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Lore of the Corps

Articles

TJAGLCS Features

New Developments

Book Reviews

Lore of the Corps

From Private to Brigadier General to U.S. Court of Appeals Judge: Emory M. Sneeden (1927-1987)

By Fred L. Borch
Regimental Historian & Archivist

Only one judge advocate in history has retired after an active duty career in the Corps and gone on to serve as an Article III federal appellate court judge: Brigadier General Emory M. Sneeden.[1] This is his story.

Born in Wilmington, North Carolina, on May 30, 1927, Emory Marlin Sneeden began his Army career in 1944 as a private in the 647th Parachute Field Artillery Battalion.[2] He served in the Pacific in World War II, and in 1946, he returned to civilian life.[3] Emory then earned a Bachelor of Science degree from Wake Forest University in 1949.[4]

After graduation, Sneeden began law school, but with the outbreak of the Korean War, he returned to active duty in January 1951.[5] He first served at Fort Bragg with the 325th Infantry Regiment before deploying to the Korean peninsula where he earned the Korean Service Medal and the United Nations Service Medal.[6] Captain Sneeden left active duty after this combat tour and returned to Wake Forest University where he received his Bachelor of Laws degree in 1953.[7] He was admitted to the South Carolina Bar that same year.[8]

Sneeden transferred to The Judge Advocate General's Corps in 1955.[9] In his early assignments, Sneeden served in Japan and Korea where he was both a trial counsel and a defense counsel.[10] He served on the faculty at The Judge Advocate General's School before being assigned to Germany as the Deputy Staff Judge Advocate for the Northern Area Command, then located in Frankfurt, Germany.[11] Major Sneeden returned to the United States for duty as the Assistant Chief of the Career Management Division,[12] what is now referred to as the Personnel, Plans and Training Office.

In 1966, Lieutenant Colonel Sneeden deployed to Vietnam where he assumed duties as the Staff Judge Advocate, 1st Air Cavalry Division.[13] He left in 1967 and returned to the United States for a year. Lieutenant Colonel Sneeden then returned to Asia to become the Staff Judge Advocate, U.S. Army Japan.[14]

Brigadier General Emory M. Sneeden, circa 1974

After this assignment, he attended the U.S. Army War College where he graduated in 1970.[15] Then, he returned to the Pentagon to be the Chief of the Personnel, Plans and Training Office (PP&TO).[16] This was an especially difficult

[1] U.S. CONST. art. III. Federal appellate judges exercise judicial power vested in the judicial branch by Article III of the U.S. Constitution. *See id.*

[2] U.S. Court of Military Appeals, In Memoriam Emory M. Sneeden 9 (Oct. 14, 1987) (unpublished bulletin) (on file with author) [hereinafter In Memoriam Emory Sneeden].

[3] *Id.*

[4] *Id.*

[5] Nat'l Archives and Records Admin., NA Form 13164, Information Releasable Under the Freedom of Info. Act Regarding Emory M. Sneeden (2015) (on file with author) [hereinafter FOIA Release].

[6] *Id.*

[7] In Memoriam Emory Sneeden, *supra* note 2, at 6.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

assignment, because at that time, the Vietnam War was winding down and the personnel picture of the Army was very turbulent.[17] After one year at PP&TO, Colonel Sneeden served as the Executive Officer to The Judge Advocate General.[18]

In 1972, Emory Sneeden was selected to be the Staff Judge Advocate, XVIII Airborne Corps.[19] He was the top airborne lawyer until June 1974, when he was selected for promotion to flag rank.[20] In his last assignment on active duty, Brigadier General Emory Sneeden was the Chief Judge of the U.S. Army Court of Military Review and Chief, U.S. Army Legal Services Agency.[21] He retired from active duty on December 31, 1975.[22]

Given his strong connections to South Carolina—and to Senator Strom Thurmond, the senior senator from that state—Sneeden immediately took up a new job as Thurmond's legislative and administrative assistant.[23] At Senator Thurmond's direction, Sneeden also served as Chief Minority Counsel on the Senate Judiciary Subcommittee on Antitrust and Monopoly.[24] By the time he left that job in 1976, Sneeden was known "as one of the foremost authorities on antitrust law in the District of Columbia."[25] The University of South Carolina certainly recognized this expertise, as Sneeden lectured in antitrust law at its law school and served as associate dean from 1978-1982.[26]

In 1977, Sneeden moved to the Judiciary Committee as its Chief Minority Counsel and, after the Republicans took control of the Senate, he served as the Chief Counsel for the Committee.[27] In 1981, Brigadier General Sneeden left public service to become "of counsel" to the Washington, D.C., law firm of Randall, Bangert and Thelen.[28] He was also a member of the Columbia, South Carolina law firm of McNair, Glenn, Konduros, Corley, Singletary, Porter and Dribble.[29]

On August 1, 1984, Sneeden was nominated by President Ronald Reagan to a newly-created seat on the U.S. Court of Appeals for the Fourth Circuit.[30] He was confirmed by the Senate less than ten weeks later, on October 4, 1984.[31] This was the first and only time in military legal history that a retired Army lawyer joined an Article III appellate court. Sadly, ill health caused Judge Sneeden to resign from the court on March 1, 1986.[32] Honorable Emory M. Sneeden died of cancer the following year, on September 24, 1987, in Durham, North Carolina.[33]

Shortly after his untimely death at the age of 60 years, an associate familiar with Sneeden's "legacy of honest, important, fair and dedicated public service" observed that if Judge Sneeden had not left the Circuit Court of Appeals when he did, he might have been nominated for the U.S. Supreme Court in 1987 instead of Judge Robert H. Bork.[34] Whether or not this is true is hard to know, but the observation indicates the incredibly high esteem in which Brigadier General Sneeden was held by his fellow lawyers.

Brigadier General Sneeden is also remembered by members of our Regiment who served with him: In May 1989, the Hanau (Germany) Legal Center, part of the 3rd Armored Division's operational area, dedicated its courtroom to his memory.[35]

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.

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* (Sneeden was a senior parachutist).

[21] *Id.*

[22] *Id.*; *see* FOIA Release, *supra* note 5.

[23] In Memoriam Emory Sneeden, *supra* note 2, at 6.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Act of July 10, 1984, Pub. L. No. 98-353, § 201(a)(1), 98 Stat. 333, 346 (giving the President authority "to appoint, with advice and consent of Senate . . . one additional circuit judge for Fourth Circuit Court of Appeals").

[31] *Biographical Dictionary of Federal Judges*, FEDERAL JUDICIARY CENTER, http://www.fjc.gov/servlet/nGetInfo?jid =2235&cid=999&ctype=na&instate=na (last visited Apr. 1, 2016).

[32] *Id.*

[33] *Id.*

[34] Charles A. White, *The Loss of a Friend*, NEWSLETTER (Friends of the Judge Advocate Gen.'s Sch. Comm.), Sept. 26, 1987. On July 1, 1987, President Reagan nominated Robert H. Bork to the U.S. Supreme Court. MARK GITENSTEIN, MATTERS OF PRINCIPLE: AN INSIDER'S ACCOUNT OF AMERICA'S REJECTION OF ROBERT BORK'S NOMINATION TO THE SUPREME COURT 53 (1992). After a hotly contested debate in the U.S. Senate, Bork was defeated by a vote of 58 to 42. *Id.* at 14. *See also* ROBERT H. BORK, THE TEMPTING OF AMERICA (1989).

[35] *Court Can Now Convene in Hanau*, HANAU HERALD (GERMANY), June 1, 1989, at 1.

Good Staff Work: Achieving Efficiency with Candid Panel Selection Advice

Major Joshua J. Wolff[*]

We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.[1]

I. Introduction

You are the new chief of military justice (CoJ) at Fort Bayonet. Your general court-martial convening authority (GCMCA) uses a standing panel to hear courts-martial.[2] It is time to select a new panel to relieve the current members of this extra duty, and to account for several transferring personnel. You know the basics of Article 25 of the Uniform Code of Military Justice (UCMJ)[3]: the boss must select whom he believes is "best qualified by reason of age, education, training, experience, length of service, and judicial temperament."[4] While preparing the documents to select the new panel,[5] you recall a warning from your predecessor. She told you to ensure you have a system to deal with loss of quorum.[6] She states, "With the Military Police (MP) Brigade and the Criminal Investigation Command (CID) Group here,[7] we always have at least one panel member who may as well not even show up because they never make it through voir dire.[8] Between cops and the Victim Advocates (VAs),[9] we busted quorum three times last year.[10]"

After researching the issue more, you find that your predecessor had a point. Implied bias is a low standard to grant challenges in courts-martial. The legal standard for "implied bias" is when, despite a disclaimer, most people similarly situated to the court member would be prejudiced *or* when an objective observer would have substantial doubt about the fairness of the accused's court-martial panel.[11] The member may have no bias whatsoever, but if their background raises reasonable concerns, the judge must grant a challenge for cause.[12] Further complicating matters, military judges are required to "liberally grant" challenges raised by the accused in "close cases."[13] Panel members have more education and training than Mark Twain's illiterate ideal juror,[14] but those credentials may decrease the likelihood they can serve on a panel.[15] Without accounting for implied bias, the convening authority (CA) may inadvertently detail personnel whose

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[1] Mark Twain, Address to a Gathering of Americans in London (July 4, 1872), *in* MILTON MELTZER, MARK TWAIN HIMSELF: A PICTORIAL BIOGRAPHY 205 (2002).

[2] 2 Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure § 15-32.00 (3d ed. 2006). Common practice in the Army, a "standing panel" is one that is assembled for the general purpose of hearing all cases referred for trial for a period of time, typically between six months and a year. *Id.*

[3] 10 U.S.C. §§ 801–946 (2012).

[4] UCMJ art. 25 (2012).

[5] These documents typically include the written advice to nominees from subordinate commanders, and an alpha roster listing each member of the command. *See infra* Appendix A for an example of the written advice.

[6] UCMJ art. 16 (2012). The minimum quorum for a general court-martial is five members; special courts-martial require only three members. *Id.* When panel membership falls below quorum following voir dire, staff members must find additional available personnel detailed to the case. *See infra* note 68 and accompanying text (discussing the potential additional requirements when challenges break quorum).

[7] *See infra* Part III.C.1 for further discussion regarding military police (MP) duties. The Army component charged with investigating serious crimes is Criminal Investigation Command (CID). U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B (9 June 2014).

[8] A recent survey indicates *most* jurisdictions have at least one panel member whose background could give rise to implied bias challenges. *See infra* Appendix D. Some even have members whose service on a panel is proscribed by case law. *See infra* note 170.

[9] The acronym VA is an abbreviation for "victim advocate." U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-3 (6 Nov. 2014) [hereinafter AR 600-20].

[10] The minimum quorum for a general court-martial is five members; special courts-martial require only three members. UCMJ art. 16 (2012).

[11] U.S. DEP'T' OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-3 (9 Sept. 2014) [hereinafter DA PAM. 27-9].

[12] *Id.*

[13] *Id.* What constitutes a "close case" can be extremely difficult for a trial judge to discern, as evidenced by two of the most recent cases on implied bias. *Compare* United States v. Peters, No. 14-0289, 2015 CAAF LEXIS 143 (C.A.A.F. Feb. 12, 2015) (finding error based on trial judge denying implied bias challenge raised by professional relationship between trial counsel and panel member), *with* United States v. Castillo, No. 14-0457, 2015 CAAF LEXIS 142 (C.A.A.F. Feb. 12, 2015) (finding no error for similar relationship).

[14] *See* Twain, *supra* note 1.

[15] *See infra* Part III.A.

occupations require training and experience that can easily rise above the low standard.[16]

But can your staff judge advocate (SJA) advise the CA on these matters without raising appellate issues? What are the boundaries of the panel selection advice? You know some panel errors can be jurisdictional.[17] While you would love for your SJA to brag about your bright idea when hitting the links in Charlottesville next fall,[18] creativity in the panel selection advice seems like playing with fire—particularly when looking at potential members' military duties.[19] After all, military courts already condemned panel duty exemptions by branch, right?[20]

Fortunately, you can do something about this concern. Your SJA's candid advice may even eliminate the scenario where a detailed panel member dutifully shows up for service only to await an inevitable challenge for cause.[21] Through careful analysis of panel selection case law, this article proposes direct, meaningful advice that can achieve greater efficiency. By discouraging selecting panel members whose occupations present clear concerns of implied bias and have greater potential for conflicts with professional duties, SJAs can promote a more efficient application of Article 25. To address representativeness concerns raised with this approach, this article also advocates resurrecting a once-novel panel selection technique originally designed to address critiques of Article 25. The appendices include a proposed SJA advice and CA action memoranda to implement in order to yield a more efficient and fair panel, all the while confident she will not create new case law.

II. Judicial Review of Panel "Screening Criteria"—Predictably Unpredictable

Civilian jury impartiality is protected, in part, by the requirement that venires be drawn from a "representative cross-section" of the community.[22] In contrast, a military accused's jury protections begin with the CA's application of Article 25 criteria to select the "best qualified" personnel.[23] Commanding large organizations, a CA likely knows only a small percentage of the personnel eligible to serve on panels.[24] Accordingly, military courts have recognized the necessity of subordinates assisting the CA during panel selection.[25] A closer look at courts' jurisprudence on this assistance, however, gives the military justice practitioner pause when contemplating advice on any criteria not enumerated in Article 25.

Aside from "packing" a panel in violation of Article 37,[26] military courts generally characterize panel selection irregularities into two categories: administrative errors or systematic inclusion or exclusion of qualified personnel.[27] Advising the CA on implied bias and related efficiency issues requires analysis of what military courts have held to be a proper exclusion of otherwise qualified personnel. Unfortunately, this area of the law is murky. For example, the critical analysis of one early case on this issue begins: "In some situations, the legality of an action depends on its impact—regardless of the intent with which the act is performed . . . . In other situations, legality hinges on the presence or absence of a specific intent."[28] Building on this precedential truism, the Court of Appeals for the Armed

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[16] *Id.*

[17] *See, e.g.*, United States v. Ryan, 5 M.J. 97, 103 (C.M.A. 1978) (finding the convening authority's (CA's) failure to personally select the members of a panel deprived the court-martial of jurisdiction).

[18] Senior Leaders from the Army's Judge Advocate General's Corps return to central Virginia every fall for a leadership and continuing legal education conference. Fred L. Borch, *Military Legal Education in Virginia: The Early Years of the Judge Advocate General's School in Charlottesville*, ARMY LAW., Aug. 2011, at 1, 4.

[19] *See infra* Part II for discussion of case law regarding subordinates applying screening criteria to reduce the number of nominees considered by the CA when selecting a panel.

[20] See *infra* note 51 and accompanying text for a common misconception about the holding of United States v. Bartlett, 66 M.J. 426 (C.A.A.F. 2008).

[21] Generally, a panel member will remain in the deliberation room or in the court until the judge has ruled on all challenges. DA PAM. 27-9, *supra* note 11, para. 2-5-3. Accordingly, a challenged panel member must remain at the court for the entire duration of voir dire which generally takes more than three hours. *See* Appendix D.

[22] Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Theoretically, a diverse background facilitates impartiality by fairly representing group differences arising from race, gender, religion, and ethnic background. *See* JEFFREY ABRAMSON, WE, THE JURY ch. 3 (1994).

[23] United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999)). The same court also noted that the right to an impartial jury is "the cornerstone of the military justice system." *Id.* (quoting United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991)). The "representative cross-section" requirement does not apply to the accused at a court-martial. *Id.* (citing Ex Parte Quirin, 317 U.S. 1, 39-41 (1942); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988)). Article 25 and voir dire are the Uniform Code of Military Justice (UCMJ) procedural safeguards of impartiality. United States v. Gooch, 69 M.J. 353, 357 (C.A.A.F. 2011).

[24] As of January 2014, the 500,000 active Army personnel were divided into 85 General Court-Martial Convening Authorities (GCMCAs). BARBARA S. JONES ET AL., REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 23 (May 2014).

[25] United States v. Kemp, 46 C.M.R. 152, 155 (U.S.C.M.A. 1973). The CA must personally select members, but also "must have assistance in the preparation of a panel . . . [and] must necessarily rely on his staff and subordinate commanders for the compilation of some eligible names." *Id.*

[26] *See Dowty*, 60 M.J. at 167 (C.A.A.F. 2004). Article 37 of the UCMJ proscribes, among other things, a commander using his rank or position to influence the outcome of a trial. UCMJ art. 37 (2012). In the context of panel selection, this is commonly referred to as "court-packing." *Id.*

[27] United States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008). The text of Article 25 appears clear on its face, but practical application has proven complicated, evidenced by litigation over "criteria" not enumerated in Article 25. *See infra* Part II.A.

[28] United States v. McClain, 22 M.J. 124, 130 (C.M.A. 1986).

Forces (CAAF) provided more clarity when deciding *United States v. Dowty*.[29]

A. The *Dowty* Factors—A Loose Framework

In *Dowty*, the CAAF reviewed a novel panel selection issue where the CA selected from a pool of nominees consisting of volunteers.[30] After a thorough review of case law on what the court terms "screening" by subordinates, the court announced—with a significant disclaimer—a list of factors to evaluate the propriety screening criteria:

> First, we will not tolerate an improper motive to pack the member pool. Second, systematic exclusion of otherwise qualified members based on an impermissible variable such as rank is improper. Third, this Court will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community.[31]

Immediately after announcing these factors, the CAAF determined that none actually implicated volunteering.[32] The court further concluded that volunteering was an irrelevant variable to use for screening because it was a "substantial variable, not contemplated by [Article 25]."[33] Despite condemning the use of volunteer panel members as error,[34] the court ultimately affirmed the conviction.[35] The rationale for affirming is particularly instructive on the relationship between staff screening and the CA's role in selection. Specifically, the court upheld the conviction because "the CA personally selected and applied the criteria of Article 25(d), thereby curing any error arising from screening . . . [by] using the impermissible variable of volunteer."[36] Stating that a CA's "proper and personal selection of members" would not "cure all impermissible screening,"[37] the opinion emphasized the importance that the record contained "no showing of an improper motive by anyone involved in the nomination or selection process."[38] Disclaimers notwithstanding, the *Dowty* opinion provides instructive factors to evaluate screening variables and perspective on the importance of a CA's personal application of Article 25 criteria.[39] The *Dowty* opinion did little, however, to assist the practitioner in discerning what constitutes an "impermissible" variable, a concept the CAAF and lower courts addressed later.

B. Occupation—An "Impermissible Variable"?

1. The Test Case That Never Got Tested: United States v. McKinney

In 2002, a U.S. Air Force SJA advised a CA at least three times regarding implied bias related to occupation during panel selection.[40] As detailed in *United States v. McKinney*, the SJA brought the CA a list of officers from which the SJA had "eliminated . . . all officers who would likely be challenged if selected as court members (i.e., [judge advocates] JAGs, chaplains, [Inspectors General] IGs or officers in the accused's unit)."[41] The Air Force Court of Criminal Appeals (AFCCA) affirmed, noting that (1) the SJA's elimination of these personnel from the pool did not constitute "court stacking" because there was no evidence of an intent to influence the outcome,[42] and (2) the CA was capable of personally detailing a panel of qualified members despite the SJA's omission of these personnel.[43] Critically, the AFCCA relied on the general principle that "it is proper

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[29] Each Service has its own appellate court, which is the first level of appellate review. UCMJ art. 66. The next level is the Court of Appeals for the Armed Forces (CAAF), which is the highest appellate court to review military cases other than the United States Supreme Court. UCMJ art. 67 (2012).

[30] *Dowty*, 60 M.J. at 171. The Court reviewed three errors in the original panel selection advice: erroneously omitting two of the Article 25 criteria (education and experience), supplying only volunteers to select from, and failing to advise the CA that all original nominees were volunteers. *Id.* at 166-67.

[31] *Id.* at 171 (citations omitted). In the paragraph introducing these "factors," the opinion makes clear that the list is "not exhaustive, nor a checklist, but merely a starting point for evaluating a challenge alleging an impermissible members selection process" and goes on to say that a criterion may be improper even if it is not covered by the stated factors. *Id.*

[32] *Id.*

[33] *Id.* at 173 (citing United States v. Kennedy, 548 F.2d 608 (5th Cir. 1977)).

[34] *Id.* at 172.

[35] *Id.* at 176.

[36] *Id.* at 175.

[37] *Id.*

[38] *Id.* at 173.

[39] The opinion notes that its rationale was limited to "the unique facts of this case." *Id.* at 175.

[40] *See* United States v. McKinney, 61 M.J. 767 (A.F. Ct. Crim. App. 2005), *review denied*, 62 M.J. 396 (C.A.A.F. 2005); United States v. Carr, 2005 CCA LEXIS 278 (A.F.C.C.A. Aug. 25, 2005), *review denied*, 64 M.J. 78 (C.A.A.F. 2006); United States v. Brooks, 2005 CCA LEXIS 277 (A.F.C.C.A. Aug. 30, 2005), *rev'd on other grounds*, 64 M.J. 325 (C.A.A.F. 2007).

[41] *McKinney*, 61 M.J. at 769.

[42] *Id.* at 769-70. Interestingly, the court noted that lawyers and personnel from the same unit as the accused serving as members had been historically discouraged by military courts. *Id.*

[43] *Id.* at 770-71. Importantly, the SJA in *McKinney* formally advised the CA of the screening, unlike the advice in *Dowty*. *Id.* at 769. Presumably, such advice raises the issue for the CA so that he can detail personnel who have been "screened" if he believes they are truly best qualified. *See infra* note 132 for the rationale and value of supplying the CA with an alpha roster at the time of selection.

to assume that a [CA] is aware of his duties, powers and responsibilities and that he performs them satisfactorily."[44]

The CAAF denied review of *McKinney*[45] and of a later case reviewing the same issue in 2005.[46] In 2006, however, the CAAF granted review of this issue in *United States v. Brooks*.[47] Fortunately for the accused in *Brooks* but unfortunately for practitioners hoping for clarity on this issue, the CAAF reversed *Brooks* on other grounds without reaching the question of whether the SJA's screening violated Article 25.[48] Interestingly, the SJA recommendation at issue appears to have remained common practice in the Air Force until 2008 when the CAAF decided *United States v. Bartlett*.[49]

2. Regulatory Occupational Exemptions: United States v. Bartlett

For nearly thirty years, the Secretary of the Army proscribed panel membership for certain personnel: chaplains, nurses, inspectors general and officers in the medical, dental, veterinary, and medical service corps.[50] Often incorrectly viewed as a ban on these occupational exemptions,[51] the *Bartlett* holding clearly rests on the lack of authority for Service Secretaries to implement such a policy.[52] Specifically, the CAAF held that the Secretary of the Army lacked the statutory authority to limit the pool of members eligible under Article 25.[53] The case was decided on principles of statutory construction, ultimately holding that the Secretary of the Army's general grant of authority to run the Army could not "trump Article 25, UCMJ, which is narrowly tailored legislation dealing with the precise question in issue."[54]

Although the *Bartlett* holding is simply that the Service Secretaries lack authority to restrict who is available for panel selection, some dicta is instructive on how the CAAF might view the occupation-based screening from *McKinney* if it came to the court today. First, the opinion notes that Congress cast panel eligibility as "broad and inclusive," noting that Article 25 does not contain "any limitations on court-martial service by any branch, corps, or occupational specialty."[55] Second, the court found no error partly because the factual record established that the "panel was well-balanced across gender, racial, staff, command, *and branch lines*."[56] Although dicta, this language indicates that the CAAF reads Article 25 to be extremely inclusive and does not condone efforts to reduce the pool of available members using any criteria not articulated in Article 25. At first blush, that emphasis on inclusion indicates that the CAAF may find occupation to be a substantial (and therefore impermissible) variable as described in *Dowty*.[57] A key difference, however, is that *Bartlett* was about the scope of the Secretary of the Army's authority and not a CA's application of Article 25 criteria.[58] A more recent case, *United States v. Gooch*, provides more material to analyze the permissibility of a staff screening variable in the context of a CA's panel selection.[59]

3. "Impermissible Variables" Revisited: United States v. Gooch

In *Gooch*, the CAAF reviewed a case where the CA's legal office limited the pool of nominees to those who would be available on the prospective trial dates and arrived at the installation after the accused had departed for a deployment.[60] The aim was to avoid selecting personnel for panel service who may have known the accused or learned about the case during their service at the installation.[61] The court noted that availability is a permissible screening factor[62] but decried "possible personal knowledge of the case" and "possible personal knowledge of the accused" as inappropriate for screening.[63] The holding relied on the notion that voir dire is the appropriate mechanism to address whether someone has possible knowledge of the case or the accused.[64] By emphasizing voir dire as "the codal method for . . . screening

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[44] *Id.* at 771 (quoting United States v. Townsend, 12 M.J. 861, 862 (A.F.C.M.R. 1981)).

[45] United States v. McKinney, 62 M.J. 396 (C.A.A.F. 2005).

[46] United States v. Carr, 64 M.J. 78 (C.A.A.F. 2006).

[47] United States v. Brooks, 64 M.J. 325 (C.A.A.F. 2007).

[48] *Id.* at 325.

[49] Lieutenant Colonel Eric F. Mejia & Major Andrew J. Turner, *Eligible to Serve: Chaplains on Court-Martial Panels*, 36 REPORTER, no. 2, 2009, at 9, 10.

[50] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-2 to 8-8 (26 Nov. 1968) (C18, 1 Jan. 1979) [hereinafter AR 27-10]. Medical Specialist Corps and Army Nurse Corps officers could be detailed to proceedings involving members of those corps. *Id.* paras. 8-6, 8-7.

[51] *See, e.g.*, CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE 21-29 (Apr. 2013) (stating "CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.")

[52] United States v. Bartlett, 66 M.J. 426, 429 (C.A.A.F. 2008).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 430 (emphasis added).

[57] *See supra* notes 30-33 and accompanying text.

[58] *See Bartlett*, 66 M.J. at 429.

[59] United States v. Gooch, 69 M.J. 353, 356 (C.A.A.F. 2011).

[60] *Id.*

[61] *Id.* at 356.

[62] *Id.* at 358.

[63] *Id.* at 359.

[64] *Id.*

members based on potential bias," the CAAF indicated it would closely scrutinize any attempt to screen members on possible bias.[65]

The *Gooch* holding leaves some room for screening beyond availability. The majority notes that "[i]t is intuitive that other relationships might similarly disqualify an otherwise eligible officer during the screening process."[66] While this language keeps the door open for staff to screen out personnel whose presence at a panel would clearly be problematic, it is far from a bright line. As noted by the dissent, the scope of relationships that the majority labels "intuitive" is actually quite broad.[67] The dissent also highlighted the inherent tension between a CA's duty to detail the "best qualified" personnel with significant limitations on practical staff screening efforts and the CA's responsibility to efficiently run a large military organization.

> Convening authorities are also very busy people. If, because of challenges, a court-martial panel falls below quorum after voir dire, the trial must be continued while the convening authority's staff looks for eligible members who are present and whose primary duties are such that they are available to sit on the court-martial. The convening authority must then interrupt his other duties to consider the nominations and select additional members. If, as the majority demands, the convening authority's staff is prohibited from rejecting persons who could not or most likely would not survive the voir dire and challenge process, convening authorities will have to refer cases to larger court panels—taking more members away from their primary duty—or face the prospect of more interruptions, in both the trial and his schedule, to select additional court members.[68]

As noted in this dissent, the primary benefit of staff efforts to screen panel members who are unlikely to serve is efficiency. Tracing the CAAF's interpretation from *Dowty* to *Gooch* draws some boundaries for staff screening and recommendations designed to facilitate selecting an efficient panel.

C. Viability of Occupational Screening Under Current Case Law

These cases highlight three important principles regarding panel selection. First, the CA may rely on assistance from subordinate commanders and staff in preparing panel selection.[69] Second, that assistance may include factors beyond the six Article 25 criteria in preparing nominees for the CA's consideration (e.g., to ensure selected members will be available[70] and senior to the accused[71] or to promote a representative panel).[72] Subordinates screening otherwise eligible personnel from consideration, however, is strongly discouraged.[73] The CA must personally select the members,[74] applying the proper Article 25 criteria with a proper motive.[75] When the intent of additional criteria is benign, the key distinction is whether the CA makes an independent decision regarding who serves on the panel or whether the staff screening amounts to a *fait accompli*.[76] Ultimately, the difference between problematic and satisfactory panel selection depends more on the motive behind and effect of applying any screening criteria than the substance of that additional variable.[77]

It appears the CAAF would uphold *McKinney* at some point in the future but would find error if decided today. First and most importantly, the SJA's actions in *McKinney* of "eliminating" certain personnel from the pool was an "exclusion of otherwise qualified personnel," which is subject to an "impermissible variable" analysis per *Dowty*. Second, the CAAF indicated, in *Bartlett*, a strong preference against excluding individuals based on branch or military occupational specialty. Most recently, the CAAF declared voir dire to be the appropriate method for screening for "possible" biases in *Gooch*, casting further doubt on whether the CAAF would deem it proper for an SJA to screen personnel for implied bias concerns. Following these

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[65] *Id.* at 360.

[66] *Id.* at 357.

[67] *Id.* at 364 (Stucky, J., dissenting).

[68] *Id.*

[69] *See* United States v. Kemp, 46 C.M.R. 152, 155 (U.S.C.M.A. 1973) (stating the CA "must necessarily" rely on subordinates to compile a list of eligible names); United States v. Benedict, 55 M.J. 451, 455 (C.A.A.F. 2001) (holding the CA may rely on staff to nominate members).

[70] United States v. Gooch, 69 M.J. 353, 358 (C.A.A.F. 2011).

[71] *See id.* ("Screening potential members of junior rank or grade is not only proper; it is required . . . .").

[72] United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004) (citing United States v. White, 48 M.J. 251, 254 (C.A.A.F. 1998); United States v. Crawford, 35 C.M.R. 3, 35 (U.S. C.M.A. 1964)).

[73] *See supra* Parts II.B.1, II.B.3 for staff screening efforts found to constitute error.

[74] United States v. Ryan, 5 M.J. 97, 103 (C.M.A. 1978) (holding the CA's responsibility to select members may not be delegated).

[75] *See Dowty*, 60 M.J. at 173.

[76] United States v. Upshaw, 49 M.J. 111, 113 (C.A.A.F. 1998). More accurately, the *Upshaw* holding refers to a CA's intent (as opposed to staff screening). *See also* United States v. Bertie, 50 MJ 489, 492 (C.A.A.F. 1999) ("[T]he intent or purpose of the convening authority in [panel selection] is an essential factor in determining compliance with Article 25.").

[77] *See* United States v Dowty 63 M.J. 163, 173 (C.A.A.F. 2004).

guideposts indicates the CAAF would condemn the SJA's screening in *McKinney*.[78]

But does that mean the CA must pick blindly from nominations and an alpha roster—perhaps unknowingly detailing members who are extremely unlikely to actually hear a case?[79] The answer is no. The SJA, as a good staff officer, can—and should—provide some analysis with her recommendation. [80] Encouraging a thoughtful, rather than mechanical, application of Article 25 yields a fair but efficient panel to hear cases.[81]

III. Tuning up *McKinney*: Recommending, Not Screening

The problem with a CA mechanically selecting from a list of nominees or the alpha roster is efficiency. Absent any other advice, the CA may detail personnel who have very low odds of making it through voir dire to serve on a panel.[82] Detailing a member whose background makes him ripe for challenge can waste significant time—certainly for the challenged member and the military justice system.[83] You and your SJA can reduce or even eliminate this wasted time by providing a specific panel selection advice implemented in a manner that avoids *McKinney*'s problematic screening. Additional techniques can reinforce the panel's legitimacy by emphasizing the CA's application of Article 25 criteria and desire for a more representative panel. Before discussing *how* to implement this advice, the threshold question is to whom should it apply?

A. Who's out? Pre-*Bartlett* Exemptions Reconsidered

As noted above, Army policy formerly excluded officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, and those detailed to Inspector General duties from panel service.[84] The SJA in *McKinney*, however, only included chaplains and IGs from this group while adding judge advocates (JAs) and officers from the accused's unit.[85] Focusing on Article 25 criteria as an analytical framework, SJAs should adopt the *McKinney* cohorts and add MPs and VAs.[86] This combination minimizes implied bias concerns by identifying those whose training and experience provide significant insight to military justice matters and those for whom panel service poses potential conflict with professional duties.

1. Those Who (Might) Know Too Much: Training and Experience

Personnel with implied bias concerns are identified after careful consideration of the Article 25 criteria of training and experience. Some occupations encounter significant overlap with common military justice issues. With the low and somewhat unpredictable standards created by implied bias

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[78] However, the court would likely uphold the result because the CA was aware of the SJA's screening (it was in the written advice) and personally selected those who served. *See supra* notes 41-43 and accompanying text. If the CA knows the SJA eliminated a person the CA believes is "best qualified," he is still free to select the screened person for service even though the SJA has removed him from the list of nominees.

[79] A recent survey indicates *most* jurisdictions have at least one panel member whose background could give rise to an implied bias challenge. *See infra* Appendix D and note 170.

[80] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-11–2-12 (5 May 2014). Staff officers apply critical thinking and use previous similar experiences and innovative approaches to assist the commander in decision-making. *See also* U.S. DEP'T OF ARMY, DOCTRINE PUB 6-0, MISSION COMMAND para. 3-41 (5 May 2014) (noting that the staff officer's "most important function" is to advise the commander by providing analysis within their area of expertise).

[81] A Staff Judge Advocate's advice for panel selection is often vague and little more than a recitation of Article 25. *See infra* Appendix A for an example of common panel selection advice.

[82] Interestingly, the likely challenge is due to Article 25 criteria—specifically, the member's training and experience may support an implied bias challenge. For example, MP officers are frequently nominated and selected for panel service despite training and experience that raise implied bias concerns. *See infra* Appendix D. See *infra* Part III.A.1 for a discussion regarding MPs and panel service.

[83] *See supra* text accompanying note 21. In the event their challenge results in a loss of quorum, significant staff work may be required to locate the replacement panel members—resulting in an ultimately longer trial and more time spent away from duties for all involved. *See infra* Appendix A for common practice to address panels falling below quorum.

[84] AR 27-10, *supra* note 50. The rationale for excluding medical, dental, and veterinary personnel is unclear, but likely due to their professional and training requirements and concerns over proper utilization. The language from the original regulation forbidding detailing these personnel indicates an intent to preserve their time to allow focus on professional duties, requiring "every effort consistent with due process" to utilize means other than in-person testimony to present evidence to courts-martial, boards, or committees. *Id.* para. 8-3. In other words, these personnel were considered too specialized and too rare to spend time away from duties on panel service. *See Id.* This rationale is consistent with the traditional justification of occupational exemptions. HON. GREGORY E. MIZE ET. AL., STATE OF THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 14 (Apr. 2007). *See also* Captain Jeffery L. Harris, The Military "Jury," A Palladium of Justice 27 (Apr. 1984) (unpublished LL.M. thesis, The Judge Advocate Gen.'s Legal Ctr. & Sch.) (on file with The Judge Advocate General's School Library).

[85] United States v. McKinney, 61 M.J. 767, 769 (A.F. Ct. Crim. App. 2005).

[86] The idea to analyze VAs in this article came from correspondence with two Chiefs of Justice (CoJs) when collecting the data in Appendix D noting high numbers of VAs selected for panel service with a high rate of successful challenges for cause granted against them. Email from Major Christian Deichert, Chief of Military Justice, Army Fires Center of Excellence and Fort Sill, to author (Dec. 11, 2014, 17:55 CST) (on file with author); email from Captain Timothy Olliges, Acting Chief of Military Justice, Fort Polk, to author (Dec. 11, 2014, 18:20 CST) (on file with author).

and the liberal grant mandate, SJAs should caution against selecting significant numbers of MPs and VAs.[87]

Generally, MPs are suspect panel members for many reasons related to one underlying theme: familiarity with law enforcement and criminal justice processes. Combine this familiarity with the assumption that MPs take pride in their work and take it seriously and several potential bias concerns become apparent.[88] As panel members, MPs may give too much weight to law enforcement witnesses or may unfairly scrutinize the witness's testimony and work based on personal experience. Perhaps most importantly, an accused who has been the subject of a criminal investigation would feel uneasy at the prospect of a police officer sitting in his judgment.[89] For these and other reasons, several jurisdictions exempt law enforcement personnel from jury service.[90] The Army appellate court has discouraged the practice of MPs serving on panels[91] and even proscribed service by an installation's chief law enforcement officer.[92]

Some jurisdictions, by nature of their tenant units, may not have the luxury of the CA disregarding the MP population during panel selection.[93] Fortunately for those jurisdictions, MP doctrine includes several non-law enforcement functions.[94] An MP could conceivably serve primarily in non-law enforcement duties, reducing the concerns addressed above. That member's training, however, would still include law enforcement fundamentals, similarly reducing their odds of surviving a defense challenge for cause.[95] Given the appellate court's significant discouragement of detailing MPs, ample opportunity for an accused's counsel to develop a challenge for cause, and the appearance issues related to these concerns, the SJA should recommend against selecting MPs when practicable.

Another population with potentially problematic training are VAs. Current Army policy requires commanders to ensure victims of sexual assault have access to a "well-coordinated, highly responsive" victim advocacy program.[96] Army VAs must receive training on several topics that would give concern to their presence on a panel hearing a sexual assault case: "criminal investigative process; evidentiary requirements; secondary victimization, intimidation, and types of sexual offenders."[97] A Soldier or officer certainly could undergo this training and still serve as an impartial, thoughtful panel member. However, the likelihood of VAs surviving a defense challenge for cause is extremely low—particularly in cases involving sexual assault allegations.[98] A reasonable person could easily conclude a VA's extensive training would make it unfair for him to sit in judgment of someone accused of a sexual assault allegation—particularly in light of their presumed dedication[99] and Army leaders' emphasis on VAs' roles in the Army's sexual assault prevention efforts.[100] When ample other panel members are

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[87] *See supra* note 13 and accompanying text (discussing implied bias standards).

[88] Army doctrine regarding warrior and service ethos encourages enthusiasm and pride in one's work and skills. *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP para. 3-21 (1 Aug. 2012) (C1, 10 Sept. 2012).

[89] Although the accused's perception of a member's implied bias is not explicitly included in the CAAF's espoused implied bias analysis, language from a recent case suggests its importance. United States v. Peters, No. 14-0289, 2015 CAAF LEXIS 143, *8 (C.A.A.F. Feb. 12, 2015).

[90] In U.S. federal courts, police are exempt from jury service. 28 U.S.C. §1863(b)(6). Under similar military codes, Canada and the United Kingdom do not allow MPs or lawyers to serve on court-martial panels. National Defence Act, R.S.C. 1985, c N-5 (Can.); Armed Forces Act 2006, c. 1, § 156 (UK).

[91] United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982). The court in *Brown* strongly discouraged empaneling "policeman" at courts-martial stating it "is not generally a good practice and should be avoided where possible." *Id.* at 892.

[92] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). In *Swagger*, the court prohibited panel service by "[t]hose who are the principal law enforcement officers at an installation." *Id.* at 760. Notably, the court reiterated its discomfort with those serving in any police function serving on a panel: "At the risk of being redundant—we say again—individuals assigned to MP duties should not be appointed as members of courts-martial." *Id.*

[93] *Brown*, 13 M.J. 892. The *Brown* court stated it stopped short of a *per se* prohibition on these personnel's panel membership "largely to accommodate" commands where the practice may be difficult to avoid. *Id.*

[94] U.S. DEP'T OF ARMY, FIELD MANUAL 3-39, MILITARY POLICE OPERATIONS para. 1-1–1-3, fig.1-1 (26 Aug. 2013). Army doctrine states four MP core competencies: soldiering, policing, investigations, and corrections. *Id.* Conceivably, an MP could serve long enough to meet Article 25 criteria and spend most, or all, of his or her time performing MP functions not related to law enforcement. However, it seems extremely unlikely that any MP could meet Article 25 criteria without receiving a fairly significant amount of law enforcement training as a core competency requirement. Such training gives rise to a successful challenge for cause, particularly in light of the liberal grant mandate.

[95] For example, current Army policy indicates even the most junior MP Soldiers "maintain law enforcement experience" while working in operational assignments. U.S. DEP'T OF PAM 600-25, U.S. ARMY NONCOMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT GUIDE para. 13-4(c)(1)(b) (28 July 2008).

[96] AR 600-20, *supra* note 9, para. 8-3. The Army's Victim Advocacy Program has three tiers: one Sexual Assault Response Coordinator at the installation level, an Installation Victim Advocate, and Unit Victim Advocates (UVAs). Army policy mandates two UVAs per battalion. *Id.*

[97] *Id.* para. H-3.

[98] *See supra* note 86 and accompanying text.

[99] AR 600-20 supra note 9, para. 8-6 (listing VA selection criteria requiring, among other things, recommendation by the chain of command and outstanding duty performance for all those nominated to serve as VAs).

[100] Army leadership has repeatedly emphasized that addressing sexual assault is a top priority. *See* Memorandum from Sec'y of the Army, subject: Sec'y of the Army Top Priorities (30 Oct. 2014). More recently, the Chief of Staff of the Army and Sergeant Major of the Army visited VA training to convey and emphasis the importance of the program. Scott Gibson, *Odierno, Dailey Emphasize Trust at Army's SHARP Academy*, ARMY.MIL (Feb. 26, 2015), http://www.army.mil/article/143546/Odierno__Dailey_emphasize_trust_at_Army_s_SHARP_Academy/.

available, the time of all involved is better served by recommending against selecting personnel who have served as VAs.

2. Potential Professional Conflicts with Panel Service

Military Police and VAs are not the only personnel who regularly encounter military justice issues in their normal duties. Chaplains, IGs, and JAs regularly deal with military justice actions[101] or personnel[102] and tangential issues related to the proceedings.[103] In most cases, these personnel are less likely to represent implied bias concerns because their education, training, and experience favor impartiality.[104] Nonetheless, SJAs selecting these personnel for panel service in order to avoid the potential conflicts between panel service and their professional duties.

Chaplains exist, in part, to provide religious services to military personnel.[105] Their service on panels has been discouraged since the Civil War period.[106] Although the historical rationale for excluding chaplains is unclear, a review of modern Army policy regarding chaplains reveals both formal and informal professional conflicts that frustrate their participation as panel members.

Formally, Army policy prohibits detailing chaplains and chaplain assistants to serve in any capacity that may require the revelation of privileged or sensitive information.[107] Voir dire, in some circumstances, may place a chaplain in this bind. Consider a case where the chaplain provided counseling to either the victim, the accused, or even one of the counsel involved.[108] The chaplain would likely indicate affirmatively that he knew or had dealings with someone in the trial but ultimately refuse to disclose with whom or the extent of the dealings, establishing a challenge for cause.[109]

Informally, panel service frustrates a core practice of chaplains by placing them in the position of passing judgment and issuing punishment. A Soldier witnessing a chaplain serve on a panel may view that chaplain (or all chaplains) as having the same disciplinary authority as any other senior officer.[110] Chaplains are commissioned officers, but they do not hold positions of command.[111] Army policy is to address them as "chaplain," regardless of rank, in an effort to reduce any gap or divide between them and the Soldiers they serve.[112] While a chaplain's training and experience likely counsels against any biases, panel service has significant potential to frustrate the primary professional requirements of his duties. Accordingly, the SJA should recommend against selecting chaplains for panel service.

Similar to the issues arising with chaplains providing pastoral care, IG responsibilities can easily overlap with court-martial issues.[113] A relatively small population, IGs are rare in most GCMCAs.[114] Often described as an extension of a commander's eyes, all IGs serve as "confidential advisers and fact-finders to the commander."[115] Officers are temporarily detailed for IG duty and are chosen for their impartiality and "impeccable ethics."[116] These traits appear to make IGs excellent candidates for panel membership, but a closer look at their duties and small numbers indicates otherwise.

Courts-martial often generate collateral issues involving requests for assistance from the IG's office.[117] An IG's

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[101] *See infra* note 124.

[102] *See infra* note 108 and accompanying text.

[103] *See infra* note 117.

[104] Personnel in these assignments are generally selected or trained in impartiality. *See infra* notes 116 and 121 and accompanying text.

[105] U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 1-7(b) (3 Dec. 2009) [hereinafter AR 165-1].

[106] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 70 (2d ed. 1920).

[107] AR 165-1, *supra* note 105, para. 3-4(c)(3). For this purpose, "sensitive information" is defined as "any non-privileged communications that would be an inappropriate subject for general dissemination to a third party (for example, attendance at substance abuse clinics, treatment by counselors, prior arrests)." *Id.* para. 16-2(e). Notably, this definition is much broader than communications protected by Military Rule of Evidence 503. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2012).

[108] Pastoral care and counseling is a stated religious support activity required of all chaplains in the Army. AR 165-1, *supra* note 105, para. 2-3. The standard trial script includes asking each panel member whether they know or have had dealings with the accused, anyone named in a specification, or any of the counsel. DA PAM. 27-9 *supra* note 11, para. 2-5-1.

[109] E-mail from Major David Beavers, Chaplain, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Mar. 11, 2015, 11:54 EDT) (on file with author).

[110] Guardlaw West, Comment to *CAAF Invalidates Army Reg's Prohibition Against Certain Staff Corps' Officers Sitting on Courts-Martial*, CAAFLOG (July 8, 2008, 2:12 PM), http://www.caaflog.com/2008/07/08/caaf-invalidates-army-regs-prohibition-against-certain-staff-corps-officers-sitting-on-courts-martial/.

[111] 10 U.S.C. § 8581 (2012).

[112] AR 600-20, *supra* note 9, para. 1-6(d).

[113] Inspectors general perform four core functions: inspections, investigations, assistance, and training. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, at preface (29 Nov. 2010) (RAR 3 July 2012) [hereinafter AR 20-1].

[114] Army policy is that only general officer commanders have a command IG. *Id.* para. 2-1.

[115] *Id.* para. 1-6(f).

[116] *Id.* para. 1-6(a).

[117] Although unsurprising to the experienced practitioner, it bears noting that the commanders of Soldiers involved in the court-martial process (either as an accused or as a victim) has several additional responsibilities tangentially related to the court-martial. Some examples include the Army's requirement of Soldiers to pay spousal support and the role allegations of domestic violence play in a Soldier's ability to handle weapons and ammunition. *See* U.S. DEP'T OF ARMY, REG. 608-99, FAMILY

requirement to provide assistance and serve as a fact-finder may ultimately expose the IG to facts about the case before opening statements even begin. These concerns are magnified given the relative small population of IGs (approximately one per GCMCA).[118] While the CAAF condemned "possible knowledge" of a case as screening criteria,[119] such knowledge undoubtedly decreases the likelihood an IG officer would survive a challenge for cause.[120] Given their very limited numbers, the SJA should recommend against selecting IGs in order to avoid wasting the time of such a scarce resource.

While IGs have greater potential to encounter issues related to a trial in their professional duties, JAs are far more likely to know some of the issues and parties involved in any given court-martial. Lawyers' service as jurors is a topic rife with debate. Many argue that with extra training and experience in logic and reasoning, lawyers make ideal panel members.[121] Who better to identify strengths and weaknesses of arguments than one whose job it is to do just that? However, critics argue that lawyers may know too much about the system, or even if entirely unbiased, receive too much deference from fellow jurors and end up as a jury of one.[122] Merits of this debate notwithstanding, selection of JAs should be discouraged due to the numbers involved.

If not in high demand, JAs are in relatively short supply. There are approximately 1900 JAs on active duty in the entire United States Army.[123] Several JAs will be involved in the court-martial and thereby disqualified from service.[124] Judge Advocates may serve as the military judge, trial counsel, defense counsel,[125] the SJA,[126] and now, the Article 32 Preliminary Hearing Officer.[127] Because the community is so small, a JA detailed as a panel member will almost certainly know one or more of the JAs detailed to the case. Such knowledge alone is likely a sufficient basis to grant a defense challenge for cause.[128] To avoid wasting time, JAs should not be detailed to panels.

B. Keys to Success

The most important aspect of any written advice discouraging selection of otherwise eligible personnel is clearly distinguishing Article 25's legal *requirements* from the SJA's *recommendations.* Critically, the advice must emphasize that recommendations regarding the selection of certain personnel are provided only for consideration (i.e., are non-binding).[129] The advice should also clearly state that the CA's sole mandate is to select the best-qualified personnel using Article 25 criteria. In this way, the panel selection advice would parallel the advice required by Article 34, UCMJ.[130] Specifically, this advice would articulate the legal requirements for panel selection (Article 25 criteria) and make recommendations on both implementation (e.g., how many to select) *and* application of those requirements (i.e., discourage selecting those likely to be challenged). Unambiguous distinction between requirements and recommendations avoids questions over whether the CA could conflate efficiency recommendations with Article 25 criteria.

SUPPORT, CHILD CUSTODY, AND PATERNITY para. 1-4(g) (29 Oct. 2003); *see also* AR 600-20, *supra* note 9, para. 8-5(o) (specifying thirty-seven distinct requirements of unit commanders for a victim or subject of a sexual assault allegation). Any person who believes a commander has failed to meet his regulatory obligations in these or other matters may complain to an inspector general office, whose "assistance" function requires fact-finding about the matter. *See generally* AR 20-1, *supra* note 113, ch. 6.

[118] *See* AR 20-1, *supra* note 113, para. 1-6(f).

[119] United States v. Gooch, 69 M.J. 353, 359 (C.A.A.F. 2011). Critically, this article advocates a non-binding recommendation in lieu of the screening condemned in *Gooch*.

[120] *See supra* notes 11-13 and accompanying text (discussing low and unpredictable standard of implied bias).

[121] *See* Molly McDonough, *Would You Pick a Lawyer to Serve on a Jury?*, ABA JOURNAL (Sept. 6, 2007, 3:15 PM), http://www.abajournal.com/news/article/would_you_pick_a_lawyer_to_serve_on_a_jury; Peter Lattman, *Lawyers as Jurors. Discuss*, THE WALL STREET JOURNAL LAW BLOG (Aug. 23, 2007, 4:25 PM), http://blogs.wsj.com/law/2007/08/23/lawyers-as-jurors-discuss/tab/comments/.

[122] Phil Anthony, comment to *Lawyers as Jurors. Discuss*, THE WALL STREET JOURNAL LAW BLOG (Aug. 24, 2007, 10:02 AM), http://blogs.wsj.com/law/2007/08/23/lawyers-as-jurors-discuss/tab/comments/. *See also* JOEL COHEN AND KATHERINE HELM, WHEN LAWYERS GET SUMMONED TO JURY DUTY (2012).

[123] The Army's Judge Advocate General's Corps publishes an internal roster of all active component members. JUDGE ADVOCATE GEN.'S CORPS, CONSOLIDATED DATE OF RANK ROSTER OF ACTIVE COMPONENT JUDGE ADVOCATES (2014) (on file with author). As of September 2, 2014, the Judge Advocate General's Corps contained 1931 officers. *Id.*

[124] Article 25 disqualifies all who have "acted as investigating officer or counsel in the same case." UCMJ art. 25(d)(2) (2012).

[125] Article 38 permits a military accused to elect representation by civilian counsel. UCMJ art. 38(b) (2012). In practice, at least one military counsel typically remains detailed to the case. This assertion is based on the author's recent professional experiences as a Trial Counsel at I Corps and 7th Infantry Division from December 1, 2011, to June 14, 2013, and Senior Trial Counsel at I Corps from June 15, 2013, to June 20, 2014 [hereinafter Professional Experience]. Panels are typically only involved in contested cases with at least four counsel involved (two trial counsel and two defense counsel). *Id.*

[126] MCM, *supra* note 107, R.C.M. 912(f).

[127] When practicable, judge advocates must preside over Article 32 preliminary hearings. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

[128] *See* DA PAM. 27-9 *supra* note 11, para. 2-5-3.

[129] *See infra* Appendix B for a sample written SJA advice implementing this article's proposals.

[130] UCMJ art. 34 (2012). Article 34 requires the SJA to advise the CA on the legal requirements of referring any case to trial, to provide legal analysis on those requirements for each specification of all charges, and to provide a non-binding recommendation regarding the disposition of those charges. *Id.*

When recommending against selecting any particular personnel, the SJA must ensure those names remain available for the CA during panel selection. As noted earlier, virtually all "screening" cases involve staff members *eliminating* eligible personnel from the CA's consideration.[131] Presenting these names along with all other nominees and the alpha roster ensures the CA can consider all eligible personnel when making his selection.[132] More importantly, this practice avoids the appearance that the SJA has preemptively applied her own judgment to a "first round" of screening. Highlighting, *but not removing* the names identifies the issue for the CA but stops short of the screening found problematic in *Gooch.*

C. Additional Safeguards

The prudent SJA considering this article's recommendation may desire greater assurance the advice would survive trial and appellate scrutiny. Fortunately, several options exist to avoid any appearance of impropriety in the selection process and even enhance the fairness of the panel. Appellate courts analyzing panel selection irregularities have emphasized the importance of the CA's personal application of Article 25 criteria with a proper intent,[133] while affording deference to efforts to be inclusive.[134] Accordingly, efforts to refine panel selection are best focused in these areas.

Perhaps the simplest measure to emphasize the CA's application of Article 25 criteria can be accomplished in a letter from the CA to subordinate commanders prior to soliciting nominees. Such a letter reinforces the importance of subordinate commanders considering all members of the command and applying *only* Article 25 criteria when making nominations.[135] Efficiency considerations, then, are only addressed when the SJA advises the CA, eliminating concern that subordinate commanders confuse these considerations with Article 25 criteria during the nomination process.

The SJA's written advice can also address concerns related to the CA's intent by briefly articulating the rationale for her recommendations. Explaining the logical reasoning behind the recommendation clarifies its benign intent: to achieve efficiency.[136] The SJA can qualify her advice, too, by acknowledging the recommendation relies on certain generalizations not applicable in every case.[137] The SJA could further hedge and only recommend against selecting "a significant number" of those personnel, virtually eliminating any meaningful argument that the selection was tainted by any intended outcome other than an efficient panel. If adopted by the CA, the SJA's well-crafted recommendation can serve as circumstantial evidence of the CA's intent to seat a fair but efficient panel.[138]

More persuasive, direct evidence of the CA's intent for fairness and efficiency is to design the panel to be more inclusive. Originally implemented as early as 1973,[139] and approved by appellate courts in 1979,[140] previous GCMCAs have applied a variety of random selection methods to court-martial panels to promote fairness and inclusiveness.[141] The process begins by the CA selecting a large number of members using Article 25 criteria.[142] A small number of personnel are then randomly detailed on a case-by-case basis.[143] Enacting this method is strong evidence that the CA does not intend to influence the outcome of trials in general because the larger field of eligible members reduces the likelihood the CA personally knows all of them.[144] The same is true for individual cases because it surrenders the specific detailing for each case to a random number generator, further reducing the CA's control over who will hear and decide a case.[145] With the CA's focus on achieving a representative, fair panel, random selection may be the most powerful tool to

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131 *See supra* Part II.

132 Theoretically, including the alpha roster as described above helps cure issues with any improper screening of nominees because it facilitates the CA making a personal selection from all available, qualified personnel. *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, MILITARY JUSTICE MANAGER'S COURSE BOOK F-11 (Aug. 2009) [hereinafter MJM COURSE BOOK].

133 *See supra* note 76 and accompanying text.

134 United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).

135 The practice is not unusual while soliciting nominees. *See* MJM COURSE BOOK, *supra* note 132, at F-73.

136 *See supra* note 76 and accompanying text for discussion about the importance of a benign intent when appellate courts analyze the propriety of panel selection variables.

137 For example, the advice may point out that some cases may have little to no law enforcement evidence (such as absent without leave or urinalysis cases), making it likely an MP could sit on the panel because the concerns typically associated with MP membership on panels are not present. *See supra* note 89 and accompanying text.

138 While the SJA's advice would only be circumstantial evidence of the CA's intent, the proposed CA selection document "approves" the SJA's recommendations. *See* Appendix C. Such "approval," it could be argued, amounts to a concurrence with the underlying rationale.

139 Gilligan & Lederer, *supra* note 2, § 15-31.00.

140 United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

141 Early methods involved almost entirely random selection by drawing a random pool and screening it with "eligibility requirements." U.S. Gov't Accountability Office, Rep. No. GAO/FPCD-76-48, Military Jury System Needs Safeguards Found in Civilian Federal Courts 27-28 (1977). A more modern approach combines the traditional process of nomination and selection of the best qualified with random detailing from a large pool of those designated "best qualified." *See* Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial,* ARMY LAW., Oct. 2006 at 22. This article advocates implementing the latter technique as an additional safeguard.

142 *See* Huestis *supra* note 141, at 27.

143 *Id.*

144 *See supra* note 24 for information related to the number of personnel assigned to a GCMCA.

145 Huestis *supra* note 141, at 27.

combine with the efficiency recommendations advocated here to insulate against trial and appellate scrutiny.

IV. Prudential Concerns—Just Because We Can, Should We?

Although case law appears to lend support for the non-binding recommendation advocated in this article, the prudent practitioner (or CA) raises additional concerns warranting attention. First, would this advice further complicate the already-scrutinized dual role of the CA as the person who decides both whether a case will go to trial and if so, who will decide the merits of the case?[146] From a public perception perspective, how does this advice affect the "spirit" or purpose of representative cross-section jury venires, even if such a requirement does not explicitly apply to courts-martial? These concerns implicate larger issues that warrant (and have received) much deeper discussion.[147] In the narrow context of the SJA's non-binding recommendation encouraged by this article, however, proper implementation as described above will allay these concerns.

A. The CA's Dual Role

The CA's role in personally selecting panel members to hear cases has endured significant criticism over the last several decades.[148] The criticism generally decries the CA's quasi-prosecutorial role as the person with the ultimate authority to decide whether a case will go to trial,[149] and the CA's responsibility to select the members who will hear and decide the facts of the case.[150] This "dual role," critics argue, creates "an invitation to mischief"[151] with the appearance of a rigged court at best and the opportunity to rig at worst.[152]

The SJA's advice recommended in this article cannot completely allay this concern however minor it may actually be.[153] The issue will remain as long as the UCMJ requires the CA's personal action both to refer cases to trial and to designate those people who will decide the merits of the case. However, when employed with the additional safeguards described above this concern is reduced. Randomly detailing members from a large pool eliminates the CA's ability to "hand-pick" a panel for any given case and further reduces any perception that the CA selected the members specifically to achieve a particular result.[154]

B. Impact on Representative Cross-Section

Article 25 is inherently in tension with the representative cross-section ideal. Implicit in detailing the "best qualified" members of the command is the notion that some group of personnel is better suited than others to hear the case and impartially decide its merits; that this group is more educated, more temperate, and more impartial. Conversely, the representative cross-section ideal eschews the notion of a truly impartial jury member, seeking instead to find impartiality with a jury selected from people with a variety of backgrounds.[155] Proponents of the cross-section ideal argue that individuals carry diverse perspectives influenced by "their race, religion, gender, and ethnic background."[156] In part to support this notion, civilian jurisdictions are trending away from exemptions from jury service based on professional occupation.[157] While science will probably never prove the theoretical foundations of either side of this argument, the civilian mandate of a representative cross-section shows its dominance in the modern American rule of law.[158]

The selection advice advocated here has little impact on the representativeness of the panel. Intuitively, a person's occupation appears less important to panel diversity as race, gender, religion, and ethnicity. As with the "dual role" issue described above, a large panel with randomized detailing would reduce these concerns. The larger panel necessarily includes more diversity, albeit with slightly fewer occupations represented.

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146 *See infra* Part IV.A.

147 Article 25 has proven to be an attractive target. *See, e.g.*, Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972-1973); Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998); Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000) (advocating the use of random selection of panel members in lieu of selection by the CA).

148 *See* MJM COURSE BOOK, *supra* note 132, at F-73.

149 UCMJ art. 34.

150 *See* MJM COURSE BOOK, *supra* note 132, at F-73.

151 NATIONAL INSTITUTE OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001).

152 Gilligan & Lederer, *supra* note 2, § 15-31.00.

153 *See* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998) (advocating that in spite of its critics, the current system and its safeguards provide fair trials).

154 With these procedural safeguards, a CA could only "pack" a panel by selecting a very large number of personnel he believed would vote a certain way based on his personal knowledge of them or their reputation. Practically speaking, such a task would be extremely difficult without generating other evidence of the improper intent, given the size of most GCMCAs. *See supra* note 24 for discussion regarding the number of personnel assigned to GCMCAs.

155 Abramson, *supra* note 22, at 100-01.

156 *Id.*

157 MIZE ET. AL., *supra* note 88, at 14.

158 Taylor v. Louisiana, 419 U.S. 522, 534 (1975).

V. Conclusion

Like all jury selection systems, Article 25 is imperfect.[159] In its current form, the statute has the potential for abuse.[160] Additionally, the uncertain nature of appellate review of panel selection—sometimes with jurisdictional consequences—can discourage candid or creative SJA advice.[161] The result is too often a mechanical, inefficient application of Article 25 by a CA.[162] Good staff work, however, can improve this process and its result.

The suggestions here are designed to facilitate fair, efficient trials before panels. With analytical advice, an SJA can appropriately raise efficiency issues to the CA. The CA can then more completely consider detailing those with implied bias concerns or potential professional conflicts with greater caution, selecting them only when he is confident that the member is unlikely to be challenged for cause. The result is less time wasted for prospective panel selectees, the military justice system, and perhaps even the CA.[163] The benefits of this advice are maximized when combined with the additional safeguards of large panels with random detailing. These techniques improve the appearance of fairness with structural limits to the CA's ability to influence results. The result is a fully-informed CA, equipped to select a more efficient panel, which is implemented in a manner to improve perceived fairness of the process.

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[159] Even the current federal system requiring a representative cross-section has critics. *See, e.g.*, Sanjay K. Chhablani, *Re-Framing the "Fair Cross-Section" Requirement*, 13 U. PA. J. CONST. L. 931, 945-46 (2011) (arguing current Supreme Court jurisprudence undermines the representative cross-section requirement espoused in earlier case law).

[160] *See supra* Part IV and note 148.

[161] *See supra* Part II.

[162] Professional Experience, *supra* note 125.

[163] *See* United States v. Gooch, 69 M.J. 353, 364 (C.A.A.F. 2011) (Stucky, J., dissenting).

Appendix A. Standard Panel Selection Advice[164]

MEMORANDUM FOR Commanding General, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. Purpose. To select new members for general and special courts-martial panels.

2. Discussion.

a. The current panel has been serving since 1 July 20XX.

b. Rule for Court-Martial (R.C.M.) 805 precludes a court-martial from proceeding without a specified number of court members. General and special courts-martial require a minimum of five and three members, respectively. Under R.C.M. 912, any member may be challenged and removed for cause. Also, each party may challenge one member peremptorily, that is, without cause. When requested by an accused who is an enlisted member, at least one-third of the members must be enlisted members. Because of losses from the current court-martial panel, resulting from retirements and Permanent Change of Station (PCS) moves, a new court-martial panel must be selected to meet the requirements of R.C.M. 805.

c. In accordance with Article 25, Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), individuals selected as panel members must be those who, in your opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament.

d. A list of nominees has been provided by the brigades and is included in enclosure B. All personnel on the list of nominees should be given equal consideration in light of the above factors and those factors only. In addition, you were provided the alpha roster for the entire command. You may select anyone under your command whom you feel is "best qualified" under the criteria in Article 25, UCMJ, to serve on a court-martial panel. Military grade by itself is not a permissible criterion for selection of court-martial panel members. It is also not appropriate to select members to achieve a particular result on findings or sentence.

3. Recommendation: Select a new court-martial panel of officers and enlisted personnel to hear cases at Fort Stumpy.

a. Place your initials beside ten officers' names on the roster in enclosure B to serve on a general courts-martial. Further, select five of the ten officers to be excused from the panel when enlisted members are requested by circling your initials. Select five enlisted personnel from the roster in enclosure B to be detailed to the general court-martial panel when the accused requests enlisted members by placing your initials beside their names.

b. Place an "SP" next to eight officers' names on the roster in enclosure B to serve on a special courts-martial panel. Further, select four of the eight officers to be excused from the panel when enlisted members are requested by circling the "SP." Select four enlisted personnel from the roster

[164] MJM COURSE BOOK, *supra* note 132, F-73. Appendix A is derived from material contained in the Military Justice Manual. *Id.*

in enclosure B to be detailed to the special court-martial panel when the accused requests enlisted members by placing a “SP” beside their names.

c. Select eight additional officers to serve as alternate court members for both general and special courts-martial by placing the numbers “O1” through “O8” beside their names on the roster at enclosure B. Select eight additional enlisted personnel to serve as alternate court members for both general and special courts-martial by placing the numbers “E1” through “E8” beside their names on the roster at enclosure B.

d. Direct that the alternate court members be automatically detailed to the court as follows:

(1) When, before trial, a primary member is excused, the primary member will be replaced for the period of time the primary member is excused by an alternate member of the same rank as the primary member. If all alternates of the same rank have been excused, an alternate member of the next junior rank will be detailed. If all alternates of the same or junior rank have been excused, then an alternate member of the next senior rank will be detailed. Within each rank, the replacement members will be notified in the order selected.

(2) When, at trial, the membership of an officer panel (for which enlisted members have not been requested) falls below the minimum number required by R.C.M. 805, the first three officer alternate members who have not been excused, in the order selected, will be detailed. If the accused has requested enlisted members and the number of enlisted members is otherwise sufficient for a quorum but the number of officer members falls below the number required for a quorum, then the first three officer alternate members who have not been excused, in the order selected, will be detailed.

(3) At trial, if the membership of any enlisted panel falls below the minimum number of enlisted members required by R.C.M. 805, the first three alternate enlisted members who have not been excused, in the order selected, will be detailed.

(4) Designate that all alternates will be detailed to either general or special courts-martial pursuant to the directions above.

e. You delegate to the Staff Judge Advocate, 54th Infantry Division, Fort Stumpy, to excuse individual members from a court-martial without cause shown pursuant to R.C.M. 505 (c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused by the Staff Judge Advocate.

f. Any court member who was a signatory on a transmittal memorandum forwarding the case for trial or who conducted an Article 32 preliminary hearing in the case should be automatically excused for that case only. Any enlisted member who is in the same company-sized unit as the accused or who is not senior in rank to the accused should be automatically excused for that case only.

g. Direct that all general courts-martial scheduled for trial on or after 1 July 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the general court-

martial convened by this memorandum. Similarly, direct that all special courts-martial scheduled for trial on or after 10 June 20XX which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the special court-martial convened by this memorandum.

4. A memorandum to accomplish the foregoing is provided in enclosure A for your signature.

Encls
as

BUTCH BEGONIA
COL, JA
Staff Judge Advocate

Appendix B. Proposed Panel Selection Advice[165]

MEMORANDUM FOR Commanding General, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. Purpose. To select new members for general and special courts-martial panels.

2. Discussion.

a. The current panel has been serving since 1 July 20XX.

b. Rule for Court-Martial (R.C.M.) 805 precludes a court-martial from proceeding without a specified number of court members. General and special courts-martial require a minimum of five and three members, respectively. Under R.C.M. 912, any member may be challenged and removed for cause. Also, each party may challenge one member peremptorily, that is, without cause. When requested by an accused who is an enlisted member, at least one-third of the members must be enlisted members. Because of losses from the current court-martial panel, resulting from retirements and Permanent Change of Station (PCS) moves, a new court-martial panel must be selected to meet the requirements of R.C.M. 805.

c. In accordance with Article 25, Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), individuals selected as panel members must be those who, in your opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament.

d. A list of nominees has been provided from the brigades in enclosure B. All personnel on the list of nominees should be given equal consideration in light of the above factors and those factors only. In addition, you have been provided the alpha-roster for the entire command. You are free to select anyone under your command whom you feel is "best qualified" under the Article 25, UCMJ, criteria to serve on the court-martial panel. Military grade by itself is not a permissible criterion for selection of court-martial panel members. It is also not appropriate to select members to achieve a particular result on findings or sentence.

3. Recommendation: Select a new court-martial panel of officers and enlisted personnel to hear cases at Fort Stumpy.

a. Place the number "1" through "50" beside fifty officers' names on the roster in enclosure B to serve for general and special courts-martial. Select fifty enlisted personnel, from the roster in enclosure B, to be detailed to general or special court-martial panels when the accused requests enlisted members by placing "51" through "100" beside their names.

b. Direct that members be detailed to the court from the pool of 100 through a random number sequence (RNS). The RNS will be uniquely generated for each case prior to presenting for a referral decision pursuant to Article 34, UCMJ. Detail ten members to serve on general courts-martial and 8 members for special courts-martial. If the accused elects trial by an enlisted panel, the composition will be half officers and half enlisted members.

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[165] Huestis, *supra* note 141. Appendix B is derived largely from Huestis. *Id.*

c. Direct that the alternate court members be automatically detailed to the court as follows:

(1) When, before trial, a primary member is excused, that primary member will be replaced for the period of time the primary member is excused by an alternate member of the same rank as the primary member. If all alternates of the same rank have been excused, an alternate member of the next junior rank will be detailed. If all alternates of the same or junior rank have been excused, then an alternate member of the next senior rank will be detailed. Within each rank, the replacement members will be notified in the order selected.

(2) When, at trial, the membership of an officer panel (for which enlisted members have not been requested) falls below the minimum number required by R.C.M. 805, the first three officer alternate members who have not been excused, in the order selected, will be detailed. If the accused has requested enlisted members and the number of enlisted members is otherwise sufficient for a quorum but the number of officer members falls below the number required for a quorum, then the first three officer alternate members who have not been excused, in the order selected, will be detailed.

(3) At trial, if the membership of any enlisted panel falls below the minimum number of enlisted members required by R.C.M. 805, then the first three alternate enlisted members who have not been excused, in the order selected, will be detailed.

(4) Designate that all alternates will be detailed to either general or special courts-martial pursuant to the directions above.

d. You delegate to the Staff Judge Advocate, 54th Infantry Division, Fort Stumpy, to excuse individual members from a court-martial without cause shown pursuant to R.C.M. 505 (c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused by the Staff Judge Advocate.

e. Any court member who was a signatory on a transmittal memorandum forwarding the case for trial or who conducted an Article 32 preliminary hearing in the case should be automatically excused for that case only. Any enlisted member who is in the same company-sized unit as the accused or who is not senior in rank to the accused should be automatically excused for that case only.

f. Direct that all general courts-martial scheduled for trial on or after 1 July 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced), are hereby withdrawn and referred to trial by the general court-martial convened by this memorandum. Similarly, direct that all special courts-martial scheduled for trial on or after 10 June 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the special court-martial convened by this memorandum.

4. Additional Considerations. Article 25, UCMJ, is the only criteria you should use when selecting the best qualified members. The recommendations below are provided solely for your

consideration and are designed to ensure panels are both fair and efficient. The recommendations are based on generalizations and would not apply to every person in these situations. Based on my experience, however, these are often accurate.

a. The training and experience associated with some personnel makes it likely they will be challenged and removed before trial pursuant to R.C.M. 912(f). Those who have performed law enforcement duties or have specific training or experience with crime victims are particularly susceptible to a challenge for cause. Military police in enclosure B are highlighted in blue.[166] Personnel who are or have served as a UVA are highlighted in green. I recommend against selecting these personnel in significant numbers.

b. Other personnel have professional responsibilities requiring impartiality that may appear to be undermined by panel service. Similarly, these personnel are frequently exposed to collateral issues related to courts-martial in their normal duties. Chaplains and those serving in inspector general positions are highlighted in yellow and orange, respectively, in enclosure B. I recommend against selecting these personnel.

c. Many judge advocates (JAs) may be disqualified by their role in the process per the UCMJ. Virtually every JA at Fort Stumpy knows all other JAs due to the relatively small community. Judge advocates' knowledge of the process and counsel involved make them likely to be challenged for cause. Judge advocates are highlighted in red at enclosure B. I recommend against selecting these personnel.

5. A memorandum to accomplish the foregoing is in enclosure A for your signature.

Encls
as

BUTCH BEGONIA
COL, JA
Staff Judge Advocate

[166] While panel nomination paperwork frequently contains nominees' branches, this article recommends highlighting the paperwork for clarity and to ensure others with non-branch-specific concerns are identified (VAs and IGs).

Appendix C. Proposed Convening Authority Selection Document[167]

MEMORANDUM FOR Staff Judge Advocate, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. The recommendations of the Staff Judge Advocate (SJA) are approved/disapproved.

2. I note that before selecting panel members, I had before me for my consideration the ORBs and ERBs of all panel member nominees as well as the alpha roster from 54th Infantry Division (ID). I have selected these members using the selection criteria of Article 25, Uniform Code of Military Justice (UCMJ). I selected panel members who were, in my opinion, best qualified for the duty based on their age, education, training, experience, length of service, and judicial temperament, and no other criteria. I did not exclude Soldiers of particular ranks from consideration nor did I exclude anyone based upon gender or ethnic background.

3. I selected a large pool of panel members, both officer and enlisted, from which panels for particular courts-martial will be randomly selected. This large pool of panel members ensures that more Soldiers are actively involved in the military justice system and that the military justice system in 54th ID is representative of the community, while still adhering to the high standards of having the best qualified panel members under Article 25, UCMJ.

4. I assigned each of the members that I have personally selected a number; officer members (1-50) and enlisted members (51-100). Before I review a case for possible referral to either a general or special court-martial, the SJA will provide me a unique, case-specific random number sequence (RNS). This 100 number RNS will be attached to the SJA's Article 34, UCMJ, pretrial advice. General courts-martial (GCMs) will be assembled with ten members and special courts-martial (SPCMs) will be assembled with eight members. The first ten or eight officer members randomly selected by RNS order will sit as panel members unless they are excused. The remaining officers will be available in RNS order as alternate members.

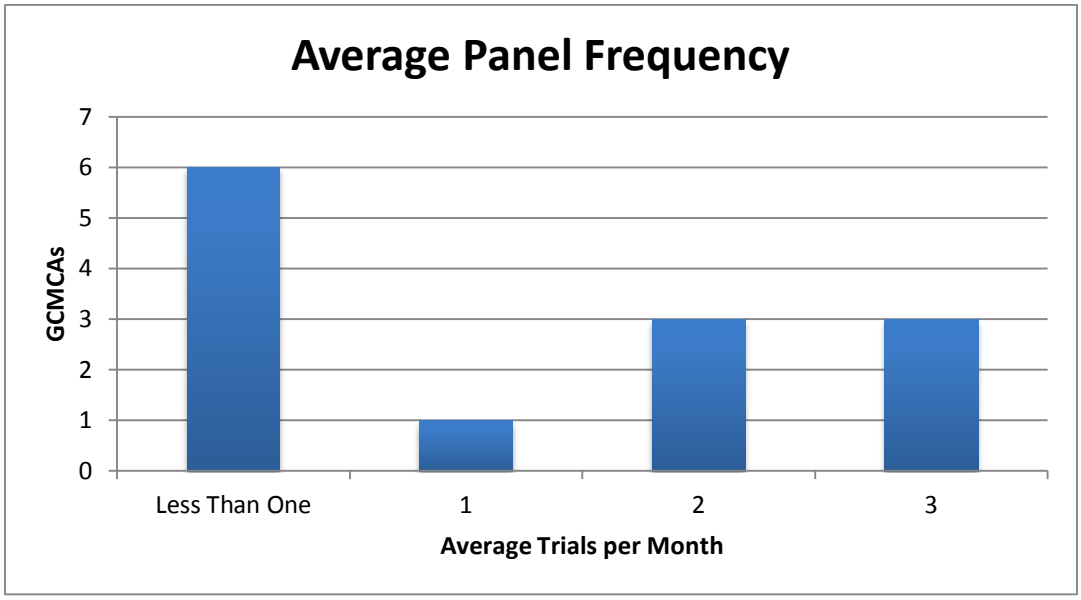
5. If enlisted members are required for a court-martial, the same process outlined above will be utilized with the following variations: Using RNS order, the first five officer members and the first five enlisted members will sit as panel members for GCMs; the first four officer members and the first four enlisted members will sit as panel members for SPCMs, unless they are excused. All other officer and enlisted members will be available in RNS order as alternate members.

STEVEN E. NICKS
MG, U.S. Army
Commanding

[167] Huestis, *supra* note 141. Appendix B is derived largely from Huestis. *Id.*

Appendix D. Survey Results

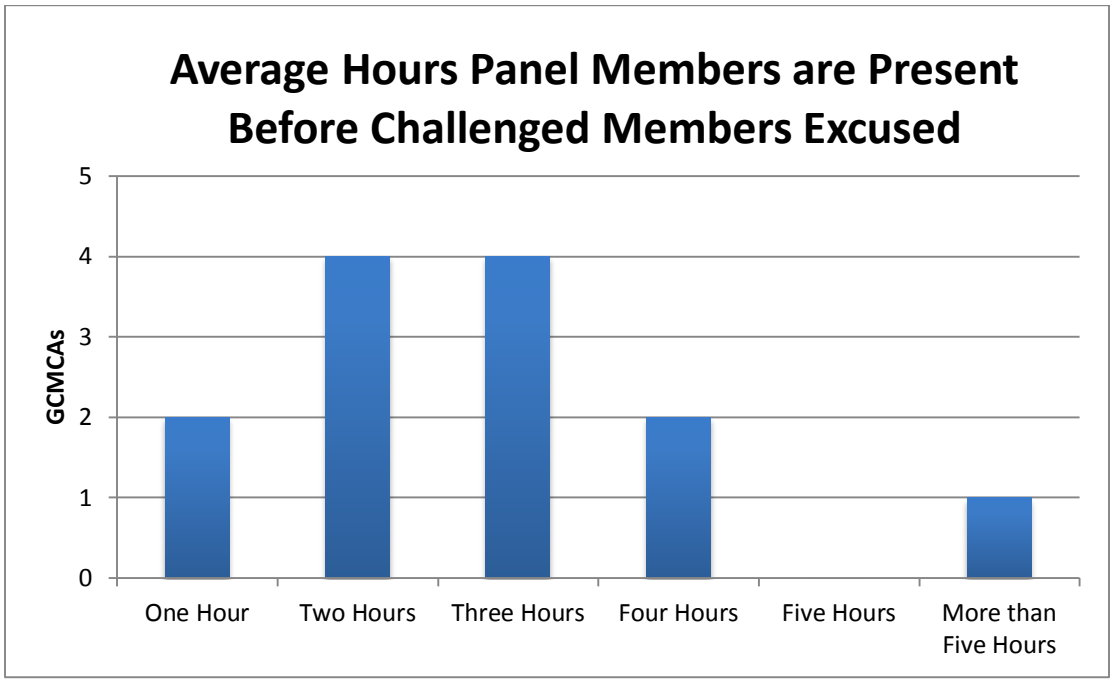
Thirteen General Courts-Martial Convening Authorities (GCMCAs) in the Army participated in a survey for this article. Responses were voluntary and anonymous. Responses came from jurisdictions with varying courts-martial frequency. The chart below illustrates the responses indicating six GCMCAs convene less than one panel case per month on average while six other respondents average two or three in that period.



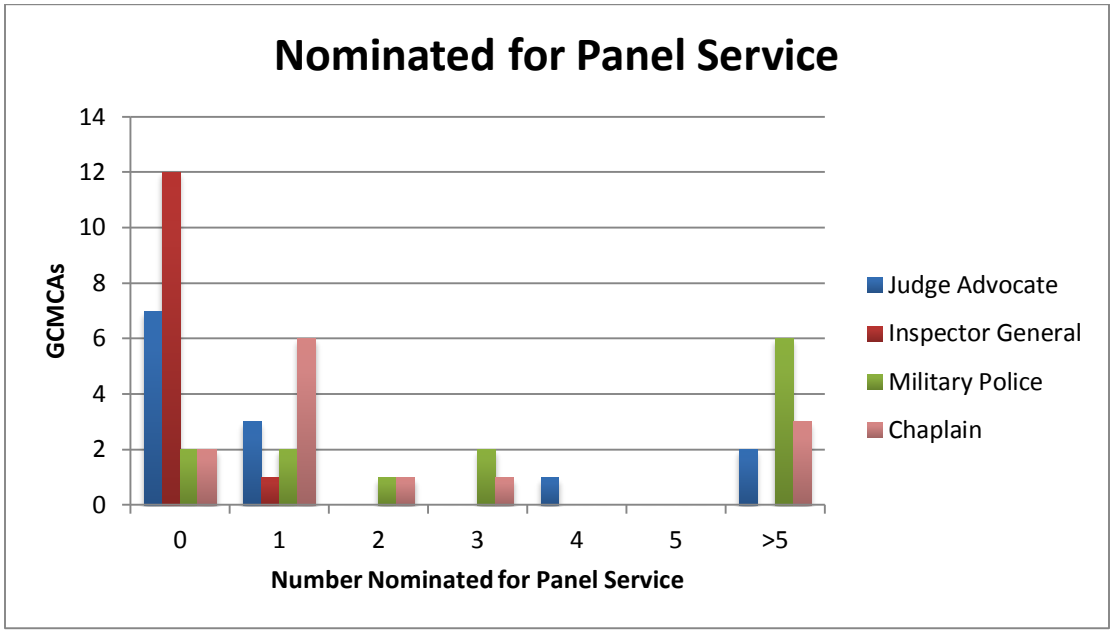
One of the goals of this study was to estimate the amount of time wasted for one member who is detailed to panel duty but does not actually sit due to an inevitable challenge.[168] The chart on the next page illustrates the minimum amount of time an individual panel member spends awaiting notification on any challenge for cause. Respondents were asked to round to the nearest hour. The average length of time is 3.25 hours across the thirteen responding GCMCAs. Two of the GCMCAs indicated that one time in the past year, their panel fell below quorum due to challenges necessitating detailing new members.[169]

[168] *See supra* note 21 and accompanying text.

[169] *See supra* note 6 and accompanying text.



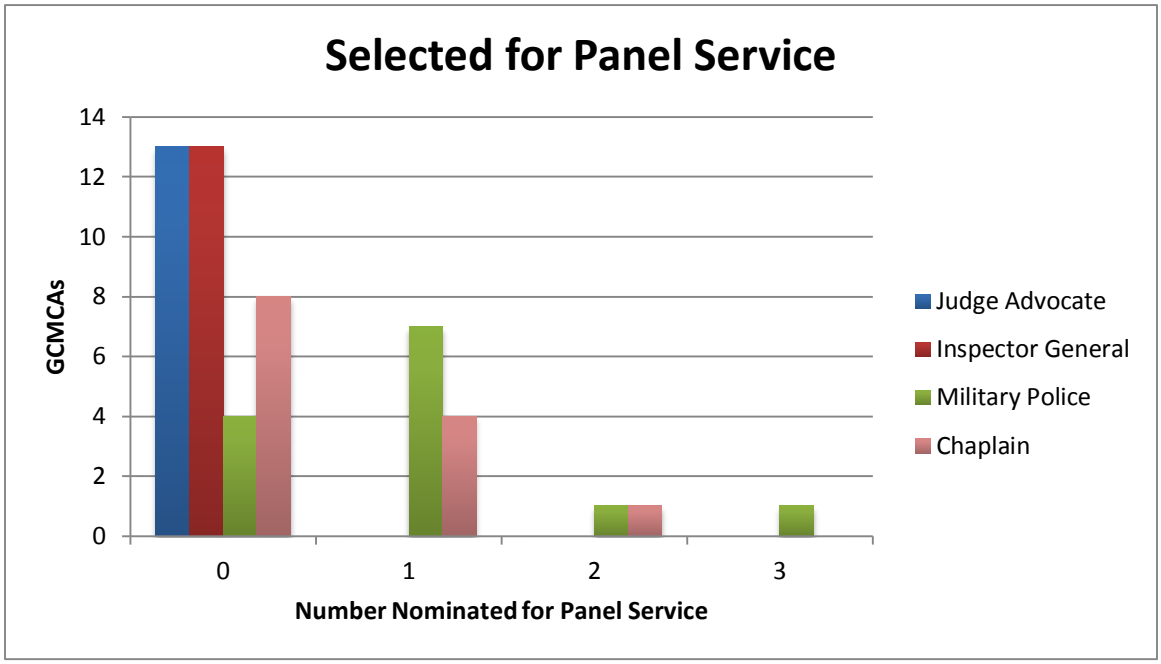
Perhaps most importantly, the survey sought the frequency that members described above were nominated and selected for panel service. As seen in the chart below, the issue may be more common than thought: two GCMCAs reported nominating more than five judge advocates for panel service and three GCMCAs had more than five chaplains nominated for service. Data regarding the Department of Veteran Affairs training was unavailable.



The rate some officers are selected is also cause for concern. The chart below shows nine of the thirteen responding GCMCAs had military police officers as primary or alternate panel members.[170] Five GCMCAs had chaplains on their panels, with one

[170] While ten respondents self-reported the quantity of special branch officers nominated and selected, three GCMCAs: I Corps, III Corps, and 8th Army provided panel selection documents for review. A closer review of these selection documents indicated that one GCMCA contained a primary panel member whose previous duty assignment was the senior agent in charge of the local CID detachment (supervising Army detectives) and another panel had the unit's provost marshal officer as a primary member (a practice specifically proscribed for decades). *See* case cited *supra* note 92 and accompanying text.

GCMCA reporting two chaplains. Again, these numbers could not account for personnel with Victim Advocates or similar training which Chiefs of Justice anecdotally reported to be a very common basis for implied bias challenges.[171]



Most panels contain at least one member who is unlikely to survive an implied bias challenge.[172] If using the typical panel of ten members as indicated in Appendix A, the panel's starting membership is practically reduced to eight when accounting for the likely implied bias and defense peremptory challenges.[173] This means an average loss of more than six work hours in the day for these two members and a greater likelihood of a broken quorum.[174] The potential time wasted grows significantly when detailing multiple members with implied bias challenge concerns.[175]

[171] *See supra* note 86.

[172] *See supra* Part III.A.

[173] UCMJ art. 41 (2012).

[174] Calculated using the average voir dire length of 3.25 hours noted above.

[175] *See generally supra* Part III.A. The greater likelihood a member will be successfully challenged, the greater likelihood the panel will drop below quorum.

A Proposal to Amend Military Rule of Evidence 304 to Conform with Federal Practice

Major Brittany Warren[*]

I. Introduction

Confessions are one of the most powerful pieces of evidence against an accused in a criminal trial. For this reason, and because of a discreditable history of police overreach regarding coerced and unreliable confessions,[1] modern courts tend to view confessions with a jaundiced eye. Confessions are now required to be not only voluntary, but also corroborated by independent evidence.[2] The reasoning behind this fundamental mistrust of confessions was articulated fifty years ago by Justice Goldberg: "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[3]

The corroboration requirement is designed to protect against coercion and prevent a mentally-ill accused from being convicted of an imaginary crime. In essence, the government has the burden of proving beyond a reasonable doubt that: (1) an injury occurred; (2) the cause of the injury was criminal in nature; and (3) the accused caused the injury.[4] The first two elements are what is known as the *corpus delicti*, or body of the crime.[5] Under the military rules of evidence, the accused's confession is not sufficient standing alone to prove that a crime has in fact been committed.

Basically stated, the corroboration requirement is the idea that a confession or admission of an accused cannot be used against him as evidence of guilt in a criminal trial "unless there is independent evidence which sufficiently corroborates the confession."[6] This rule has a lengthy history both at common law and in military practice. The military's version of the corroboration requirement is currently codified at Military Rule of Evidence (MRE) 304(c)[7] but has existed in some form for over a century. Despite clear intent by Congress that military courts apply the same standard as federal courts, military judges have used ambiguous language found in Rule 304(c) to apply a more stringent standard when evaluating the admissibility of an accused's confession.[8] Recently, Congress directed the President to amend MRE 304 to match the federal version of the rule.[9] This article proposes language for the new rule and a drafter's analysis to guide its application during courts-martial.

II. Historical Context

Early English practice allowed for an accused's conviction based solely upon his confession.[10] This frequently led to miscarriages of justice. In a widely-reported 1661 case, two brothers and their mother were executed for murder when a third man, William Harrison, disappeared under suspicious circumstances.[11] The evidence against them consisted of bloody clothing found on the road to Harrison's home and one of the co-defendants' confession.[12] Two years after their executions and far too late to do any of the unfortunates any good, Harrison re-appeared, claiming that he had been kidnapped by pirates and sold into slavery.[13] In a similar case in the United States, *The Trial of Stephen and Jesse Boorn*, two brothers were convicted of murdering their missing brother-in-law based on a brother's confession that the brother-in-law's ghost appeared to his father and said he was dead.[14] Thankfully for these two, the supposedly dead brother-in-law turned up alive and well in New Jersey prior to the scheduled date of execution.[15] Clearly, a new rule was needed, and the *corpus delicti* rule was born.

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[1] *See, e.g.*, Beecher v. Alabama, 389 U.S. 35 (1967); Brown v. Mississippi, 297 U.S. 278 (1936).

[2] Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 32 HARV. C.R.-C.L. L. REV. 105, 107-08 (1997).

[3] Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (Goldberg, J., concurring), *quoted in* Major Russell L. Miller, *Wrestling with M.R.E. 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1, 2 (2003).

[4] *See Proof of the Corpus Delici Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638 (1955) [hereinafter *Proof of the Corpus Delici Aliunde*]. The idea here is to ensure that before someone is imprisoned based on their confession to a murder, it must first be established that the alleged victim was real, that they are dead, and that the victim's death was caused by another rather than the result of an accident or natural causes. *Id.*

[5] *Id.*

[6] Miller, *supra* note 3, at 2.

[7] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c) (2015) [hereinafter MCM].

[8] *See* discussion *infra* Section II.

[9] *See* National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (2015) (vetoed by President).

[10] *See Proof of the Corpus Delici Aliunde*, *supra* note 4, at 638.

[11] *The Story*, THE CAMPDEN WONDER, http://www.thecampdenwonder.com/the_story.html (last visited Mar. 30, 2016).

[12] *Id.*

[13] *Id.*

[14] Miller, *supra* note 3, at 5, n.21 (citing Rollin M. Perkins, *The Corpus Delecti of Murder*, 48 VA. L. REV. 173, 175 (1962)).

[15] *Id.*

As articulated by Colonel William Winthrop, a leading 19th century scholar of military law, the *corpus deliciti* rule states: "As to the requisites to the admission in evidence of *extra-judicial* confessions—it has been seen, in the first place that a confession cannot be admitted in evidence till the *corpus delicti*—the fact that the alleged criminal act was in fact committed, by somebody—is proved."[16]

The purpose of this rule is to prevent false and coerced confessions; to provide incentives to law enforcement to seek additional evidence, which would confirm the reliability of a particular confession; and to protect against jurors' tendency to view confession evidence uncritically regardless of the circumstances under which a confession was given or the extent of corroboration.[17] At the federal level, controversy arose about what precisely the *corpus delicti* rule required. On one side of the circuit split was *Daeche v. United States*,[18] which held that corroboration of a confession required merely "substantial evidence" supporting the veracity of the confession and that corroborative evidence needed only to touch on the *corpus delicti* of the charged offense.[19] On the other side lay *Forte v. United States*,[20] which held that corroboration of a confession required independent evidence tending to establish "the whole of the *corpus delicti*," which means proving "each of the main elements or constituent parts of the *corpus delicti*."[21] In 1954, the Supreme Court resolved this circuit split in favor of *Daeche*, in what came to be known as the "trustworthiness doctrine":[22] "It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement."[23]

Under this doctrine, the purpose of the corroboration rule is merely to ensure the reliability of the confession or the admission of the accused.[24] To this end, the corroborative evidence need not be sufficient—independent of the confession—to establish all elements of the crime charged, as long as it tends to establish the trustworthiness of the statements as well as those elements of the offense that are not proven by the statement.[25] While this holding should have settled matters, the state of the law in military courts was much more complicated.

III. The Uniform Code of Military Justice and *Adams*

Prior to establishment of the Uniform Code of Military Justice (UCMJ) on May 5, 1950,[26] the military had a version of the corroboration rule largely similar to the language from *Daeche*. In the 1921 Manual for Courts-Martial (MCM), the drafters explicitly stated that the evidence introduced to corroborate the confession did not need to cover each element of the offense.[27] Despite this, and similar language in the 1928 and 1949 MCMs, military courts and boards of review tended to apply the more strict *Forte* elements test.[28] The first post-code MCM in 1951 did not substantially change the language of the pre-code rule,[29] but it did remove the clause that the corroborating evidence need not "cover every element of the offense charged."[30] Because of this, and because pre-code practice was to functionally disregard that clause in favor of the *Forte* rule, the Court of Military Appeals (CMA) overturned a conviction for desertion in the 1953 case *United States v. Isenberg*, holding that the Government failed to provide independent evidence corroborating every element of the offense of desertion.[31] When post-*Opper* cases gave the CMA the opportunity to revisit the rule, it refused to adopt the more lenient federal standard, stating that the stricter rule was within the President's power to promulgate.[32] In response, the 1969 MCM contained a provision explicitly making the *Opper* holding applicable to military courts,[33] but also adding a new wrinkle:

> It is a general rule that a confession or admission of the accused cannot be considered as evidence against him on the question of guilt or innocence unless independent evidence, either direct or circumstantial, has been introduced which

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[16] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 327 (2d ed. 1920).

[17] Miller, *supra* note 3, at 6-7.

[18] Daeche v. United States, 250 F.566 (2d Cir. 1918).

[19] *Id.* at 571.

[20] Forte v. United States, 94 F.2d 236 (D.C. Cir. 1937).

[21] *Id.*

[22] Opper v. United States, 348 U.S. 84, 86 (1954).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *See* Uniform Code of Military Justice, Pub. L. No. 81506, 64 Stat. 107 (1950).

[27] *See* United States v. Isenberg, 8. C.M.R. 149, 152 (C.M.A. 1953). *Isenberg* contains an excellent discussion of the historical development of the rule in military courts. *See id.*

[28] *Id.* at 153-55.

[29] MANUAL FOR COURTS MARTIAL, UNITED STATES, pt. iv, ¶ 140(a) (1951).

[30] *Isenberg*, 8 C.M.R. at 155.

[31] *Id.*

[32] *See, e.g.*, United States v. Smith, 32 C.M.R. 105 (C.M.A. 1962). In this case, regarding a lewd and lascivious act upon a child, the court held that the Government's evidence, aside from a confession by the defendant, consisted solely of medical testimony establishing that the child had sustained injuries consistent with penetration by an erect penis. *Id.* Because that testimony could not rule out other causes, however, the confession was held to be insufficiently corroborated. *Id.*

[33] *See* U.S. DEP'T OF THE ARMY, PAM. 27-2, ANALYSIS OF CONTENTS MANUAL FOR COURTS-MARTIAL ch. 27, para. 140a(5) (July 1970).

> corroborates *the essential facts admitted* sufficiently to justify an inference of their truth.[34]

Despite the drafters' intent that this language invoke *Opper*, military courts debated what exactly "essential facts" were,[35] and their holdings reflected the confusion. Courts debated the quantum of evidence required to corroborate, whether the corroborative evidence itself had to be admissible, and whether the entire confession was admissible or only those facts that had been corroborated.[36] In 2015, the Court of Appeals for the Armed Forces (CAAF) appeared to take a substantial step back towards the elements test in its holding in *United States v. Adams*[37] when the CAAF overturned a conviction based on a confession that it held was insufficiently corroborated. It was error to have admitted the accused's entire confession into evidence because every "essential fact" within it had not been corroborated; only those corroborated portions of the confession should have been introduced.[38] The *Adams* holding requires the Government to corroborate essential facts on a one-for-one basis, "effectively returning the law to a *corpus delicti* test."[39]

As the case law demonstrates, an elements-based test for corroboration encourages over-technical application and unjust results.[40] There is no reason for military practice to differ so substantially from the rule used for more than a half-century in federal courts.[41] In direct response to *Adams*, the Fiscal Year 2016 National Defense Authorization Act (FY16 NDAA) mandates the President to amend MRE 304(c) to conform to federal practice. The remainder of this article outlines what that amendment should look like.

III. Proposal

The MRE 304(c) amendments should clarify the following points: (1) The quantum of corroborating evidence necessary (substantial); (2) whether the corroborating evidence must be itself admissible (yes); (3) whether the corroborating evidence must be admitted before the confession can be offered (yes); (4) whether the confession can be admitted in its entirety once its trustworthiness has been corroborated (yes); and (5) whether the confession can itself be proof of an element of the offense (yes).

The rule should be worded as follows:

(c) Corroboration of a Confession or Admission.

(1) An admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if substantial independent evidence, either direct or circumstantial, has been admitted into evidence that tends to establish the essential trustworthiness of the statement.

This above paragraph's language is taken verbatim from *Opper*.[42]

(2) Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. So long as the essential trustworthiness of the statement is established by admissible independent evidence, the confession or admission may be admitted in its entirety.

The proposed paragraph above requires that the corroborating evidence be itself admissible and allows for a corroborated confession to be admitted into evidence in its entirely. This latter language overrules *Adams*.

(3) [No Change]

(4) Quantum of Evidence Needed. Substantial evidence is that evidence which is sufficient for a reasonable, prudent fact-finder to conclude that a crime was committed by someone. This independent evidence need not be sufficient, independent of the confession or admission, to establish all elements of the crime charged, as long as it raises an inference of the trustworthiness of the statements. Between the statement and the corroborating evidence, all elements of the offense must be proven beyond a reasonable doubt. The amount and type of evidence introduced as corroboration is a

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[34] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. iv, ¶ 140(a) (1969) [hereinafter MCM].

[35] *See, e.g.*, Opper v. United States, 348 U.S. 84, 93 (1954). The verbiage "essential facts" also comes from *Opper*, as an explanation for what evidence would be sufficient to corroborate a confession under the trustworthiness doctrine. *Id.* The Court articulated: "It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth." *Id.* It is unclear why the 1969 Manual for Courts-Martial drafters chose to use this phrase rather than the "substantial independent evidence" language of the Court's holding. MCM, *supra* note 34.

[36] *See, e.g.*, Miller, *supra* note 3, at 37-45.

[37] United States v. Adams, 74 M.J. 137 (C.A.A.F. 2015). In this case, the accused was charged with using a firearm to rob his drug dealer, Ootz, of cocaine. *Id.* at 138. He confessed to stealing the cocaine from Ootz, but a search of his home only turned up the handgun. *Id.* At trial, the government introduced only the accused's statement and testimony from two Criminal Investigation Command (CID) agents that they were aware of a drug dealer named Ootz and that the accused had a handgun. *Id.* As the majority opinion pointed out, there was no independent corroborating evidence as to motive, opportunity, access, intent, the subject of the larceny (the cocaine), the time of the crime, or the act of larceny itself. *Id.* at 139. The dissent pointed out that the confession was otherwise trustworthy and would have sustained the conviction without requiring independent corroboration of each fact on a one-for-one basis. *Id.* at 142 (Baker, J., dissenting).

[38] *Id.* at 140.

[39] *Id.* at 142 (Baker, J., dissenting).

[40] *See, e.g.*, United States v. Smith, 32 C.M.R. 105 (C.M.A. 1962).

[41] The general principle is that the President should, to the extent he finds practicable, promulgate rules for trials by courts-martial that apply the principles of law and rules of evidence applicable in federal district courts. *See* 10 U.S.C. § 836 (2006).

[42] *See* Opper v. United States, 348 U.S. 84, 93 (1954).

factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

The proposed paragraph above takes its definition of substantial evidence from federal case law.[43]

Because the trustworthiness doctrine is, above all, concerned with the trustworthiness and veracity of a particular confession, the drafter's analysis should be worded as follows:

> In assessing the trustworthiness of the confession or admission, the military judge's analysis should hinge on whether there is independent evidence that a crime has occurred. Other factors used to substantiate the trustworthiness of a confession or admission include, but are not limited to: evidence as to the spontaneity of the statement; the absence of deceptive or coercive police or other investigative practices to obtain the statement; and the defendant's positive physical and mental condition, including age, education, and experience.

A confession may be deemed trustworthy if it is consistent with objective facts known about the crime and demonstrates the individual has specific, personal knowledge about the crime.[44] This analysis may include: (1) providing information that leads to the discovery of evidence unknown to investigators, (2) providing information about highly unusual elements of the crime that have not been made public, and (3) providing an accurate description of the mundane details of the crime scene which are not easily guessed and have not been reported publicly.

This proposal will bring military practice in line with federal practice and directly reflect Congressional intent. This should be the language promulgated in the new MRE 304(c) as directed by the FY16 NDAA.

[43] *See, e.g.*, United States v. Fuller, 243 F.Supp. 203 (D.C. Cir. 1965).

[44] *See* discussion *supra* Section III.

Military Service, Civil Service, Settlement and Sabotage

Mark E. Sullivan[*]

There's always the unexpected . . . .[1]

I. Introduction

"The unexpected" is a major theme in David Lean's complex 1957 war film, *The Bridge on the River Kwai*.[2] Early in the plot, Navy Commander Shears is unmasked and found to be an ordinary seaman impersonating an officer in the hope that he would get better treatment in a Japanese prisoner of war camp; however, he soon discovers that the camp officials treat both officers and enlisted men with equal cruelty.[3] Upon hearing this, Major Warden, who leads the commando team to blow up the bridge, wryly remarks, "Yes, there's always the unexpected, isn't there?"[4]

References to "the unexpected" occur often in the movie. After parachuting into the jungle, the commando team is surprised to learn that the initial bridge construction was abandoned and a new span has been erected at a different site than the one to which they were marching.[5] After the saboteurs finish their work, the River Kwai goes down unexpectedly overnight, exposing the demolition charges previously hidden underwater and the wires to the detonator downstream.[6] Then the team discovers that a troop and VIP train from Bangkok to Rangoon is scheduled for just a few days after their arrival.[7] Warden, upon hearing of this surprise "target of opportunity," points out that the swift kick Shears gave to the malfunctioning radio brought it back to life, giving the commando team new intelligence as to the bridge's location and the train.[8] Shears, in a sarcastic reprise of Warden's earlier remark, exclaims, "Well, there's always the unexpected, isn't there?"[9]

II. *Lusso v. Quiggle*—The Unexpected

The unexpected is what happened to Muriel Quiggle in her divorce case upon appeal to the Minnesota Court of Appeals in 2015.[10] The expected division of her ex-husband's retired pay vanished into thin air. The appellate court laid the blame on the wording of the divorce settlement; it left the court with no room to wiggle.

The parties married in April 1973, and the husband joined the Air Force in November of that year.[11] In 1989, he filed for divorce.[12] A divorce was granted in October of that year.[13]

Like many divorcing couples, the parties entered into an agreement to resolve issues of property division and other matters.[14] Their stipulated divorce decree, in regard to the husband's retirement rights, said that for fifteen years of the marriage, the husband was on active duty in the Air Force, accumulating retirement benefits payable to him if he retired after twenty years.[15] If he became eligible for a military pension benefit as a result of this service, 37.5% of his pension would be awarded to the wife.[16]

What happened next defies any planning and cannot be explained. The husband left the Air Force.[17] He stopped serving before he reached twenty years of service.[18] The court opinion does not indicate whether he resigned his commission or was forced out. It is simply silent.

After the husband left the service, he took a job with the Department of Veterans Affairs. With more than fifteen years of creditable service in the Air Force, the husband paid $9,700 to the civil service retirement fund to buy into the Federal Employees Retirement System (FERS).

When Mrs. Quiggle found out that there was no Air Force pension to divide, she moved to amend the divorce decree and re-open the judgment on the grounds that she had a marital

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[1] *The Bridge on the River Kwai* (Columbia Pictures Corp. 1957).

[2] *Id.*

[3] *Id.*

[3] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Lusso v. Quiggle, 2015 Minn. App. Unpub. LEXIS 28 (Minn. Ct. App. Jan. 12, 2015).

[11] *Id.* at *1.

[12] *Id.*

[13] *Id.*

[14] *Id.* at *1-2.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at *2.

interest in her ex-husband's civil service pension.[19] The trial court denied her motion, stating that the plain language of the decree governed, and the Court of Appeals affirmed.[20]

The problem in the *Quiggle* case is that there was no provision for the wife to receive part of any other retirement plan. The divorce decree contained no clause that allowed the division or allocation of a different retirement program that might take the place of the military retirement. Additionally, there was no imposition of a constructive or resulting trust on the benefits in a subsequent pension plan, which derived from marital time in the military. Constructive credit for the pension earned during the years of military pension service while the parties were married was neither contemplated, expressed nor agreed upon; it just was not on the radar.

III. Civil Service Rollovers

The conversion of military time to civil service time often occurs when an individual has a few years of prior military service and is discharged. Federal law allows the individual to purchase time credits toward a civil service retirement, using active duty time spent in the armed forces and paying into a fund for the additional time gained, meaning an earlier pay date for the civil service retirement annuity.[21]

In these cases, the litigated issue is usually whether the former spouse possesses a property right in the additional time purchased. Sometimes the purchase was made during the marriage, with the former spouse claiming that this means the property is marital or community property and, thus, is divisible.[22] In other cases, the court is asked to determine whether the purchase was made with marital or community funds or with separate funds.[23] When there is a marital or community component, whether time or payment, the court can either grant the former spouse a share of the new retirement benefit or return the funds to 'the marital pot' for division by the parties.[24] This may be done by requiring the individual acquiring civil service pension rights to pay back the former spouse for fifty percent (or other percentage) of the cost incurred with marital funds.[25]

The interrelationship of military and civil service retirement is complex. Few civilian lawyers (and even fewer spouses) realize that a servicemember can "roll over" his or her years of active duty service into federal civil service and purchase a year-for-year credit based on the time spent in the military.[26] Even fewer lawyers and spouses have the foresight to anticipate that this situation may occur in connection with the divorce case. Almost no one possesses a working knowledge of the statute allowing this credit. The failure of the former spouse's lawyer to consider this consequence might be an expensive mistake.

IV. Choices for the Member or Retiree

Military members should carefully consider their options regarding a post-retirement job with the federal civil service.[27] A military member eligible for military retirement (or a military retiree) who is working as a civil servant may choose one of three options regarding military retired pay, Social Security, and the civil service pension. The first option is to receive military and civil service pensions plus Social Security benefits based on time in the military.[28] This gives the retiree three distinct retirement benefits. Since the military service provides Social Security benefits, the spouse

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[19] *Id.*

[20] *Id.* at *1.

[21] 5 U.S.C. § 8334(j) (1994). *See also* 5 U.S.C. §§ 8332(c), 8334(j), 8411(c), 8422(e) (1994). The implementing regulations of the U.S. Office of Personnel Management (OPM) are found in 5 C.F.R. § 831.2101 to 831.2107 (1995) (for the Civil Service Retirement System) and 5 C.F.R. §§ 842.306 to 842.309 (1995) (for the Federal Employees Retirement System).

[22] *See, e.g.*, In re Marriage of Mahaffey and Mahaffey, 773 P.2d 806 (Or. Ct. App. 1989) (holding that four years of military service used by a husband in purchasing federal civil service credit was jointly owned by his wife since the purchase occurred while the couple was married).

[23] *See, e.g.*, Gainer v. Gainer, 639 S.E.2d 746 (W. Va. 2006). In this case, the husband purchased federal civil service credit prior to his marriage. *Id.* The court held that this increase in the husband's federal retirement benefit was his separate property, but his wife was entitled to reimbursement of one-half of the cost because marital funds were used for the purchase. *Id.*

[24] *See, e.g.*, Leatherman v. Leatherman, 833 P.2d 105 (Idaho 1992).

[25] *See, e.g.*, *Gainer*, 639 S.E.2d 746. The problem is not limited to federal pension rights, as some cases involve the purchase of time credits in a state or local retirement system. *See, e.g.*, Valachovic v. Valachovic, 780 N.Y.S.2d 222 (N.Y. App. Div. 2004). In that case, both parties were retired school teachers receiving pension benefits from the New York State Teachers' Retirement System at the time of their divorce. *Id.* During the marriage, the husband purchased three additional years of credit for military service in the state system. *Id.* The wife filed a motion to receive a share of those credits but the court denied the motion, holding that the credits were the husband's separate property since they preceded the marriage. *Id.* The order was affirmed on appeal, with the court stating that whether, and to what extent, a pension benefit was marital or separate property was determined by the time period in which the credit for the pension was earned. *Id.* at 223. *See also* Okos v. Okos, 739 N.E.2d 368 (Ohio Ct. App. 2000) (involving a similar situation related to a husband's disability pension). *But see* Lodrigue v. Lodrigue, 817 So. 2d 466 (La. Ct. App. 2002). In that case, the husband had purchased state employment credit *during* his marriage with military service that occurred *before* he was married. *Id.* at 467. The appellate court held that since there was no evidence presented at trial that the credit was purchased with separate funds, the service was deemed to be community property. *Id.* at 470.

[26] *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 643, 113 Stat. 512, 664 (1999). This is different from the dual compensation restriction, which required reduction of military retired pay when a retired servicemember entered federal civil service. *Id.* Dual compensation limitations were eliminated in 1999. *Id.*

[27] *See* OFF. OF PERS. MGMT., *CSRS and FERS Handbook for Personnel and Payroll Offices* ch. 22 (Apr. 1998), https://www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c022.pdf [hereinafter *CSRS & FERS Handbook*].

[28] DAVID BURRELLI, CONG. RESEARCH SERV., RL31663, MILITARY BENEFITS FOR FORMER SPOUSES: LEGISLATION AND POLICY ISSUES 19 (Dec. 9, 2004).

or former spouse will receive Social Security survivor benefits, if the marriage lasted at least ten years.[29]

The second option is to waive military retired pay and credit all military service to civil service retirement, with Social Security benefits to be based on military service. With this alternative, the retired member obtains two separate benefits: civil service retirement plus Social Security.[30] The amount of the civil service pension is based on total federal service, including military service.[31] When the retiree attains age sixty-two, however, the years of military service stop counting toward the civil service pension because they are counted toward Social Security; thus the civil service employee annuity drops at the age of sixty-two when Social Security becomes payable to the retiree.[32]

The third alternative is to elect the second option, discussed above, and deposit a lump sum into the federal retirement fund (Civil Service Retirement Fund or Federal Employees Retirement System) to avoid the reduction mentioned above at age sixty-two.[33] Here, the retiree is also eligible for two retirement benefits—the civil service pension and Social Security payments, the latter being without reduction at age sixty-two.

V. Roll-Over of Military Service in the Courts

The Idaho case of *Leatherman v. Leatherman* provides an example of how the rollover, waiver, and division works.[34] In that case, the parties were divorced in 1982 after thirty-five years of marriage.[35] The former husband served in the Navy for fourteen years during the marriage, and the court awarded him his Navy retirement pay as his separate property.[36]

In 1983 the Veterans Administration determined that the husband was 100% disabled as a result of a heart attack.[37] He had been employed as a postal worker; to qualify for full civil service disability, he waived his military pension.[38] Though he lacked military retirement benefits at that time because he left the Navy too early, he received credit for his years of Navy service in determining his civil service retirement.[39]

Upon the motion of the former wife to modify the divorce decree, the magistrate granted her nine-teen percent of her former husband's civil service annuity.[40] This was due to credit for his service in the Navy during the parties' marriage.[41] The Idaho Supreme Court upheld this decision, stating that "the district court correctly ruled that the portion of appellant's civil service benefits representing his years of service in the military are divisible military retirement benefits" under state law.[42]

VI. The Potential for Abuse

The potential for abuse in these cases is obvious. Before January 1, 1997, a military retiree could avoid paying a former spouse her share of the military pension by using federal employment to circumvent the military pension division order; all the employee had to do was convert his years of military service into creditable time for an increased civil service retirement benefit.

Because of this workaround, Congress changed the rules effective January 1, 1997. The changes to the Civil Service Retirement Act and the Federal Employees Retirement Act allow a former spouse to continue to receive payments of military pension division when the military retiree has waived military retired pay to credit military service toward a single civil service employee annuity.[43] A worker in the federal government who retired from military service can no longer count his or her years of military service toward a civilian federal retirement without authorizing the Office of Personnel Management (OPM) to deduct the appropriate amount adjudicated by court order for the former military spouse.[44]

For the last twenty years, former spouses have been protected from loss of divided military retired pay through transfer of retirement benefits from military retirement to civil service retired pay. That protection, however, does not address the issue of past military service that has not matured into a military pension.

VII. The Last Word

When one encounters the unexpected, the last word is sometimes left to the commander, supervisor or senior staff. In *The Bridge on the River Kwai*, the final words on planning

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[29] *Id.*

[30] *Id.*

[31] Burrelli, *supra* note 28.

[32] *Id. See also CSRS & FERS Handbook*, *supra* note 27, §§ 22A3.1-4A.1., 22A5.1-1, 22A5.1-3.

[33] *CSRS & FERS Handbook*, *supra* note 27, § 22A5.1-3.

[34] Leatherman v. Leatherman, 833 P.2d 105 (Idaho 1992).

[35] *Id.* at 106.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 108.

[43] Civil Service Retirement Act of 1920, 5 U.S.C. § 8332(c)(4) (1920); Federal Employees Retirement System Act of 1986, 5 U.S.C. § 8411(c)(5) (1986).

[44] *See Id.*

the destruction of the bridge are from Colonel Green, the commandant of the commando training school.[45] He advises the sabotage team: "As I've told you before, in a job like yours, even when it's finished, there's always one more thing to do."[46]

Here, the attorney for the former spouse must think about one more thing, one unanticipated issue, namely, What happens if the servicemember does not retire—is that possible? After all, the servicemember has not attained twenty years of creditable service. If this is the case, the former spouse's attorney must also ask what happens to the client's share of the potential military pension? What happens to the years of service that accrued during the marriage?

Finally, counsel should consider if the husband resigns his commission now, or if he does not re-enlist, then he will not have a military pension to divide with the former spouse. And if he leaves military service and rolls over his military credits to federal civil service, he may not have *any* pension to divide with her.

VIII. Guidance and Dangers

To assist attorneys who may not be fully familiar with these questions and issues, the OPM provides the following guidance in its booklet, *Court Ordered Benefits for Former Spouses*:

> What Happens if Military Service is Used for Civilian Retirement Credit, and There is a Court Order Awarding a Former Spouse a Portion of the Retiring Employee's Military Retired Pay?
>
> Receipt of military retired pay often bars credit for the military service for Civil Service Retirement or Federal Employees Retirement unless the retiring employee elects to waive the military retired pay, and have the military service added to civilian service in computing their civilian annuity.
>
> If the employee's military retired pay is subject to a court order awarding a former spouse a portion of the military retired pay, the retiring employee cannot receive credit for the military service for Civil Service Retirement or Federal Employees Retirement without first consenting for us to continue payment to the former spouse, in the amount the military pay center would pay the former spouse if military retired pay continued.[47]

The OPM provides further guidance in its booklet, *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, Federal Employees Health Benefits, Federal Employees Group Life Insurance Program*.[48] The agency suggests adding the following clause in a federal retirement division in order to protect the nonmilitary spouse or former spouse in the event that the servicemember waives the military retired pay to allow crediting the military service under CSRS or FERS:

> If [Employee] waives military retired pay to credit military service under the Civil Service Retirement System, [insert language for computing the former spouse's share from 200 series of this appendix]. The United States Office of Personnel Management is directed to pay [former spouse]'s share directly to [former spouse].[49]

When a division order pertaining to military pension contains proper protective language and is entered and served on the designated agent,[50] the nonmilitary spouse will be covered. This is true whether the servicemember retires or leaves the military with only ten or fifteen years of service and fails to retire on the military side. So long as the designated agent[51] is served, then the OPM and the designated agent will cooperate to protect the non-military spouse.

Counsel should take care in preparing a settlement in the light of the above rules. There are traps to avoid. The first danger lurks in failure to serve the designated agent. Effective service on the designated agent triggers implementation of the law and the rules set out above.[52] If the order is never forwarded by the court or the attorney for the spouse, then the enacted protections are meaningless. The servicemember will be able to convert his or her military time into credits toward

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[45] *The Bridge on the River Kwai*, *supra* note 1.

[46] *Id.*

[47] OFF. OF PERS. MGMT., COURT ORDERED BENEFITS FOR FORMER SPOUSES 5 (July 2014), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf.

[48] OFF. OF PERS. MGMT., A HANDBOOK FOR ATTORNEYS ON COURT-ORDERED RETIREMENT, HEALTH BENEFITS AND LIFE INSURANCE UNDER THE CIVIL SERVICE RETIREMENT BENEFITS, FEDERAL EMPLOYEES RETIREMENT BENEFITS, FEDERAL EMPLOYEES HEALTH BENEFITS, FEDERAL EMPLOYEES GROUP LIFE INSURANCE PROGRAM ¶ 111 (July 1997), https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf.

[49] *Id.* ¶ 111. The paragraph should be used only if the former spouse is awarded a portion of the military retired pay. *Id.*

[50] Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408(b)(1)(A) (1982).

[51] U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7B, ch. 29, ¶ 290403 (Apr. 2013). The Defense Finance and Accounting Service in Cleveland, Ohio, is the designated agent that processes retired pay division orders for Army, Navy, Air Force and Marine Corps cases. *Id.* The Coast Guard Pay and Personnel Office in Topeka, Kansas, processes paperwork for that service as well as the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. *Id.*

[52] 10 U.S.C. § 1408(d)(1).

civilian federal retirement without violating the law and without protecting the nonmilitary spouse's rights under the military pension division order.

The second danger is when there is no order dividing the military pension because the servicemember leaves military service far enough away from military retirement that the issue does not come up in the trial or negotiations. In this situation, the issue is not addressed in an order dividing military retirement benefits because there are no benefits presently to divide and none anticipated. While there is no military pension to waive, however, the former servicemember may still transfer *creditable military service* to civil service in computing civil service retired pay.[53] If the time to be transferred is marital time—that is, years or months during the marriage—then it is important for the nonmilitary spouse's attorney to be alert in drafting the separation agreement or marital settlement agreement.

As is true elsewhere in this field, the best way to handle this potential problem is through anticipatory drafting. The attorney should anticipate that the former servicemember may well choose to roll over those years in military service toward a federal retirement down the road and that the non-military spouse should get a portion of the federal retirement if part of it was acquired through credit for military service. A well-drafted contingency clause, such as the following, can take this condition into account and promise some protection for the non-military spouse:

> If the Defendant fails to retire from military service and elects to "roll over" or merge the time of his military service into federal or other government service in order to get credit for same, then the Plaintiff shall be entitled to her share of any such retirement pay or annuity he receives based on the parties' period of marriage during Defendant's period of military service. Defendant shall notify Plaintiff immediately upon his termination of military service, through retirement or otherwise, and shall include in said notification a copy of his military discharge certificate, Department of Defense Form 214. Defendant shall also notify Plaintiff immediately if he obtains government employment, and will include in said notification a copy of his employment application and his employment address.

Of course, this clause is not self-implementing. The non-military spouse must remain alert and help to determine whether the former military spouse elects federal employment in the future. There is simply no incentive for the former servicemember to engage in self-reporting only to have his or her future civilian federal retirement diminished.

IX. Language to Protect the Former Spouse

With these concerns in mind, the former spouse's attorney needs to ensure that the property settlement contains the following protective clauses:

1. If Defendant-Husband tries to waive or convert any portion of his military service (whether active-duty or Guard or Reserve) into federal or state civil service time without first obtaining Plaintiff's consent, and the effect of this action is that her benefits would be reduced, then -

a. Plaintiff-Wife will receive either:

i. Non-modifiable alimony equal to the amount or share of the military pension that she was entitled to receive before any waiver (with cost-of-living adjustments, if applicable), and not terminating at her remarriage or cohabitation; or

ii. A portion of the federal civil service retirement annuity that provides Plaintiff an amount equal to what she would have received as her share of the military pension had there been no waiver to obtain an enhanced federal retirement annuity.

iii. In the event of such conversion, pursuant to 5 U.S.C. § 8411(c)(5), Defendant will authorize the personnel office (e.g., Director of the Office of Personnel Management) to deduct and withhold (from the annuity payable to Defendant) an amount equal to the amount that, if the annuity payment were instead a payment of Defendant's military retired pay, would have been deducted, withheld, and paid to Plaintiff under the terms of this Order. The amount deducted and withheld under this subsection will be paid promptly to Plaintiff.

b. If the waiver of military pension for other government retirement prevents Plaintiff's coverage under the Survivor Benefit Plan, then Defendant will –

i. Designate Plaintiff as beneficiary under the equivalent federal retirement survivor annuity plan and provide equivalent coverage; or

ii. Obtain life insurance (with Plaintiff as the owner) covering his life with a death benefit equal to full Survivor Benefit Plan (SBP) coverage; or

iii. Purchase a single-premium annuity (with Plaintiff as the owner) that is equal to the benefits payable for full SBP coverage.

c. Defendant will notify Plaintiff immediately if he accepts employment with the federal government. He will include in said notification a copy of his employment application and his employment address.

[53] *See* discussion *supra* Section III.

d. Any subsequent retirement system of Defendant is directed to honor this court order to the extent of Plaintiff's interest in the military retirement and to the extent that the military retirement is used as a basis of payments or benefits under the other retirement system, program, or plan.

If the civilian lawyer or legal assistance attorney for the spouse or former spouse is aware of these civil service roll-over issues, then the client can be fully advised about the risks and further litigation which may be in store. If that attorney plans for these contingencies through the drafting of a remedial clause such as the above, there will be some measure of prevention, protection, or relief available for the client—avoiding "the unexpected."

When Reduction in Force (RIF) May Not Mean Rest in Piece: Protections Against RIF Actions under the Uniformed Services Employment and Reemployment Rights Act

*Major T. Scott Randall & Major Rich Gallagher**

I. Introduction

The federal government is the largest employer of Reserve Component (RC) servicemembers in the United States.[1] Although the federal government employs less than 2% of the total U.S. workforce, it employs nearly 18% of all RC members who are employed full time.[2] This disproportionately high number of RC servicemember-employees inevitably leads to exposure to many issues regarding the special protections afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA).[3] Unfortunately, but understandably, the top employer of RC servicemembers also receives the highest number of USERRA complaints in the nation.[4] In fiscal year 2011 alone, over 300 USERRA complaints were made against the federal government.[5]

One perennial issue for servicemembers returning to their positions following a period of active service is what protections, if any, they are afforded when their positions no longer exist.[6] For private employers, the USERRA creates no additional burdens over and above the fundamental protection that servicemembers cannot be placed in a worse position because of their military service.[7] For example, if a private employer would have eliminated an employee's position regardless of his active service, the employer would have no duty to rehire the servicemember.[8] However, for the federal government, the rule is completely different.[9] Servicemembers are provided additional rights that require the federal government to retain them if their positions were eliminated by a reduction in force (RIF) action during a period of military service.[10] For the federal government manager, labor counselor, and servicemember-employee, these little known protections are extremely important considering the personnel reductions contemplated for the federal government in the years to come.

II. RIF Overview

The 2011 Budget Control Act, also known as sequestration, led to massive cuts in defense spending and made the prospect of a separation or a downgrade a reality for thousands of U.S. Army civilian employees.[11] In July 2015, the Army announced plans to reduce the size of the regular Army from 490,000 to 450,000 Soldiers by the end of fiscal year 2018.[12] As reported by the Department of Defense, the Army's reduction of 40,000 Soldiers will be accompanied by a reduction of 17,000 Army civilian employees.[13] The Army predicts these "cuts will impact nearly every Army installation, both in the continental United States and overseas."[14]

When a federal agency reduces the size of its civilian workforce or conducts a RIF, it must follow the Office of Personnel Management's RIF procedures contained in title 5, Code of Federal Regulations, part 351.[15] In contrast to traditional adverse actions for employee misconduct, RIF procedures "are

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[1] Steve Vogel, *Returning Military Members Allege Job Discrimination – By Federal Government*, WASH. POST (Feb. 19, 2012), https://www.washingtonpost.com/world/national-security/returning-military-members-allege-job-discrimination--by-federal-government/2012/01/31/gIQAXvYvNR_story.html.

[2] RAND CORP.: SUPPORTING EMPLOYERS OF RESERVE COMPONENT MEMBERS (2013), http://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9711/RAND_RB9711.pdf.

[3] *See* 38 U.S.C. §§ 4301-4034 (2015).

[4] *See* Vogel, *supra* note 1.

[5] *Id*.

[6] *See, e.g.*, 5 C.F.R. § 353.209(a) (2015).

[7] *See* 20 C.F.R. §1002.42 (2015).

[8] *Id*.

[9] *See* 5 C.F.R. § 353.209(a) (2015).

[10] *Id*.

[11] *See* Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 241 (2011) (amending the Balanced Budget Emergency Control Act of 1985), codified at 31 U.S.C. § 3101A, 2 U.S.C. § 901a. The Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 125 Stat. 585, "modified the caps on defense and nondefense funding for fiscal year 2016 that were established by the Budget Control Act of 2011 (P.L. 112-25). The Bipartisan Budget Act reset those limits to total $1.07 trillion—$548.1 billion for defense programs and $518.5 billion for nondefense programs." CONGRESSIONAL BUDGET OFFICE, FINAL SEQUESTRATION REPORT FOR FISCAL YEAR 2016 1 (Dec. 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51038-Sequestration.pdf.

[12] Am. Forces Press Serv., *Army Announces Force Structure and Stationing Decisions*, U.S. DEP'T OF DEF. (July 15, 2015), http://www.defense.gov/News/News-Releases/News-Release-View/Article/612774/army-announces-force-structure-and-stationing-decisions.

[13] *Id*.

[14] *Id*.

[15] 5 C.F.R. § 351.201(a)(2) (2016).

not aimed at removing particular individuals" but instead "are directed solely at [eliminating] positions."[16]

In accordance with RIF regulations, a RIF occurs when an agency furloughs (more than 30 days), separates, demotes, or reassigns (requiring displacement) employees for one of several permissible reasons.[17] Those reasons include a lack of work, a shortage of funds, an insufficient personnel ceiling, reorganization, an employee's exercise of reemployment rights or restoration rights, or a reclassification of an employee's position due to an erosion of duties.[18] While these are all reasons to initiate RIF procedures, not all employees in an organization undergoing a RIF are necessarily separated, and some who are subject to the RIF may have retention rights allowing them to remain in their positions or to be reassigned.[19]

The pool of employees who may be subject to a RIF action are referred to as "competing employees."[20] They are the employees who fall within the "competitive area" that an agency establishes for the RIF.[21] The competitive area is based upon the agency's organizational unit(s) and geographic location.[22] "Competitive levels" within the competitive area consist of positions within the competitive area which are in the same grade and classification series.[23] Positions in the same competitive levels must also be similar enough so that the agency can "reassign the incumbent of one position to any of the other positions in the level without undue interruption."[24] Accordingly, employees who satisfy an agency's criteria for its competitive area and for a specific competitive level are the competing employees who may compete for retention of a position during the RIF.

Once the agency has determined which employees are competing employees for purposes of the RIF, the agency must determine which employees have retention rights based upon the following four factors: tenure of employment, veterans' preference (or lack thereof), length of service, and performance.[25] An agency may not use RIF procedures for other purposes, e.g., to circumvent an employee's procedural rights in an adverse action for misconduct or unacceptable performance.[26] This is particularly significant when the employee is also a servicemember who is subject to the rights and protections afforded by USERRA.

III. Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 to § 4334, establishes certain rights and benefits for employees and certain duties for employers.[27] The act affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services.[28] It is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940.[29]

Under the USERRA, an employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of the employee's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.[30] In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, the employee will be eligible for reemployment under the USERRA by meeting the following criteria:

(1) The employer had advance notice of the employee's service;

(2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

(3) The employee timely returns to work or applies for reemployment; and

(4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.[31]

During a period of service in the uniformed services, an employee is deemed to be on furlough or leave of absence

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[16] Grier v. Dep't of Health and Human Services, 750 F.2d 944, 945 (Fed. Cir. 1984).

[17] 5 C.F.R. § 351.201(a)(2) (2016).

[18] *Id*.

[19] See 5 C.F.R. § 351.203 (2016) (defining "competing employee"); 5 C.F.R. § 351.501 (2016) (order of retention for competitive service employees); 5 C.F.R. § 351.502 (2016) (order of retention for excepted service employees).

[20] *Id*.

[21] *See* 5 C.F.R. §§ 351.402 (2016), 351.403(a)(1) (2016).

[22] 5 C.F.R. § 351.402 (2016).

[23] 5 C.F.R. § 351.403(a)(1) (2016).

[24] *Id*.

[25] 5 C.F.R. § 351.501 (2016); 5 C.F.R. § 351.502 (2016).

[26] *See, e.g.*, Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Carter v. Dep't of Army, 62 M.S.P.R. 393 (1994), *aff'd*, 45 F.3d 444 (Fed. Cir. 1995).

[27] 20 C.F.R. § 1002.1 (2016).

[28] *Id*.

[29] *See* 20 C.F.R. § 1002.2 (2016).

[30] 20 C.F.R. § 1002.18 (2016).

[31] 20 C.F.R. § 1002.32 (2016).

from a civilian employer.[32] In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or a leave of absence.[33] For example, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.[34]

If a private sector employee is in a layoff status and begins service in the uniformed services or is laid off while performing military service, the employee may be entitled to reemployment upon return if the employer would have recalled the employee to employment during the period of service.[35] Similar principles apply if the employee is on strike or on a leave of absence from work when the employee begins a period of service in the uniformed services.[36] Therefore, if the employee is laid off before or during service in the uniformed services and the employer would not have recalled the employee during that period of service, then the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee for USERRA purposes.[37] Hence, reemployment rights under the USERRA cannot put the employee in a better position than if the employee had remained in the private sector employment position.[38] However, this is not the case with respect to federal employees whose positions are subject to a RIF action during military service.[39]

IV. RIF Protections

Under 38 U.S.C. § 4313, upon completion of a period of service in the uniformed services, a federal government employee shall be promptly reemployed in the same position of employment or in a position of like seniority, status, and pay.[40] Most importantly, a federal government employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause, and a "*reduction in force [action] is not considered for cause.*"[41] Consequently, if the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status and pay.[42] Therefore, unlike private sector employees subject to layoffs during military service, federal government employees are shielded from a RIF reduction or separation when such action occurs during a period of military service.[43]

In *Depascale v. Department of the Air Force*, an enlisted Airman was not returned to his vehicle foremen position at the Newark Air Force Base following his service in Desert Shield/Desert Storm.[44] The Airman's position had gone through a RIF action while he was deployed, and he was offered a "freight rate specialist" position by the Air Force upon his return.[45] The Airman contested the agency's action arguing that the position offered to him upon his return to the agency was improper due to its lower status.[46]

In deciding the case, the Merit System Protection Board (MSPB) noted that as a returning veteran, the Airman was entitled to be placed back in his former civilian position at the precise point he would have occupied had he remained on the job.[47] The board further noted that even though the agency would have abolished the appellant's position if he had been present via the RIF action, the agency was still required to place him in an equivalent position upon his return.[48]

Similarly, in *Crawford v. Department of the Army*, a returning Soldier contested the position offered to him following his military service.[49] The Soldier argued his former civilian position of information technology specialist, which had been abolished by the agency, had a higher status than that of a program support specialist.[50] Although not at issue, the court commented that USERRA's implementing regulations to the USERRA mandate that when an employee's position is abolished during uniformed service, the agency must reassign the employee to another position of like status and pay.[51] Therefore, the USERRA provides returning servicemembers with the peace of mind of knowing that their federal government employment will not be

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[32] 20 C.F.R. § 1002.149 (2015).

[33] *Id.*

[34] 20 C.F.R. § 1002.150(c) (2015).

[35] 20 C.F.R. § 1002.42 (2015).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* 5 C.F.R. § 353.209(a) (2015).

[40] *See* 38 U.S.C. § 4313 (2012). If the period of service is ninety days or less, the employee is entitled to the same position. *Id.* If the period of service is for more than ninety days, the employee is entitled to a position of like seniority, status, and pay. *Id.*

[41] 5 C.F.R. § 353.209(a) (2015) (emphasis added).

[42] *Id.*

[43] *Id.*

[44] *See* Depascale v. Dep't. of Air Force, 59 M.S.P.B. 186 (1993).

[45] *Id.* at 187-88.

[46] *Id.* at 188.

[47] *Id.* at 191.

[48] *Id.*

[49] *See* Crawford v. Dep't. of Army, 718 F.3d 1361 (Fed. Cir. 2013).

[50] *Id.* at 1363.

[51] *Id.* at 1365.

terminated prior to their return regardless of any agency restructuring or potential RIF actions.[52]

V. Conclusion.

As the principal employer of RC servicemembers, the federal government is in a unique position to impact this important population.[53] Recognizing this fact, Congress placed additional burdens on the federal government as an employer.[54] The federal government is required to offer servicemembers positions of employment upon their timely return from military service regardless of the fact that their previous positions may have been abolished through a RIF action.[55] This protection recognizes the capacity of the federal government to rehire servicemember-employees to positions of like seniority, status, and pay even if their exact positions have been removed.[56] It also recognizes that private employers, especially small businesses, may not have the capacity to rehire an employee whose position was cut for business reasons during a period of military service.[57] This flexibility in the law focuses its burdens on the largest RC employer while allowing smaller employers the ability to effect needed personnel changes.[58] Knowledge of these rules will allow the federal government manager, labor counselor, and servicemember-employee to make informed choices in the years to come as personnel reductions are implemented across the federal government.

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[52] *See* 5 C.F.R. § 353.209(a) (2015).

[53] *See* Vogel, *supra* note 1.

[54] *See* 5 C.F.R. § 353.209(a) (2015).

[55] *Id.*

[56] *Id.*

[57] *See* 20 C.F.R. § 1002.42 (2015).

[58] *Id.*; *see also* 5 C.F.R. § 353.209(a) (2015).

Book Review

All In: The Education of General David Petraeus[1]

Reviewed by *Major Donel J. Davis*[*]

I. Summary

General David Petraeus was a talented and successful general who oversaw the reform of the counter insurgency (COIN) doctrine and executed COIN operations in two major campaigns.[2] In *All In: The Education of General David Petraeus*, the author, Paula Broadwell, gives an informative and detailed account of General Petraeus's time as the commander of the International Security Assistance Force (COMISAF) in Afghanistan. She also highlights the difficulty of tactical operations when executing COIN operations on the modern battle field. While the book is not the biography it purports to be, these two aspects of the book make it worthwhile for readers seeking to learn about the complexities of COIN operations.

Broadwell touts this book as a biography of General Petraeus. She states it is a melding of her Doctor of Philosophy dissertation, which attempted to trace fundamental themes in General Petraeus's education, experience, and the role of key mentors, with a first-hand account of General Petraeus's time as COMISAF.[3] She also proffers the book will chronicle a year of war through the eyes of three battalion commanders in the 101st Airborne Division.[4] Finally, she states she will deliver a cautionary tale about how military bureaucracy can overcome passion and expertise based on the experiences of a special forces officer Major (MAJ) Fernando Lujuan.[5]

Regarding General Petraeus, the details about his education, experience, and the role of key mentors are too few and too generic for readers to gain any real insights into him.[6] The book provides some details about his military service and background, but it does not offer candid details a reader expects from a biographer who had significant access to General Petraeus.[7] Furthermore, despite the book containing references and graphs to aid readers, the author assumes readers understand COIN doctrine and fails to provide materials to help readers evaluate General Petraeus's COIN strategy.

Besides failing to deliver on details about General Petraeus, the book is sometimes difficult to follow. There are abrupt transitions to past events that add little value to the topic of the section[8] and details that contribute little to the book.[9] Finally, the experiences of MAJ Fernando Lujuan are scattered across 260 pages of the book, which degrade any value his story may have added.

Despite some of the book's shortcomings, Broadwell's book does provide an in-depth account of how General Petraeus developed and implemented an arguably successful COIN strategy on a modern day battlefield. It also examines the rationale behind several tough decisions battalion commanders made when faced with only bad choices during their operations in Afghanistan. These insights are invaluable to anyone seeking to understand the difficulties commanders face when fighting against an insurgency. They are also unique due to the access Broadwell had to the commanders when drafting the book.

II. Introduction

Broadwell met General Petraeus in 2006 at Harvard.[10] They were both graduates of the United States Military Academy, so they had some common ground.[11] During their initial conversation, she described her studies to General Petraeus, and he offered to help her network with people who could aid her in her research.[12]

In 2008, Broadwell started work on a Ph.D., which included a case study of General Petraeus's leadership.[13] When she learned that General Petraeus was appointed as the COMISAF in 2010, she decided to combine her Ph.D. research with a first-hand account of General Petraeus's command in Afghanistan.[14] General Petraeus agreed to help

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[1] PAULA BROADWELL WITH VERNON LOEB, ALL IN: THE EDUCATION OF GENERAL DAVID PETRAUS (2012).

[2] Peter Bergen, *How Petraeus Changed the U.S. Military*, CNN (Nov. 11, 2012), http://www.cnn.com/2012/11/10/opinion/bergen-petraeus-legacy/.

[3] BROADWELL, *supra* note 1, at 19.

[4] *Id.* at 20.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 110.

[9] *Id.* at 52-53 (describing the military service of Lieutenant General William A. Knowlton).

[10] *Id.* at 18.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 19.

[14] *Id.*

by giving her access to written materials (emails, memoranda, and letters) and allowing her to interview him and other individuals in Afghanistan.[15] Broadwell also traveled with General Petraeus throughout most of his time as the COMISAF.

Broadwell was given information from over 150 individuals and conducted approximately 700 interviews over a period of three years.[16] The majority of the interviews took place during her fifteen months in Afghanistan.[17] She cites 111 sources.[18] Of those, 41 are interviews or emails from military leaders.[19] The vast majority of the remaining sources are newspaper articles regarding events in Afghanistan at that time.[20] The primary sources she drew from, add perspective to the tone of the book, which is effusive of Gen Petraeus and lacks any real criticism of him or his subordinates.[21]

Another detail that gives readers perspective is the knowledge of the relationship that developed between Broadwell and General Petraeus. The book was published in January 2012[22] after General Petraeus retired and was appointed director of the Central Intelligence Agency (CIA). General Petraeus resigned as the director of the CIA in November 2012, citing his extramarital affair with Broadwell as the reason for his resignation.[23] Neither Broadwell nor General Petreaus ever disclosed the details of the affair, but many believe it began in November 2011.[24]

The details and ramifications of the affair are discussed *ad nauseam* in reviews, articles, and through media outlets. It will not be addressed beyond a few brief remarks in this review. It is mentioned only to note that the affair diminishes Broadwell's credibility and may explain why Broadwell never offers an unkind word about General Petraeus throughout the book. Furthermore, readers should not rely on any overall conclusions or justification in the book due to potential bias.

While readers should avoid relying on the ultimate conclusions, the factual account of events can be relied on. The length of time Broadwell spent in Afghanistan and her unprecedented access to personnel gave her a first-hand look at events as they unfolded. This gives readers a unique perspective on the COIN operations during her time in Afghanistan.

III. General Petraeus and his Strategy in Afghanistan

Broadwell does an adequate job of briefly describing General Petraeus's experience in the military. She takes the reader from his acceptance at the United States Military Academy to retirement, highlighting his assignments as aide to general officers and his time in command. She also provides details of assignments that gave General Petraeus experience with North Atlantic Treaty Organization (NATO) forces[25] and exposure to COIN operations[26] prior to his appointment as the COMISAF.

Regarding his command in Afghanistan, Broadwell lays a good foundation to understand the enormous challenges General Petraeus faced. They included the political issues surrounding his confirmation as the COMISAF on June 29, 2010,[27] the issues surrounding the timing of an eventual drawdown of troops,[28] and the public perception that the military could not successfully execute COIN operations in Afghanistan.[29] She effectively sets the stage for the rationale behind General Petraeus's overall strategy.

The political landscape and tight timeline required General Petraeus to use a strategy that could be implemented

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[15] *Id.* at 20.

[16] *Id.* at 368.

[17] *Id.*

[18] *Id.* at 368-74.

[19] *Id.*

[20] *Id.*

[21] During an interview with Broadwell, Jon Stewart stated the only controversy in the book is whether General Petraeus "is awesome, or incredibly awesome." *The Daily Show*, COMEDY CENTRAL (Jan. 25, 2012), www.cc.com/video-clips/c4i2bb/the- daily-show-with-jon-stewart-paula-broadwell.

[22] The Associated Press, *Timeline: The David Petraeus Scandal*, USA TODAY (Apr. 23, 2015), http://www.usatoday.com/story/news/nation/2015/04/23/timeline-general-david-petraeus-paula-broadwell-jill-kelley/26245095/ [hereinafter AP].

[23] Greg Miller & Sari Horwitz, *David Petraeus Resigns as CIA Director*, WASH. POST (Nov. 9, 2012), https://www.washingtonpost.com/world/national-security/david-petraeus-resigns-as-cia-director/2012/11/09/636d204e-2aa8-11e2-bab2-eda299503684_story.html.

[24] *See* AP, *supra* note 22.

[25] BROADWELL, *supra* note 1, at 75, 80, 128. General Petraeus worked with the North Atlantic Treaty Organization forces as a speech writer for the Supreme Headquarters Allied Powers, Europe, and as the United Nations Force operations chief in Haiti. *Id.*

[26] *Id.* at 77-78. In 1986, General Petraeus served a short assignment in Southern Command Headquarters, Panama, where he assisted with counterinsurgency (COIN) operations. *Id.*

[27] BROADWELL, *supra* note 1, at 22-23. General Stanley McChrystal was fired on June 23, 2010, for comments he made to a reporter that were viewed as insubordinate. *Id.*; *see also* Michael Hastings, *The Runaway General*, ROLLING STONES (June 22, 2010), http://www.rollingstone.com/politics/news/the-runaway-general-20100622. The report strained relations between General McChrystal and the White House. BROADWELL, *supra* note 1, at 22-23. General Petraeus was selected to replace him as the Commander of International Security Assistance Force. *Id.*

[28] *Id.* at 44. President Obama directed General Petraeus to set the conditions that would enable the drawdown of American forces by July 2011. *Id.*

[29] *Id.* at 34. At the time, Washington analysts argued that COIN was not applicable to Afghanistan because it lacked a central government and that COIN operations hindered Afghanistan's ability to develop an effective government. *Id.*

relatively quickly. It also had to have ways to measure whether the strategy made any progress in Afghanistan. He settled on what he called the Anaconda strategy, which he previously employed in Iraq, with modifications to make it applicable in Afghanistan.[30] The modified strategy employed kinetic operations, politics, intelligence, detainee operations, information operations, international engagements, and non-kinetics to overcome insurgents.[31]

The book lacks clarity on whether the modified Anaconda strategy deviated from COIN doctrine. Since General Petraeus oversaw the rewriting of the COIN doctrine in a previous assignment, one may assume the strategy did not deviate.[32] However, the enormous pressure on General Petraeus to succeed creates some doubt. This potential issue could have been addressed in the book by providing references to COIN doctrine, which would enable readers to compare the strategy to the doctrine. Unfortunately, these references are absent.

What is clear about the modified Anaconda strategy, as Broadwell points out, is that only one of the seven lines of effort involved predominately military actions.[33] The rest required extensive input and support from foreign and civilian entities. The key take away—and one of the salient points in the book—is that success in COIN operations requires commanders to develop and sustain a partnership with a variety of entities that have competing interests. The book is helpful to commanders in this regard because it provides multiple examples of the great lengths General Petraeus and his staff went to in accomplish this daunting task.

IV. Tactical Operations

Broadwell discussed the missions of three battalion commanders, Lieutenant Colonel (LTC) David G. Fivecoat, LTC David S. Flynn, and LTC J.B. Vowell, to highlight difficulties commanders face at the tactical level during modern day COIN operations.[34] Their efforts are described intermittently throughout the book, which occasionally makes them hard to follow. However, the passages pertaining to them are focused on the most daunting challenges they faced. Their stories illustrate that COIN operations are complex even at the tactical level; that commanders must be flexible on how they train and employee their troops; and that COIN operations often require commanders to pick between two bad options. One incident the book describes is particularly illuminating on this last point.

One of the most controversial tactical decisions in 2010 was the decision to destroy the village of Tarok Kolache.[35] The battalion commander responsible for that area of operations had to secure the village because it was a bastion of insurgent activity.[36] Nearly every building in the village was abandoned by the original inhabitants and riddled with improvised explosive devices.[37]

Faced with the prospect of losing many Soldiers to clear the village, the commander opted to destroy it with artillery and aerial bombs.[38] The book explains that this was not an easy decision for the commander to make. He had to weigh the cost of Soldier's lives in keeping the village intact against potentially catastrophic consequences destroying the village would have to the COIN mission.[39] His decision to destroy the village and the impact on the mission in Afghanistan is still the subject of debate and faces heavy criticism.[40]

VI. The Afghan Counterinsurgency Advisory and Assistance Team

The book describes special forces officer MAJ Fernando Lujuan's failed effort to expand the Counterinsurgency Advisory and Assistance Team (CAAT) to an Afghan Counterinsurgency Advisory and Assistance Team (A-CAAT).[41] The mission of the CAAT members, as described by Broadwell, is to circulate around combat bases, develop ideas to enable Soldiers to shift from conventional warfare to protecting the population, then provide the ideas to regional commanders.[42] Therefore, the A-CAAT would do the same thing except it would require members of the team to embed with Afghan forces and provide ideas to Afghan commanders.[43]

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[30] *Id.* at 139.

[31] *Id.* at 365.

[32] *Id.* at 67.

[33] *Id.* at 139.

[34] *Id.* at 13-14. All were assigned to the 101st Airborne Division. *Id.*

[35] *Id.* at 101-03.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See, e.g.*, Joshua Foust, *How Short-Term Thinking is Causing Long-Term Failure in Afghanistan*, THE ATLANTIC (Jan. 24, 2011), http://www.theatlantic.com/international/archive/2011/01/how-short-term-thinking-is-causing- long-term-failure-in-afghanistan/70048/; Kevin Sieff, *Years Later, a Flattened Afghan Village Reflects on U.S. Bombardment*, WASH. POST (Aug. 25, 2013), https://www.washingtonpost.com/world/years-later-a-flattened- afghan-village-reflects-on-us-bombardment/2013/08/25/d8df9e62-05cf-11e3-bfc5-406b928603b2_story.html.

[41] BROADWELL, *supra* note 1, at 14.

[42] *Id.* at 36.

[43] *Id.*

Despite the success of the project, it ultimately was not implemented due to a lack of interest by superiors.[44] The cautionary tale appears to be that sometimes bosses in the military disagree with their subordinates and decline to implement their suggestions. This is not new in the military or other organizations, so the cautionary tale is superfluous.

As discussed earlier in this review, the details about MAJ Lujuan's mission are unceremoniously peppered throughout the book. If the passages were consolidated in the book they may have provided a more compelling story. However, the minimal information discussing the A-CAAT and the way it is sprinkled throughout the book reduces the story to a distraction.

VII. Conclusion

Readers should look elsewhere if they desire an unbiased, meaningful biography of General Petraeus. On the other hand, readers can obtain a unique account of COIN operations at the strategic and tactical levels through the multiple examples and factual accounts in this book. Overall, this book is a worthwhile read for anyone seeking to learn about the execution of COIN operations on the modern battlefield.

[44] *Id.* at 295.

Book Review

A Higher Standard: Leadership from America's First Female Four-Star General[1]

Reviewed by *Major Latisha Irwin*[*]

The quality of a leader is reflected in the standards they set for themselves[2]

I. Introduction

One of the first females to attend Airborne school, the first female staff officer at the 82d Airborne Division, the first female general officer assigned to Fort Bragg, and the first female four–star general in the Army;[3] General Ann Dunwoody, U.S. Army, Retired, had a lot of firsts in her career, but she never planned it that way.[4] Dunwoody's book does not tell the reader how to become a general officer or provide a step-by-step guide to being a good leader; instead, it sets out leadership lessons Dunwoody thinks are key to success based on what she has seen in her life and career.[5] Dunwoody illustrates her leadership lessons through her own experiences and failures, and she highlights others as examples of good leaders.[6] She demonstrates her leadership strategies founded on family, education, and fitness.[7] These lessons give insight into her true leadership and make the book imperative for anyone striving to succeed.[8] As Sheryl Sandberg wrote in the forward:

> I concluded my book *Lean In* with my hope that "in the future, there will be no female leaders. There will just be leaders." I did not know Ann when I wrote that, but she is exactly who I had in mind. What distinguishes Ann is not that she is a woman, but that she is a spectacular and inspiring leader.[9]

II. Background

Dunwoody is no stranger to the military or its structure. Her father was a third generation West Point graduate and decorated war hero whom she idolized.[10] Dunwoody and her siblings knew what it meant to be part of a military family.[11] She learned early on that "[her] actions could have negative consequences on [her] father's career, if [she] did something to discredit the family name."[12] Consequently, Dunwoody ensured that she was always on her best behavior and did her best.[13] She excelled in sports and was a self-proclaimed tomboy.[14] Dunwoody never planned on following in her father's footsteps by attending West Point or making the military her choice of career; she was going to be a coach and physical education teacher.[15]

Dunwoody attended the University of New York at Cortland where she competed in collegiate tennis and gymnastics.[16] It was at Cortland that she again crossed paths with the military.[17] She decided to join the Army[18] in order to get five hundred dollars a month and serve a short two-year

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[1] ANN DUNWOODY WITH TOMAGO COLLINS, A HIGHER STANDARD: LEADERSHIP FROM AMERICA'S FIRST FEMALE FOUR-STAR GENERAL, (2015).

[2] Brainy Quotes, *Ray Kroc*, BRAINYQUOTE.COM, http://www.brainyquote.com/quotes/quotes/r/raykroc390229.html (last visited Apr. 30, 2016).

[3] DUNWOODY & COLLINS, *supra* note 1.

[4] Ann Dunwoody, *Book Discussion on A Higher Standard*, C–SPAN (Apr 28, 2015), http://www.c-span.org/video/?325756-1/general-ann-dunwoody-higher-standard.

[5] *Id*.

[6] DUNWOODY & COLLINS, *supra* note 1, at x.

[7] *Id*.

[8] *Id*.

[9] *Id*.

[10] *Id*. Hal Dunwoody is a retired one–star general who fought in World War II, the Korean War and Vietnam. *Id*. at 7. While in combat, he received the Distinguished Service Cross and two Purple Hearts. *Id*.

[11] *Id*. at 18.

[12] *Id*.

[13] *Id*.

[14] Alix Steel, *Career Advice From Four-Star Army Gen. Ann Dunwoody*, BLOOMBERG (May 5, 2015, 6:08 PM), http://www.bloomberg.com/news/videos/2015-05-05/career-advice-from-four-star-army-gen-ann-dunwoody.

[15] Michelle Tan, *First female 4-star shares lessons in 'A Higher Standard'*, ARMYTIMES (May 19, 2015 10:03 AM), http://www.armytimes.com/story/military/careers/army/officer/2015/05/19/gen-dunwoody-new-leadership-book/27179551/.

[16] DUNWOODY & COLLINS, *supra* note 1, at 162.

[17] *Id*. at 83-84.

[18] *Id*. General Ann Dunwoody commissioned as a second lieutenant in the Army Reserve as part of the Women's Officer Orientation course in 1975 before her senior year of college. *Id*.

commitment.[19] The two-year commitment turned into a thirty-eight-year career containing many firsts.[20]

III. Key Lessons

Readers can take away many thoughts or ideas from Dunwoody's book, but three lessons stand out. First, learn from your mistakes and never walk by a mistake.[21] Second, good leaders are everywhere, find them, and emulate them.[22] Finally, gender does not matter, good is good.[23]

A. Mistakes

Dunwoody points out often throughout book that she made mistakes and others helped her learn from them. Her first time performing a speaking role was a disaster.[24] As a battalion adjutant, she had to read aloud an award citation; however, she was unable to speak, and when she did manage to do so, she could only stutter and stammer.[25] Afterwards, to her amazement, her battalion commander told her she would do better next time.[26]

> I learned . . . valuable lessons that day. One of those lessons was to be better prepared! Another, just as important, is that nobody is perfect. When leaders help subordinates overcome weaknesses or mistakes, they help the subordinate, they help the organization, and they help themselves become better leaders.[27]

Dunwoody's first public speaking mistake was not her last. She mentioned a few others in her book that can resonate with any reader. Dunwoody's first marriage ended in divorce, and this is something she saw as a failure and a mistake.[28] She felt she had let her Catholic mother and traditional father down.[29] Also Dunwoody failed to qualify on her first assigned 9mm pistol when she was at the 82d Airborne Division despite previously qualifying on an M–16 rifle and 45–caliber pistol.[30]

Another lesson concerning mistakes is to never walk by one; always correct it.[31] It seems so simple, but it is true that if we do not correct the mistake, it becomes acceptable and the norm. Correcting mistakes is just another way that Dunwoody suggests good leaders hold others accountable for their actions.[32]

B. Examples

Dunwoody highlights people throughout the book whom she sees as good examples of leaders. They are everyday people who hold themselves to a higher standard and individuals with whom the reader can identify with and respect. Coach Stokes, a tennis coach at Cortland, taught Dunwoody enduring lessons including, "never confuse enthusiasm with capability," to never give-up, and always believe in yourself.[33] Sergeant First Class Bowen,[34] Lieutenant Dunwoody's platoon sergeant, taught her the power of belief, what right looks like, never walk by a mistake, and be true to yourself.[35] Specialist Giunta, a Medal of Honor recipient, taught her that average, or the standard, is just the starting point because success has no ceiling.[36] Finally, there are her parents; Betty, her mother, instilled in her a values–based system, which is key for any good leader.[37] Betty was the unsung hero in charge of the home front while her father was away fighting wars.[38] Her mother was a devout Catholic, and the most selfless, caring, gracious person in Dunwoody's life who taught her the glass was always half full and no matter the weather, it would never rain on their parade.[39] Her father, Hal, gave her advice that she

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[19] *Id*. at 85.

[20] Dunwoody, *supra* note 4.

[21] DUNWOODY & COLLINS, *supra* note 1, at 4.

[22] *Id.* at 163.

[23] *Id.* at 23-24.

[24] *Id.* at 3-5.

[25] *Id.* at 4.

[26] *Id.* at 5.

[27] *Id*.

[28] *Id.* at 58. When Dunwoody's first marriage was falling apart, it made her question everything. *Id.* at 58-63. She started dating Ken, a West Point Graduate, when she was seventeen but she separated from Ken while stationed in Germany. The stress of the situation caused Dunwoody to have a bleeding ulcer, dislike her job, and become depressed. *Id*.

[29] *Id*. at 58–63.

[30] *Id*. at 20–21. Dunwoody's husband was the leader and supporter who would not allow her to wallow in self-pity. *Id.* He ensured that the Airmen who shot rifles and pistols in their daily lives properly trained her. *Id*.

[31] DUNWOODY & COLLINS, *supra* note 1, at 20-21.

[32] *Id*.

[33] *Id*. at 163.

[34] *Id.* at 35-39. Sergeant First Class Bowen was Dunwoody's first platoon sergeant and she would later ask him to be her first sergeant when she took command of a maintenance company at Fort Sill in 1978. *Id.* at 35-49. She was the first female to command a maintenance company at Fort Sill. *Id*. at 49.

[35] *Id*. at 35-39.

[36] *Id*. at 30. Specialist Giunta calls himself average and does not feel he is any different from the Soldier standing to his left or right. *Id*.

[37] *Id*. at 10-12.

[38] *Id.* at 7.

[39] Dunwoody, *supra* note 4.

lives by everyday: Believe in yourself or no one else will.[40] If you believe in something, do not give up on it, and with the more rank you earn, the more visibility you receive.[41]

C. Females

Dunwoody mentioned gender throughout the book; however, the lessons were not about gender, but about exceeding the standard and being competent.[42] Dunwoody made it clear that she does not see gender playing a role in her success, she was going to be a success or she would fail.[43] Sergeant First Class Bowen told her that he would, "Make [her] the best platoon leader in the United States Army,"[44] not the best female platoon leader in the United States Army. Dunwoody always strived to exceed the standard. This drive resonates throughout the book and in many of the interviews she has given. She addressed the Marine Corps' failed attempt at allowing females into their infantry officer course stating, "If it's about lowering the standards, this policy will have failed . . . . This is about identifying the standards and then allowing anyone, male or female, who can meet or exceed those standards give them the opportunity to serve."[45] She continues to address the need for setting the standard regarding the Department of Defense's effort to integrate women into combat arms military occupation specialties.[46]

> I think it is smart the Army and the military are methodically looking at each one of these branches and career fields to determine what the standard is. They can't lower those standards, once identified, to accommodate women coming into those fields. That would be a failure. We're not a social experiment. We're a war fighting institution, and that's dangerous business.[47]

Dunwoody fought hard to integrate women into the Army and not have them seen as a segregated section.[48] An example, when Dunwoody returned to Fort Bragg to be the first female general officer at the installation, another female officer approached her about doing an all–female jump in honor of all the accomplishments of military women.[49] Dunwoody responded with, "I've spent my whole career trying to support the integration of women into the Army, and this kind of activity seems to counter that. Don't get me wrong—I'm so proud that we could even have the opportunity to conduct an all-women event like this."[50]

Dunwoody is proud of being a female and acknowledges that females in the military have come a long way.[51] Her niece, an A–10 fighter pilot, is an example of a female breaking down the barriers.[52] As is Lieutenant General McQuistion, a fellow general officer who served with Dunwoody.[53] Although Dunwoody is a firm believer in integrating females into the U.S. military, she also feels that female–only sessions allow females to speak freely.[54] They can speak openly about biases, harassment, sexual assaults, and any issues where they might feel hindered in the presence of males.[55]

IV. Application to Judge Advocates and Others

Judge advocates, Soldiers, and military leaders at every level can learn from *A Higher Standard*. It puts a human face on leadership and instills values that every Soldiers should have. Integrity and courage are front and center in the book and every judge advocate, Soldier, and leader should strive to do "the right thing for the right reasons."[56] This sound, simple advice applies at all levels and spans the entire military.

The lessons in this book reach beyond the military. The lessons can apply to any large corporation, small business, or to someone who is striving to be a great leader.[57] Dunwoody suggests having a strategic vision, showing every employee how important he or she is to the mission, and making that vision part of everyday leadership practices.[58] She also

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[40] DUNWOODY & COLLINS, *supra* note 1, at 23-24.

[41] *Id.*

[42] *Id*.

[43] *Id.*

[44] *Id*. at 35.

[45] Greg Richter, *Gen. Ann Dunwoody: Don't Re-Evaluate Military Standards for Women*, NEWSMAX (May 11, 2015, 9:44 AM), http://www.newsmax.com/Newsmax-Tv/ann-dunwoody-female-soldiers-military/2015/05/11/id/643954/.

[46] *Id.*

[47] Tan, *supra* note 15.

[48] DUNWOODY & COLLINS, *supra* note 1, at 156.

[49] *Id.* at 156-57.

[50] *Id*.

[51] Dunwoody, *supra* note 4.

[52] *Id*.

[53] DUNWOODY & COLLINS, *supra* note 1, at 80. Lieutenant General McQuistion was a subordinate whom Dunwoody sees as a good officer, leader, and logistician who happens to be female. *Id*. at 80-83. Lieutenant General McQuistion managed to raise three children despite taking unaccompanied assignments. *Id.*

[54] *Id*. at 157-58.

[55] *Id*. at 157.

[56] *Id*. at 97. Judge advocates have to have integrity and courage because they are arguably the moral compass for commanders.

[57] Steel, *supra* note 14. Dunwoody's final job commanding the Army Materiel Command qualifies her to give business advice, her budget was sixty million dollars and she was in charge over sixty-nine thousand people. *Id.* This command is relatively the same size as a large Fortune 500 company. *Id.*

[58] DUNWOODY & COLLINS, *supra* note 1, at 179-92.

reiterates never walking by a mistake.[59] Never walking by a mistake has such a broad range of applications. For example, if someone at General Motors had not allowed the mistake of defective ignition switches leaving the factory floor, think of how many lives might have been saved or how much money investors would have saved.[60] If someone at the Department of Veterans Affairs had highlighted the backlog of patients awaiting medical care, how many patients could have been seen or how many more veterans would have been able to receive care?[61]

V. Conclusion

Dunwoody's book should be on the professional reading list of anyone looking to improve his or her leadership skills. It combines her lessons with personal examples, making them functional and relatable. The personal examples give the reader insight into her life and show that even a four–star general made mistakes, but still managed to succeed. It is evident that to Dunwoody, the cornerstone of her leadership philosophies comes from family, education, and fitness, but *A Higher Standard* goes beyond those, giving the reader easy-to-follow lessons on leadership and making a difference.

[59] *Id*.

[60] Dunwoody, *supra* note 4.

[61] *Id*.

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