintain the minimum academic grade point average may subject me to disenrollment from the ROTC program.

e. ROTC COURSES GRADE POINT AVERAGE AGREEMENT. I agree to maintain at least a 2.0 on a 4.0 or equivalent scale, cumulative and semester or quarter academic grade point average in all ROTC courses. I understand and agree that failure to maintain the minimum ROTC courses grade point average may subject me to disenrollment from the ROTC program.

f. MEDICAL AND PHYSICAL FITNESS STANDARDS.

(1) I agree to maintain eligibility for enrollment and retention in ROTC and commissioning, as defined by statute, Army regulation, and this contract, throughout the period of this contract. I agree to meet and maintain the Army Physical Fitness Test *(APFT)* standard and the screening weight or body fat percentage required by the Army Weight Control Program as required of active duty soldiers each year and prior to attendance at ROTC LDAC. These will be continuous requirements that I must continue to meet until the date that I report to Officer Basic Course *(OBC)* or a Reserve Component unit and thereafter. Commissioning eligibility standards, including the APFT and Army Weight Control Program standards, are subject to change, and I must keep myself informed of such changes through contact with the PMS. I understand and agree that failure to maintain the weight and physical fitness requirements may subject me to disenrollment from the ROTC program.

(2) I agree to undergo precommissioning drug and alcohol screening tests, normally administered during LDAC training, or as may otherwise be prescribed by U.S. Army Cadet Command. If the result of any test is positive, I will be subject to disenrollment from the ROTC program.

(3) I agree to undergo testing for HIV *(Human Immunodeficiency Virus)* antibody during my precommissioning physical examination; normally during LDAC training or as the U.S. Army Cadet Command may otherwise prescribe. If the result of the testing is confirmed positive, I will be disenrolled from the ROTC program.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM *(Continued)*

g. NURSE CADET AND ARMY MEDICAL SPECIALIST CORPS CADET ADDITIONAL AGREEMENT. I agree, if I am a nurse candidate or a medical specialist corps cadet, to complete a baccalaureate program from an accredited and approved educational institution with an academic and clinical curriculum in English. I also agree to complete my ROTC training requirements by my projected commissioning date and accept, if offered, a commission in the USAR. I further understand that if selected for active duty in the Army Nurse Corps or Army Medical Specialist Corps, I must first pass the professional degree and licensing exam requirements set forth in relevant Army regulations prior to entry on active duty for my particular specialty. If a nurse cadet, I will take the exam not later than 60 days after graduation. If I fail the exam, I must retake it within 120 days after the first exam. If I fail my nurse licensing examination for the second time, I will be branched based on the needs of the Army.

3. ADDITIONAL TERMS AND CONDITIONS. I further understand that--

a. DISCLOSURE OF DISQUALIFYING CONDITIONS. By executing this contract, I represent that I meet all eligibility criteria for contracting in the ROTC Program and commissioning, as defined by statute, Army regulation, and this contract. I represent that I have disclosed or will disclose any and all pre-existing medical conditions and non-medical conditions that would make me ineligible for enrollment in the ROTC program as specified in statute, Army regulations *(including but not limited to AR 145-1)* and this contract. If I am ineligible for contracting in ROTC based on a particular medical or non-medical condition, but such ineligibility may be waived, I must obtain an approved waiver before executing this contract. Failure to have disclosed or to disclose any disqualifying condition, including any conditions I should have known about, will subject me to disenrollment from the ROTC program and possible recoupment of scholarship benefits. I certify that I have been notified of the Department of Defense Homosexual Conduct Policy, and I understand that my sexual orientation does not make me ineligible for contracting with the Army. Therefore, nothing in this paragraph requires a disclosure of my sexual orientation in violation of the Department of Defense Homosexual Conduct Policy as addressed in AR 600-20.

b. NATURE OF DUTIES AND CONSCIENTIOUS OBJECTOR STATUS. My acceptance of the terms and conditions of this agreement signifies my readiness to bear arms, to engage in and support combat operations and to operate and support operations of approved weapons systems. If I at any time apply for and receive conscientious objector status, I will be disenrolled from the program. If conscientious objector status is approved, my failure to complete the service obligation within this contract will result in my disenrollment, at which point I may be required to reimburse the United States Government for advanced educational assistance expended on my behalf.

c. CADET OBLIGATION.

(1) CADETS. I understand and agree that I will incur an active duty and/or reimbursement obligation after the first day of my MS II year *(sophomore year)* if I am a three-, four- or five-year scholarship recipient; after the first day of my MS III year *(junior year)* if I am a two-year scholarship recipient; or after the first day of my MS IV year *(senior year)* if I am a one-year or less scholarship recipient.

(2) GREEN-TO-GOLD CADETS. If I was conditionally discharged from the active Army to become a scholarship recipient, I am obligated and may not voluntarily withdraw from the ROTC program from the date of discharge without incurring an active duty or reimbursement obligation.

(a) If I am an MS I/freshman and I am disenrolled from the ROTC Program for any reason, I may be returned to active duty for the time not served on my original active duty enlistment when I was separated to accept the ROTC scholarship. If I have less than one year remaining on my original active duty enlistment and am not returned to active duty, I may be required to repay scholarship funds expended on my behalf.

(b) If I am in the ROTC program beyond the MSI/freshman year and am disenrolled, I may be returned to active duty or I may be involuntarily ordered to active duty as stipulated in paragraph 6 of this contract. In case of personal hardship, I may request return to active duty in my enlisted status to serve

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PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM *(Continued)*

out the time remaining on my original active duty enlistment contract instead of the active duty obligation stipulated in paragraph 6 of this contract.

NOTE: If I am a cadet with prior service, I understand that I will be required to serve any unexpired portion of my previous statutory enlistment obligation. The unexpired portion of my previous statutory enlistment obligation runs concurrently with my contractual military service obligation under this contract.

4. CADET AGREEMENTS UPON PROGRAM COMPLETION. Upon completion of all requirements for appointment, to include medical qualification, all prescribed military science courses, LDAC and any other training that may be prescribed by the Secretary of the Army or his or her designee, I agree to, as prescribed by the Secretary of the Army, complete the following requirements:

a. ACCEPTANCE OF APPOINTMENT. I agree to accept an appointment, if offered, as a commissioned officer in the USAR or ARNGUS, in accordance with governing Army regulations. I understand that upon appointment, I will incur a total military service obligation not to exceed eight *(8)* years and cannot resign such appointment before completion; however, this obligation may be met in a variety of ways as outlined below. I further understand that active duty service may include worldwide assignment and assignment that involves combat or exposure to nuclear, chemical, or biological weapons.

(1) ACTIVE DUTY ASSIGNMENT. Serve up to 4 years on active duty as a commissioned officer in the U.S. Army or for a period as prescribed by relevant Army regulations based on the needs of the Army, followed by service in the Reserve Component as set forth in relevant Army regulations, until the remainder of my eight-year contractual military service obligation has been served.

(2) RESERVE COMPONENT DUTY ASSIGNMENT. Serve a short period of active duty or active duty training if appointed for duty in a Reserve Component. If I am not selected for extended active duty, I will complete an officer's basic course for branch qualification. This will be followed by service in a Reserve Component Unit *(ARNGUS or USAR)*, which has Monthly Unit Training Assemblies and an annual training period of approximately two weeks until the remainder of my contractual military service obligation has been served.

(3) UNAVAILABILITY OF TROOP PROGRAM UNIT ASSIGNMENT. If I am fulfilling my obligation through Reserve Component duty and an appropriate troop program unit assignment is not available or becomes unavailable in either the U.S. Army Reserve or the Army National Guard of the United States, I agree to participate as a member of the Individual Mobilization Augmentee *(IMA)* program by serving at least twelve *(12)* days, excluding travel time, on annual training each fiscal year as directed by the Human Resources Command - St. Louis (HRC-St Louis). If it is determined that neither an appropriate unit nor an IMA assignment is available, I agree to participate as a member of the Individual Ready Reserve *(IRR)* by serving up to twelve *(12)* days of training each fiscal year until such time as an appropriate unit or IMA assignment becomes available or until the expiration of my contractual military service obligation. I may be required to travel the distance specified in Army regulations to fulfill my contractual military service obligation.

(4) THE ARMY NATIONAL GUARD COMBAT REFORM INITIATIVE ***(ANGCRI)***. If I am offered the opportunity to participate in the Army National Guard Combat Reform Initiative *(ANGCRI)*, I understand and agree that in return for participation in the ANGCRI program, I will serve my remaining service obligation in an Army National Guard unit, in lieu of completing my active duty service obligation, including mandatory service requirements as prescribed by Federal statute, Army regulation, and my ROTC contract. Furthermore, if I voluntarily, or because of misconduct, fail to complete my obligated Reserve service in an Army National Guard unit, the Army may require me to return to active duty to complete the remainder of my service obligation or the Army may seek recoupment against me.

b. APPLICATION FOR RESERVE COMPONENT DUTY ASSIGNMENT. I understand that I may apply for a Reserve Component appointment and request service on active duty or service with a Reserve Component Unit *(ARNGUS or USAR)* at my discretion. However, my selection for the appointment and service shall be determined according to the needs of the Army at the time that my requested appointment is considered. Further, specific career field choices and branch assignments cannot be guaranteed but will be made according to the needs of the Army no earlier than 12 months before commissioning.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM *(Continued)*

c. If granted scholarship benefits beyond four years, I am obligated to serve an additional period of active duty equivalent to any scholarship entitlements extended beyond four years, e.g., six months for each additional semester of financial assistance granted *(or four months for each additional quarter of financial assistance granted)*.

5. TERMS OF DISENROLLMENT. I understand and agree that once I become obligated and I am disenrolled from the ROTC program for breach of contractual terms or any other disenrollment criteria established now or in the future by Army regulations *(which include, but are not limited to, AR 145-1)* incorporated herein by reference, I am subject to the terms in paragraphs 5a through 5e below--

a. I AGREE TO SERVE ON ENLISTED ACTIVE DUTY. Under the terms of this contract, the Secretary of the Army or his or her designee, may order me to active duty as an enlisted soldier, if I am qualified, for a period of not more than four *(4)* years if I fail to complete the ROTC program. If I am disenrolled after the point of obligation, I may be ordered to active duty for one of the periods listed in paragraph 6 below based upon the year during which my disenrollment was initiated;

b. I AGREE TO REIMBURSE THE UNITED STATES GOVERNMENT. If I am offered the opportunity to repay my advanced educational assistance in lieu of being ordered to active duty, I will be required to reimburse the United States government through repayment of an amount of money, plus interest, equal to the entire amount of financial assistance *(to include tuition, educational fees, books, laboratory expenses, and supplies)* paid by the United States for my advanced education from the commencement of this contractual agreement to the date of my disenrollment or refusal to accept a commission. This amount includes any financial assistance I may have received prior to my obligation point. I agree that any money I am determined to owe to the United States shall bear interest at the rate equal to the highest rate being paid by the United States on securities having maturity dates of ninety days or less and shall accrue from the day that I am first notified of the amount I owe to the United States as reimbursement under this contract. I understand that I may be deemed to have failed to comply with the terms and conditions of this contract *(breach of contract)* regardless of whether I knew that the failure violated the contract and regardless of whether the failure was the result of an act or omission on my part made with a specific intent to avoid responsibilities under the contract.

c. FAILURE TO COMPLETE REQUIRED SERVICE OBLIGATION. I understand and agree that if I voluntarily or because of misconduct fail to begin or fail to complete any period of active duty or duty in a reserve status not on active duty that I have incurred under this contract whether as an officer or an enlisted soldier, I will be required to reimburse the United States an amount of money, plus interest, that is equal to or bears the same ratio to the total cost of the financial assistance provided to me by the United States as the unserved portion of such duty bears to the total period of such duty I was obligated to serve.

d. I AGREE THAT PENDING DISCHARGE FROM ROTC, I MAY NOT ENLIST. I may not enlist in the active Army, another military service, or in a military service academy while I am a contracted ROTC cadet unless I am properly released from my ROTC cadet status.

e. I AGREE THAT ANY OBLIGATION TO REIMBURSE WILL NOT BE ALTERED BY SUBSEQUENT ENLISTED DUTY. If I am disenrolled from ROTC, I understand the Secretary of the Army, or his or her designee, retains the prerogative to either order me to active duty or order monetary repayment of my scholarship benefits. Therefore, if I am required to repay my advanced educational assistance under the terms of this contract, my subsequent enlistment in an Armed Service will not relieve me from my repayment obligation.

6. ENLISTED ACTIVE DUTY SERVICE OBLIGATIONS. If I am called to active duty for breach of contract under the provisions of paragraph 5, above, I will be ordered to active duty for one of the periods listed below, based upon the year during which the breach occurs -

a. During MS II, 2 years;

b. During MS III, 3 years;

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM *(Continued)*

c. During MS IV, 4 years;

d. After completion of MS IV, 4 years if I was a 2, 3, or 4-year scholarship recipient;

e. Scholarship recipients who are granted extended scholarship benefits beyond 4 years incur an additional active duty service obligation equivalent to the length of the extended period of scholarship benefits.

f. Any unexpired portion of my enlistment obligation remaining after such active duty must be served in a Reserve Component.

7. LEAVE OF ABSENCE, SUSPENSION OR TERMINATION OF SCHOLARSHIP BENEFITS. If my scholarship benefits are temporarily inactivated by a leave of absence or administrative suspension, or are terminated due to my failure to meet academic or military retention standards for scholarship cadets, as prescribed by law, Army regulation, or this contract; I will not be relieved of my obligation to the U.S. Army and my obligations under this contract remain in effect. If my ROTC scholarship contract is terminated for any reason, but I am qualified and am allowed to remain in the ROTC program as a nonscholarship cadet, I understand that I will not be required to reimburse the United States for any financial assistance I received provided that I successfully completed the ROTC program and all of the active duty and duty in a reserve status not on active duty for which I am obligated under the provisions of this scholarship contract.

8. RELEASE FROM OBLIGATIONS. I understand that the Secretary of the Army or his/her designee may at any time release me without notice from the obligations under this contract and disenroll me from the ROTC Program without further benefits hereunder if, in the opinion of the Secretary of the Army or his or her designee, it is in the best interest of the Army.

9. COMPLIANCE WITH AND CHANGES IN ELIGIBILITY REQUIREMENTS. I acknowledge that I have discussed the eligibility requirements pertaining to enrollment in ROTC, enlistment in the USAR or ARNG, and accepting a commission as an officer, with the PMS or other designated and authorized ROTC cadre member, and that I understand these requirements. I realize that these requirements may change in the future. I agree to keep myself apprised of all changes in requirements and to maintain my eligibility to participate in ROTC at all times in the future. I also agree to inform the PMS of any change in my eligibility *(medical and non-medical)* based on current or revised requirements as soon as I know or should have known of a change in my eligibility status. Failure to so advise the PMS may result in disenrollment. Nothing in this paragraph requires a disclosure in violation of the Department of Defense Homosexual Conduct Policy as addressed in AR 600-20.

10. DECLARATION OF BANKRUPTCY. I understand that the cost of my education under this program is, for all purposes, a debt owed to the United States and entered into voluntarily on my part which, under the provisions of Title 10, United States Code, Section 2005, Subsection *(d)*, may not voluntarily be discharged by my declaration of bankruptcy if less than five *(5)* years after the last day of the specified period of active duty.

11. ORDER TO ACTIVE DUTY IN THE EVENT OF A WAR. I understand that either as an enlisted member or as a commissioned officer in the Reserve Component of the Army of the United States or upon my transfer or assignment thereto, I may be ordered to active duty without my consent in the event of a war, a national emergency declared by Congress or the President, an order of the Selected Reserve to active duty authorized by the President, and as otherwise authorized by law, such call to active duty could be for the duration of a war or any period of time authorized by law.

12. COMPLETE AGREEMENT AND SEVERABILITY. I understand the provisions in the contract contain the only binding promises by and to both parties. This agreement controls over any conflicting advice or information that I may have received orally or in writing from Cadet Command, my PMS, other cadre, cadets or others regarding my obligations and agreements to the Army. If any provision within this agreement is determined to be invalid or unenforceable by a court of law, the remaining terms and agreements remain in full force and effect.

PART II - AGREEMENT OF SCHOLARSHIP CADET CONTRACTING IN THE SENIOR ROTC PROGRAM *(Continued)*	
N. HOME ADDRESS *(Include ZIP Code)*	O. SIGNATURE
	P. DATE *(YYYYMMDD)*

PART III - CONSENT OF PARENT OR GUARDIAN TO CONTRACT IN ROTC AND ENLIST IN THE U.S. ARMY RESERVE
(To be completed if applicant is under 18 years of age at time of contracting in the ROTC program)

13. I certify that I am the applicant's parent or legal guardian, and that the applicant's date of birth as shown above is correct.

14. I consent to applicant's enrollment in the ROTC and to enlistment in the USAR.

15. I have read and thoroughly understand the above statements of terms under which the applicant is being enrolled, including all statutes, directives, and regulations, incorporated by reference. I relinquish all claims to applicant's service and to any wages or compensation for such service. I understand that the applicant will be subject to all of the requirements and lawful commands of the officers who may from time to time be placed over the applicant, and I certify that no promise of any kind has been made to me concerning the applicant's assignment to duty or appointment as an officer as an inducement to me to sign this contract.

Q. SIGNATURE OF PARENT OR GUARDIAN	R. SIGNATURE OF WITNESS	S. DATE *(YYYYMMDD)*

PART IV - CONFIRMATION OF ENROLLMENT AS AN ROTC SCHOLARSHIP CADET
(And of Enrollment in the ROTC Program, if not previously enrolled)

16. On the basis of the above executed contract *(Part II)*, the above named applicant's selection for the award of the financial assistance indicated *(Part I)*, and the executed consent of the parent or guardian *(Part III)*, if applicable, I have selected and enrolled this applicant as a cadet in the ROTC Program on the effective date of enrollment in item T.	T. EFFECTIVE DATE OF ENROLLMENT *(YYYYMMDD)*

PART V - FOR THE SECRETARY OF THE ARMY

U. NAME OF ROTC CONTRACTING OFFICIAL *(Print or Type)*	W. DATE *(YYYYMMDD)*
V. SIGNATURE OF ROTC OFFICIAL	

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The Missing Link: *Williams v. Illinois* and the Military's Drug Testing Program

*Captain Brian Zuanich**

I. Introduction

It seemed like an open and shut case. After PVT Smith's urine tested positive for marijuana, the government charged him with wrongfully ingesting a controlled substance. The young prosecutor had all the necessary witnesses—the Soldier who collected his urine, the evidence officer who took the urine sample to the lab, and an expert from the laboratory that tested the urine. Frankly, the prosecutor was surprised that PVT Smith and his lawyer seemed ready for trial at all.

But PVT Smith's attorney came out swinging. He immediately moved to exclude the government's expert witness, Dr. Lang, from testifying. Dr. Lang worked for one of the military's well-known laboratories, and her expertise was beyond dispute. But that wasn't why PVT Smith's attorney was challenging her. Dr. Lang hadn't tested PVT Smith's urine sample—in fact, she was working at a different laboratory altogether when the sample was tested several months ago. But the expert who did test PVT Smith's sample was out of the country and wasn't available for trial. So the prosecutor asked Dr. Lang to review the urinalysis results and Dr. Lang was confident that the original expert had gotten it right—PVT Smith's urine contained traces of marijuana. And she was prepared to testify to that conclusion. At least, that was the prosecutor's plan, but he was surprised by this turn of events. But what was really surprising was that the prosecutor wasn't prepared for this motion. He should have seen this coming a mile away.

The government routinely relies on expert witnesses to prosecute wrongful drug use cases.[1] Sometimes, the government's case hinges entirely on urinalysis results.[2] In these cases—where there is no other direct or circumstantial evidence of illegal drug use—the prosecutor *must* present expert testimony to establish the reliability of the drug testing procedures.[3] Typically, the government calls a single expert, and the expert may not even be the laboratory technician who tested the Soldier's urine sample.[4] As a result, convicted Soldiers typically raise a Sixth Amendment right to confrontation claim on appeal.[5] In 2010, the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Blazier*, which provided a framework for analyzing the Confrontation Clause in urinalysis cases.[6]

Two years later, the United States Supreme Court addressed—in a non-military context—a rape case where the government used forensic expert testimony to obtain a conviction.[7] In *Williams v. Illinois*,[8] the defendant argued that the government's deoxyribonucleic acid (DNA) expert improperly testified to DNA results when she did not perform the tests or even observe the testing process, in violation of his Sixth Amendment right to confrontation.[9] The Court upheld Williams' conviction, but the Justices were far from unified; the Court produced a plurality opinion, two concurring opinions, a dissenting opinion, and three different rules.[10]

In a 2013 decision, *United States v. Tearman*, the CAAF decided that *Williams* does not offer any guidance in resolving Confrontation Clause challenges in urinalysis cases.[11] In a concurring opinion, however, Chief Justice Baker criticized his colleagues for ignoring *Williams* simply because the Supreme Court did not speak with one voice.[12]

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[1] *See e.g.*, United States v. Tearman, 72 M.J. 54 (C.A.A.F. 2013); United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011); United States v. Lusk, 70 M.J. 278 (C.A.A.F. 2011). Under Article 112a, a Soldier who "wrongfully uses" a controlled substance is subject to court-martial. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 37(a) (2012) (hereinafter MCM).

[2] United States v. Campbell, 50 M.J. 154, 159 (C.A.A.F. 1999).

[3] *Id.*

[4] *See* cases cited *supra* note 1.

[5] *Id.* The Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend VI.

[6] United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010) [hereinafter *Blazier II*]. The CAAF actually issued two separate *Blazier* opinions. The CAAF announced its first opinion in March 2010. United States v. Blazier, 68 M.J. 439 (C.A.A.F. 2010). [hereinafter *Blazier I*]. Then, after remanding the case for further argument, the CAAF issued *Blazier II*. United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010).

[7] Williams v. Illinois, 132 S. Ct. 2221 (2012).

[8] *Id.*

[9] *Id.* at 2227-28.

[10] *Id.* at 2244. Justice Alito authored the plurality opinion, to which Chief Justice Roberts, Justice Kennedy, and Justice Breyer joined. *Id.* at 2227. Justices Breyer and Justice Thomas filed separate concurring opinions. *Id.* In the dissent, Justice Kagan spoke for herself, Justice Ginsburg, Justice Scalia, and Justice Sotomayor. *Id. See also infra* notes 53-73 and accompanying text (discussing plurality, concurring, and dissenting opinions).

[11] *Tearman*, 72 M.J. at 59 n.6.

[12] *See id.* at 69 (Baker, C.J., concurring).

This Article agrees. No court can adequately address these kinds of cases without grappling with *Williams*.[13]

This Article is divided into five sections. The first section provides a brief overview of the Confrontation Clause. The second section describes the Supreme Court's *Williams* decision. Next the Article discusses the military's urinalysis testing program and then analyzes the CAAF's opinion in *United States v. Blazier*. Finally, the Article concludes that the CAAF's interpretation of *Williams* is incorrect; a close reading of the Supreme Court's decision, in fact, strongly suggests that key components of the *Blazier* framework are no longer good law.

II. The Confrontation Clause

The Sixth Amendment guarantees that an accused has a right to "confront" (i.e. cross-examine) the witnesses against him at trial.[14] The right to confrontation is not unlimited, however.[15] In *Crawford v. Washington*,[16] the U.S. Supreme Court held that the Confrontation Clause only applies to "testimonial" hearsay statements.[17] The government, therefore, cannot introduce a testimonial hearsay statement into evidence unless the accused has an opportunity to cross-examine the witness during trial or that witness is unavailable.[18]

Since *Crawford*, testimonial evidence has become the cornerstone of the Court's Confrontation Clause jurisprudence.[19] To be considered testimonial, the Supreme Court held in *Crawford*, a reasonable person (upon hearing the statement) would "believe that the statement would be available for use at a later trial."[20] Some statements, the Court held, are always testimonial, including prior trial testimony, affidavits, and statements that suspects make to police officers during formal interrogation sessions.[21] Beyond these few examples, however, the Court did not provide a more comprehensive definition of the term "testimonial."[22]

The Supreme Court eventually developed a "primary purpose" test to evaluate whether a statement is testimonial.[23] In *Davis v. Washington*,[24] the Court ruled that a statement is testimonial if the primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution."[25] In *Davis*, a woman's 911 call during an ongoing assault was non-testimonial because the primary purpose of the call was to "enable police assistance to meet on ongoing emergency," not to support a future government prosecution.[26] Applying the *Davis* test, a federal circuit court held that statements in autopsy reports are non-testimonial because the medical examiner's office generally performs autopsies regardless of whether the authorities suspect foul play.[27]

The Confrontation Clause also applies to forensic laboratory reports.[28] In *Melendez-Diaz v. Massachusetts*,[29] the Court concluded that the drug analysis reports at issue were "quite plainly affidavits" because they were sworn statements that the government offered at trial to prove that the defendant possessed cocaine.[30] Two years later, in *Bullcoming v. New Mexico*,[31] the Supreme Court made explicit the proposition that the defendant has the right to cross-examine the actual *author* (or creator) of the testimonial document upon which the government is relying to prove the defendant's guilt.[32] In *Bullcoming*, the Court

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[13] *Id.* at 65-66 (Baker, C.J., concurring).

[14] U.S. CONST. amend VI. In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court held that the right of cross-examination is the centerpiece of defendant's confrontation right. *Id.* at 54.

[15] *See Crawford*, 541 U.S. at 51-53 (describing limits of defendant's confrontation rights).

[16] 541 U.S. 36 (2004).

[17] *Id.* at 53. Under the Military Rules of Evidence (MRE), the government cannot introduce "hearsay" statements into evidence—that is, an out-of-court statement offered at trial for its truth—unless it meets a recognized exception. MCM, *supra* note 1, MIL. R. EVID. 801(a), 802. Before *Crawford*, the government could introduce hearsay statements into evidence without running afoul of the Confrontation Clause so long as the statement had a "sufficient indicia of reliability." *See* Ohio v. Roberts 448 U.S. 56, 68 (1980) (setting forth pre-*Crawford* test for determining Confrontation Clause violations).

[18] *Crawford*, 541 U.S. at 68.

[19] *See* Jessica Smith, *Confrontation Clause Update: Williams v. Illinois and What It Means for Forensic Reports*, ADMIN. OF. JUSTICE BULL. (Sept. 2012), at 1 (describing Court's post-*Crawford* Confrontation Clause jurisprudence).

[20] *Id.* at 52 (internal citations omitted).

[21] *Id.* at 68.

[22] *Crawford*, 541 U.S. at 68.

[23] Davis v. Washington, 547 U.S. 813, 822 (2006).

[24] *Id.*

[25] *Id.* To determine the primary purpose, a reviewing court must objectively evaluate the statements and actions of the parties at the time the statement was made. *Michigan v. Bryant*, 131 S. Ct. 1143, 1156 (2011).

[26] *Davis*, 547 U.S. at 828. The Court reasoned that the victim "was not acting as a *witness*" for Sixth Amendment purposes when she called 911. *Id* (emphasis in original). "No 'witness' goes into court to proclaim an emergency and seek help." *Id.*

[27] *See* United States v. James, 712 F.3d 79, 98 (2nd. Cir. 2013) (describing autopsy procedure under New York state law).

[28] Smith, *supra* note 19, at 2.

[29] Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

[30] *Id.* at 310. The Court overturned the defendant's conviction because the defendant had a right to cross-examine a laboratory analyst who tested the suspected narcotics that were found in his car when the defendant was arrested. *Id.* at 311.

[31] Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

[32] *Id.* at 2714.

overturned a defendant's driving under the influence (DUI) conviction because the trial judge improperly admitted the defendant's blood alcohol test results even though the State's expert witness played no role in the testing process.[33]

III. *Williams v. Illinois*

Williams v. Illinois is the Supreme Court's latest case applying the Confrontation Clause to a case involving forensic scientific evidence.[34] The Supreme Court has issued fractured opinions in prior cases.[35] Three different tests for defining testimonial evidence emerged from the Court's opinions and no single test received majority support.[36]

A. Factual Background

In early 2000, an Illinois hospital performed a sexual assault exam on a female rape victim and sent vaginal swabs to the Illinois State Police (ISP) crime lab for testing.[37] After confirming the presence of semen, the ISP lab sent the samples to a laboratory in Maryland (Cellmark) for further DNA testing.[38] Cellmark developed a male DNA profile from the vaginal sample and generated a report for the ISP lab, which then entered the profile into the State of Illinois' DNA database.[39] At this time, Sandy Williams ("Williams") was not a suspect in the rape.[40]

Several months later, Williams was arrested for an unrelated offense and an Illinois court ordered him to submit a blood sample.[41] The ISP lab created a DNA profile from Williams' blood sample and entered his profile into the state database.[42] The ISP laboratory analyst, Sandra Lambatos, eventually ran a computer search and determined that the Cellmark-created DNA profile matched Williams' DNA profile.[43] Williams was arrested and charged with sexual assault.[44]

At trial, the State offered Lambatos as an expert witness in forensic DNA analysis.[45] She testified that Williams' DNA profile matched the Cellmark profile.[46] The State did not call an analyst from Cellmark, however, to explain how its laboratory obtained the male DNA profile from the victim's vaginal swabs.[47] Lambatos testified that she did not play any role in the Cellmark testing process.[48]

The trial judge found Williams guilty of sexual assault.[49] On appeal, Williams argued that he should have had the right to cross-examine a laboratory analyst from Cellmark because the Cellmark report was testimonial.[50] Specifically, Cellmark created its report in response to a state police request and the report was meant to serve as evidence in a future criminal prosecution.[51]

B. The *Williams* Decisions

The Supreme Court affirmed Williams' conviction.[52] The four-justice plurality, per Justice Alito, concluded that the Cellmark report was non-testimonial.[53] Justice Thomas agreed, but he disagreed with the plurality's testimonial analysis.[54] Justice Kagan spoke for the four dissenting justices; she determined that the Cellmark report was

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[33] *Id.* at 2710-12. The Court ruled that the defendant could not effectively cross-examine the State's "surrogate" expert about whether the testing analyst followed the appropriate procedures for testing the defendant's blood. *Id.* at 2715-16. Furthermore, the State did not establish or even assert the testing analyst was "unavailable," as *Crawford* requires. *Id.* at 2715.

[34] *Sweeney*, 72 M.J. at 65-66 (Baker, C.J., concurring).

[35] *Williams*, 132 S. Ct. at 2227, 2244.

[36] Smith, *supra* note 19, at 2.

[37] *Williams*, 132 S. Ct. at 2229 (plurality opinion).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 2230.

[47] *Id.* at 2267 (Kagan, J., dissenting). The State did not introduce the Cellmark report into evidence at trial. *Id.* at 2230 (plurality opinion).

[48] *Id.* at 2235 (plurality opinion).

[49] *Id.* at 2231.

[50] *See id.*

[51] *See id.*

[52] *Williams*, 132 S. Ct. at 2228 (plurality opinion).

[53] *Id.* The Court actually affirmed Williams' convictions on two independent grounds. *Id.* at 2228. The plurality first concluded that the State did not offer the Cellmark DNA results into evidence for their truth—i.e. the report was not *hearsay*. *Id.* In the Court's view, the State's expert simply testified the two DNA profiles—she didn't vouch for the scientific validity of the Cellmark profile and her expert opinion didn't depend on the validity of the Cellmark profile. *Id.* at 2239. Therefore, the State used the Cellmark for a *non-hearsay* basis—as a basis for the expert's comparison of two different samples. *Id.* Even assuming the Cellmark report did qualify as hearsay, however, the plurality concluded that it was non-testimonial. *Id.* at 2227.

[54] *Id.* at 2259-62 (Thomas, J., concurring).

testimonial, but she applied an altogether different test for defining a testimonial statement.[55]

1. The Plurality Opinion: The Targeted Individual Test

To qualify as testimonial, the plurality held a statement must have the primary purpose of "accusing a *targeted* individual of engaging in criminal conduct."[56] When Cellmark produced its DNA report, Williams had not been charged with a crime; in fact, he was not even a suspect in the sexual assault case.[57] The real purpose of the Cellmark report, Justice Alito declared, was to "catch a dangerous rapist who was still at large."[58] At the time Cellmark produced its report, it could not have possibly known that Williams would be inculpated in the rape.[59] In that respect, this lab report was more akin to a domestic violence victim's 911 cry-for-help, the primary purpose of which is to obtain immediate police assistance for an ongoing emergency (in this case, the possibility of future sexual assaults).[60]

2. The Dissenting Opinion: The Evidence Test

Justice Kagan criticized Justice Alito for adopting a novel and far more restrictive test for evaluating testimonial evidence.[61] The correct test according to Justice Kagan is the one to which the Court has previously adhered. This test looked at whether the primary purpose of the statement is to establish "past events potentially relevant to later prosecution."[62] That is, a testimonial statement is "meant to serve as evidence in a potential criminal trial."[63] In this case, Cellmark extracted a DNA profile from semen that was found inside a rape victim, documented its findings in a formal report, and forwarded its report to the state police lab that requested DNA testing.[64] This report was clearly meant to serve as evidence in a potential rape trial of the specific male whose DNA profile matched the Cellmark profile.[65] The fact that Williams himself was not a suspect at the time was legally irrelevant.[66]

3. Justice Thomas's Concurring Opinion: The Formality Test

In Justice Thomas's view, the Confrontation Clause only reaches "formalized testimonial statements that are characterized by solemnity."[67] They include affidavits, depositions, and statements made to police during formal custodial interrogations.[68] The Cellmark report was non-testimonial because it "lacks the solemnity of an affidavit or deposition."[69] First, no one at Cellmark certified that the DNA testing results were accurate.[70] Second, the reviewers who signed the report did not claim to have performed the DNA testing.[71] Finally, the reviewers did not even certify that the actual testers had followed standard DNA testing protocol.[72] Unlike his colleagues, Justice Thomas believes that a functional-based "primary purpose" analysis is unworkable in practice.[73]

IV. The Military's Urinalysis Program

To understand the potential impact of *Williams* in military drug prosecutions, one needs to understand how the military's urinalysis program generally operates.

The military's urinalysis program has three primary purposes: (1) deterring drug use among servicemembers; (2) maintaining military readiness and fitness; and (3) separating

[55] *Id.* at 2272-75 (Kagan, J., dissenting). The dissenting justices also disagreed with the plurality's hearsay analysis. *See id.* at 2264-72 (concluding State offered Cellmark report into evidence to prove that DNA results originated from semen found inside victim's vaginal swabs).

[56] *Id.* at 2243 (plurality opinion).

[57] *Id.* at 2243.

[58] *Id.*

[59] *Id.* at 2243-44.

[60] *See id.* at 2242-43 (analogizing purpose of Cellmark report to purpose of victim's 911 call in *Davis. Washington*); *see also Davis*, 547 U.S. at 2268 (describing circumstances of victim's 911 call).

[61] *Id.* at 2273. "Where that test comes from is anyone's guess," Justice Kagan dismissively wrote regarding the Targeted Individual Test. *Id.*

[62] *Id.* 2273-74 (surveying post-*Crawford* Confrontation Clause jurisprudence).

[63] *Id.* at 2273.

[64] *Id.* at 2264.

[65] *Id.* at 2275. Justice Kagan also criticized Justice Alito's attempt to analogize the Cellmark report to a victim's 911 call for help. *Id.* at 2274. Justice Kagan noted that the local police waited nine months after the rape before sending the victim's vaginal swabs to Cellmark for DNA testing—"hardly the typical emergency response," she wrote. *Id.*

[66] *Id.* at 2274.

[67] *Id.* at 2259 (Thomas, J., concurring).

[68] *Id.* at 2260.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 2261. Because, for instance, a person may make a statement to a police officer *both* to resolve an emergency *and* to assist in a future criminal prosecution, the primary purpose test "gives no principled way to assign primacy to one of those purposes." *Id.* Justice Thomas also agreed with the dissenting justices that the Targeted Individual Test "lacks any grounding in constitutional text, in history, or in logic." *Id.* at 2262. Justice Breyer also filed a separate concurring opinion. Although he agreed with the plurality's ultimate result, he criticized both the plurality and the dissent for failing to devise a comprehensive rule for how to apply the Confrontation Clause to crime laboratory reports. *See* 132 S. Ct. at 2244-55 (Breyer, J., concurring) (discussing proposed approach).

servicemembers who knowingly misuse drugs.[74] Although a court-martial is one possible outcome of a positive drug test, notably it is not listed as one of the primary purposes of the DoD program.[75] Most positive drug tests, in fact, do not result in criminal prosecution.[76]

Every active-duty servicemember is randomly drug tested at least once per year.[77] After obtaining a urine sample, the Soldier's unit ships the specimen to one of the military's forensic laboratories for testing.[78] Before shipment, the unit collections officer completes the chain-of-custody portion of the specimen custody document, DD Form 2624.[79] The specimen custody document accompanies the samples to the lab.[80]

The lab subjects each urine specimen to a standard three-step testing process.[81] In every case, the lab enters the test results on the specimen custody document.[82] The results are recorded on Block G, and an analyst signs and dates Block H, certifying that the results "were correctly determined by proper laboratory procedures, and that they are correctly annotated."[83]

Upon command request, the lab provides copies of the complete testing results and all supporting documents.[84] These include the completed specimen custody document and the machine-generated results of the three tests—the so-called "raw data."[85] The lab also prepares a cover memorandum to accompany each drug testing report.[86] The cover memorandum summarizes the urinalysis test results and records the specific concentration of each illegal drug found.[87] It also lists the corresponding Department of Defense (DoD) cutoff levels for each drug.[88] Finally, a laboratory official certifies at the bottom of the memorandum that the test results are scientifically reliable.[89]

V. The *Blazier* Approach

As noted above, Soldiers who are convicted of drug offenses on the basis of urinalysis results typically raise a Confrontation Clause challenge on appeal.[90] In the wake of *Crawford* and *Melendez-Diaz*, the CAAF's decision in *United States v. Blazier* has had the most far-reaching impact in this area of the law.[91]

In *Blazier*, a Soldier's urine tested positive for methamphetamine and THC in two different tests.[92] At the command's request, the Air Force laboratory provided copies of both drug testing reports.[93] The command specifically noted in writing that the reports were "needed for court-martial use."[94] The lab provided both reports, along with two separate cover memorandums that described the testing results.[95] The certifying official, Dr. Vincent Papa, signed each memorandum under oath, confirming the "authenticity of the attached records."[96]

Dr. Papa testified at trial as an expert witness in forensic toxicology.[97] He concluded that Blazier's urine samples tested positive for methamphetamine and marijuana, based on his training and experience, his knowledge of the lab's testing procedures, and his review of the drug testing reports.[98] He also repeated verbatim the information listed in the cover memorandums—the test results, the concentration

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[74] U.S. DEP'T OF DEF., INSTR. 1010.01, para. 4 (12 Sept. 2012) [hereinafter DODI 1010.01].

[75] DODI 1010.01, *supra* note 74, para. 4; *see also Tearman*, 72 M.J. at 65 n.4 (Baker, C.J., concurring) (summarizing recent DoD drug testing statistical report).

[76] *See Tearman*, 72 M.J. at 65 n.4 (summarizing DoD data).

[77] DODI 1010.01, *supra* note 75, enclosure 3, para. 2.c.

[78] *See* Major David Edward Coombs, *United States v. Blazier: So Exactly Who Needs an Invitation to the Dance?*, ARMY LAW., July 2010, at 19 (describing military's drug testing procedure).

[79] Fort Meade Forensic Toxicology Drug Testing Laboratory, Tour Our Lab, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited May 25, 2015) (summarizing laboratory's normal drug testing procedure).

[80] *Id.*

[81] *Id.* The lab subjects each sample to an immunoassay-based test to separate positive samples from negative samples. *Id.* Then, the presumptively positive samples undergo an identical re-test. *Id.* Finally, the lab performs a final Gas Chromatography / Mass Spectrometry (GC / MS) test, considered the "gold standard" of tests within the forensic field. Coombs, *supra* note 78, at 19. If the GC / MS test confirms the earlier two results, the lab reports the sample as positive. *Id.*

[82] Fort Meade Lab, Tour Our Lab, *supra* note 79.

[83] *See Tearman*, 72 M.J. at 57-58 (describing relevant sections of DD 2624)

[84] Fort Meade Forensic Toxicology Drug Testing Laboratory, Litigation Support, https://iftdtl.amedd.army.mil/ftmd/Tour.html (last visited May 25, 2015).

[85] Fort Meade Lab, Litigation Support, *supra* note 84; *see also Blazier I*, 68 M.J. 439, 440 (describing typical contents of drug testing report).

[86] *Id.*

[87] *See Blazier I*, 68 M.J. at 440 (describing cover memorandum); *see also Sweeney*, 70 M.J. 296, 299 (describing similar cover memorandum).

[88] *Id.*

[89] *Blazier I*, 68 M.J. at 440.

[90] *See* cases cited *supra* note 1.

[91] *See Sweeney*, 70 M.J. at 301-03 (describing impact of *Blazier* opinions).

[92] *Blazier I*, 68 M.J. at 440. After his first sample came back positive, Blazier denied to authorities that he knowingly used any illegal substances, and he agreed to provide a second urine sample. *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Blazier II*, 69 M.J. at 221.

[98] *Id.* at 226.

levels of each substance, and the DoD cutoff levels.[99] Dr. Papa acknowledged that he did not test either urine sample or observe either testing process.[100] The government did not call either testing analyst.[101] Over the accused's objection, the military judge admitted both drug testing reports into evidence as non-testimonial business records.[102]

The CAAF reached two major conclusions in *Blazier*. First, the cover memorandums contained testimonial hearsay.[103] They were made under "circumstances which would lead an objective witness to believe that the statement[s] would be available for use at a later trial."[104] As the Court reasoned, Blazier's command specifically requested the reports to court-martial him for drug-related offenses after already learning that the test results were positive.[105] Furthermore, the cover memorandum stated that "certain substances were confirmed present in appellant's urine at concentrations *above the DOD cutoff level*," which is exactly what the government intended to prove at trial to obtain a conviction.[106] The military judge, therefore, should not have admitted the cover memorandums into evidence nor should Dr. Papa have been permitted to testify to statements contained in the memorandums.[107]

Nevertheless, the CAAF ruled that an expert has the right to present an independent opinion based on training, experience, and a review of the evidence, so long as the expert does not *repeat* testimonial hearsay evidence into the record.[108] In *Blazier*, Dr. Papa offered an independent opinion about Blazier's urine results and the accused had the opportunity to cross-examine him about the validity of that opinion.[109] Except for repeating the statements in the cover memorandum, Dr. Papa's testimony did not violate the accused's confrontation rights.[110]

The CAAF reaffirmed and extended its *Blazier* analysis in *United States v. Sweeney*.[111] In *Sweeney*, the court held that Blocks G and H of the specimen custody document are testimonial.[112] Block G (the certification) is testimonial because it functions as an "affidavit-like statement of evidence" that formally certifies the drug testing results contained in Block H.[113] Not only does Block G certify the results, but it also certifies that the Block H results are scientifically valid.[114] As in *Blazier*, the *Sweeney* court also concluded that the cover memorandum was testimonial.[115] In Sweeney's particular case, the command did not request the lab reports until *after* the accused was charged, which further buttressed the CAAF's view that the document was meant to serve as evidence at a court-martial against Sweeney.[116] Lastly, the CAAF reaffirmed that *Blazier's* "available for use at a later trial" test is the proper test for evaluating whether a statement is testimonial.[117]

VI. The *Blazier* Approach: A Critique

The CAAF has made it very clear that the Supreme Court's *Williams* decision does not have any precedential value in military urinalysis cases.[118] In *United States v. Tearman*, the CAAF bluntly declared "We do not view *Williams* as altering either the Supreme Court's or this Court's Confrontation Clause jurisprudence."[119] Quite notably, the CAAF did not even discuss the *Williams* case in *Tearman*; the Court buried its only reference (the above quotation) in a footnote.[120] The CAAF has never again cited the *Williams* case.[121]

The CAAF's position has a tempting simplicity because the *Williams* Court did not produce a majority opinion.[122]

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[99] *Id.*

[100] *Blazier I*, 68 M.J. at 440.

[101] *Blazier II*, 69 M.J. at 221.

[102] *Id.*

[103] *Blazier I*, 68 M.J. at 443.

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

[105] *Id.*

[106] *Id.*

[107] *Blazier II*, 69 M.J. at 226.

[108] *Id.* at 224-26. Under MRE 703, the CAAF reasoned, an expert witness may review and rely upon the work of other laboratory analysts so long as the expert reaches an independent opinion. *Id.* at 225; *see also* MCM, *supra* note 1, MIL. R. EVID. 703 (setting forth permissible bases of expert witnesses' opinion in military system).

[109] *Blazier II*, 69 M.J. at 226.

[110] *Id.* at 226-27. The CAAF ultimately reversed Blazier's conviction, but the Court remanded the case for further argument over whether the admissibility of the cover memorandum and Dr. Papa's repetition of the contents of the memorandum were harmless beyond a reasonable doubt. *Id.* at 227.

[111] *Sweeney*, 70 M.J. at 298.

[112] *Id.* at 303.

[113] *Id.* at 304.

[114] *Id.* "Such a formal certification," the CAAF reasoned, "has no purpose but to function as an affidavit." *Id.* at 303.

[115] *Id.* at 304.

[116] *Id.*

[117] *Id.* at 301. "In the *Blazier* cases," the CAAF wrote, "we set forth a straightforward path for analyzing the admissibility of drug testing reports under the Confrontation Clause." *Id.* at 298.

[118] *Tearman*, 72 M.J. at 59 n.6.

[119] *Id.*

[120] *See generally* United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011).

[121] *See* United States v. Squire, 72 M.J. 285 (C.A.A.F. 2013) (analyzing standard for evaluating testimonial evidence without referencing *Williams v. Illinois*); *see also* United States v. Porter, 72 M.J. 335 (C.A.A.F. 2013) (analyzing Confrontation Claim in drug testing case without referencing *Williams v. Illinois*).

[122] *Williams*, 132 S. Ct. 2221.

But, a close reading of *Williams* strongly suggests that the CAAF's dismissive view may be incorrect.[123] There are three major reasons why.

First, a majority of the Supreme Court justices did not apply the CAAF's "available for use" test for determining a testimonial statement.[124] The four-justice plurality applied the Targeted Individual Test and Justice Thomas would apply a formality-based test in future cases.[125] In that key respect, the CAAF was wrong about *Williams*—at least one common rationale united five of the Justices.

Even the four dissenting justices in *Williams* made it clear that "primary purpose" of the underlying forensic reports is the most relevant consideration.[126] In *Williams*, the Cellmark report was testimonial because (per Justice Kagan) it was "meant to serve as evidence in a potential criminal trial."[127] That is not the same thing as saying that the Cellmark report was testimonial because it *may* have been *available* for use at trial. As Chief Justice Baker has argued, after *Williams* the CAAF cannot adequately address a Confrontation Clause challenge in a urinalysis case without considering the primary purposes of the military's urinalysis program which does not include criminal prosecution.[128] In short, arguably all nine Supreme Court justices did not endorse the CAAF's "available for use" test as the CAAF applied it in *Blazier.*

Second, a majority of the *Williams* Court would likely conclude that the specimen custody document (specifically Blocks G and H) is non-testimonial. As explained above, DD 2624 is not created to serve as evidence at a particular court-martial against a particular servicemember; rather, the Soldier's unit initiates the document at the outset of the urinalysis process long before it knows the results.[129] In other words, the purpose is to *exonerate* a Soldier of any wrongdoing as much as it is to *inculpate* a particular Soldier for a drug-related offense. Therefore, certainly the Justice Alito-led plurality (applying the Targeted Individual Test) and probably the Justice Kagan-led dissent (applying the Evidence Test) would have ruled differently than the CAAF in *Sweeney*.[130]

Third, the cover memorandum would likely be non-testimonial in some cases under a *Williams* analysis. Take, for example, a case where the commander learns about a Soldier's positive test results and requests the full drug testing report from the lab, but the commander has still not decided whether to prefer charges. In this hypothetical case, the cover memorandum is not necessarily *meant* to serve as evidence at a court-martial and is not necessarily *meant* to target the Soldier for prosecution. Therefore, it probably would not qualify as testimonial under either the Targeted Individual Test or the Evidence Test.[131]

Of course, every case is different, which is why the CAAF cannot dismiss *Williams* as an afterthought. In *Sweeney*, for instance, the command preferred charges and *then* requested the cover memorandum.[132] In *Blazier*, the command specifically requested the cover memorandum for "court-martial use."[133] In some cases, like the hypothetical above, the government may request the cover memorandum without having decided to pursue a court-martial. And finally, not every cover memorandum looks the same, which would be important for Justice Thomas because his formality-based analysis is by definition document-specific.[134] What this means is in every case the CAAF should conduct a rigorous analysis—explain how and why *Williams* applies, or why it does not.[135]

VII. Conclusion

So long as the military continues to drug test Soldiers, the military will continue to court-martial Soldiers for wrongful drug use based on urinalysis results. The government will continue to rely on expert witnesses to obtain convictions, and accused Soldiers will continue to raise Confrontation Clause challenges under the Sixth Amendment. In short, the litigants, the military judges, the

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[123] *Williams*, 132 S. Ct. 2221-2277.

[124] *Id.*

[125] *Id. See also supra* text accompanying notes 56-60, 67-73 (describing Formality Test and Targeted Individual Test).

[126] *Williams*, 132 S. Ct. at 2273 (Kagan, J., dissenting).

[127] *Id.* at 2275 (Kagan, J., dissenting).

[128] *Tearman*, 72 M.J. at 64 (Baker, C.J., concurring).

[129] *See* DoDI 1010.01 *supra* notes 74-75, 77*; see also* accompany text (describing standard military drug testing protocol).

[130] *See supra* text accompanying notes 56-66 (describing Evidence Test and Targeted Individual Test); *see also supra* text accompanying notes 111-117 (describing *Sweeney* opinion).

[131] *Tearman*, 72 M.J. at 64 (Baker, C.J., concurring).

[132] *Sweeney*, 70 M.J. at 304.

[133] *Blazier I*, 68 M.J. at 440.

[134] *See* United States v. Byrne, 70 M.J. 611, 616 (C.G. Ct. Crim. App. 2011) (describing differences between cover memorandum in *Blazier* and *Byrne*); *see also Williams*, 132 S. Ct. 2259 –61 (describing Formality Test).

[135] *Tearman*, 72 M.J. at 68 (Baker, C.J., concurring). In all likelihood, the government would have an easier time obtaining a conviction in some cases. If the specimen custody document and cover memorandum are non-testimonial, as this Article suggests, the government would be able to introduce the test results on both documents into evidence without calling a live witness, plus admit the expert witnesses' independent opinion at trial. The cover memorandum and the specimen custody document would reinforce the expert's testimony, and in turn the expert's testimony would confirm the written forensic reports. Also the defense would be unable to keep out these two documents on Confrontation Clause grounds—and still would not have the opportunity to cross-examine the authors of either document. *See Blazier II*, 69 M.J. at 225 (explaining expert witness can convey substance of non-testimonial hearsay statements but cannot repeat testimonial hearsay statements).

service courts, and the CAAF will continue to confront the issues raised in this Article.

In *Blazier*, the CAAF set forth a useful framework for analyzing Confrontation Clause challenges in urinalysis cases when the government does not produce every laboratory expert involved in the drug testing process, but "useful" does not mean "dispositive." In *Williams*, the U.S. Supreme Court subjected the Confrontation Clause to rigorous analysis—even if the nine Justices did not agree on the analysis. But a close reading of the Justices' opinions suggests that a majority would hold that key components of the *Blazier* framework are no longer good law, if they were confronted with this particular issue in the future. For that reason alone, *Williams* merits close analysis.

But the CAAF has settled on applying the Supreme Court's Confrontation Clause jurisprudence as if *Williams* never existed. This is wrong. The CAAF should reconsider its view of *Williams* and the government should urge the military judges, the service courts, and the CAAF to do so. To quote Chief Justice Baker, "we should get the law right."[136]

[136] *Tearman*, 72 M.J. at 69 (Baker, C.J., concurring).

Unique Aspects of Article 139 Claims Overseas

*R. Peter Masterton**

I. Introduction

Article 139 of the Uniform Code of Military Justice[1] is a powerful tool that can be used by victims of larceny and vandalism to obtain compensation for the loss of their property. Designed to discourage the "wasting, spoiling, and destroying" of private property,[2] it permits claims to be filed directly against servicemembers who wrongfully take or willfully damage private property.[3] However, its provisions can overlap with the Foreign Claims Act,[4] which permits claimants residing overseas to recover for this same type of damage.[5] Judge advocates and claims professionals working overseas must be aware of this overlap and take appropriate steps to ensure that claims are processed properly.

A. Article 139

Article 139 allows any person or entity to file a claim directly against servicemembers who willfully damage or wrongfully take their property.[6] The claims are paid directly from the pay of the servicemember responsible for the damage or theft.[7] For example, if Private Doe vandalizes his neighbor's vehicle, the neighbor can file a claim directly against Doe and obtain compensation for the damage directly from Doe's pay.

It is critical to process these claims quickly. Since willful damage and wrongful taking of private property are also crimes under the punitive articles of the Uniform Code of Military Justice,[8] the servicemembers responsible will usually face disciplinary action, which may include non-judicial punishment[9] and administrative separation from the service[10] or trial by court-martial. These actions often result in significant forfeitures of pay or the complete termination of entitlement to pay.[11] For this reason, Article 139 claims should never be delayed pending the outcome of disciplinary action.[12]

B. Foreign Claims Act

The Foreign Claims Act permits payment of claims for, among other things, property damage caused by servicemembers.[13] Such claims are payable even when the servicemembers were acting outside the scope of their duties.[14] The Foreign Claims Act only applies overseas and is designed to engender good will and promote friendly relations between U.S. forces and host nations.[15] So, for example, if Private Doe vandalizes a local national's vehicle while stationed in Kosovo, the Foreign Claims Act would permit the local national to file a claim directly against the United States for this damage.[16] In this area, Article 139 overlaps with the Foreign Claims Act.[17]

The same overlap occurs in countries covered by a Status of Forces Agreement. These agreements generally contain a provision allowing the United States to compensate local nationals under U.S. law for damage caused by U.S. servicemembers not acting in the scope of their duties.[18]

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[1] UCMJ art. 139 (2012).

[2] U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 9-2b (21 Mar. 2008) [hereinafter DA PAM 27-162].

[3] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS ch. 9 (8 Feb. 2008) [hereinafter AR 27-20].

[4] 10 U.S.C. §2734 (2012).

[5] AR 27-20, *supra* note 3, para. 10-3a.

[6] *Id*. para. 9-3.

[7] *Id*. para. 9-8h.

[8] *Id*. para. 9-5a. Wrongful taking of private property can be charged as larceny under article 121 of the Uniform Code of Military Justice and willful damage of private property can be charged under article 109. UCMJ, arts. 109, 121 (2012).

[9] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. and pt. V [hereinafter MCM].

[10] *See generally* U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (6 Jun. 2005); U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2005).

[11] MCM *supra* note 9 R.C.M. 1003(b)(2) and pt. V, ¶5. In courts-martial, sentences to forfeiture of pay generally take effect no later than 14 days after sentence is adjudged. UCMJ art. 57. In addition, certain sentences at a court-martial automatically result in forfeitures of pay. UCMJ art. 58b.

[12] AR 27-20, *supra* note 3, para. 9-4a.

[13] *Id*. para. 10-3a.

[14] *Id*.

[15] DA PAM 27-162, *supra* note 2, para. 10-1.

[16] Such a claim would be filed with a Foreign Claims Commission. *See* AR 27-20, *supra* note 3, para. 10-6a.

[17] *Id.* para. 9-5e.

[18] *See, e.g.*, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 Jun. 1951, Art. VIII, para. 6, available at http://www.nato.int/cps/en/natolive/official_texts_17265.htm [hereinafter NATO SOFA].

These "ex-gratia" claims are paid by the United States under the Foreign Claims Act.[19]

So, for example, if Private Doe vandalizes a local national's vehicle while stationed in Germany, where the North Atlantic Treaty Organization Status of Forces Agreement applies, the Foreign Claims Act would permit the local national to file a claim against the United States for the damage. The only difference is that the claim is initially submitted to a "receiving state claims office" (in our example, this would be a "Schadensregulierungsstelle des Bundes," a department of the German government[20]) so it could make a nonbinding recommendation.[21] The claim is subsequently transferred for resolution under the Foreign Claims Act to the U.S. claims office responsible for that country.[22] Again, Article 139 overlaps with the Foreign Claims Act in this area.

C. Avoiding double payment; Precedence of Article 139

Claims professionals overseas need to be aware of the overlap explained above. Because such claims may be payable under more than one provision, they need to be tracked properly to avoid double payment.[23] In addition, the Article 139 claim should be processed first to ensure that the servicemember responsible rather than the American taxpayer pays for the damage.[24]

Tracking claims under both Article 139 and the Foreign Claims Act can be difficult. The Article 139 claim may not be filed with the same command or even the same service as the claim filed under the Foreign Claims Act. Article 139 claims are processed by the command of the servicemember who caused the damage.[25] Most claims under the Foreign Claims Act are referred to a single service of the U.S. forces (the Army, Air Force, or Navy) responsible for all tort claims within the country where the claim arose, regardless of whether the damage was caused by a Soldier, Airman, Sailor, or Marine.[26] So, for example, an Article 139 claim for vandalism by an Airman in Germany would be filed with the Air Force, while the same claim filed under the Foreign Claims Act would be forwarded from the receiving state claims office to the Army under the "single service" claims concept.[27]

Even when only one service is involved, claims under Article 139 and the Foreign Claims Act may be sent to different offices. As mentioned above, Article 139 claims are initially sent to a local commander.[28] Claims under the Foreign Claims Act are referred to a Foreign Claims Commission, which is usually appointed by a Command Claims Service.[29] For example, an Article 139 claim for vandalism by Soldiers in Kaiserslautern, Germany, would be forwarded to a local commander in Kaiserslautern, while an identical claim under the Foreign Claims Act would be forwarded to the appropriate Command Claims Service, the U.S. Army Claims Service Europe in Wiesbaden.[30]

It is critical for claims professionals who process claims that may result in the overlap mentioned above to check with other claims offices, as appropriate.[31] When adjudicating an Article 139 claim, check with the office responsible for processing Foreign Claims Act claims to determine if it is working on a similar claim. Offices adjudicating Foreign Claims Act claims involving willful damage or wrongful taking of property need to conduct a similar check.

Article 139 claims should take precedence over identical claims filed under the Foreign Claims Act. It is better to ensure that payment comes from the servicemember responsible for the loss, rather than the U.S. government. This fulfils the statutory purpose of Article 139 by promoting discipline and protecting the community from vandalism and theft.[32]

The simplest way to ensure that Article 139 claims are processed first is to notify potential claimants, including local nationals, of their right to file such claims. These potential claimants are usually interested in ensuring that the servicemember responsible for the damage to their property is held accountable. Notifying potential claimants may be difficult, however, when receiving state claims offices are involved.[33] In these cases, it is important to coordinate

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[19] AR 27-20, *supra* note 3, para. 7-4b(3).

[20] More information (in German) and addresses for these offices can be found at the German Finance Ministry website at http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Bundesvermoegen/Bundesanstalt_fuer_Immobilienaufgaben/Schadensregulierungsstellen/schadensregulierungsstellen-des-bundes.html.

[21] AR 27-20, *supra* note 3, para. 7-13; NATO SOFA, *supra*, Art. VIII, para. 6a.

[22] AR 27-20, *supra* note 3, para. 7-4b(3); NATO SOFA, *supra*, Art. VIII, para. 6b.

[23] AR 27-20, *supra* note 3, para. 2-15d(2).

[24] DA PAM 27-162, *supra* note 2, para. 9-2a.

[25] AR 27-20, *supra* note 3, para. 9-8c.

[26] *Id*. para. 1-19.

[27] DEP'T OF DEFENSE, INSTRUCTION 5515.08, SUBJECT: ASSIGNMENT OF CLAIMS RESPONSIBILITY (Nov. 11, 2006) encl. 2.

[28] Such claims are forwarded to the offender's Special Court-Martial Convening Authority. AR 27-20, *supra* note 3, para. 9-8c.

[29] *Id*. para. 10-6a. A Foreign Claims Commission can be composed of one or three persons. *Id*. para. 10-7a.

[30] DA PAM 27-162, *supra* note 2, para. 2-15c(2).

[31] AR 27-20, *supra* note 3, para 2-15d(2).

[32] DA PAM 27-162, *supra* note 2, para. 9-2a.

[33] AR 27-20, *supra* note 3, para. 7-13.

closely with these offices to ensure they provide potential claimants with the proper information. Information papers, translated into the local language, may assist in this effort.

When claims are filed under both Article 139 and the Foreign Claims Act for the same incident, the best practice is to hold the Foreign Claims Act claim in abeyance until the Article 139 claim is paid. For example, if Private Doe's vehicle vandalism generates claims under both Article 139 and the Foreign Claims Act, the latter claim should be held in abeyance until the Article 139 claim is processed. If undue financial hardship to the claimant will result, the Foreign Claims Act claim may be paid and the claimant informed of the obligation to repay the United States if the Article 139 claim later succeeds.[34] Unfortunately, it may be difficult for the United States to recoup a double-payment from a foreign claimant.[35] If the Article 139 claim is not successful, the claim should be promptly processed under the Foreign Claims Act. Using the example above, if Doe has already been discharged from the military when the claims are filed, the claim under the Foreign Claims Act should be immediately processed and paid, as appropriate.

II. Conclusion

The overlap between Article 139 and the Foreign Claims Act is just one of the many challenges that claims professionals overseas face. Proper tracking of these claims is critical to ensure that claimants are not compensated under both Article 139 and the Foreign Claims Act. In addition, close coordination with potential claimants and foreign claims officials will help ensure that the Article 139 claims are processed first, so payment comes from the servicemember responsible for the damage.

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[34] *Id.* para. 9-8e. Payment of an Article 139 claim under the Foreign Claims Act should be approved only when necessary to prevent financial hardship to the claimant, not merely to avoid an inconvenience. DA PAM 27-152, *supra* note 2, para 9-8e.

[35] The ability of the United States to collect claim overpayments from a foreign national may be complicated if the foreign national is not employed by the United States or otherwise have financial dealings with the United States. One method of collecting debts owed to the United States is by administrative offset against other payments due to the debtor from the United States. 31 U.S.C. §3716 (2012). For example, claims overpayments made to employees of the United States under the Personnel Claims Act, 31 U.S.C. §3721 (2012), can be collected through deductions from the employee's pay. DA PAM 27-162, *supra* note 2, para. 11-37. This means it is not available for individuals not employed by the United States.

The Admirals: Nimitz, Halsey, Leahy, and King – The Five Star Admirals Who Won the War At Sea[1]

Reviewed by *Major E. Patrick Gilman*[*]

Leadership . . . consists of picking good men and helping them do their best for you. The attributes of loyalty, discipline and devotion to duty on the part of subordinates must be matched by patience, tolerance and understanding on the part of superiors.[2]

I. Introduction

What differentiates a good from a great man? How do great men come to be? In his book, *The Admirals*, author Walter Borneman tells the story of four great Americans: William Leahy, Ernest King, Chester Nimitz, and William Halsey. Mr. Borneman discusses why, in his estimation, the only four men in the history of the United States Navy to achieve the rank of fleet admiral (five-star admiral) were great men, and how those great men came to be during the same period in history. In doing so, he takes his readers on a historical journey from the Spanish-American War through World War II and explains in detail how these four men not only created the modern U.S. Navy, but also won World War II. For students of this period of American history and students of United States naval history, some suggest there is, perhaps, no better single work.[3]

Yet, its depth is also its weakness. Mr. Borneman's description of the rise of these four men and their contributions to the creation of the greatest naval force in history is detailed and nuanced. So much so, that the book is, at times, both confusing and difficult to follow. For readers who are not historians or students of the World War II era, the book may even be a bit of a bore.

II. Beginnings

> Each of the fleet Admirals . . . had the "ability to make men admire them one way or another." But far more than instilling admiration alone, each in quite different ways possessed a commanding presence that engendered commitment and resolve toward a common purpose. King demonstrated it by bluster and verve; Nimitz by putting his hand on your shoulder and saying, "Let's get this thing done;" Halsey—still the fullback—by rushing through the line in such a way that everyone on the team wanted to go through with him; and Leahy with never letting his own personal feelings, or those of others, interfere with the long-range objectives and best interests of his country.[4]

As the four most famous admirals in American naval history, Earnest King's, Chester Nimitz's, William Leahy's, and William Halsey's names fill the pages of countless books. Their biographies and tales of their exploits line the shelves (virtual or actual) of popular book retailers. Yet, Mr. Borneman, much like the incredible men he wrote about, did what no one before him had; he combined the individual stories of the four most influential naval officers in history, providing his readers with a micro view of their lives and a macro view of their impact on each other, the United States Navy, and the United States of America during the most momentous war the modern world has ever known.[5] The sheer brilliance of this accomplishment, however, is also the book's greatest weakness. In merging the stories of the four men, Mr. Borneman's writing, at times, is so nuanced that it is difficult to follow. The book reads more like a documentary, or a lesson in history, than that of a book trying to convey a salient message to its readers.

Mr. Borneman begins *The Admirals* by devoting a chapter to each of the four main characters.[6] He begins

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[1] WALTER R. BORNEMAN, THE ADMIRALS: NIMITZ, HALSEY, LEAHY AND KING – THE FIVE STAR ADMIRALS WHO WON THE WAR AT SEA (2012).

[2] BORNEMAN, *supra* note 1.

[3] *See generally* Robert F. Dunn, *Book Review:The Admirals'*, WASH. TIMES, Aug. 14, 2012, http://www.washingtontimes .com/news/2012 /aug/14/how-navy-giants-secured-victory.

[4] BORNEMAN, *supra* note 1.

[5] John Lehman, *"The Admirals: Nimitz, Halsey, Leahy, and King – The Five-Star Admirals Who Won the War at Sea," by Walter R. Borneman*, WASH POST, June 29, 2012, http://www.washingtontpost. com/opinions /the-admirals-nimitz-halsey-e-war-at-sea-by-walter-r-borneman/2012/06 /29/gJQAR95MCW_story.html.

[6] BORNEMAN, *supra* note 1, at Part One: Sailors, 1897-1918, Chapter 1, Leahy: "The Judge"—Annapolis, Class of 1897; Chapter 2, King: "Rey"—Annapolis , Class of 1901; Chapter 3, Halsey: "Pudge"—

before each man was born, takes the readers through their childhoods, and introduces the readers to their families. He takes his readers to the Naval Academy with each of the four men and discusses, at considerable length, their time in school and their initial assignments.[7] Mr. Borneman attempts to illustrate that each of these men differed greatly from one another and all converged on the U.S. Navy from very different paths.

Mr. Borneman begins with William Leahy. Fleet Admiral Leahy, born in Hampton, Iowa, on May 6, 1875, was the first of eight children, and was raised by his mother and father in Wisconsin.[8] Leahy's father, an attorney, wanted his son, William, to pursue a law degree. William, intrigued by his father's military service, decided instead to seek an appointment to the U.S. Military Academy at West Point.[9] As luck would have it, his Congressman did not have any appointments to the military academy that year, but was willing to give him a nomination the following year to the U.S. Naval Academy at Annapolis.[10] Despite being the weaker of the two academies at the time, Leahy accepted the appointment and in May, 1893, began his career in the U.S. Navy.[11]

Ernest Joseph King was born November 23, 1878, in rural Lorain, Ohio.[12] From the time he was a very young child, Ernest King was never afraid to speak his mind. "Absolute candor, no matter how rude or insulting, became his trademark."[13] King was clearly no fool, nor was he looking to follow in his father's footsteps working in the machining industry in Ohio.[14] Instead, King pursued an appointment to the U.S. Navy from Congressman Winfield Scott Kerr.[15] After excelling at Kerr's examinations, he was awarded Kerr's appointment.[16] On August 15, 1897, Ernest J. King—who would become known as a frequent smoker, drinker, and philanderer[17]— began his career in the U.S. Navy.[18]

William Frederick Halsey, Jr. was born on October 30, 1882, to a long line of sailors and "at least one pirate."[19] Unlike his contemporaries, Bill Halsey was not much of a student.[20] Though he tried time after time to receive a Presidential appointment to the Naval Academy, by the fall of 1899, it was clear that was not going to happen.[21] After a dismal first year at the University of Virginia, it was clear that medical school was not an option either.[22] However, in the wake of the Spanish-American War naval build-up, the President received an additional five academy appointments. Bound and determined to see her son at Annapolis, Halsey's mother "camped in McKinley's office until he promised her one for [him]."[23] On July 7, 1900, William Halsey followed in his father's footsteps by beginning his naval career.[24]

Finally, Chester William Nimitz was born on February 24, 1885, to his widowed mother in Fredericksburg, Texas.[25] Nimitz, much like his contemporaries, was seeking a way out of a small town and a life of boredom—for him it would have been working in his grandfather's hotel or butcher shops.[26] His first choice, much like that of Leahy's, was seeking an appointment to West Point.[27] Also like Leahy's, Nimitz's Congressman only had appointments remaining for the Naval Academy in 1901.[28] Nimitz excelled at his examinations for the appointment and on September 7, 1901, he too began his career in the U.S. Navy.[29]

III. Common Ground

> Yes, the fleet admirals were different, but each had an enduring sense of duty, mission, and love of country that had been honed years before on the banks of the Severn. Each of them first learned to be

Annapolis, Class of 1904; Chapter 4, Nimitz: "Nim-i-tiz"—Annapolis, Class of 1905.

[7] *Id.* at 16-25, 30-36, 45-49, 57-63.

[8] *Id.* at 14.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 16.

[12] *Id.* at 28.

[13] *Id.* at 29.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 30.

[17] Lehman, *supra* note 5.

[18] BORNEMAN, *supra* note 1, at 30.

[19] *Id*. at 43.

[20] *Id*. at 44.

[21] *Id*.

[22] *Id*. at 45.

[23] *Id*.

[24] *Id*.

[25] *Id.* at 55.

[26] *Id.* at 56.

[27] *Id*.

[28] *Id*.

[29] *Id.* at 57.

> a follower. Then each unquestionably became a leader. All played pivotal roles in bringing the United States Navy to the pinnacle of naval power.[30]

In his attempt to explain the lives and contributions of the fleet admirals, the author makes it clear that though each of the four men attended the U.S. Naval Academy at Annapolis, all graduating within ten years of each other (Leahy being the outlier, graduating in 1893), they were all very different. While their successes in large part mirrored each other's, the paths they travelled to their fifth stars did not. In a word, the men were diverse. Yet, together they were able to "transform Theodore Roosevelt's Great White Fleet of their youth into his cousin Franklin's ultimate weapon of global supremacy."[31]

The last of three sections of the book—"Admirals, 1941-1945"—recount, almost in full, the day-to-day activities of the fleet admirals,[32] while essentially summarizing the battles in which they engaged. In doing so, Mr. Borneman, by others' accounts, matures and cultivates the fleet admirals' personalities for what he believed them to be.[33]

> Four distinct, complex and colorful personalities emerge from Borneman's prose. King was at once a mercurial egoist, a calculating careerist, an innovative administrator, and a brilliant strategist. Although Nimitz's ability as a master strategist equaled King's, the patient and thoughtful leadership style of this dedicated family man stood in marked contrast to that of his senior. Dynamic and pugnacious, []Halsey basked in the flow of public admiration, yet he privately suffered from nervous disorders that took him out of the fight at key moments. Dismissive of any 'standard protocol' that might impede action, Halsey also failed to heed important advice from his counselors—a reckless tendency that Borneman blames for the tragic loss of life suffered [,] caused when the indomitable admiral let his fleet into typhoons during the fall/winter of 1944-45. While Halsey reveled in publicity, Leahy actively avoided it. Such studied reticence often earns Leahy a mere mention in the footnotes of his historical accounts.[34]

Regardless of their distinct personalities and varied backgrounds, what the author attempts to crystallize is that the fleet admirals' common abilities to inspire and motivate made them great. The fact that Earnest King was a "vain, hot-tempered, argumentative, hard-drinking womanizer" did not matter in the World War II United States Navy.[35] It was his brilliance as a sailor that propelled him above his peers to Commander in Chief, United States Fleet, at the end of 1941, and in 1942, Commander in Chief, Naval Operations.[36]

Halsey, Leahy, and Nimitz were no different. Each of them had their quirks—Halsey, also a heavy drinker, was quite brash and insensitive with some of his public remarks.[37] Leahy was the statesman of the group. After he had retired, he was recalled to active duty by his friend, President Franklin D. Roosevelt, to serve as the President's senior military advisor.[38] Of the four, Nimitz is the hero that stands out most.[39] Known to be "patient, incisive, courteous, and diplomatic," he is the fleet admiral most written about, and "Borneman, in clear and concise writing, merely adds to the legend that is Chester Nimitz."[40]

Mr. Borneman's work, however, is far from perfect. There is no arguing that the fleet admirals individually and collectively were great men. They were patriots and heroes. They were the sailors from which modern lore is created. However, in 476 pages of intersecting stories of battles and relationships, discussions of wives and children, talk of courts-martial,[41] and of grounding ships,[42] it is easy to lose track of who's who and of each of the four men's

[30] *Id.* at 473-74.

[31] *Id.* at 3.

[32] Scott Mobley, *Book Review – The Admirals: Nimitz, Halsey, Leahy, and King – The Five-Star Admirals Who Won the War at Sea* (March 26, 2013), http://www.navyhistory.org/2013/03/book-review-admirals-nimitz-halsey-leahy-king-five-star-admirals-won-war-at-sea/.

[33] *See* Dunn, *supra* note 3; Lehman, *supra* note 5; Mobley, *supra* note 34; Andrew Roberts, *The Hands on the Tiller*, WALL ST. J., May 25, 2012, http://www.online.wsj.com/news/articles/SB10001424052702303513404577356392157165950.

[34] Mobley, *supra* note 32.

[35] Lehman, *supra* note 5.

[36] BORNEMAN, *supra* note 1, at 5, 214.

[37] *See* Dunn, *supra* note 3.

[38] BORNEMAN, *supra* note 1, at 269.

[39] Dunn, *supra* note 3.

[40] *Id*.

[41] BORNEMAN, *supra* note 1, at 64.

[42] *Id*. at 64, 295.

individual contributions. Mr. Borneman, as evidenced by the sheer volume of sources referenced throughout his book,[43] had a seemingly unmanageable amount of information to convey to his readers, such that some of that information often comes across jumbled and confused. Mr. Borneman certainly tells a story about leaders; he does not, however, tell a story about leadership.

IV. Conclusion

> "You will, . . . all have to a greater or lesser degree something that is intangible . . . a combination of loyalty to ideals, tradition, courage, devotion, clean living, and clear thinking. It is more than 'esprit do corps' because it reaches far beyond the corps and comradeship."[44]

The final chapter of *The Admirals* sums up the contributions and attributes of the four fleet admirals—good and bad—and gives readers an understanding of their lives after the navy, ultimately culminating with their deaths. Whether enjoyable or a bore, Mr. Borneman's work told the stories of four great men who were patriots, scholars, and statesmen. Why are their stories so important? Why are their stories relevant? The answers are not clear. *The Admirals* discusses the lives of leaders, but it is not a book about leadership. It is a lesson on United States history—more specifically the history of the U.S. Navy these four men built, but not much more. Notwithstanding, it is clear the fleet admirals were exceptional men.

> Once, when two enlisted men were walking along a passageway shooting the breeze, one of them acknowledged, "I'd go to hell for that old son of a bitch." The sailor felt a poke in his back and turned around to find Halsey playfully wagging a finger. "Not so old, young man."[45]

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[43] *Id.* at 495-532.

[44] *Id.* at 474.

[45] *Id.* at 473.

How Will You Measure Your Life?[1]

Reviewed by *Major Edward L. Westfall*[*]

And he was rich—yes—richer than a king. And admirably schooled in every grace: In fine we thought he was everything. To make us wish that we were in his place.
So on we worked and waited for the light, and went without the meat and cursed the bread; and Richard Cory, one calm summer night, went home and put a bullet to his head.[2]

I. Introduction

While brutal, there is no better illustration of the maxim "money can't buy happiness" than the poem and tale of Mr. Richard Cory.[3] Professionals can find enormous financial success and often end up with a shallow job and nonexistent personal lives. In the book, *How Will You Measure Your Life*, Professor Clayton Christensen of Harvard Business School (along with James Allworth and Karen Dillon) argues that these unseen fissures result from a systemic misbalance of personal and professional satisfaction.[4] His inspiration is based primarily on the dissonance between financial success and personal happiness that he witnessed in his students and business colleagues.[5] The book is a noble attempt to apply several leading business theories to one's personal life. The book succeeds in some areas, and falls short in others.

The author is at his strongest when applying these principles to charting a course for genuine *professional* satisfaction. The analysis becomes strained, however, when applying these same principles to common facets of *personal* life, such as marital relationships and child rearing. This review will examine the two primary sections of the book that apply business theories to professional and personal satisfaction, respectively, as well as discuss some, but not all, of the applied theories, evaluate their effectiveness, and highlight any use they may have to the career or personal life of a military professional.

Of note, the author does not provide any formal references or sources, which is an overall issue with the composition of the book. When it was possible to glean enough reference information concerning a specific theory, the primary source of the theory was consulted and referenced in this review if appropriate. However, the lack of references makes it difficult to truly scrutinize some concepts the author discusses. Many theories appear to be derived from several academic articles published over several years. Furthermore, in one case, the author's cited support is not found within the referenced source.[6] While there are obvious problems, this book still contains some insights of value to a military officer.

II. A Better Title: How to Chart Your Career

For two reasons, a more apt title for this book would be *How to Chart your Career*. First, this title highlights the most effective part of the author's work. As analyzed below, the author makes several strong points, deftly explained in simple terms, on ways any professional can approach career planning with greater ease. Second, the crux of the author's analysis is really how to navigate the important decisions of life, not measure them.

The first section of the book makes four primary points. First, the author makes an argument (that is echoed throughout both sections) for the value of sound theory versus anecdote.[7] Second, he discusses three main business theories that can help any professional in making decisions throughout a career. These concepts vary from valuing more than just your annual salary when making job decisions, being open to unforeseen opportunities, and lastly, understanding the importance of applying one's resources to the right priorities.[8]

As argued by Professor Christensen, in its most basic form, a theory attempts to describe the true reasons for a certain phenomenon while an anecdote merely represents a story of how one thing worked at one time.[9] While quite simple, this is one of the more valuable lessons of the book. In attempting to learn from the past successes of any business or individual, you must give more weight to the theory or process that was used, not the specific facts of any given success story. One should always try to replicate *how*

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[1] CLAYTON M. CHRISTENSEN ET. AL., HOW WILL YOU MEASURE YOUR LIFE (2012). *See also* HOW WILL YOU MEASURE YOUR LIFE?, *www.measureyourlife.com/authors* (last visited July 29, 2015).

[2] EDWIN ARLINGTON ROBINSON, RICHARD CORY (Magill's Survey of American Literature Revised Edition, William Sheick ed., Salem Press 2007) (1897).

[3] *Id*.

[4] CHRISTENSEN ET AL., *supra* note 1, at 3-4.

[5] *Id*. at 7.

[6] *See infra* note 30.

[7] *Id*. at 12.

[8] *Id*. at 21-75.

[9] *Id*. at 12.

an organization or individual tackled a problem and not simply mimic *what* they did to tackle the problem.[10]

A. Motivation/Hygiene Theory

The first theory discussed for charting a satisfying professional life is the Motivation/Hygiene Theory.[11] The author uses this theory to counter the prevailing belief that a higher salary equals higher job satisfaction—otherwise known as the Incentive Theory.[12] In contrast to Incentive Theory, the Motivation/Hygiene Theory attempts a more nuanced and complex calculus of what can truly lead to professional satisfaction.[13]

To summarize this theory, job satisfaction is based on two factors: hygiene factors and motivation factors. The hygiene factors are those which closely parallel the factors discussed by Incentive Theory such as salary, prestige, the size of one's office, etc.[14] This theory, however, departs from Incentive Theory when it argues that satisfaction is also made up of "motivation factors."[15] These factors include the perceived importance of someone's work, the intrinsic value of being challenged, and the opportunity to solve new problems.[16] This theory poses that these motivation factors may or may not always equate with higher hygiene factors such as increased salary.[17] As the proponent of the theory, Frederick Herzburg argues that a lack of hygiene factors can obviously promote job dissatisfaction but high hygiene factors do not necessarily cause high job satisfaction.[18] In essence, you need the basics of a decent wage and working conditions to ensure an employee is not dissatisfied. However, a job needs to provide the intrinsic values of achievement, recognition, advancement, and personal growth in order to move that employee from just being "not dissatisfied" to truly satisfied.[19]

The author's application of this theory is a strong argument that should ring true for any military professional. For anyone in the military, the fact that your paycheck comes on time and is enough to support you and your family's basic needs is obviously important. However there are plenty of judge advocates and other military officers who are paid on time every month and would still say that they are not satisfied with their job. Specific research on this issue is well beyond the scope of this review, but it is a logical assumption that the definition of true satisfaction for any judge advocate can come, at least in part, from their perceived value to their office, their ability to be trusted with more responsibility, and the opportunity to tackle new problem sets.

This theory can help a judge advocate in assessing both himself and in leading other Soldiers. In deciding a career path, any officer would be wise to consider how a new position may personally challenge them and give them increased levels of responsibility. In the supervision of other Soldiers, judge advocates should take this theory into account when trying to motivate subordinates to accomplish the mission. You can always order a Soldier to do something and he will most likely do it. But if you can craft a work environment that allows for personal growth, increased responsibility, and new challenges, he just may *want* to do it.

B. Knowing When to Plan and Knowing When to Improvise

"Only a few lucky companies start off with the strategy that ultimately leads to success."[20] Professor Christensen argues that one must apply both emergent and deliberate strategies when trying to chart your career. The key to making the right decision when faced with a fork in the road along your career path is understanding the difference between "deliberate strategy" and "emergent strategy." A deliberate strategy is one that is well thought out in advance and encompasses a longer time horizon of a year to several years. For many professionals, this would be your five year plan. An emergent strategy is a plan based upon new and unexpected information or opportunities that disrupt your initial deliberate strategy. The author illustrates this dilemma with the challenges Honda faced in the 1990s while attempting to enter the U.S. motorcycle market.[21]

This application also represents one of the more valuable portions of the book that is also directly relatable to career choices faced by judge advocates. The true value of this theory does not lie in the advice that you should be open

[10] *Id.*

[11] *Id.* at 29.

[12] Michael Jensen and William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, Journal of Financial Economics, October, 1976, V. 3, No. 4, pp. 305-60. Incentive theory as proposed by Jensen and Meckling is that a business runs best when the personal profit interests of management are aligned with those of the shareholders hence the concept of stock options, among other compensation packages. According to the author of *How to Measure Your Life*, this has become a dominant school of thought for corporations and executive compensation. *Supra* note 1, at 30.

[13] CHRISTENSEN ET AL., *supra* note 1, at 29-34.

[14] *Id.* at 31.

[15] *Id.*

[16] *Id.* at 32.

[17] *Id.*

[18] Frederick Herzberg, *One More Time: How do you Motivate Employees?*, Harvard Business Review, September-October 1987, Reprint Number 87507, pp 6-8.

[19] *Id.*

[20] CHRISTENSEN ET AL., *supra* note 1, at 60.

[21] *Id.* at 42.

to unforeseen opportunities. That would be a rather severe case of stating the obvious. The true value is in the business decision mechanism the author provides for knowing when to stick to your original plan and when to take advantage of what you did not see coming. This mechanism is known as "discovery driven planning."[22] Its essence is simple: when deciding upon a new course of action that may disrupt your primary long term strategy, you should identify which assumptions you have made that must be true in order for you to have a realistic chance of success.[23] While it sounds like common sense, Professor Christensen details several business decisions over the past 30 years where large and sophisticated corporations failed to do this and lost billions of dollars.[24]

This principle should not sound unfamiliar to a military officer. Assumptions and their associated risks are a primary focus of the military decision making process.[25] Moreover, the iterative review process for emergent and deliberate strategies discussed by the author mirror the "detect-deliver-assess" procedures ingrained into the targeting process of any Army unit's planning cell.[26] While this is a familiar concept, it is valuable for a judge advocate to see it illustrated and applied outside of the military context. This reveals a tool that can help a judge advocate decide between the option of an unforeseen job opportunity (that random phone call from the Personnel, Plans and Training Office) and sticking to a career plan forged several years ago.

III. The Tenuous Application of Business Theory to Family Life

The second section of the book presents additional theories, similar to those discussed above, in an attempt to draw lessons that can be applied to the challenges of marital relationships and raising children. Each theory's description and business anecdotal illustrations are just as enlightening as those discussed in the first section. However, the author haphazardly applies them to common personal life challenges without the same clarity he used in the previous half of the book.

For example, the author spends a great deal of time explaining the business theory of "Good and Bad Capital."[27] In short, this theory poses that a new business venture should be flexible enough to try various strategies at profitability prior to devoting large amounts of capital towards one strategy.[28] This is good advice, despite the fact that it is not supported by the data as strongly as the author claims.[29] The author then attempts to tie this theory to the concept that one should not wait to invest in your family until later on in life.[30] This is also good advice; however, unlike the previous section, the author fails to draw the clear link between his posed theory and its application. After several re-reads of that chapter, it is still difficult to find the relationship between the family advice he proffers (essentially do not wait until your children are teenagers to become a part of their life) and the theory that new businesses should not rigidly follow their original plan if they truly want to be successful.

In other areas of this section, the author lists superficial anecdotal evidence to support his assertions. For example, another discussion of theory ends with an argument that "sacrifice deepens our commitment" to our families, friends and loved ones.[31] Little empirical evidence is either cited (or probably even available) to support this platitude. However, the author then provides a very superficial example to prove his point that completely misses the mark. To support his notion, the author gives the example of the U.S. Marine Corps. In a matter of one paragraph he simply states that Marine training is very difficult but yet you still see a lot of "Semper Fi" bumper stickers across the country.[32]

The author then quickly moves on to a discussion of his daughter's experience as a missionary.

While the Marines may be an example of sacrifice deepening commitment, a cursory example to quickly imply the correlation between rugged basic training and observations of bumper stickers is an unconvincing way to prove your point. This appeares to be out of form for an author who does so well tying every anecdote or business

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[22] *Id.* at 53; *See also* Rita McGrath and Ian MacMillan, *Discovery Driven Planning*, Harvard Business Review, July 1995.

[23] *See* McGrath et al., *supra*, note 23.

[24] CHRISTENSEN ET AL., *supra* note 1, at 55-57. The author details the debacle that Disney faced after opening "Euro Disney" without testing the simple assumption that most visitors to the park would stay for three days like they did in the United States. This failure led to roughly a billion dollar lost in two years.

[25] U.S. DEP'T OF ARMY, DOCTRINE PUB. 5-0, THE OPERATIONS PROCESS (May 2012).

[26] U.S. DEP'T OF ARMY, FIELD MANUEL 3-60, THE TARGETING PROCESS para 2-1 (November 2010).

[27] CHRISTENSEN ET AL., *supra* note 1, at 87-91.

[28] *Id.*

[29] *See Id.* at 87. *See also* AMAR BHIDE, THE ORIGIN AND EVOLUTION OF NEW BUSINESS 65 (1999) (electronic copy retrieved at http://bhide.net/). The author of How Will You Measure Your Life cited Bhide's book as stating that "93% of successful businesses had to abandon their original idea." CHRISTENSEN ET AL., *supra* note 1, at 87. Data to support this claim was not found in a review of Bhide's book and Bhide's studies actually show that approximately 66% of businesses had to abandon or modify their original business plan. Perhaps the author was citing to a different study by Bhide, but this illustrates the difficulty in assessing this book based on its lack of clear references.

[30] CHRISTENSEN ET AL., *supra* note 1, at 91.

[31] *Id.* at 116.

[32] *Id.*

example to his primary arguments in the first section of the work.

The second section did have a discussion which is valuable for every judge advocate. The author discusses the importance of building a positive and ethical culture in one's family, by discussing examples of positive corporate cultures found throughout the United States.[33] He poignantly states that "[M]ake no mistake: a culture happens [in a family, business, or any organization] whether you want it or not. The only question is, 'How hard are you going to try to influence it?'"[34]

As a lesson for setting an ethical climate within a unit or office, this could not hit closer to home for judge advocates. The author's point is that the culture of a family (or office) develops from repetitive observed behaviors. A judge advocate must realize that paralegals, civilian employees, and other officers are always watching. What is allowed once, will be hard to prohibit again; or as the author states "doing the ethical thing 100 percent of the time is easier than 98 percent of the time."[35]

IV. Conclusion

How Will You Measure Your Life provides an approachable analysis of several business theories that many judge advocates may otherwise never encounter. As previously discussed, these theories can prove valuable when wrestling with the choices associated with a career path and the challenges of leading a team or legal office. These principles can, at the very least, assist leaders in creating an environment in which subordinates achieve professional satisfaction.

The book falls short of its promise to provide theories which can be applied to one's personal life. The analysis and support for these connections prove to be somewhat rushed and stretched to meet the author's purpose. Notwithstanding any theory, we can never be reminded too often to ensure that we devote time to both personal and professional pursuits. One can be "richer than a king" and "schooled in every grace" but still lead a joyless and empty life when it is time to go home for the night.[36] Professor Christensen's simple and approachable treatment of these theories is bound to open the eyes of anyone seeking a different set of tools to analyze the tough career and leadership decisions that we must all make.

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[33] *Id.* at 160-66.

[34] *Id.* at 169.

[35] *Id.* at 189.

[36] EDWIN ARLINGTON ROBINSON, RICHARD CORY, *supra* note 2.

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