



THE ARMY LAWYER

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Just Mercy: A Story of Justice and Redemption
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Lore of the Corps

The First Female Instructor in International Law and a Pioneer in Judge Advocate Recruiting: Michelle Brown Fladeboe (1948-2016)*

By Fred L. Borch
Regimental Historian and Archivist

Michelle B. Fladeboe (né Brown) was the first female instructor in the International Law Division at The Judge Advocate General's School, U.S. Army (TJAGSA). She was also the "face" of the Corps in early efforts to recruit more women to be Army lawyers. This is her story.

Born Michelle Bright Brown in Oak Ridge, Tennessee, on March 10, 1948, she graduated from Peabody Demonstration School in Nashville. Brown then started college at Emory University in Atlanta but transferred to the University of Colorado, from which she graduated Phi Beta Kappa in 1972. The following year, Michelle began law school at the University of Georgia. She developed an interest in public international law, and former Secretary of State Dean Rusk, then on the law school faculty, encouraged this interest.¹ Secretary Rusk also supported her efforts to get an advanced degree in the field. As a result, after graduating with honors from Georgia, Brown moved to the United Kingdom, where she completed an LL.M. in International Law at the London School of Economics in 1977.

After returning to the United States, Michelle applied for a direct commission in The Judge Advocate General's Corps,



Captain Michelle Brown, *ABA Journal*, September 1981

U.S. Army. She considered all the services, but was most attracted by the Army because it seemed to have the most opportunities to practice public international law. She also thought that the Army would be a good way to start a career in that field.²

After completing the 85th Judge Advocate Officer Basic Course (JAOBC) in December 1977,³ Captain (CPT) Michelle Brown was assigned to Heidelberg, Germany, where she assumed duties in the Office of the Judge Advocate, Headquarters, U.S. Army Europe (USAREUR) and 7th Army. At the time, with some 300,000 Soldiers stationed in Europe and the Cold War still very much a reality, the senior Army lawyer at USAREUR was Brigadier General Wayne Alley.⁴ There were a variety of international legal issues during this time, and CPT Brown very much enjoyed

working for Alley in the Opinions and Policy Branch of the International Affairs Division.⁵

She considered her time in Heidelberg to have been a "dream job" and was disappointed when the Corps cut short her tour in Germany by a year. But the Army decided that CPT Brown's expertise could be best used in teaching others,

* The author thanks Lieutenant Colonel Jan P. Fladeboe, U.S. Marine Corps (retired) for his help in preparing this Lore of the Corps.

¹ Born in Georgia in 1909, David Dean Rusk graduated from Davidson College (North Carolina) and St. Johns College, Oxford, where he was a Rhodes Scholar. He served in the Army during the Second World War and as Secretary of State during the Kennedy and Johnson Administrations (1961-1969). From 1970 to 1994, Rusk was a Professor of International Law at the University of Georgia Law School. Dean Rusk died in 1994. For more on Rusk's life and career, see DAVID DEAN RUSK, *AS I SAW IT* (1990).

² E-mail from Jan P. Fladeboe to author, Subject: Three Questions (Oct. 12, 2016, 2:58PM) (on file with author).

³ Personnel Data Sheet, Michelle B. Gottlieb, 85th Judge Advocate Officer Basic Course, Oct-Dec 1977.

⁴ After retiring from active duty, Brigadier General Wayne Alley became the Dean of the University of Oklahoma School of Law. He subsequently was nominated and confirmed as a U.S. District Judge for the District of Oklahoma, becoming only the second Army lawyer in history to retire from active duty and then serve as an Article III judge. For more on Alley's remarkable career, see George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Court Judge and Brigadier General (Retired) Wayne E. Alley, U.S. Army, 1952-1954, 1959-1981*, 208 MIL. L. REV. 212 (2011).

⁵ Michelle Bright Brown, Staff and Faculty, 29th Graduate Class Directory, 1980-1981 [hereinafter 29th Graduate Class Directory].

and so Michelle returned to Charlottesville in May 1980 to be an instructor at TJAGSA.⁶



Captain Michelle Brown Gottlieb, 85th JAOBC,
TJAGSA, ca. 1977

As she departed Germany, her class work at USAREUR was recognized by the award of the Meritorious Service Medal, a high honor for a first-term captain who ordinarily might expect to receive an Army Commendation Medal.⁷

While not the first female judge advocate on the TJAGSA faculty,⁸ CPT Brown was the first female judge advocate to be a professor (then called an instructor) in the International Law Division. While certainly well-qualified with an LL.M. in international law and practical experience from her time in Heidelberg, Michelle's assignment to the faculty was unusual in that she had less than three years in uniform and had only completed one tour of duty as an Army lawyer. She also had not completed the Graduate Course, the usual prerequisite for joining the TJAGSA faculty.⁹

For the next several years, CPT Brown served in the International Law Division and taught with a variety of more senior officers, including Majors Eugene D. (Gene) Fryer, David (Dave) R. Dowell, and Harold W. (Wayne) Elliott.

In early 1981, she was asked if she would be a part of the Army Judge Advocate General's (JAG) Corps' recruiting

campaign. Captain Brown "was a bit unsure about it, but somehow was convinced to go up to New York City, where the Manhattan-based advertising firm of A. W. Ayer arranged a photo 'shoot' of her in uniform. A.W. Ayer is famous today having originated the Army's phenomenally successful "Be All You Can Be" recruiting slogan, which was "the signature for all Army ads" for twenty years.¹⁰ Unfortunately, the firm's success was overshadowed by its later legal troubles with the Army.¹¹

In any event, the JAG Corps was especially interested in attracting more female attorneys to its ranks, a process that had started ten years earlier with the creation of a Minority



An Army Nurse Corps Recruiting
Advertisement, ca. 1975

Lawyer Recruitment Program focusing on African-Americans and women.¹² Michelle Brown was a perfect choice given her background and photogenic face, and a full-page recruiting advertisement identifying her as an "International Lawyer" appeared in a variety of publications, including the American Bar Association Journal in September 1981. While readers today might be surprised by obvious sex-appeal in the ad, it was very similar advertisements used by other Army branches, as shown in the accompanying recruiting photograph for the Army Nurse Corps.

Whether or not the advertisement brought more women (and men) into the Corps will never be known. But Michelle Brown "was a bit uncomfortable about the publicity that her ad received . . . she felt it detracted from her work on the podium" at TJAGSA.¹³ As for the photo shoot itself, Brown

⁶ E-mail from Jan P. Flabeboe, *supra* note 2.

⁷ 29th Graduate Class Directory, *supra* note 5.

⁸ The first woman on the The Judge Advocate General's School, U.S. Army (TJAGSA) faculty was Major Nancy Hunter, who taught criminal law in the early 1970s. Colonel Elizabeth Smith, Jr. had been the first female Army lawyer assigned to TJAGSA, but she had been on the staff in the 1960s.

⁹ Another example of a judge advocate whose expertise led to an early assignment on the faculty was Colonel (retired) David E. Graham. Then Captain (CPT) Graham was selected to stay and teach international law at TJAGSA after graduating from the Judge Advocate Officer Basic Course in 1971.

¹⁰ Tom Evans, *All We Could Be: How an Advertising Campaign Helped Remake the Army*, ON POINT, Jan. 2015, at 6-8.

¹¹ In late 1986, N.W. Ayer's relationship with the Army collapsed when it was suspended (and then debarred) for procurement fraud. Ayer was found to have "engaged in time-card mischarging" between 1979 and 1983, and have conspired with its subcontractors to submit "collusive, rigged, noncompetitive bids." Michael Isikoff, *N.W. Ayer Barred from U.S. Business*, WASH. POST, Nov. 26, 1986, at A1.

¹² In 1971, then CPT Kenneth Gray was asked to direct the inaugural Minority Lawyer Recruitment Program. His mission was to implement and coordinate the recruitment of all minority and women for the Corps. JUDGE ADVOCATE GENERAL'S CORPS, THE ARMY LAWYER 251 (1975). Gray later served as The Assistant Judge Advocate General of the Army and retired as a major general in 1997.

¹³ 29th Graduate Class Directory, *supra* note 5.

remembered later that she had been “a bit nervous” and was given “a tot of whiskey to relax” before the photographs were taken of her.¹⁴

Captain Brown left active duty after marrying then-Major Jan P. Fladeboe, a U.S. Naval Academy graduate and Marine Corps lawyer whom she met while he was a student at TJAGSA. For several years, she remained in the Army Reserve as a judge advocate, serving with the 63d Army Command in California. She resigned her Reserve commission when her husband was assigned overseas to the Marine Corps Air Station in Iwakuni, Japan.



Captain Michelle Brown, TJAGSA Faculty, ca. 1981

After Lieutenant Colonel Fladeboe retired from active duty and joined the U.S. State Department, Michelle and their three children joined him at State Department postings in Moscow and Vienna.

After returning to American soil, the Fladeboes settled in Lake Monticello, Virginia. Michelle resumed her connections with the JAG Corps by sponsoring Egyptian student officers attending either the Basic or Graduate Courses at The Judge Advocate General’s Legal Center and School. She was especially interested in Egypt and had visited the country twice. She was working on a book about the people and the country when she was diagnosed with acute myeloid leukemia. Michelle B. Fladeboe died on February 2, 2016. She was 67 years old.¹⁵

She is survived by her husband, Jan Fladeboe, and two sons and one daughter. Michelle will not be forgotten by those who were in the Corps in the late 1970s and early 1980s, and this Lore of the Corps will bring her achievements—and her place in our history—to the attention of a new generation of judge advocates.

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.*

¹⁴ *Id.*

¹⁵ E-mail from Jan P. Fladeboe, *supra* note 2.

To Buy or Not to Buy? So Many Questions: How Judge Advocates Can Find Purpose to Spend Appropriated Funds

Major David M. Jones*

I. Introduction¹

You look down at your coffee and wonder if you have enough to get you through the next ninety minutes. You scan the quad chart you prepared in anticipation for the first command and staff meeting of the new year, questioning whether the rest of the staff needs to know any of the information or if you should just give a rhetorical “nothing for the group” when the garrison commander (GC) goes around the table. You identify a few topics to bring up—financial disclosure forms, the opening of the installation tax center—and then you settle into your seat and prepare to issue spot.

The GC enters and the meeting begins. The Directorate of Public Works (DPW) Director begins by briefing his quad chart, which oddly is broken up into fifteen parts. You notice in one of the sections that the labor union is requesting that DPW purchase cold weather gear for the employees plowing snow. The status reads “pending legal” despite this being the first time you have heard of the issue. You make a note in your little green book to follow up on it.

The newly hired Health Promotion Officer from the Community Health Promotion Council says she plans on buying 100 fitness trackers so that civilian employees can chart their fitness level while participating in an Army civilian fitness program. The GC responds “Ok. Get with the lawyer to make sure we’re good.” You look down the long conference table, give her a quick nod, and make another note.

The Garrison Chaplain begins his portion of the brief by offering a word of encouragement. He then mentions an

upcoming event he wants to host at the chapel that focuses on building strong families. He says, “Child care will be provided,” as he gives you a passing glance. You are not quite sure there is an issue, but his glance leaves you feeling a little uneasy. You make another note in your green book.

The Sexual Harassment/Assault Response and Prevention (SHARP) Program Manager wants to purchase some promotional items for the new SHARP Resource Center² on the installation, to include magnets, stress balls, and coffee mugs. You look down at your coffee mug and stare at the *Safety Starts Here*³ message on it — just a little something you picked up from the Fort Jackson Safety Office seven years ago. “How did they buy that?” you think to yourself. Your thought is interrupted by the GC’s voice, “No issues there, right? I mean it’s SHARP.”

The GC ends the meeting by discussing his desire to host a town hall type of event that highlights why we serve. The capstone of the event will be when he re-administers the oaths of enlistment and commissioned officers for all the Soldiers in attendance, concluding with a ceremonial cake cutting. The GC tasks the Garrison Headquarters and Headquarters Company (HHC) Commander with getting a cake. He then glances at you and asks, “Good to go?”

By the end of the meeting your coffee mug is empty and your little green book is full. You leave feeling inundated with fiscal law issues. Purchasing clothing, fitness trackers, magnets, stress balls, coffee mugs, child care, and ceremonial cakes with appropriated funds⁴ — these seem like relatively small and simple purchases in the grand scheme of the Department of Defense’s (DoD) annual budget.⁵ But you

* Judge Advocate, United States Army. Presently assigned as Student, 64th Judge Advocate Officer Graduate Course, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia. J.D., 2005, Widener University School of Law; B.A., 2002, Pensacola Christian College. Previous assignments include Chief of Administrative and Civil Law, Chief of Military Justice, Communications–Electronics Command, Aberdeen Proving Ground, Maryland, 2013–2015; Trial Counsel, United States Military Entrance Processing Command, Naval Station Great Lakes, Illinois, 2011–2013; Chief of Administrative Law, Chief of Claims, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, 2009–2011; Trial Counsel, Special Assistant United States Attorney, Legal Assistance Attorney, Fort Jackson, South Carolina, 2006–2009. Member of the bars of Maryland, the United States Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ The events laid out in the introduction and referenced throughout this article are based on the author’s actual experiences while serving as the Chief, Administrative and Civil Law, at Aberdeen Proving Ground, Maryland.

² In 2013, the Army opened its first Sexual Harassment/Assault Response and Prevention (SHARP) Program Resource Center at Joint Base Lewis-McChord, Washington. See Julie Smith, *New SHARP Facility Open at JBLM for Collaborative Effort*, JBLM NORTHWEST GUARDIAN (Nov. 7, 2013, 1:53 PM), http://www.nwguardian.com/2013/11/07/16763_new-

[sharp-facility-open-at-jblm.html](http://www.nwguardian.com/2013/11/07/16763_new-sharp-facility-open-at-jblm.html). In 2014, the Army launched a pilot program for eleven additional resource centers. See Libby Smith, *Installations to Open SHARP Resource Centers*, U.S. ARMY (July 2, 2014), <http://www.army.mil/article/129352/>.

³ This is a variation on the official motto of the U.S. Army Training Center and Fort Jackson, “Victory Starts Here.” THE INSTITUTE OF HERALDRY, <http://www.tioh.hqda.pentagon.mil/Catalog/Motto.aspx> (search for “Victory Starts Here” in the “Motto” query box).

⁴ E.g., *Appropriated Funds vs. Non-Appropriated Funds*, FEDERALPAY.ORG, <https://www.federalpay.org/article/>

fund-types (last visited Feb. 25, 2016) (“Appropriated Funds refer to moneys allocated by legislation passed by Congress and signed by the President . . . Non-Appropriated Funds refer to revenue earned by government departments, organizations or agencies by means other than taxation . . . There is more leeway regarding how Non-Appropriated funds can be used. For example, the Moral, Welfare and Recreation (MWR) within the Army is funded with Non-Appropriated Funds.”).

⁵ OFF. OF THE UNDER SEC. OF DEF. (COMPTROLLER) CHIEF FINANCIAL OFFICER, U.S. DEP’T OF DEFENSE (DoD) FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW at 1-1 (Feb. 2015), http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2016/FY2016_Budget_Request_Overview_Book.pdf (requesting funding totaling \$585.2 billion for the DoD for fiscal year 2016).

know that determining whether these purchases are authorized is seldom simple.

Judge advocates can confidently and accurately advise commanders on whether there is legal authority to spend appropriated funds for these items only after understanding some foundational principles of fiscal law and carefully examining relevant statutes, regulations, and opinions. First, when a commander inevitably asks “Why is this important?” a judge advocate must know and be able to articulate some foundational principles of fiscal law governing the expenditure of appropriated funds. Second, a judge advocate needs to identify what sources of authority are available that potentially address these expenditures, where to find them, and apply the various authorities to the proposed expenditures. Lastly, in the absence of specific sources of authority that address an expenditure, a judge advocate must be able to accurately apply the necessary expense test in order to advise his or her commander if an expenditure may be made with appropriated funds.

II. The Authority to Spend Appropriated Funds

A judge advocate must know and be able to articulate foundational principles of fiscal law governing the expenditure of appropriated funds when advising a commander. Inevitably a judge advocate will hear, “We have the funds. Why can’t we just buy it?” While just saying “no” may be an effective way to teach children how to respond to drugs,⁶ it is often insufficient legal advice. A judge advocate must be able to explain the rationale behind the rules on spending appropriated funds. And for that, judge advocates need to know their history.

A. Constitutional Basis

It was the summer of 1787, and the largest city in the newly formed United States of America was hosting fifty-five

state delegates at a new constitutional convention.⁷ Among them were some of the nation’s foremost founding fathers — George Washington, Benjamin Franklin, and James Madison.⁸ These men sat inside the assembly room of the Pennsylvania State House (now known as Independence Hall) and began creating a new system of government in an effort to preserve the union of the newly liberated states.⁹

The need was apparent. The weak central government that existed under the Articles of Confederation had proved futile in addressing many issues, to include how to pay the debts from the recent revolution.¹⁰ In an attempt to resolve these issues, the various state delegates crafted the Constitution of the United States. This “supreme law of the land”¹¹ laid the foundation for a new model of government, one that divided the federal government’s authority between three separate branches: the legislative branch, the executive branch, and the judicial branch.¹²

Article I of the Constitution established the Congress, the legislative branch of the federal government.¹³ This bicameral legislative body, comprised of the Senate and House of Representatives, was given authority over numerous areas.¹⁴ One specific area of authority given to Congress was the power to authorize the expenditure of public funds.¹⁵ In particular, the delegates in Philadelphia wanted the House of Representatives to have this power.¹⁶ Massachusetts’ Delegate Elbridge Gerry stated that the House “was more immediately the representatives of the people, and it was a maxim that the people ought to hold the purse-strings.”¹⁷

This constitutional grant of authority to Congress, known as *The Appropriations Clause*, is considered the cornerstone of Congress’s power of the purse.¹⁸ The Supreme Court of the United States reiterated this aspect of Congress’s authority over the purse in *United States v. MacCollum*, where Justice Rehnquist, writing for the court, stated, “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”¹⁹ Therefore, just

⁶ See Proclamation No. 5653, 101 Stat. 2130 (May 12, 1987) (President Reagan proclaiming *Just Say No to Drugs Week* in May 1987 in an effort to realize “our dream of a drug-free generation of American youth”).

⁷ See *A More Perfect Union: The Creation of the U.S. Constitution*, THE U.S. NAT’L ARCHIVES & RECORDS ADMINISTRATION, <https://www.archives.gov/founding-docs/more-perfect-union> (last visited Jan. 21, 2017).

⁸ *Id.*

⁹ See *May 25, 1787: Constitutional Convention Begins*, HISTORY.COM, <http://www.history.com/this-day-in-history/constitutional-convention-begins> (last visited Jan. 21, 2017).

¹⁰ *A More Perfect Union*, *supra* note 9.

¹¹ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”).

¹² U.S. CONST. art. I, art. II, art. III.

¹³ U.S. CONST. art. I.

¹⁴ See, e.g., U.S. CONST. art. I § 8 (“To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; To establish Post Offices and post Roads,” etc.).

¹⁵ U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

¹⁶ *Power of the Purse*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Power-of-the-Purse/> (last visited Jan. 29, 2017).

¹⁷ *Id.*

¹⁸ See *The Heritage Guide to The Constitution*, THE HERITAGE FOUNDATION, <http://www.heritage.org/constitution/> (last visited Jan. 28, 2017).

¹⁹ *U.S. v. MacCollum*, 426 U.S. 317, 321 (1976).

as the founding fathers intended, in order for the government to spend public funds Congress must authorize the expenditure.²⁰

This is more than just an interesting constitutional history lesson. It is imperative that a judge advocate understands and is able to articulate to a commander that there must be authority granted by Congress to spend funds.²¹ That rule does not originate with the legal advisor. It is laid out in the document all military personnel swear or affirm to support and defend—the Constitution of the United States.²²

B. The Funding Process

How does Congress grant authority to spend appropriated funds? Simply put, Congress provides the authority to expend funds in the laws it passes. Therefore, a judge advocate should understand how funds are requested from Congress and which laws address the expenditure of appropriated funds. This requires at least a basic understanding of the budget process.

Prior to receiving funding, the DoD—the largest of the executive agencies²³—goes through a laborious budget process that is years in the making. It involves each of the services working with the DoD and the White House Office of Management and Budget (OMB) to finalize their respective budgets through a process known as the Planning, Programming, Budget, and Execution (PPBE) cycle.²⁴ This multi-year process, introduced by Secretary of Defense Robert McNamara in 1961,²⁵ addresses the need for the DoD to plan and program to control change over several years.²⁶ It is designed to allow the DoD to prepare a budget for submission to Congress in addition to being the primary

means by which the DoD prepares its own internal, long-term financial plan.²⁷

While most judge advocates will not be involved in the budget process at the DoD level, a judge advocate may be involved at the local installation or unit level. This means that a judge advocate should be familiar with his or her service's budget regulations. For example, an Army judge advocate should familiarize themselves with the Army's counterpart to the DoD PPBE process detailed in Army Regulation (AR) 1-1, *Planning, Programming, Budgeting and Execution System*, in order to advise commanders and other staff sections on the budget process.²⁸ Furthermore, an Army judge advocate should work closely with his or her legal administrator in preparing the budget for their own office.²⁹ This provides the judge advocate an early opportunity to offer advice on the legality of proposed expenditures.

Once DoD has prepared its budget with the assistance of OMB, the budget is submitted through the White House to Congress.³⁰ Congress's timeline to act on the budget is laid out in The Congressional Budget Act of 1974.³¹ Generally, Congress authorizes the expenditure of public funds in a two-part process known as authorization and appropriation.³² This two-part process is not in the Constitution. It is the result of years of internal House and Senate rules regarding the budget process.³³ The resulting two sequential steps that are used today are: (1) enactment of an authorization measure that may create or continue an agency, program, or activity as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency, program, or activity.³⁴

²⁰ *Id.*

²¹ *Id.*

²² 5 U.S.C. § 3331 (2012) ("An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: 'I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States.'"); 10 U.S.C. § 502 (2012) ("Each person enlisting in an armed force shall take the following oath: 'I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States. . . .'").

²³ See *The Executive Branch*, THE WHITE HOUSE, <https://www.whitehouse.gov/1600/executive-branch> (last visited Jan. 21, 2017) ("The Department of Defense is the largest government agency, with more than 1.3 million men and women on active duty, nearly 700,000 civilian personnel, and 1.1 million citizens who serve in the National Guard and Reserve forces.").

²⁴ See DoD, DIR. 7045.14, THE PLANNING, PROGRAMMING, BUDGETING, AND EXECUTION (PPBE) PROCESS (25 Jan. 2013); *Planning, Programming, Budgeting, and Execution (PPBE) Process*, DEF. ACQUISITION U., <https://dap.dau.mil/aphome/ppbe/Pages/Default.aspx> (last visited Jan. 21, 2017); See also MARY T. TYSKIEWICZ & STEPHEN DAGGETT, CONG. RESEARCH SERV., RL30002, A DEFENSE BUDGET PRIMER (1998) [hereinafter DEFENSE BUDGET PRIMER] (using the original term *Planning, Programming, and Budgeting System (PPBS)* which was later replaced in DoD Directive 7045.14 with the current term *PPBE*).

²⁵ DEFENSE BUDGET PRIMER, *supra* note 24, at CRS-26.

²⁶ *Id.* at CRS-27.

²⁷ *Id.*

²⁸ U.S. DEP'T OF ARMY, REG. 1-1, PLANNING, PROGRAMMING, BUDGETING, AND EXECUTION SYSTEM (30 Jan. 1994).

²⁹ U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT para. 38-4a(2)(c) (3 Dec. 2014) (stating that legal administrators are responsible for managing Staff Judge Advocate Office budgets).

³⁰ DEFENSE BUDGET PRIMER, *supra* note 24, at CRS-28.

³¹ Pub. L. No. 93-344, 88 Stat. 297 (1974).

³² Agencies and programs funded through discretionary spending (to include DoD) follow the authorization and appropriation process. However, funding for some agencies and programs is provided by the authorizing legislation without going through this two-step process (this is referred to as *direct or mandatory spending*). This spending makes up roughly 55% of all federal spending. See BILL HENIFF JR., CONG. RESEARCH SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 1 (2012).

³³ *Budget Process: Evolution and Challenges: Hearing Before the H. Comm. on the Budget*, 104th Cong. (1996) (statement of Susan J. Irving, Associate Director, Budget Issues, Accounting and Information Management Division, Government Accountability Office).

³⁴ HENIFF, *supra* note 32, at 1.

1. Authorization Laws

Authorization laws can establish, continue, or modify an agency, program, or activity for a fixed or indefinite period of time.³⁵ They can also establish an agency's or programs' duties or functions, its structure, and responsibilities of officials.³⁶ An authorization does not create budget authority, but rather it is intended to provide guidance regarding the appropriate amount of funds to carry out the authorized activities of an agency.³⁷ Put another way, an authorization "does not give a government agency permission to cut a check or enter into a contract. Rather, its purpose is to set parameters for government agencies/programs."³⁸ While there is no general requirement, either constitutional or statutory, that an appropriation act be preceded by specific authorization, the majority of appropriations today are preceded by some form of authorization.³⁹ And even though an authorization is generally not required, there are a number of specific situations where it is required by statute⁴⁰ or under House and Senate rules.⁴¹ For budget guidance "for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes,"⁴² Congress passes the National Defense Authorization Act (NDAA).

2. Appropriation Laws

Appropriation laws are the "authority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes."⁴³ Stated another way, "appropriations legislation is what a department or agency needs before it can cut a check or sign a contract."⁴⁴ Discretionary agencies (to include the DoD) and programs are funded each year in appropriations legislation.⁴⁵

If judge advocates feel confused about Congress's federal budget two-part process, there is a good chance they

are not alone.⁴⁶ This is because authorizations and appropriations frequently do "not follow the course laid out in textbooks on legislative procedure."⁴⁷ At the very least a judge advocate should understand the distinction between the two. A judge advocate may hear a commander say something similar to, "Congress passed the NDAA. Now we can go forward with our purchases." As the commander's legal advisor, a judge advocate must be aware that this is not the case. You need authorization and appropriation before funds can be spent.⁴⁸

C. Limitations on the Authority to Spend Appropriated Funds

Once an agency receives its authorization and appropriation from Congress, can it spend those funds as it pleases? The answer is no. The authority of executive agencies to spend appropriated funds is limited. 31 U.S.C. § 1301(a) provides that, "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."⁴⁹ This rule is often characterized as whether or not the funds were *legally available* at the time of the expenditure.⁵⁰

Whether appropriated funds are legally available for expenditure depends on three things: the purpose of the obligation or expenditure must be authorized, the obligation must occur within the time limits applicable to the appropriation, and the obligation and expenditure must be within the amounts Congress has established.⁵¹ Therefore, there are three elements that must be observed for the

³⁵ See 1 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 2, pt. C, sec. 1, at 2-41 (3d ed. 2004) [hereinafter GAO Red Book I].

³⁶ *Id.*

³⁷ *Id.*

³⁸ George Krumbhaar, *Budget 101: Authorization vs Appropriations*, USBUDGET.COM OF GALLERYWATCH.COM, (on file with author).

³⁹ GAO Red Book I, *supra* note 35, at 2-41.

⁴⁰ See, e.g., 10 U.S.C. § 114(a) (stating that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law"); Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorization.").

⁴¹ See HOUSE RULES AND MANUAL, r. XXI, reprinted in H. R. DOC. NO. 110-162, at 836-91; STANDING RULES OF THE SENATE, r. XVI, reprinted in S. DOC. NO. 110-9, at 11-12.

⁴² See National Defense Authorization Act for Fiscal Year 2016, H.R. 1735, 114th Cong. (2016).

⁴³ *Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979) (citing COMP. GEN. OF THE U.S., TERMS USED IN THE BUDGETARY PROCESS 4 (1977)).

⁴⁴ Krumbhaar, *supra* note 38.

⁴⁵ See HENIFF, *supra* note 32, at 2.

⁴⁶ See DEFENSE BUDGET PRIMER, *supra* note 24 at CRS-1 ("Both the defense budget itself and the process of congressional review and approval are complex. Even observers who regularly track the defense budget may occasionally be baffled by defense budget terminology and procedures.").

⁴⁷ NESE F. DEBRUYNE, CONG. RESEARCH SERV., 98-756, DEFENSE AUTHORIZATION & APPROPRIATIONS BILLS: FY1970-FY2015 (2017).

⁴⁸ See generally HENIFF, *supra* note 32.

⁴⁹ 31 U.S.C. § 1301(a) (2012).

⁵⁰ See GAO Red Book I, *supra* note 35, at 4-6.

⁵¹ *Id.*

expenditure to be appropriately authorized: purpose, time,⁵² and amount.⁵³

As stated above, 31 U.S.C. § 1301(a), known as *The Purpose Statute*, requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.⁵⁴ When a statute clearly states what objects are appropriate for expenditure of government funds, answering the question of whether the purchase is authorized is relatively straightforward (i.e. Congress said so). However, when a statute does not clearly state what objects are appropriate for expenditure of government funds, a purchase can still be permissible if it is “necessary or proper or incident” to the proper execution of the general purpose of the appropriation.⁵⁵

How does a judge advocate determine if an expenditure is “necessary or proper or incident” to the proper execution of the general purpose of the appropriation? To answer that question, the Government Accountability Office (GAO)⁵⁶ applies a three-part necessary expense test. First, “[t]he expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.”⁵⁷ Second, “[t]he expenditure must not be prohibited by law.”⁵⁸ Third, “[t]he expenditure must not be otherwise provided for, that is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.”⁵⁹ Therefore, in order to determine whether a proper purpose exists to spend appropriated funds, a judge advocate must determine if there is statutory authority for the purchase or if the purchase qualifies as a necessary expense. If either exists,

the purchase can be made with appropriated funds; if neither exists, the purchase cannot be made with appropriated funds.

III. Finding Purpose

Determining an appropriation’s purpose either through finding and examining the statutory authority or applying the necessary expense test can be challenging. Thankfully there are a host of authorities that answer many of the questions that are posed to a judge advocate by either stating the purpose of an appropriation or applying the necessary expense test and determining a proper purpose exists for a purchase. Either way, a judge advocate must be aware of what authorities potentially address the proposed expenditure and where to find them.

A. Finding Purpose in a Statute⁶⁰

It seems like the most obvious place a judge advocate should begin his or her search for a proper purpose is in the statute. If there is a statute that authorizes the purchase, there is no need to conduct a necessary expense test. But what statutes should be examined? First, a judge advocate should review the legislation that created or continued the agency, program, or activity,⁶¹ to include any authorization act (e.g. the NDAA).⁶² In addition to the authorization act, a judge advocate should review the appropriations act, the second piece of legislation that is part of Congress’s spending process.⁶³ Both the authorization act and the appropriations

⁵² In addition to the rule that appropriated funds may only be used for a proper purpose, which is discussed in greater detail in this article, appropriated funds may only be used for limited periods of time. This means that an agency must incur a legal obligation to pay money within an appropriation’s period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations. *See id.* at ch. 5.

⁵³ In addition to the rule that appropriated funds may only be used for a proper purpose, the Antideficiency Act prohibits any government officer or employee from obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds, incurring an obligation in advance of an appropriation, unless authorized by law, and accepting voluntary services, unless otherwise authorized by law. *See* 31 U.S.C. §§ 1341–42, 1517(a); *see also* 2 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 6 (3d ed. 2006) [hereinafter GAO Red Book II].

⁵⁴ 31 U.S.C. § 1301 (2012); *see also* GAO Redbook I, *supra* note 35, at ch. 4.

⁵⁵ To Maj. Gen. Anton Stephan, 6 Comp. Gen. 619, 621 (1927) (“It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the

Government creating the implication that such expenditures should not be incurred except by its express authority.”).

⁵⁶ The Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. It is headed by the Comptroller General of the United States. Part of the GAO’s mission is to “ensure the accountability of the federal government for the benefit of the American people.” U.S. GOV’T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html> (last visited Jan. 23, 2017). The GAO does this, in part, by “auditing agency operations to determine whether federal funds are being spent efficiently and effectively.”

⁵⁷ GAO Redbook I, *supra* note 35, at 4-21.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4-22.

⁶⁰ The U.S. Code can be searched at <http://uscode.house.gov/advancedSearch.xhtml>.

⁶¹ Legislation “that creates an agency, establishes a program, or prescribes a function” is referred to as *enabling* or *organic* legislation. Legislation “which authorizes the appropriation of funds to implement the organic legislation” is referred to as *appropriation authorization*, or simply *authorization* legislation. GAO Redbook I, *supra* note 35, at 2-40.

⁶² *See, e.g.,* Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 (2014).

⁶³ GAO Redbook I, *supra* note 35, at 2-40.

act may contain statutory language detailing the purpose of the funds.⁶⁴

While looking to statutes may seem like an obvious starting point for finding a proper purpose, the reality is that most judge advocates will not be inundated with questions about spending appropriated funds to purchase something that has been specifically outlined in a statute. The far more common questions that a judge advocate will be asked are similar to the ones in the introduction; relatively small purchases that will often require looking beyond the statutes.

B. Finding Purpose in Agency Regulations⁶⁵

When a judge advocate is asked for an opinion regarding whether or not an expenditure of appropriated funds is authorized, the first place that judge advocate should look is the agency regulations. Agency regulations may state when the use of appropriated funds is authorized or may place restrictions on the use of appropriated funds.⁶⁶ The regulation may cite to a specific statute for authority, or the drafters may have applied the necessary expense test and determined that a purchase is authorized.⁶⁷ Either way, judge advocates must be aware of agency regulations authorizing or limiting anticipated expenditures.

The reason that a judge advocate should start with the agency regulations is because when an agency is created or continued, rarely does the legislation lay out precise details about how the agency operates.⁶⁸ Congress allows the agency to implement regulations governing how the agency performs, especially when it comes to its day-to-day

functions.⁶⁹ The regulations promulgated by the agency often outline how appropriated funds may be spent; these determinations by the agency are given a great amount of deference by Congress unless they are plainly erroneous.⁷⁰ Therefore it is imperative that judge advocates are familiar with any agency regulation that may address the expenditure.

C. Finding Purpose in Other Areas

If judge advocates cannot find purpose in the clear language of a statute or agency regulation prior to applying the necessary expense test themselves, they should look for advice and guidance from three other sources: the Department of Justice (DoJ) Office of Legal Counsel (OLC), the DoD Office of General Counsel (OGC), and finally the GAO.⁷¹

1. The DoJ Office of Legal Counsel⁷²

It is aptly described as "the most important government office you've never heard of."⁷³ Despite the fact that some of the most prominent jurists in recent American history have served there,⁷⁴ most judge advocates are likely unfamiliar with the OLC. The OLC is headed by an assistant attorney general who is granted authority from the Attorney General of the United States to provide legal advice to both the President and all executive branch agencies.⁷⁵ The OLC's decisions interpreting statute are binding on the executive branch to include the DoD.⁷⁶ Simply put, the OLC has the "final say on what the president and all his agencies can and

⁶⁴ See generally Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 528 (2014) (stating that appropriated funds may not be used "to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions Khalid Sheikh Mohammed . . .").

⁶⁵ Judge advocates should search DoD and any service specific regulations for guidance on spending appropriated funds for a particular purchase. DoD regulations can be searched at <http://www.dtic.mil/whs/directives/>; Army regulations can be searched at <http://www.apd.army.mil/>; Air Force regulations can be searched at <http://www.e-publishing.af.mil/>; Navy regulations can be searched at <http://doni.daps.dla.mil/>; Marine Corps regulations can be searched at <http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx>; and Joint Publications can be searched at <http://www.dtic.mil/doctrine/>.

⁶⁶ See GAO Redbook I, *supra* note 35, at ch. 3.

⁶⁷ CONTRACT & FISCAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, FISCAL LAW DESKBOOK 2-71 (2014).

⁶⁸ See GAO Redbook I, *supra* note 35, at 3-3.

⁶⁹ *Id.*

⁷⁰ *Id.* at 3-38.

⁷¹ There are a host of secondary sources judge advocates can consider when determining whether an expenditure of appropriated funds is appropriate. For example, judge advocates will likely find additional guidance within their own services' Judge Advocate General's (JAG) Corps (e.g. Air Force JAG publications can be searched at <http://www.afjag.af.mil/library/publicationsarchive/index.asp>; Naval Justice

School publications can be searched at http://www.jag.navy.mil/njs_publications.htm, etc.).

⁷² The Office of Legal Counsel's (OLC) opinions can be searched by date and title or by volume at <http://www.justice.gov/olc/opinions-main>. While judge advocates should research OLC's opinions, they should be aware that not all of OLC's guidance will be published. See THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/olc/opinions-main> (last visited Jan. 27, 2017) ("This web site includes Office of Legal Counsel opinions that the Office has determined are appropriate for publication."); Memorandum from David J. Barron, Acting Assistant Attorney General, U.S. Dep't of Justice Office of Legal Counsel, to Attorneys of the Office (July 16, 2010), <https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf> (hereinafter OLC Memo) ("[C]ounterbalancing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication.").

⁷³ Daniel Klaidman, *Palace Revolt*, NEWSWEEK, (Feb. 5, 2006, 7:00 PM), <http://www.newsweek.com/palace-revolt-113407>.

⁷⁴ The late Chief Justice William Rehnquist and the late Justice Antonin Scalia were among its leaders prior to serving on the Supreme Court. *Id.*

⁷⁵ THE UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/olc> (last visited Jan. 27, 2017).

⁷⁶ See OLC Memo, *supra* note 72 at 1 ("OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government.").

cannot legally do.”⁷⁷ Therefore it is important for judge advocates to review OLC opinions that may address a proposed expenditure.

2. The DoD Office of General Counsel⁷⁸

In addition to OLC guidance, judge advocates must be aware of DoD specific legal guidance. The DoD’s OGC, headed by the General Counsel of the DoD (who is by law the chief legal officer within DoD⁷⁹), provides this guidance.⁸⁰ One of the responsibilities of the OGC is to “establish DoD policy on general legal issues, determine the DoD positions on specific legal problems, and resolve disagreements within the DoD on such matters.”⁸¹ In addition, the OGC’s Standards of Conduct Office (SOCO) “prepares policy guidance for Department-wide application.”⁸² Much of the OGC SOCO guidance addresses issues related to the appropriate expenditure of appropriated funds,⁸³ therefore it is essential for judge advocates to review this guidance.

3. The Government Accountability Office⁸⁴

In addition to the OLC and the OGC guidance, judge advocates must look to the GAO for guidance on appropriate expenditures. Often called the “congressional watchdog,”⁸⁵ the GAO is an independent, nonpartisan agency that works for Congress.⁸⁶ The GAO’s mission “is to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people.”⁸⁷ The GAO supports congressional oversight by “auditing agency operations to determine whether federal funds are being spent efficiently and effectively; investigating allegations of illegal and improper activities . . . and issuing legal decisions and opinions.”⁸⁸

The GAO’s opinions on authorized uses of appropriated funds provide great guidance for judge advocates researching these issues. Despite the non-binding nature of the GAO’s guidance for executive agencies,⁸⁹ a judge advocate is more likely to find an answer regarding a specific purchase in the GAO’s opinions than that provided by the OLC or the OGC. Therefore it is essential that judge advocates review the GAO’s opinions for fiscal law guidance on a proposed expenditure.

IV. Application of the Rules

After leaving the command and staff meeting you went back to your office and began researching the issues you wrote down in your green book. While walking through the garrison headquarters a few days later, you hear a voice calling out to you: “Judge, come in here for a minute.” You have researched the relevant statutes, regulations, and opinions. You enter the GC’s office prepared to advise him on the proposed expenditures.

A. Cold-Weather Gear

“So can we purchase cold-weather gear for the DPW employees plowing snow?” You know from your research the general rule is that buying clothing for individual employees generally does not materially contribute to an agency’s mission performance.⁹⁰ Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary.⁹¹ There are three recognized statutory exceptions under which clothing can be purchased.⁹² First, 10 U.S.C. § 1593 provides statutory authority to use appropriated funds to provide a uniform allowance for federal

⁷⁷ Klaidman, *supra* note 73.

⁷⁸ The Office of General Counsel (OGC) Standards of Conduct Office (SOCO) guidance can be searched at <https://search.usa.gov/search?affiliate=soco>.

⁷⁹ 10 U.S.C. § 140 (2012).

⁸⁰ U.S. DEP’T OF DEF. OFFICE OF THE GENERAL COUNSEL, <http://www.dod.mil/dodgc/about.html> (last visited Jan. 27, 2017).

⁸¹ *Id.*

⁸² U.S. DEP’T OF DEF. STANDARDS OF CONDUCT OFFICE, http://www.dod.mil/dodgc/defense_ethics/ (last visited Jan. 27, 2017) (stating that the SOCO is responsible for carrying out the DoD General Counsel’s Designated Agency Ethics Official (DAEO) responsibilities).

⁸³ See, e.g., Memorandum from DoD SOCO, OGC, to DoD Personnel 3 (2014), http://www.dod.mil/dodgc/defense_ethics/resource_library/dod_holiday_guidance.pdf (prohibiting the use of appropriated funds for office parties).

⁸⁴ GAO opinions can be searched by keyword or report number at <http://www.gao.gov/>.

⁸⁵ U.S. GOV’T ACCOUNTABILITY OFF., <http://www.gao.gov/about/index.html> (last visited Jan. 27, 2017).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ See Memorandum from Todd David Peterson, Deputy Assistant Attorney General to Lois J. Schiffer, Assistant Attorney General, Env’t & Nat. Res. Div. & John D. Leshy, Solicitor, Dep’t of the Interior 6 n.7 (July 28, 1998), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2016/04/22/1998-07-27-mineral-royalties-2.pdf> (“Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies or officers of the executive branch.”).

⁹⁰ See IRS Purchase of T-Shirts, 70 Comp. Gen. 248, 248 (1991) (stating Combined Federal Campaign t-shirts for employees who donated five dollars or more per pay period not authorized).

⁹¹ *Id.*

⁹² 10 U.S.C. § 1593 (2012); 29 U.S.C. § 668 (2012); 5 U.S.C. § 7903 (2012).

civilian employees.⁹³ Second, 29 U.S.C. § 668 requires the head of each federal agency to establish and maintain an effective and comprehensive occupational safety and health program, which includes the provision of certain protective equipment and clothing pursuant to the Occupational Safety and Health Act (OSHA).⁹⁴ Lastly, 5 U.S.C. § 7903 authorizes using appropriated funds for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks.⁹⁵ In conjunction with this statutory authority, the Army provides regulatory guidance on what is considered personal protective equipment.⁹⁶ Additionally, GAO has offered its interpretation on purchasing cold-weather gear on multiple occasions.⁹⁷

Applying those three statutory exceptions along with the Army's regulatory guidance and GAO's opinions, you advise that appropriated funds may be used to purchase the cold-weather gear only if a determination is made that the cold-weather gear is required by OSHA⁹⁸ or that it is required special clothing for the protection of its personnel in the performance of their assigned tasks.⁹⁹ Without this determination, there is no authority to purchase the cold-weather gear for the DPW employees with appropriated funds. With this determination, the purchase of cold-weather gear is authorized.

B. Fitness Trackers

"What about the fitness trackers the Health Promotion Officer asked for?" Federal agencies are authorized under 5 U.S.C. § 7901 to establish physical fitness programs as a preventive health program.¹⁰⁰ In accordance with the statute, a health service program is limited to the treatment of on-the-job illness and dental conditions requiring emergency attention, preemployment and other examinations, referral of employees to private physicians and dentists, and preventive programs relating to health.¹⁰¹ The Army has created the Community Health Promotion Program¹⁰² through AR 600-63, which states "Garrison Commanders will establish and sustain programs and infrastructure that enable unit leader initiatives that promote physical fitness and resilience for individual Soldiers, units, and Family members."¹⁰³

There is no specific language in the statute or regulation that addresses purchasing this type of equipment. However, the authority in 5 U.S.C. § 7901 has been interpreted by GAO to extend to purchasing physical fitness equipment for employees in certain situations.¹⁰⁴ Since there is no specific statutory authority for this purchase, you must apply the necessary expense test to determine if the purchase is authorized.¹⁰⁵ Here, you advise that it is reasonable in this case to find that the purchase of fitness trackers for use by civilian employees engaged in an Army established health service program is necessary, proper or incident to the employees participating in that program. Put simply, without tracking the employee's fitness level it is impossible to gauge the effectiveness of the fitness program. The purchase bears a logical relationship to the appropriation sought to be charged, does not appear to be prohibited by law, and is not

⁹³ 10 U.S.C. § 1593 (2012).

⁹⁴ 29 U.S.C. § 668 (2012).

⁹⁵ 5 U.S.C. § 7903 (2012).

⁹⁶ See U.S. DEP'T OF ARMY, REG. 420-1, ARMY FACILITIES MANAGEMENT para. 25-7 (12 Feb. 2008).

⁹⁷ See *Purchase of Insulated Coveralls*, Vicksburg, Mississippi, B-288828, 2002 WL 31242199 (Comp. Gen. Oct. 3, 2002) (discussing the rules for purchasing cold-weather clothing); see *Purchase of Cold Weather Clothing*, Rock Island District, U.S. Army Corps of Engineers, B-289683, (Comp. Gen. Oct. 7, 2002), <http://www.gao.gov/assets/370/366962.pdf> (stating that if a determination is made that it is necessary to provide protective clothing to satisfy Occupational Safety and Health Act (OSHA) standards then OSHA provides the necessary authority to make the purchase of cold weather gear); Cf. U.S. Dep't of the Air Force Whiteman Air Force Base, Mo. (Agency) and Am. Fed'n of Gov't Emp. Local 2361 (Union), 68 F.L.R.A. 969 (2015) (addressing the issue of purchasing of cold-weather gear using precedent of the Comptroller General).

⁹⁸ One may assume that this determination requires a high level of approval. However, the occupational safety and health standards found in 29 C.F.R. 1910.132(d)(1) (2011) only require that a determination be made by the employer ("The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall . . . select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment." (emphasis added)).

⁹⁹ U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM para. 25-7 (27 Nov. 2013) (lays out the Army's policy regarding OSHA, to include the provision of PPE, and states "all Army leaders at each echelon

will develop and implement functions and written procedures as part of the Army Safety Program and the Army Occupational Health Program to fulfill the following Army and OSHA requirements [regarding] PPE." Furthermore, para. 18-11c states that "PPE and training will be provided at no cost to the employee." In this case, it would be appropriate for the Director of DPW to make this determination in conjunction with the garrison command.

¹⁰⁰ 5 U.S.C. § 7901 (2012).

¹⁰¹ *Id.*

¹⁰² *Army Civilian Wellness Programs*, U.S. ARMY MEDICAL DEPARTMENT, ARMY PUBLIC HEALTH CENTER (PROVISIONAL), <http://phc.amedd.army.mil/topics/healthyliving/al/Pages/ArmyCivilianWellnessPrograms.aspx> (last visited Jan. 28, 2017) ("Community Health Promotion Councils (CHPC) will facilitate efforts for planning, implementing, and evaluating civilian fitness programs. The chair of the Physical Fitness Working Group of the CHPC is responsible for ensuring the status, results, and impacts of the CFP are reported at the quarterly briefings. The Health Promotion Representative will coordinate with the Physical Fitness Working Group to ensure execution in accordance with published standards; but is not a manager of any specific health promotion program.").

¹⁰³ U.S. DEP'T OF ARMY, REG. 600-63, ARMY HEALTH PROGRAM para. 5-2e (14 Apr. 2015).

¹⁰⁴ See Department of the Interior—Purchase of Physical Exercise Equipment, 63 Comp. Gen. 296, 296 (Apr. 17, 1984).

¹⁰⁵ See GAO Redbook I, *supra* note 35, at 4-21–4-22.

otherwise provided for.¹⁰⁶ Therefore, you advise that the expenditure of appropriated funds for the fitness trackers is authorized.

C. Chaplain's Program

"What about the Chaplain's upcoming strong families event? Can we pay for child care with appropriated funds?" Multiple provisions of the U.S. Code establish the position of chaplain in the Army and, together with regulations promulgated by the Secretary of the Army, prescribe the duties of that position.¹⁰⁷ These authorities require commanders to assist chaplains in the performance of their duties by furnishing them what is necessary.¹⁰⁸ Additionally, AR 165-1 authorizes the use of appropriated funds "for command-sponsored religious support activities, including, but not limited to, religious education, retreats, camps, conferences, meetings, workshops, and Family support programs."¹⁰⁹ Per the regulation, appropriated funds "should be used to . . . support chaplain-led programs to assist members of the Armed Forces and their immediate Family members in building and maintaining strong Family structures. This includes cost of transportation, food, lodging, supplies, fees, *childcare*, and training materials for members of the Armed Forces and their immediate Family members while participating in such programs."¹¹⁰ Therefore, based on the clear statutory and regulatory guidance, you advise the GC that the childcare for the chaplain's program can be paid for with appropriated funds.

D. Promotional Items

¹⁰⁶ *Id.*

¹⁰⁷ See 10 U.S.C. § 3073 (2012); 10 U.S.C. § 3547 (2012); 10 U.S.C. § 3581 (2012); U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAINS CORPS ACTIVITIES para. 1-7 (23 June 2015) [hereinafter AR 165-1].

¹⁰⁸ 10 U.S.C. § 3037; 10 U.S.C. § 3547, 10 U.S.C. § 3581; AR 165-1, *supra* note 112 at para. 1-7.

¹⁰⁹ AR 165-1, *supra* note 107 at para. 14-3.

¹¹⁰ *Id.*

¹¹¹ See NIH Policy on Promoting Efficient Spending: Use of Appropriated Funds for Conferences & Meeting Space, Food, Promotional Items, and Printing and Publications, Nat'l Inst. of Health 19 (June 15, 2015), <https://oamp.od.nih.gov/sites/default/files/contracttoolbox/nihespromnibusrwr20150529.pdf> ("NIH considers promotional items to be an extraneous expense. Therefore, [NIH institutes and centers] shall not use appropriated funds to purchase promotional items."); Memorandum from Christopher Douwes, U.S. Dep't of Transportation Fed. Highway Admin., to State Trail Administrators (Oct. 5, 2000) (updated Feb. 6, 2006) https://www.fhwa.dot.gov/environment/recreational_trails/guidance/financial_management/promoprohib.cfm (stating the general rule that the purchase of promotional items with federal funds is prohibited, to include purchase of pens, cups, shoelaces, key chains, baseball caps, paperweights, buttons, etc.).

¹¹² Compare Food & Drug Admin.—Use of Appropriations for "No Red Tape" Buttons and Mementoes, B-257488, 1995 WL 646489 (Comp. Gen. Nov. 6, 1995) (finding that using appropriated funds to purchase buttons with "no intrinsic value . . . and [] designed solely to assist in achieving

"Can we get the promotional items? After all, it's SHARP, my top priority." Multiple executive agencies take the approach that promotional items are extraneous expenses, and using appropriated funds to purchase them is prohibited.¹¹¹ However, in rare cases, an agency may purchase promotional items when it can demonstrate that the promotional items are necessary expenses that directly further its mission.¹¹²

In this case, part of the Army's mission "is to reduce with an aim toward eliminating sexual offenses within the Army through cultural change, prevention, intervention, investigation, accountability, advocacy/response, assessment, and training to sustain the All-Volunteer Force."¹¹³ One way the Army seeks to accomplish this is through establishing SHARP Resource Centers "to synchronize the advocacy services available to victims of sexual assault."¹¹⁴ As a newly created office on the installation, distributing a limited amount of appropriate promotional items can be reasonably necessary for the office to inform the installation population about the office, its services, and its location.¹¹⁵ You advise the GC that using appropriated funds for a reasonable amount of SHARP Resource Center promotional items is authorized.

E. Ceremonial Cake

"Appreciate the advice. Last one — can we buy the cake for the ceremony?" The general rule is that food typically does not materially contribute to an agency's mission performance, and therefore is usually considered a personal expense.¹¹⁶ There are, however, statutory exceptions that

internal agency management objectives" was authorized), with Implementation of Army Safety Program, B-223608, 1988 WL 228374 (Comp. Gen. Dec. 19, 1988) (finding that the purchase of ice scrapers imprinted with a safety slogan to disseminate to employees was not authorized because the Army Corps of Engineers failed to show on the record that there was a connection between the promotional material imprinted on the ice scraper with the purposes of the OSHA.).

¹¹³ I. A.M. STRONG, U.S. ARMY SEXUAL HARASSMENT/ASSAULT RESPONSE & PREVENTION, http://www.sexualassault.army.mil/Template-IamStrong.cfm?page=iam_mission.cfm (last visited Jan. 28, 2017).

¹¹⁴ Sergeant William White, *Resource Center Synchronizes SHARP Efforts*, ARMY.MIL (Apr. 15, 2015), http://www.army.mil/article/146500/Resource_center_synchronizes_SHAR_P_efforts.

¹¹⁵ As a practice point, any promotional item should include contact information for the office, Sexual Assault Response Coordinator (SARC), or Unit Victim Advocate (UVA), in addition to promoting Army SHARP policy. The item should be of little or no intrinsic value, and should not be considered a gift. See Gen. Servs. Admin., Order OGC 5090.1A, *Purchase of Promotional or Memento Items* (Oct. 1, 2010), <https://www.gsa.gov/portal/directive/d0/content/521670> ("Personal items such as food, eating utensils, clothing, toys or sporting equipment normally should not be used as promotional items as they have been considered to be prohibited personal gifts in past decisions of the Comptroller General.").

¹¹⁶ See 31 U.S.C. § 1345 (2012) ("Except as provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting."); see In re: Corps of Engineers – Use of Appropriated Funds to Pay for Meals, B-249795 (May 12, 1993) ("Free

allow the purchase of food.¹¹⁷ Many of these exceptions either involve an employee's attendance at a training event¹¹⁸ or an award ceremony.¹¹⁹

However, in this case there is no statutory or regulatory authority, or OLC, OGC, or GAO guidance that would authorize the purchase of the cake with appropriated funds for this specific type of event.¹²⁰ The event does not appear to be training or an award ceremony, but is more celebratory in nature (similar to having cake at a military birthday celebration).¹²¹ Without finding specific guidance that authorizes the purchase, you advise against purchasing the cake with appropriated funds.

IV. Conclusion

Understanding some basics fiscal law principles, coupled with thorough research of relevant statutes, regulations, and other relevant guidance, enables a judge advocate to confidently and accurately address any expenditure of appropriated funds. Regardless of the type of expenditure, whether it is clothing, fitness trackers, magnets, stress balls, coffee mugs, childcare, or ceremonial cakes, a judge advocate will be ready to respond. Just make sure you have enough coffee to last the ninety minutes and plenty of room in your little green book.

food and refreshments normally cannot be justified as a 'necessary expense' under an appropriation since such expenses are considered personal expenses that government employees are expected to bear from their own salaries.'").

¹¹⁷ See 37 U.S.C. § 402 (2012) (providing statutory authority for DoD to pay service members a basic allowance for subsistence).

¹¹⁸ See 5 U.S.C. § 4110 (2012) (providing statutory authority for the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."); 5 U.S.C. § 4109 (2012), 10 U.S.C. § 4301 (2012), 10 U.S.C. § 9301 (2012) (allowing the government to pay all or a part of the necessary expenses of the training); *compare* U.S. Army Garrison Ansbach—Use of Appropriated Funds to Purchase Food for Participants in Antiterrorism Exercises, B-317423, 2009 WL 754699 (Comp. Gen. Mar 9, 2009) (determining that appropriated funds may be used to purchase food for federal civilian employees and military members where the Ansbach commander determines the food is necessary for the attendees to obtain the full benefit of the antiterrorism training exercise) *with* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 WL 174196 (Comp. Gen. Jan. 27, 2003) (determining that appropriated funds are not available to feed government employees while training at their duty station.).

¹¹⁹ See 5 U.S.C. § 4503 (2012); 5 U.S.C. § 4504 (2012); 5 U.S.C. § 4505 (2012).

¹²⁰ As with any question pertaining to the expenditure of appropriated funds, different or additional facts may change the opinion. A judge advocate would be wise to gather these facts. For example, knowing what else—if anything—will occur at the ceremony will be useful in determining whether the ceremony meets the definition of a training event or an awards ceremony. Knowing who will be in attendance at the ceremony in addition to military servicemembers will help determine whether there are other authorized means to pay for light refreshments such as, for example, official representation funds. See U.S. DEP'T OF ARMY, REG. 37-47, OFFICIAL REPRESENTATION FUNDS OF THE SECRETARY OF THE ARMY (18 Sept. 2012).

¹²¹ See generally U.S. MARINE CORPS, MARADMIN 541/10, APPROPRIATED FUNDS NOT AUTHORIZED FOR USMC BIRTHDAY CAKE (24 Sept. 2010) (indicating that appropriated funds could not be used to purchase a cake for the Marine Corps Birthday Ball, and the expenditure of appropriated funds could lead to a "violation of 31 U.S.C. 1301 (the Purpose Statute) and result in costly and time consuming Antideficiency Act (ADA) investigations"); U.S. Navy Office of the Judge Advocate General (OJAG), Code 13, *Military Balls*, ETHICS GRAM 15-01 (19 Aug. 2015), <https://www.history.navy.mil/content/dam/nhhc/browse-by-topic/commemorations/commemorations-toolkits/navy-birthday/Administration%20Direction%20and%20Planning/Ethics%20Gram%2015-01%20Military%20Balls.pdf> (indicating that appropriated funds should not be used to purchase cake for the official portion of a birthday ball).

Better Buying Power and Incentivizing Public-Private Partnerships Through Non-Monetary Incentives

Major Nicholas C. Frommelt*

In the year 2054, the entire defense budget will purchase just one aircraft. The aircraft will have to be shared by the Air Force and Navy three and one half days per week except for leap years, when it will be made available to the Marines for the extra day.¹

I. Introduction

A common critique of defense acquisition is that it continues to sink slowly under its own weight. Over the last fifty years, defense acquisition reform has remained “a high priority each time a new administration comes into office.”¹ However, the ills of cost growth and schedule slippages “have remained much the same throughout this period.”² Defense appropriations are an incredible investment of public treasure,³ representing a trust which is constantly bombarded by headlines alleging the latest acquisition snafu.⁴ Such headlines are not unwarranted. Defense programs have seen \$300 billion in cost-overruns and \$50 billion in canceled programs in the last ten years.⁵ Congress’s gutting of the acquisition workforce during the 1990s, coupled with explosive contingency-related growth in defense spending,

have only compounded problems, exerting incredible stress on defense acquisition.⁶

It is no surprise then that the Department of Defense (DoD) has undertaken Better Buying Power (BBP) to drive better value and control costs.⁷ Now in its third iteration, BBP 3.0 emphasizes two notable measures: increased use of incentive-based contracting and increased partnering with industry.⁸ Incentives target supplies or services that “can be acquired at lower costs and, in certain instances with improved delivery or technical performance” by relating “the amount of profit or fee payable under the contract to the contractor’s performance.”⁹ The DoD axiom is that incentives motivate better performance and reduce costs. Incentives have been around for decades,¹⁰ but BBP 3.0

* Judge Advocate, United States Air Force. Presently assigned as Staff Judge Advocate, Air Force Research Laboratory. LL.M., 2016, The Judge Advocate General’s School, United States Army, Charlottesville, Virginia; J.D., 2008, University of Iowa College of Law, Iowa City, IA; B.A., 2005, Loyola University Chicago. Previous assignments include Executive Officer and Deputy Chief, Federal Courts Branch, Commercial Law and Litigation Directorate, Air Force Legal Operations Agency, Joint Base Andrews, Maryland, 2013-2015; Chief, Military Justice, Chief, General Law, Nellis Air Force Base, Nevada (Deployed, Criminal Investigation Task Force and Task Force 2010, Fort Belvoir, Virginia and Kabul, Afghanistan), 2011-2013; Chief, General Law, Chief, Legal Assistance, Los Angeles Air Force Base, California (Deployed, Combined Joint Interagency Task Force 435, Bagram Air Base, Afghanistan), 2009-2011. Member of the bars of Illinois, the Court of Federal Claims, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

¹ Norman R. Augustine, *Augustine’s Laws and Major System Development Programs*, DEF. ACQUISITION REV. J. (Jan. 2015), http://www.dau.mil/publications/DefenseARJ/ARJ/ARJ72/ARJ-72_Augustine.pdf.

² Richard W. Stewart, *Foreword to J. RONALD FOX, DEFENSE ACQUISITION REFORM, 1960–2009: AN ELUSIVE GOAL* vii (Center of Military History, U.S. Army 2011), http://www.history.army.mil/html/books/051/51-3-1/CMH_Pub_51-3-1.pdf [hereinafter DEFENSE ACQUISITION REFORM].

³ *Id.*

⁴ Congress appropriated over \$570 billion to the Department of Defense (DoD) in Fiscal Year 2016. See U.S. DEP’T OF DEF. FISCAL YEAR 2016 BUDGET REQUEST OVERVIEW (Feb. 2015), http://comptroller.defense.gov/Portals/45/Documents/defbudget/fy2016/FY2016_Budget_Request_Overview_Book.pdf.

⁵ See, e.g., Sen. John McCain, *It’s Time to Upgrade the Defense Department*, WAR ON THE ROCKS (Nov. 10, 2015), <http://warontherocks.com/2015/11/its-time-to-upgrade-the-defense-department/>.

⁶ Sandra I. Erwin, *Acquisition Reform: It’s Mostly Up to Congress*, NATIONAL DEFENSE (Dec. 4, 2014),

<http://www.nationaldefensemagazine.org/blog/lists/posts/post.aspx?ID=1693>.

⁷ See, e.g., *Expert Perspectives on Managing the Defense Acquisition System and the Defense Acquisition Workforce: Before the Defense Acquisition Reform Panel of the H. Comm. on Armed Servs.*, 111th Cong. (2010) (statement of Prof. Steven L. Schooner, Co-Director of the Government Procurement Law Program, George Washington University Law School) (noting that the DoD acquisition workforce has been “starved for a couple decades”). See also, Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 173 (2006) (arguing that “cuts to the acquisition workforce have proven too severe” and that, coupled with increased procurement spending from the Global War on Terrorism, the Government faces “increased risk of significant downstream costs . . . [that] threatens successful contract performance”).

⁸ U.S. DEP’T OF DEF., BETTER BUYING POWER, ACQUISITION, TECHNOLOGY AND LOGISTICS, [HTTP://BBP.DAU.MIL/](http://bbp.dau.mil/) (LAST VISITED JAN. 21, 2016).

⁹ Memorandum from Frank Kendall to Secretaries of the Military Departments et al., subject: Implementation Directive for Better Buying Power 3.0—Achieving Dominant Capabilities through Technical Excellence and Innovation (9 Apr. 2015), [http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0\(9Apr15\).pdf](http://www.acq.osd.mil/fo/docs/betterBuyingPower3.0(9Apr15).pdf) [hereinafter BBP 3.0]. BBP 3.0 states that “the Department can still improve its performance in aligning profit incentives with contract performance.” *Id.* at Attachment 2, p. 7. Moreover, BBP 3.0 emphasizes that public-private partnerships such as the superior supplier incentive program (SSIP) play a critical role in incentivizing greater productivity. *Id.* at Attachment 2, p. 8. BBP 3.0 expands the SSIP with the intent “to recognize higher-performing industry partners based on past performance evaluations, with the intent of incentivizing superior performers and creating healthy competition.” *Id.*

¹⁰ FAR 16.401(a) (2010). Contract incentives obtain their acquisition objectives by “[e]stablishing reasonable and attainable targets” and by “[i]ncluding appropriate incentive arrangements designed to—(i) motivate contractor efforts that might not otherwise be emphasized; and (ii) discourage contractor inefficiency and waste.” *Id.*

¹¹ See, e.g., Vernon J. Edwards, *Award-Fee Incentives: Do They Work? Do Agencies Know How To Use Them?*, 20 No. 6 NASH & CIBINIC REP. ¶ 26

signals a renewed emphasis.

However, it is worth examining whether the DoD has had the right firing solution for employing incentives. This article will take up the case that the DoD should broaden its aperture and emphasize non-monetary incentives, which may induce better contract performance with the prospect of a long-term partnering.¹¹ In particular, the award term incentive warrants greater consideration because of its potential to spur high-level performance with the prospect of guaranteed additional contract terms.¹² Award terms have considerable potential value to contractors insofar as contractors can earn continued performance. In order to leverage award term incentives, the DoD should revisit its regulatory guidance to account for non-monetary incentives; and the DoD should specifically codify the award term in the Defense Federal Acquisition Regulation Supplement (DFARS).

II. Types of Contract Incentives

In a broad sense, incentives are native to all defense contracts insofar as they generate profit or some value for firms.¹³ However, not all contract vehicles are equal in returning value to the government. BBP 3.0 recognizes as much in directing Departments to “Incentivize Productivity in Industry and Government.”¹⁴ BBP 3.0 specifically states that “profit is a fundamental driver of private enterprise” and that

(2006) (discussing research going back to the 1960s on whether incentive fees are effective in controlling cost). See also DEFENSE ACQUISITION REFORM, *supra* note 3 at 36 (discussing how the DoD, under the leadership of Sec. Robert McNamara, began emphasizing fixed-price and incentive contracts in the early 1960s in order to increase efficiency and cost effectiveness, as well as reduce waste).

¹¹ See Michael W. Mutek, *Implementation of Public-Private Partnering*, 30 PUB. CONT. L.J. 557, 558, (2001) (discussing the value of “longer, more cooperative relationships with key suppliers”).

¹² See, e.g., Vernon J. Edwards, *Award Term: The Newest Incentive*, WHERE IN FEDERAL CONTRACTING? WIFCON.COM (Oct. 30, 2000), <http://www.wifcon.com/anal/analaterm.htm> (defining an award term as an incentive that allows a contractor to earn additional periods of performance instead of an incentive award fee).

¹³ BBP 3.0 points to profit as “a fundamental driver of private enterprise.” See BBP 3.0, *supra* note 10, at 14.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ FAR 16.401(a) provides that incentive contracts are appropriate where “supplies or services can be acquired at lower costs and, in certain circumstances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor’s performance.” FAR 16.401(a) (2014).

¹⁷ FAR 16.4 (describing different structures of incentive contracts).

¹⁸ FAR 16.403. A FPIF contract provides “for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset.” FAR 16.403(a).

¹⁹ FAR 16.404. A FPAF allows for award fees where “other incentives cannot be used because contractor performance cannot be measured

“industrial performance responds to the incentive structure . . . [in] business arrangements.”¹⁵

1. Monetary Incentives: A Questionable Link to Cost Control

Monetary incentives attempt to motivate better value to the government by way of incentive or award fees.¹⁶ These fees may increase based on an objective or subjective rating by the contracting officer vis-à-vis performance. The idea is simple—deliver better value to the government to increase fees above the contractor’s cost. Incentive contracts include cost-plus and fixed price contracts with either award fees or incentive fees.¹⁷ Combinations include: fixed-price incentive contracts (FPIF),¹⁸ fixed-price contracts with award fees (FPAF),¹⁹ cost-plus-incentive-fee contracts (CPIF),²⁰ and cost-plus-award-fee contracts (CPAF).²¹

There is an intuitive attractiveness to incentive fee contracts, as they appear to be a win-win for the government and contractor. No doubt, in many instances contractors do innovate and produce better value in response to monetary incentives. However, incentive fees are not the cure-all for defense acquisition. They are often only as good as their contract administration scheme, and there is evidence that incentive fees are often paid as a matter of course.²² Moreover, it is not clear that incentives consistently have the

objectively.” *Id.* Such contracts establish a fixed price, which must be paid for satisfactory performance, and a contractor may earn award fees in addition to the fixed price. *Id.*

²⁰ FAR 16.405-1. A CPIF allows a contractor to earn incentive fees (up to a cap) on cost-plus contracts:

The [CPIF] is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. [The CPIF] specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. . . . [T]he fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. When total allowable cost is greater than or less than the range of costs within which the fee-adjustment formula operates, the contractor is paid total allowable costs, plus the minimum or maximum fee. *Id.* at 16.405-1(a).

²¹ FAR 16.405-2. A CPAF allows a contractor to earn an award fee based on the discretion of the contracting officer:

[A] fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer, and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance. *Id.*

²² U.S. GOV’T ACCOUNTABILITY OFF., GAO-06-66, DEFENSE ACQUISITIONS: DoD HAS PAID BILLIONS IN AWARD AND INCENTIVE FEES REGARDLESS OF ACQUISITION OUTCOMES 3 (2005) [hereinafter GAO ACQUISITION REPORT].

desired effect of motivating better performance and limiting cost overruns.²³

In 2005, the GAO reviewed monetary incentives and found their value to motivate excellent contractor performance and improve acquisition outcomes “is diluted by the way the DoD structures and implements incentives.”²⁴ The GAO observed that contracting officers often pay incentives as a matter of course.²⁵ The GAO concluded that there is “little evidence . . . that these fees improve contractor performance and acquisition outcomes.”²⁶

The GAO’s study echoed earlier examinations of monetary incentives. As monetary incentives came into vogue in the early 1960s,²⁷ scholars began to study their effectiveness in controlling cost in government contracts; they concluded that incentive fees are generally not effective at controlling costs.²⁸ In Vernon Edwards’s examination of the GAO’s findings on paying award fees as a matter of course, he highlighted that “[s]tudies conducted by GAO, Harvard University, and the RAND Corporation, among others, have concluded that these incentives do not motivate cost efficiency, in part because profit is not the contractor’s only motivation.”²⁹ Of particular note, one of the biggest motivators of better performance was securing future business with the government.³⁰ Moreover, Edwards highlights the failures in contract administration that undermine monetary incentives’ effectiveness.³¹

Nevertheless, BBP 3.0 guidance states that the DoD “can still improve its performance in aligning profit incentives with contract performance.”³² Its assertion that “profit is a fundamental driver of private enterprise” is predicated on the premise that “Our analysis shows that industrial performance responds to the incentive structure that the Department designs into our business arrangements.”³³ The guidance specifically emphasizes using FPIF and CPIF contracts, as

they are “highly correlated with better cost and schedule performance.”³⁴ Pointing to the DoD’s *2014 Annual Report on the Performance of the Defense Acquisition System*, BBP 3.0 states that the analysis contained therein demonstrates the value of focusing on incentives.³⁵

Indeed, industry should naturally innovate in response to increased opportunity for profit. However, great care and planning need to frame any effective use of incentives in order to avoid past pitfalls with incentive contracts. One good news story with regard to monetary incentives appears to be a shift away from award fee contracts toward FPIF and CPIF contracts. The migration appears to recognize the GAO’s finding that subjective award fees—often part of CPAF contracts—often result in awarding fees as a matter of course.³⁶ The shift in emphasis suggests the DoD has heeded the GAO’s concerns in tailoring incentives to reducing costs. Nevertheless, the government should not view the link between monetary incentives and contractors delivering better value as axiomatic. The effectiveness of any incentive is a function of the effectiveness of the contract’s administration.

2. Long-Term Partnerships: A Powerful Incentive

A recent evaluation of Performance Based Lifecycle (PBL) strategies by the Defense Acquisition University (DAU) examines issues associated with lengthy, guaranteed contract vehicles for PBL contracts.³⁷ The fundamental tension explored in the study is between building long-term partnerships that encourage investment from commercial contractors and the operational and financial risks of such long-term contracts.³⁸ In their examination of six PBL programs with “top-level outcomes” as the object of the acquisition instead of “discrete quantities of goods and services,”³⁹ they found that contractors have greater incentive

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 3–4.

²⁶ *Id.* at Highlights. See also *id.* (“[T]he [DoD] has not compiled data, conducted analyses, or developed performance measures to evaluate the effectiveness of award and incentive fees.”). [NOTE: the quote comes from an unpaginated summary of the report called “Highlights” that appears between the cover page and the table of contents. A variant of this quote appears on p. 32 of the report.]

²⁷ DEFENSE ACQUISITION REFORM, *supra* note 3, at 36.

²⁸ See Edwards, *Award Fee Incentives*, *supra* note 12 (noting that incentive fees have not been shown to motivate cost efficiency) [you need a parenthetical here so it is clear how this source supports the text].

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Edwards makes several observations concerning contract administration and incentives. Notably, Edwards recommends increased linkage between incentive payments and desired outcomes, commensurate with contractor performance. *Id.*

³² BBP 3.0, *supra* note 10, at Attachment 2, p. 7.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ GAO ACQUISITION REPORT, *supra* note 24, at Highlights.

³⁷ Major Christopher P. Gardner, USAF, Jeffrey A. Ogden, Lieutenant Colonel Harold M. Kahler, USAF, Stephan Brady, *Balancing Incentives and Risks in Performance-Based Contracts*, 22 DEF. ACQUISITION REV. J. 472 (2015). Performance based lifecycle or logistics (PBL) is an “outcome-based product support strategy . . . designed to optimize system readiness and meet the warfighter’s requirements . . . through long-term product support arrangements with clear lines of authority and responsibility.” *Id.* at 477 (citing Defense Acquisition University, *PBL Overview*, ACQUISITION COMMUNITY CONNECTION, <https://acc.dau.mil/CommunityBrowser.aspx?id=527144&lang=en-US> (last updated Aug. 18, 2015)).

³⁸ *Id.*

³⁹ *Id.* at 474.

to invest in long-term cost reducing measures when the contract vehicle guarantees business over an extended period.⁴⁰ That is, when the DoD increases contract length, contractors respond with long-term investment and innovation strategies.

The DAU study specifically found that for PBL contracts, both the government and contractors had a “consistently high level of satisfaction” among “programs with a 5-year base, followed by option years or award terms.”⁴¹ These “five-plus-five” contract arrangements “allowed for an appropriate amount of risk sharing and ROI [return on investment].”⁴² While the study provided a caveat that there is no one-size-fits-all contract length, longer contracts provide an “incentive to invest in logistics support for systems, enabling affordability improvements.”⁴³ The study concluded that the benefits of such longer-term PBL contracts build strong partnerships that encourage systemic investment by contractors, thereby benefiting both the contractor and the government.⁴⁴ Moreover, the study found that the operational and financial risks associated with longer-term contracts were minimal.⁴⁵

While the study focused on PBL contracts (with a set of six programs studied), there may be a critical lesson for non-PBL contracts. Namely, longer-term contracts may prompt innovation and the development of efficiencies in other (non-PBL) defense acquisitions.⁴⁶ While the operational and financial risks associated with longer term, non-PBL contracts may be higher, their potential for incentivizing better value to the government cannot be ignored.

III. The Award Term Incentive: Another Firing Solution

Working then on the premise that long-term, public-private partnerships incentivize the delivery of better value to

the government, one incentive bears a closer examination—the award term. Vernon Edwards succinctly describes the award term: “instead of rewarding a contractor for excellent performance with additional fee, it rewards the contractor with additional business by extending the term of the contract.”⁴⁷ The award term is relatively new and not provided for in the FAR.⁴⁸ Award terms are already used by the DoD, largely modeled after award fee contracts.⁴⁹ The Air Force developed the award term and first used the concept in October 1997.⁵⁰ Air Force guidance distinguishes award terms from options:

Award terms differ from options in that award terms are based on a formal evaluation process and the contractor earns the unilateral right to future periods of performance. Once the contractor has earned an additional performance term, only non-availability of funds or termination would jeopardize award of the subsequent terms.⁵¹

The Air Force recognizes that long-term contracts motivate increased operational efficiency, increase contractor investment, and reduce acquisition transaction costs.⁵² The Air Force also has concluded that non-monetary incentives help contractors bolster their image and reputation, and helps them retain skilled personnel.⁵³

According to Air Force guidance, one critical element of the award term is that it forces a “disciplined process to determine if we want to continue a long-term business relationship with a contractor.”⁵⁴ That is, it should force contracting officers to take a deliberate approach to assessing whether planning for an award term is appropriate. Options, of course, do not require a contracting officer to conduct a careful review of current performance.⁵⁵ For options, Air Force guidance notes that “barring truly substandard performance, the contracting activity will usually continue to

⁴⁰ *Id.* at 487.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 497–98.

⁴⁴ *Id.* at 499.

⁴⁵ *Id.*

⁴⁶ See, e.g., Mutek, *supra* note 13, at 573 (noting that “the most effective and efficient arrangement may be a long-term relationship that does not include frequent competitions.”).

⁴⁷ Edwards, *Award Term: The Newest Incentive*, *supra* note 14; Vernon J. Edwards, *The Award Term Incentive: A Status Report, WHERE IN FEDERAL CONTRACTING? WIFCON.COM* (Feb. 2002), <http://www.wifcon.com/anal/analaterm2.htm>.

⁴⁸ See Edwards, *Award Term: The Newest Incentive*, *supra* note 14 (noting the award term incentive traces back to the late 1990s).

⁴⁹ *Id.*

⁵⁰ *Id.* Edwards attributes the award term incentive to Mr. Thomas Jordan, who used the award term “on a task order contract that the Air Force’s

Aeronautical Systems Center awarded to the McDonnell Douglas Corporation in October of 1997, for simulation services for the F-15C aircraft.” *Id.* Its first use included a seven-year base period, which could be extended to fifteen years with an “excellent service” rating. *Id.*

⁵¹ U.S. AIR FORCE, SPACE & MISSILE SYSTEMS CTR., INCENTIVES GUIDE 42 (Mar. 7, 2007), https://acc.dau.mil/adl/en-US/160016/file/29743/SMC_Incentives_Guide_7Mar07a.doc [hereinafter AIR FORCE SMC INCENTIVES GUIDE].

⁵² U.S. AIR FORCE CONTRACTING (SAF/AQC), AIR FORCE GUIDE: AWARD TERM/INCENTIVE OPTIONS 4 (Jan. 2003), <https://dap.dau.mil/policy/Documents/Policy/award.term.doc> [hereinafter AIR FORCE GUIDE].

⁵³ *Id.* at 2.

⁵⁴ *Id.* As highlighted by the Air Force Guide, FAR 17.207 requires the contracting officer to make findings on how exercising an option is in the best interest of the Government. See, e.g., FAR 17.207(c)(3) (2012). Also, a contracting officer only has to determine that the “contractor’s performance on this contract has been acceptable, e.g., received satisfactory ratings.” *Id.* at 17.207(c)(7). Conversely, exercising an award term may require a review of the partnership to determine whether the contractor’s performance should rate as excellent.

⁵⁵ AIR FORCE GUIDE, *supra* note 55, at 2.

place orders and exercise options through the end of the ordering period or optional periods.”⁵⁶

The Army commissioned a study by Science Applications International Corporation (SAIC) to review contracting innovations.⁵⁷ Based on surveys of industry and acquisition professionals, SAIC found that award term contracting is a “high impact” incentive with “relative ease of implementation.”⁵⁸ The study found that award terms enable a “supplier to make investments in process improvements that it might not otherwise make when facing short-term or uncertainty in periods of performance.”⁵⁹ The incentive also allows the government to extend performance quickly, rewards reduced cost while maintaining or exceeding performance standards, and forces the government to take a disciplined approach in developing requirements.⁶⁰ However, the study did caution that with an award term it can be difficult to monitor contractor progress accurately and challenging to define the reward scheme precisely to drive high-level performance.⁶¹

The pressure for industry to achieve superior performance to trigger an award term is a critical point of differentiation from an option. Options may not spur the same type of long-term investment because of their unilateral nature. After all, options present “an element of risk to the contractor because the Government possesses discretion whether to exercise the option,”⁶² whereas contractors effectively earn award terms through high performance.

1. The Department of Defense and Award Term Incentives

The award term incentive does not appear in the DFARS, nor does it appear in any of the service regulations. However, both the Army and the Air Force have published guides on incentive-based contracting that discuss the use of award term

incentives.⁶³ Likewise, the Air Force has recognized that these long-term partnerships are “usually in the best interest of the Air Force,” so long as the partnerships are with “superior contractors.”⁶⁴ The Air Force Space and Missile Systems Center (SMC) has also developed guidance on award terms.⁶⁵ SMC articulates that such incentives are appropriate when “establishing a long-term relationship is valuable both to the Government and the contractor.”⁶⁶

Moreover, award term incentives may have utility in a variety of contracting situations. They may be appropriate in service contracts, where requirements recur over an extended period of time, and where qualitative performance metrics are measurable.⁶⁷ One example reviewed by SAIC’s study for the Army was an Air Force engine repair and maintenance acquisition.⁶⁸ The requirements contract provided for a minimum of five years and a maximum of fifteen years from the date of contract award.⁶⁹ The government informed offerors of the award term clauses through the request for proposals, indicating that “performance will be continually monitored against ‘measures of merit,’ outlined in the contract.”⁷⁰ The contract’s award term plan provided for an award term review board, which provided recommendations to an award term determining official via a performance point scheme.⁷¹ The DoD seems to already have one foot in the door when using award term incentives, but there is no formal regulatory scheme governing the incentive’s use.

2. The Environmental Protection Agency and Award Term Incentives

The Environmental Protection Agency (EPA) proposed adding the award term incentive for service contracts to the EPA Acquisition Regulation (EPAAR) in 2007.⁷² In the “Background” section of its proposal, the EPA noted:

⁵⁶ *Id.* at 3.

⁵⁷ SCIENCE APPLICATIONS INTERNATIONAL CORPORATION, CONSTRUCTING SUCCESSFUL BUSINESS RELATIONSHIPS: INNOVATION IN CONTRACTUAL INCENTIVES (Jan. 20, 2016), https://www.acquisition.gov/seven_steps/library/DOAconstructing.pdf [hereinafter SAIC REPORT].

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 53.

⁶⁰ *Id.*

⁶¹ *Id.* at 53–54.

⁶² Mutek, *supra* note 13, at 578.

⁶³ See U.S. ARMY CONTRACTING AGENCY, ARMY CONTRACT INCENTIVES GUIDE (Nov. 2004), <https://acc.dau.mil/CommunityBrowser.aspx?id=54818&lang=en-US>; AIR FORCE GUIDE, *supra* note 55.

⁶⁴ AIR FORCE GUIDE, *supra* note 53, at 1.

⁶⁵ AIR FORCE SMC INCENTIVES GUIDE, *supra* note 54.

⁶⁶ *Id.* at 42.

⁶⁷ STAN LIVINGSTONE, AWARD TERM CONTRACTING: OPTIMIZING CONTRACTOR PERFORMANCE THROUGH NONMONETARY INCENTIVES (Acquisition Solutions Research Institute June 2009), https://www.asigovernment.com/files/documents/Advisory_Award%20Term%20Contracting.pdf

⁶⁸ SAIC REPORT, *supra* note 60, at 121.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The contracting officer noted that the concept had “great support from offerors” and that “there is more pressure on [contractors] to provide exceptional performance in an award-term than in an award-fee situation because failure to earn maximum points directly affects the period of performance and return on investment.” *Id.*

⁷² Acquisition Regulation: Guidance on Use of Award Term Incentives; Administrative Amendments, 72 Fed. Reg. 56,708 (proposed Oct. 4, 2007) (to be codified at 40 C.F.R. pts. 1516, 1533, and 1552) [hereinafter EPA Award Term Proposal].

Award terms are a form of incentive, offering additional periods of performance rather than additional profit or fee as a reward for achieving prescribed performance measures. Award term incentives were introduced by the Department of the Air Force in 1997. While they have become increasingly popular, the Federal Acquisition Regulation (FAR) has yet to provide any coverage on their use. Accordingly, in order to assist EPA contracting officers seeking to use award term incentives, it is necessary to amend the EPAAR to incorporate guidance on their use.⁷³

The EPA's final EPAAR's revision resulted in EPAAR 1516.401-70.⁷⁴ The EPA shaped its rule to ensure that contractors were not under the impression that "their achievement of prescribed performance measures conferred an absolute entitlement to award term(s), notwithstanding the absence of need or funds for such term(s)." ⁷⁵ The corresponding clause at EPAAR 1516.401-70(e)(1)(iii) indicates that the government may cancel an award term if it does not have available funds.⁷⁶

While the EPAAR provides an excellent starting point for shaping the use of award term incentives, the DoD may want to revisit some of its terms in assessing how to implement its own award term incentive strategy, including whether to include such a similar provision in the DFARS. For example, the EPAAR limits the incentive to service-based contracts.⁷⁷ Also, perhaps because of its narrow focus, the EPAAR does not address some of the legal concerns with the implementation of award term incentives, which will be reviewed below.

IV. Award Term Incentives: The Legal Framework

The underlying tension then becomes reconciling award term incentives with the Anti-Deficiency Act (ADA)⁷⁸ and the Competition in Contracting Act (CICA).⁷⁹ The idea of

obligating unavailable, future-year funds seems to run afoul of the ADA's rule against obligating non-available funds.⁸⁰ Moreover, binding the government to a long-term, multiple-year contract—that may or may not trigger automatic extensions—seems to undermine the CICA's requirement for full and open competition.⁸¹ The issue for an award term incentive is navigating the ADA and CICA without diluting the incentive's effectiveness.

1. Right Year, Right Money: The Anti-Deficiency Act

Taking the ADA first, contracting officers may not obligate funds "for the payment of money before an appropriation is made unless authorized by law" ⁸² Moreover, agencies may only use funds to fill requirements that have actually accrued—for which there is a current bona fide need.⁸³ As discussed by Steven N. Tomanelli, the "legal entitlement to additional periods of performance" is the "most controversial aspect of award term contracting."⁸⁴ Tomanelli contends that exercising the award term may offend the bona fide needs rule because the obligation would occur prior to the funds' availability, where the performance (and the corresponding bona fide need) would occur in a subsequent fiscal year.⁸⁵ That is, the obligation occurs when the contracting officer determines that the contractor qualified for the award term; and such a determination may obligate unavailable funds. Tomanelli also contends that efforts to caveat the incentive in order to conform to the bona fide needs rule may erode its inherent value.⁸⁶ Namely, diluting the contractor's right to another period of performance makes the incentive illusory and thus less attractive.⁸⁷

However, there are at least two means of avoiding violations of the bona fide needs rule where funds are constrained by time. First, the contracting officer can make exercising an award term contingent on the availability of future year funds and on the bona fide need for continued performance.⁸⁸ It is important to note that, in the absence of

⁷³ *Id.*

⁷⁴ Environmental Protection Agency Acquisition Regulation (EPAAR), 48 C.F.R. § 1516.401-170 (2008).

⁷⁵ EPA Award Term Proposal, *supra* note 75, at 56,710.

⁷⁶ EPAAR 1516.401-170(e)(1)(iii).

⁷⁷ EPAAR 1516.401-170(f).

⁷⁸ Anti-Deficiency Act (ADA), 31 U.S.C. § 1341(a)(1)(B) (2012).

⁷⁹ Competition in Contracting Act (CICA) (enacted as part of the Deficit Reduction Act), P.L. 98-369, §§ 2701–2753 (1984).

⁸⁰ 31 U.S.C. § 1341(a)(1)(A).

⁸¹ 10 U.S.C. § 2304(a)(1)(A) (2012); 41 U.S.C. § 253(a)(1)(A) (2012).

⁸² 31 U.S.C. § 1341(a)(1)(B) (2012).

⁸³ 31 U.S.C. § 1552 (2012).

⁸⁴ Steven N. Tomanelli, *Feature Comment: Award-Term Contracting Incentives—Fiscal Constraints and Strategies to Overcome Them*, GOV. CONTRACTOR, 46 No. 13, ¶ 137 (2004).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* Tomanelli takes issue with an effort by the Air Force to structure award terms such that the contractor does not have a contractual entitlement when qualifying under the award term: "[S]uperior performance during the base period(s) entitles the contractor only to the possibility that the CO [contracting officer] will exercise an option to extend performance." *Id.* Tomanelli notes that while this approach may assuage fiscal law concerns, it results in a failure to provide the contractor with a meaningful guarantee of future business. *Id.*

⁸⁸ As noted, the EPA navigates this obstacle by making any exercise of an award term contingent on the availability of funds. See EPAAR 1516.401-170(e)(1)(iii). The FAR provides for obligating future year funds that are conditioned on availability, provided that the contracting officer includes an appropriate availability of funds clause. See FAR 32-703-2(a)–(c). However, the Armed Services Board of Contract Appeals (ASBCA) has opined that "exercise of an option contingent on the availability of funds is

regulatory guidance for award term incentives, a clause of this kind must be included in such contracts. The EPA included a caveat in EPAAR 1516.401-70 qualifying the obligation of funds in an award term on both the availability of funds and a continued bona fide need for contract performance.⁸⁹

Second, in an approach suggested by Tomanelli, a contracting officer may shape an award term such that it works like a requirements contract, obligating the government to purchase all its requirements from the contractor during the earned award term.⁹⁰ Under this approach, the contractor would have a monopoly for any requirement generated by the government; but the exercise of the award term would not trigger an obligation of funds when earned. Rather, the contract would only obligate funds when the contracting officer orders against the contract. Furthermore, acquisition planners may also consider exceptions to the bona fide needs rule (e.g. lead time exceptions) in avoiding ADA pitfalls.⁹¹

The bottom line is that there is a tension between vesting a contractual right to future performance under the contract and the underlying framework of the ADA. While the purpose of the award term is to incentivize long-term investment and foster superior contractor performance, acquisition planners must remain mindful of mechanisms to avoid an unlawful obligation of funds. Moreover, acquisition planners must also consider that the more award term incentives are qualified with caveats and exceptions, the more the incentive's effectiveness will erode. That is, the utility of undergirding the award term incentive is stability in a public-private partnership; and an easily broken or porous set of obligations in a partnership will diminish its value.

2. Justifying the Award Term on the Front End: Complying with the CICA

Like the ADA, contracting officers will have to tailor award term incentives to comply with the CICA. The CICA

requires that agencies only enter into contracts after full and open competition by using competitive procedures,⁹² unless otherwise authorized.⁹³ The FAR further delineates agency requirements to engage in full and open competition.⁹⁴

There is nothing about an award term incentive that, on its own, permits the extending (via earned award term) of the contract without a new full and open competition. However, extending a contract under an award term is substantially similar to extending a contract under a multiple-year option, which is not subject to the CICA.⁹⁵ The triggering of an award term intuitively resembles the government exercising an option, even though options have key differences (e.g. invoking an option is the unilateral right of the government).⁹⁶ So long as acquisition planners account for a potential award term and include them in a solicitation prior to award, award terms should be scrutinized like options vis-à-vis the CICA.

However, in practice, an award term incentive combines elements of multiple-year options and incentive or award fee contracts. To use both multiple-year options and fee-based incentives, the government must generally make a determination and finding (D&F) that the best interests of the government are served by the contract action. The government should treat award term incentives similarly.

a. Option Contracts

A contracting officer exercising an option provides perhaps the closest analogue for how an award term must comply with the CICA.⁹⁷ For an option contract to meet the requirements for full and open competition, the government must include option periods in the initial evaluation criteria.⁹⁸ So long as the government evaluates option pricing during the initial evaluation of proposals, offerors are on notice that their proposed option pricing may bind them several years before

proper" only if required by the option clause of the contract. See JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 1272 (3d ed. 1998) (citing Western States Management Servs., Inc., ASBCA No. 37504, 92-1 BCA ¶ 24,663; Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912).

⁸⁹ See EPAAR 1516.401-170(e)(1)(iii)–(iv) (providing that the award term does not go into effect if "[t]he Government notifies the contractor in writing it does not have funds available for the award term" or if the "[g]overnment no longer has a need for the award term incentive period at or before the time an award term incentive period is to commence.").

⁹⁰ Tomanelli, *supra* note 87.

⁹¹ See U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATIONS, Vol. 3, ¶ 080303B (noting that "[c]ontracts entered into or orders placed for goods, supplies, or services must be executed only with bona fide intent that the contractor (or other performing activity) must commence work and perform the contract without unnecessary delay").

⁹² 10 U.S.C. § 2304(a)(1) (2012).

⁹³ See 10 U.S.C. § 2304(c). Under the CICA, there is a requirement for full and open competition unless one of the following circumstances apply: (1)

there is a single responsible source for goods or services; (2) unusual or compelling circumstances warrant limits to the number of potential contractors; (3) maintenance of the industrial base requires limited competition; (4) requirements of international agreements mandate; (5) there is statutory authorization for acquisition of brand name items; (6) disclosure of agency needs would compromise national security; (7) the agency head determines that limited competition is necessary and in the public interest. *Id.*

⁹⁴ See FAR 6.001 (2014) *et seq.* (implementing requirements of the CICA).

⁹⁵ Full and open competition does not apply to the "exercise of priced options that were evaluated as part of the initial competition." FAR 6.001(c). See also FAR 17.207 (2014).

⁹⁶ See FAR 17.207.

⁹⁷ Options are unilateral rights in a contract whereby the government may "elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract." FAR 17.201.

⁹⁸ Full and open competition does not apply to the "exercise of priced options that were evaluated as part of the initial competition." FAR 6.001(c).

performance.⁹⁹ Contracting officers must make a D&F that the use of options is in the government's best interest.¹⁰⁰

As noted, the act of exercising an award term is intuitively similar to exercising an option. For both exercising an option and earning an award term, the contractor qualifies for continued performance. The key difference is where the authority lies in the contractual arrangement. One may think of an award term as a type of option wherein the right to continued performance vests in the contractor—not unilaterally with the government. The issue then becomes whether this distinguishing feature, where leverage shifts to a contractor to continue performance, is problematic for the incentive's legal footing under the CICA.

Agencies are afforded great discretion in whether or not to exercise options.¹⁰¹ The contracting officer essentially makes a business judgment—determining that funds are available, that there is a bona fide need (and that the option is the most advantageous method of fulfilling the need), and that the option meets the requirements of FAR 5.202.¹⁰² However, in exercising an award term incentive, the terms of the incentive necessarily limit discretion, as the right to additional performance would vest with the contractor with exemplary performance.¹⁰³ If the contractor qualifies for continued performance under pre-set conditions of the award term, the government cannot simply decide not to award the award term and re-compete the contract (without perhaps a costly termination for convenience of the government). That is, a contractor may earn continued performance even if the best interests of the government would be best served by re-competing the contract.

If the government wished to postpone negotiation of pricing for award terms to avoid binding itself to a pricing or performance scheme not in its best interest, contracting officers may be tempted to craft award terms as negotiated contract extensions. Yet, with the exception of one possible workaround (discussed below), it is difficult to conceptualize how a contracting officer could avoid negotiating the pricing of award terms in the initial competition while staying in

bounds with the CICA. Specifically, the full and open competition requirement would apply to “the exercise of options that have not been evaluated in the award, since such exercise can be considered a form of sole source contracting,”¹⁰⁴ just as it would apply to award term incentives. Like options, the conditions and pricing of award terms would have to be evaluated during the initial competition for continued performance to meet the requirements of full and open competition.

The consequence is that, like an option, the details of award term incentive must be a part of the initial evaluation to comply with the CICA. Although both a contractor and the government may want to postpone the negotiation for additional award term pricing, such a delay seems to be incompatible with the CICA. Therefore, there should be no ambiguity in the solicitation concerning the evaluation of award terms in the initial competition; and acquisition planners should understand the inherent risk posed by award terms.

b. Fee-Based Incentives & Structuring the Award Term Incentive's Justification

Monetary incentives also shed some light on how the government should craft award term incentives. While the regulatory requirements behind exercising an option provide the best foundation for complying with the CICA, it would be nonsensical for the government to author a D&F when the contractor triggers the award term.¹⁰⁵ Rather, as discussed, the justification for using an award term for continued performance must precede the contract award. Therefore, in drafting a D&F for award terms, the justification used for fee-based incentives is an appropriate analogue. That is, the justification for the use of award terms should substantially comply with the D&F requirements of both exercising an option and including an incentive fee in a contract.

While monetary incentives do not require reconciling with the CICA, structuring a front-end justification for an

⁹⁹ FAR 6.001(a)–(f) provides for several circumstances when CICA's requirement for full and open competition does not apply. Full and open competition does not apply to the “exercise of priced options that were evaluated as part of the initial competition.” FAR 6.001(c). *See also*, Edwards, *Award Term: The Newest Incentive*, *supra* note 14; Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49; AIR FORCE GUIDE, *supra* note 55, (directing evaluation of incentive based options with the initial competition).

¹⁰⁰ FAR 17.2 (2014).

¹⁰¹ FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1264 (citing National Cash Register Co., Comp. Gen. Dec. B-179045, 74-1 CPD ¶ 116 (“[O]ptions were purely for the interest and benefit of the Government . . .”); *id.* (“ASBCA has held that it will not review a decision not to exercise an option unless it is demonstrated that the decision is made in bad faith or is an abuse of discretion”) (citing Pennyrite Plumbing, Inc., ASBCA No. 44555, 96-1 BCA ¶ 28,044; Sample Enters., ASBCA No. 44564, 94-2 BCA ¶ 27,105).

¹⁰² FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1265.

¹⁰³ The procedures involved with the exercise of an option would be an impossibility for the government if it exercised in an award term incentive. Specifically, even for options that were part of the original competition, FAR 17.207(d) charges the contractor with making a business decision prior to exercising an option. Yet, so long as the government finds that a contractor qualified for an award term incentive, the government's hands are tied vis-à-vis FAR 17.207—there is no discretion for a business judgment that comports with the regulation.

¹⁰⁴ FORMATION OF GOVERNMENT CONTRACTS, *supra* note 91, at 1267, (citing Kollsman Instrument Co., 68 Comp. Gen. 303 B-233759, 89-1 CPD ¶ 243).

¹⁰⁵ FAR 17.207 requires the government to make a business judgment at the time it exercises an option. FAR 17.207(c)(3). However, with respect to an award term the idea is that the government will extend performance if a contractor has earned an award term, regardless of its business judgment. The foundation of the award term is earning a right to continued performance.

award term incentive to mirror a monetary incentive would provide a sound insulation for an award term in light of the CICA. The D&F under FAR 16.401(d) requires a finding by the Head of Contracting Activity (HCA) that an incentive scheme is in the best interest of the government.¹⁰⁶ The discretion on the part of the government in whether the contractor met the requirements of the incentive would effectively become the proxy for the business judgment for exercising an option under FAR 17.207. It is important to note that the requirements of FAR 16.401 and FAR 17.207 substantially overlap—each requiring an analysis regarding whether the incentive structure or the exercise of an option, respectively, is in the best interest of the government.¹⁰⁷

The key point of differentiation is that incentives require a D&F prior to award, while the exercise of an option requires a D&F prior to exercising the option. However, for an HCA to execute a D&F ahead of a contract award—which finds an award term is in the best interest of the government several years before it is earned—may require HCAs to make difficult forecasts. This may be a tall order in several areas. For one, a determination that an award term is in the best interests of the government may require committing to pricing well in advance of award term periods. However, the other side of the coin is that long-term forecasting drives at the heart of the value of an award term incentive—it encourages long-term investment and innovation in order to be both competitive and profitable.

The take-away with respect to comparing award term incentives to elements of multiple-year options and fee-based incentives is that in order not to run afoul of the CICA, the government must make a finding that using an award is in the best interest of the government, which may be no easy task when assessing the incentive's utility several years down the road. However, using the incentive as such is likely

acceptable so long as incentives are in the best interest of the government and are accounted for prior to award.

This forecasting exercise presents a major counterweight in assessing whether to use an award term incentive. Pricing award terms presents risk not only for the contractor but also for the government.¹⁰⁸ While the contract could account for economic price adjustments,¹⁰⁹ it is difficult to conceptualize how an award term incentive could provide for negotiating additional award terms without pricing them at the outset of competition.¹¹⁰ However, Edwards suggests a novel workaround such that award terms may be priced in terms of a ceiling with allowances for clearly defined downward price adjustments and upward economic price adjustments.¹¹¹

Given the constraining regulatory framework, as well as the lack of formalized guidance on implementing award term incentives, incorporating award term incentives is not without both litigation and economic risk. Moreover, there is undoubtedly significant cost with administering such incentives. Nonetheless, even without a regulatory framework for incorporating award term incentives into contracts, there are analogous mechanisms for avoiding problems with the ADA and the CICA. Namely, contracting officers should include the appropriate caveats regarding availability of funds and the need for goods or services and properly document the justification for using award term incentives on the front end of contracts. Finally, contracting officers should be mindful of the tension between the need to comply with applicable laws and the inherent value of the incentive.

V. Conclusion

Insofar as defense acquisition reform remains a high-visibility, high priority item for the DoD,¹¹² exploring non-

¹⁰⁶ FAR 16.401 requires a D&F from the head of contracting activity for all incentive and award fee contracts. The D&F must be documented in the contract file and must justify why the work requires or would benefit from the incentive, why the likelihood of meeting contract objectives will be enhanced by the incentive, and why any administrative burden caused by monitoring the incentive is justified by expected benefits. FAR 16.401(d)–(e) (2014).

¹⁰⁷ FAR 16.401(d) requires that the HCA determine that the use of the incentive is in the best interest of the government. Moreover, FAR 16.401(e)(1) requires specific justification by HCA for award fees where it is not feasible to provide objective criteria for the triggering of the incentive. FAR 17.207(d) also requires a D&F that the option is in the best interest of the government. However, exercising an option only requires a contracting officer to make the determination, not the HCA.

¹⁰⁸ See, e.g., Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49 (discussing the difficulty of forecasting pricing for an award term incentive).

¹⁰⁹ See FAR 17.109(b), 17.207(f) (allowing for economic price adjustments in option contracts).

¹¹⁰ FAR 17.207(f) requires that the government may only exercise options at prices that are “reasonably determinable from the terms of the basic contract.” See also Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49.

¹¹¹ Edwards, *The Award Term Incentive: A Status Report*, *supra* note 49. Edwards states:

In light of the fact that most agencies that have used or that plan to use award term incentives have provided for as many as 10 to 15 years of performance, the GAO's requirement to price those years at the time of initial contract award, and its objection to renegotiating those prices, confront agencies and contractors with a daunting problem. It is hard to imagine any business person making a firm commitment to prices 10 to 15 years in advance without some provision for price adjustment or escape from the deal.

Economic price adjustment clauses, in the sense in which they are described in FAR 16.203, can help, but they usually do not cover all exigencies that could affect prices significantly. Thus, agencies that are contemplating the use of award term incentives must develop another solution, one that will meet with the approval of the GAO. One such solution may be for the parties to agree on ceiling prices that are subject to downward adjustment based on clearly stipulated terms and conditions. Upward adjustments of such ceilings could be based on economic price adjustment provisions or some other reasonable basis.

¹¹² Stewart, *Foreword*, *supra* note 3, at vii.

monetary incentives like the award term seems to naturally complement the priorities outlined in BBP 3.0.¹¹³ Non-monetary incentives like the award term encourage contracting officers to innovate, develop partnerships, and ultimately promote better value to the government. However, in order to appropriately harness the effectiveness of these incentive-based contracts, the DoD needs to review the existing regulatory framework for their use and codify incentives like the award term in the DFARS.

As BBP 3.0 recognizes, contract incentives drive down cost;¹¹⁴ but there is a questionable link between monetary incentives and cost control.¹¹⁵ Where monetary incentives are often paid as a matter of course and may not incentivize better performance,¹¹⁶ incentives that lead to long-term public-private partnerships have real potential to improve contract performance. Long-term contracts often increase efficiency and contractor investment, reduce transaction costs,¹¹⁷ and force the disciplined contract administration.¹¹⁸

While there is certainly value in developing public-private partnerships through award term incentives, there is limited guidance on how to best incorporate these incentive schemes into contracts. While the DoD already uses award terms, their use is not standardized across agencies; and there is no provision in the DFARS or service supplements for their use. Where agencies like the EPA have codified their use for service contracts, the DoD is effectively playing a pick-up game with award term incentives.

While the absence of regulatory guidance for non-monetary incentives like the award term may afford some flexibility, the government should be wary of reconciling them with the ADA and the CICA. To maintain compliance with the ADA, the government should take measures to ensure that award terms are conditioned on both the bona fide need and time constraints for the obligation of funds. Furthermore, in order to comply with the CICA, the government should follow the scheme for multiple-year options in its acquisition planning. The justification for the use of award term incentives should also substantially comply with existing D&F requirements for including monetary incentive structures in contracts.

While there is no perfect solution to control costs and exact superior performance from contractors, and while all incentives have the potential to increase the order of magnitude of difficulty for contract administration, the DoD should not overlook non-monetary incentives like the award term in its efforts to build partnerships and increase buying power.

¹¹³ U.S. DEP'T OF DEF., BETTER BUYING POWER, *supra* note 9.

¹¹⁴ BBP 3.0, *supra* note 10.

¹¹⁵ See Edwards, *Award-Fee Incentives*, *supra* note 12.

¹¹⁶ GAO ACQUISITION REPORT, *supra* note 24, at 4

¹¹⁷ AIR FORCE GUIDE, *supra* note 55.

¹¹⁸ *Id.*

Command-Directed Mental Health Evaluations: A Simplified Process

Major T. Scott Randall

I. Background

Recent changes to both federal law and Department of Defense (DoD) policy have streamlined the procedures associated with command-directed mental health evaluations (CDMHEs).¹ These changes remove many of the due process requirements necessary to effectuate these evaluations and greatly enhance commanders' ability to compel treatment for their most vulnerable Soldiers.² Although these changes diminish many of the protections designed to prevent perceived abuses associated with the CDMHE process, they promote efficiency and safety in an environment plagued by violence associated with the military.³

The policy concerning CDMHEs historically involved a balancing between two competing, but equally important, interests.⁴ The policy sought to balance the commander's need to protect his Soldiers with the individual Soldier's right to engage in whistleblowing activities without fear of reprisal.⁵ The 1997 policy on CDMHEs weighed much more heavily toward protecting the individual Soldier's interest by implementing a series of procedural safeguards necessary to effectuate a CDMHE.⁶ However, by 2012, the social and political environment necessitated a reconsideration of this balance.⁷

II. The Old Rule

The DoD's policy regarding CDMHEs remained relatively unchanged for over sixteen years. It was governed by both DoD Directive (DoDD) 6490.1 and DoD Instruction (DoDI) 6490.4.⁸ These policy instruments implemented Section 546 of the National Defense Authorization Act (NDAA) of 1993, which mandated a series of notice requirements associated with CDMHEs.⁹ For *non-emergency*

referrals, a commander was required to provide a servicemember (SM) written notice of his "rights" prior to any involuntary examination.¹⁰ These rights included the following: (1) the right to consult with an attorney; (2) the right to consult with the inspector general (IG); (3) the right to also be evaluated by a mental health professional of the Soldier's choosing (if a non-DoD professional, at the Soldier's own expense); (4) the right to unrestricted communication with an IG, attorney, member of Congress, or others about the member's referral for a mental health evaluation; and (5) the right to at least two business days before a scheduled mental health evaluation to meet with an attorney, IG, chaplain, or other appropriate party.¹¹ The commander was also required to consult with a mental health professional prior to any referral, provide the SM a memorandum explaining the reasons for the referral with information on the mental health provider, and provide a formal written request to the servicing military treatment facility requesting the mental health evaluation.¹²

For situations calling for *emergency referrals*, DoD policy shifted toward the safety of the SM. If the SM was deemed imminently or potentially dangerous to himself or others, the commander was required to take immediate physical control of the SM through the use of command escorts or military police and transport the Soldier to mental health services or the emergency room for treatment.¹³ However, the commander was required to make every effort to consult with a mental health professional prior to this emergency referral.¹⁴ Following these immediate steps, the commander was then required to complete a memorandum to the SM explaining the facts necessitating the command referral and notify the SM of his rights.¹⁵ Further, the commander was required to provide the Military Treatment Facility (MTF) a written synopsis of the observations and

¹ See National Defense Authorization Act (NDAA) for Fiscal Year 2012, Pub. L. No. 112-81, § 711(b) (2012) [hereinafter 2012 NDAA, § 711(b)]; U.S. DEP'T OF DEF., INSTR. 6490.04 Mental Health Evaluations of Members of the Military Services (4 Mar. 2013) [hereinafter DoDI 6490.04].

² See DoDI 6490.04, *supra* note 1, para. 3.

³ See, e.g., Bill Mears, *Fort Hood Shooting Jury Recommends Death Penalty For Nidal Hasan*, CNN (Aug. 29, 2013), <http://www.cnn.com/2013/08/28/us/nidal-hasan-sentencing/>; Jim Sciutto et al., *Washington Navy Yard: Police Say All Clear After Lockdown*, CNN (July 2, 2015), <http://www.cnn.com/2015/07/02/politics/navy-yard-shooting-lockdown-police-activity/>.

⁴ See DEP'T OF DEF., DIR. 6490.1 Mental Health Evaluations of Members of the Armed Forces (1 Oct. 1997) [hereinafter DoDD 6490.1].

⁵ *Id.*

⁶ *Id.* para. 4.3.

⁷ See *A History of Shootings at Military Installations in the U.S.*, NBCWASHINGTON.COM (Sep. 16, 2013),

<http://www.nbcwashington.com/news/local/A-History-of-Shootings-at-Military-Installations-in-the-US-223933651.html>.

⁸ See DoDD 6490.1, *supra* note 4; DEP'T OF DEF., INSTR. 6490.4 Requirements for Mental Health Evaluations of Members of the Armed Forces (28 Aug. 1997) [hereinafter 1997 DoDI 6490.4].

⁹ See National Defense Authorization Act (NDAA) for Fiscal Year 1993, Pub. L. No. 102-484, § 546 (1993) [hereinafter 1993 NDAA].

¹⁰ *Id.*

¹¹ See 1997 DoDI 6490.4, *supra* note 8, encl. 4.

¹² *Id.* para. 6.1.1.2.

¹³ *Id.* para. 6.1.1.5.

¹⁴ *Id.* para. 6.1.1.5.2.

¹⁵ *Id.* para. 6.1.1.5.4. These are the same rights provided for non-emergency command referrals. *Id.*

circumstances precipitating the referral.¹⁶ Therefore, even in emergency situations, DoD policy provided mechanisms by which Soldiers could challenge their CDMHEs, albeit after being seen by a physician, in order to discourage any attempted use of these evaluations for the purpose of reprisal.¹⁷

III. New Rule

Section 711(b) of the 2012 NDAA repealed the procedural protections associated with CDMHEs.¹⁸ Section 711(b) is codified at 10 U.S.C. § 1090a.¹⁹ This provision retains the express language prohibiting the use of CDMHEs as retaliation against military whistleblowers.²⁰ However, it removes the statutory authorization for the extensive due process requirements found in DoDD 6490.1 and DoDI 6490.4.²¹ Therefore, simultaneously with the codification of section 711(b), DoDI 6490.04 was updated to expressly state that CDMHEs have “the same status as any other military order”²² and therefore require no additional steps for their lawful compliance.

The DoDI 6490.04 incorporates and cancels DoDD 6490.1, and implements the statutory changes embodied in section 711(b) of the 2012 NDAA.²³ The procedural requirements for non-emergency CDMHEs found in DoDI 6490.04 are greatly simplified to encourage their use.²⁴ The commander now has three basic responsibilities: (1) he must advise the SM that there is no stigma associated with obtaining mental health services; (2) refer the SM to a mental health provider, providing both the name and contact information; and (3) tell the SM the date, time, and place of the examination.²⁵ This is all the new process requires.²⁶ The commander is no longer required to provide written requests for examinations and formal notifications of rights.²⁷

The process associated with emergency CDMHEs has also changed. Once the SM is escorted to the mental health provider, the commander is no longer required to follow up with a written notification to the SM.²⁸ However, commanders are still required to report the circumstances and observations that led to the referral to the MTF either prior to or en route to the emergency evaluation.²⁹

IV. Conclusion

The new policy embodied in DoDI 6490.04 has dramatically reduced the procedural requirements associated with CDMHEs.³⁰ This reduction has changed the dynamic associated with CDMHEs from adverse proceedings requiring a formal notification of SM rights to procedures primarily concerned with safety and efficiency.³¹ The current policy continues to prohibit the use of CDMHEs as retaliatory measures associated with military whistleblowers.³² However, it clearly places more trust in commanders to use these important evaluations to save lives, not stifle dissent.

¹⁶ *Id.* para. 6.1.1.5.5.

¹⁷ *Id.* para. 6.1.2.

¹⁸ *See* 2012 NDAA, § 711(b), *supra* note 1.

¹⁹ *See* 10 U.S.C. § 1090a (2015).

²⁰ *Id.*

²¹ *Id.*

²² *See* DoDI 6490.04, *supra* note 1, para 3(b) (2013).

²³ *Id.* para. 1(c).

²⁴ *Id.* encl. 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* para. 2(c).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* para. 3(e).

The Inevitable: Understanding the 12 Technological Forces That Will Shape Our Future¹

Reviewed by Major Justin C. Barnes*

[T]he average expert was roughly as accurate as a dart-throwing chimpanzee.²

I. Introduction

Forecasting the future with any degree of accuracy is a tough business. To borrow a phrase from Thomas Hobbes, such forecasts tend to be “nasty [and] brutish”; therefore, they are generally better when they are “short.”³ Even trustworthy weather forecasts “become increasingly less accurate three, four, and five days out.”⁴ It seems that few things forecasted really are inevitable—especially over a thirty-year horizon.

Not so, apparently, for Kevin Kelly, the author of the aptly, if inappropriately, titled book *The Inevitable: Understanding the 12 Technological Forces that Will Shape our Future*. Drawing on his thirty years of “living online,” Kelly “wade[s]”—or leaps, often head first—into the “myriad [of] technological forces” shaping the next thirty years.⁵ The portrait that emerges is one in which humanity has been freed from labor and is able, through technology-enabled collaboration, to continually re-define what it means to be human by creating unique experiences, which, in a new era of “superabundance,” just also happens to be the last scarcity.⁶

As professional military officers, judge advocates have an obligation to think about the future.⁷ Officers prepare for—in order to avoid—the next war. That task requires a

view of the environment in which that war will be fought. Kelly’s forecast is a useful contribution to that effort because it challenges a certain common assumption; specifically, Kelly suggests—albeit with little elaboration—that war may become obsolete.⁸

Vivid portrait it is, but there is cause for skepticism regarding Kelly’s forecast. History suggests that human agency should not be discounted as Kelly implies.⁹ More importantly, Kelly’s “myriad of technological forces” really are just one type of technology: information technology (IT). And common perception notwithstanding, there is reason to question the extent of IT’s influence, including its impact on today’s and tomorrow’s standard of living. Regardless, though, any thirty-year forecast is educated speculation; and for Kelly’s forecast, like all such forecasts, only time will ultimately tell.

II. One Force to Rule Them All

To discover the future, Kelly has “waded through the myriad technological forces erupting into the present and . . . sorted [them] . . . into 12 . . . [p]resent participles, the grammatical form that convoys continuous action.”¹⁰ These

* Judge Advocate, U.S. Army. Student, 65th Judge Advocate Officer Graduate Course, The Judge Advocate Gen.’s Legal Ctr. & Sch., U.S. Army, Charlottesville, VA.

¹ KEVIN KELLY, *THE INEVITABLE: UNDERSTANDING THE 12 TECHNOLOGICAL FORCES THAT WILL SHAPE OUR FUTURE* (2016).

² PHILIP E. TETLOCK & DAN GARDNER, *SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION* 4 (2015).

³ See THOMAS HOBBS, *LEVIATHAN* (1651), <https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/748/leviathan.pdf>; see also TETLOCK & GARDNER, *supra* note 2, at 5 (discussing experts’ forecast and concluding that it is “easiest to beat chance on the shortest-range questions that only required looking one year out” but that “accuracy fell off the further out experts tried to forecast—approaching the dart-throwing chimpanzee level three to five years out”).

⁴ TETLOCK & GARDNER, *supra* note 2, at 13.

⁵ KELLY, *supra* note 1, at 3-4, 7.

⁶ See *id.* at 176, 188 (discussing post-scarcity and the fundamental limitation of human attention and noting that producing “this explosion of superabundance . . . is the compounding cheapness of stuff”).

⁷ Paul R. Norwood et al., *Capturing the Character of Future War*, U.S. ARMY WAR C. Q. PARAMETERS, Summer 2016, at 81, 90, http://strategicstudiesinstitute.army.mil/pubs/parameters/issues/Summer_2016/Vol46No2.pdf (“[T]he profession of arms needs a more vibrant and competitive marketplace of ideas that invests uniformed personnel with the responsibility to describe the changing character of war.”).

⁸ KELLY, *supra* note 1, at 274-75 (“‘Everyone knows’ that humans are warlike, but I would guess organized war will become less attractive, or useful, over time as new means of social conflict resolution arise at the

global level.”).

⁹ Earlier in the introduction Kelly goes so far as to argue that “while culture can advance or retard . . . [technological] expression, the underlying forces are universal.” *Id.* at 4. One is tempted to respond to Kelly’s diminishment of culture’s role by pointing to China’s Treasure Fleet and its Admiral Zheng He, which “made seven epic voyages” across much of the globe. LOUISE LEVATHES, *WHEN CHINA RULED THE SEAS: THE TREASURE FLEET OF THE DRAGON THRONE, 1405-33* loc. 119-124 (1994) (ebook) (noting also that as a result of the Treasure Fleet, “[h]alf of the world was in China’s grasp, and with such a formidable navy the other half was easily within reach, had China wanted it”). Yet despite this impressive achievement, “after the last voyage . . . , the Chinese emperor forbade overseas travel and stopped all building and repair of oceangoing” ships. *Id.* loc. 124. This decision meant that “[w]ithin a hundred years the greatest navy the world had ever known willed itself into extinction and Japanese pirates ravaged the Chinese coast.” *Id.* Apparently for China’s Treasure Fleet, culture had a say.

¹⁰ KELLY, *supra* note 1, at 2, 7-8. The twelve present-participle categories are: becoming, cognifying, flowing, screening, accessing, sharing, filtering, remixing, interacting, tracking, questioning, and beginning. *Id.* at 8. As a further matter, Kelly essentially re-defines the word inevitable from “[a] situation that is unavoidable” to something that looks an awful lot like: a situation that is highly likely. See *Inevitable*, OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/definition/inevitable> (last visited Jan. 20, 2017) (defining “inevitable” as a noun). Ditching a description of the word that has the virtue of a consistency with the dictionary, Kelly defines “inevitable,” at least in the technological context, as reflecting a “bias in the nature of technology that tilts it in certain directions.” KELLY, *supra* note 1, at 3. “These tendencies,” Kelly asserts, “exist primarily in the aggregate forces that shape the general contours of technological forms,” and thus, “the form of an internet—a network of networks spanning the globe—was inevitable, but the specific kind of internet we chose to have is not.” *Id.* Thus, to Kelly, inevitability is really “momentum,” that is the “momentum

twelve present-participles categories—or “megatrends”—are “inevitable,” Kelly asserts.¹¹ Why? Kelly argues that “[p]articular technological processes will inherently favor particular outcomes.”¹² For instance, in the case of IT, the “bias [is] toward cheap ubiquitous copies.”¹³ “[B]ecause [those outcomes] are rooted in the nature of technology, rather than in the nature of society,” Kelly concludes, these trends are inevitable.¹⁴

Despite the use of the adjective “myriad” and the plural “forces,”¹⁵ Kelly really discusses only one technology: IT.¹⁶ Indeed, Kelly’s future is characterized by IT-enabled human collaboration and IT-powered—i.e., artificial intelligence—robots. But by minimizing the importance of other technologies, this focus will ultimately become the book’s weakness.

First, regarding IT-enabled collaboration, Kelly relates an anecdote in which he met with executives at the television network ABC to talk about “Internet Stuff.”¹⁷ For the executives, “all the sharing, all the free stuff seemed too impossible . . .”¹⁸ Yet, as Kelly states, the “the big story” of the internet was just that: “[n]either old ABC nor startup Yahoo!” created the content;¹⁹ it was “billions of users” who did that.²⁰

Kelly argues that the “online public has an incredible willingness to share.”²¹ He lauds this IT-enabled “new kind of participation,” one that, in Kelly’s words, “has since developed into an emerging economy based on sharing.”²² In other words, gone are the days of “national production” and “government . . . subsidies,” and in come the days of “peer production” and “a bounty of free commercial goods and

services.”²³

Setting aside the fact that even today much of the internet’s content is not created by volunteers,²⁴ in Kelly’s future, presumably someone is paying these billions of users’ bills. After all, one cannot eat (non-monetized) “Likes.” But that poses no big obstacle for Kelly because of the second type of IT: This will be an IT-powered, robot-built post-scarcity world.²⁵

To support this assertion, Kelly argues that there has been an “explosion of superabundance,” which comes from the “the compounding cheapness of stuff.”²⁶ This explosion will expand as IT-powered—namely, artificial intelligence—robots “consolidate their gains in already automated industries” and “continue their migration into white-collar work.”²⁷ As a consequence, humanity will be freed from labor. Indeed, Kelly asks rhetorically: “Isn’t the whole idea that in a highly evolved advanced society work is over?”²⁸ Perhaps.

III. Economics Strike Back: There is no Such Thing as a Free Lunch

Kelly’s view of the future is compelling, but it raises two inter-related questions. First, despite the apparent glamor of the iPhone generation, recent research casts into doubt the IT revolution’s actual impact on standards of living. And if that is so today, it calls into question IT’s impact on standards of living tomorrow. Second, technology’s influence on the economy now also suggests that future technology-driven benefits may not be relatively equally distributed, as Kelly

of an ongoing technological shift.” *Id.* at 4. Momentum seems like another word for a trend. And here, Kelly quibbles a little bit: first Kelly notes the “broad historical trends” that have shaped the “technological convergence between communication and computation,” and then he states that “[t]here is nothing on the horizon to decrease” those trends. *Id.* at 2. Perhaps. But if there could be something on the horizon that is capable of diminishing those trends, there may also be something on that horizon that could blunt that Kelly’s “momentum” in which case the *unavoidable* seems more like just the *likely*.

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ This becomes fairly clear in the very beginning of the book. There Kelly states that since the 1980s, the “technological convergence between communication and computation has spread, sped up, blossomed, and evolved” and that “it is very clear that there have been large-scale trends governing what has happened.” *Id.* at 2. Understanding “[t]hese broad historical trends [is] crucial because the underlying conditions that birthed them are still active and developing, which strongly suggests that these trends will continue in the next few decades.” *Id.* Further given Kelly’s background, it is perhaps unsurprising that his focus is on information technology. *Id.* at 4 (describing Kelly’s “three decades” of “living online,” as both “a pioneer in a rather wild empty quarter” and, “later, as a builder who constructed parts of this new continent”).

¹⁷ *Id.* at 16.

¹⁸ *Id.*

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ *Id.* at 130.

²² *Id.* at 19.

²³ *Id.* at 137.

²⁴ For instance, “[a]s of July 2016, YouTube has paid out \$2 billion to rightsholders who have chosen to monetize claims since Content ID first launched in 2007.” *Statistics*, YOUTUBE, <https://www.youtube.com/yt/press/statistics.html> (last visited Jan. 20, 2017). Further, “The number of channels earning six figures per year on YouTube is up 50% . . .” *Id.*

²⁵ KELLY, *supra* note 1, at 176 (“This is the curse of the postscarcity world: We can connect to only a thin thread of all there is.”).

²⁶ *Id.* at 110, 189 (identifying two examples, namely, the falling price of copper—and commodities in general—and the ever-more efficient beer can).

²⁷ *Id.* at 50-51.

²⁸ *Id.* at 281.

implies.²⁹

It can certainly seem like technology is progressing at an ever faster rate. Kelly asserts that human knowledge and information is doubling every two years.³⁰ In support of that assertion, Kelly notes that the number of scientific articles published, and patent applications filed, each year has been increasing.³¹ This has led to accelerations in technology's "rate of graduations" and the "cycle of obsolescence."³² It can feel like everything is moving faster.

But measuring technological progress is hard. In *The Rise and Fall of American Growth*, Robert Gordon argues that the "best measure of the pace of innovation and technical progress is total factor productivity (TFP), a measure of how quickly output is growing relative to the growth of labor and capital inputs."³³ And unfortunately, TFP growth has lately been less than dazzling.

Specifically, according to Dr. Gordon, "TFP grew after 1970 at barely a third the rate achieved between 1920 and 1970."³⁴ Further, "advances since 1970 have tended to be channeled into a narrow sphere of human activity having to do with entertainment, communications, and the collection and processing of information."³⁵ But, as Dr. Gordon notes, "[f]or the rest of what humans care about—food, clothing, shelter, transportation, health, and working conditions . . . —progress slowed down after 1970, both qualitatively and quantitatively."³⁶ In other words, much of what those soon-to-be-mundane bills buy has not shared in IT's explosive growth.

The appearance of progress may not be the reality of progress. As Dr. Gordon argued,

The wonders achieved by computers and, since the

mid-1990s, by the Internet have misled many analysts into believing that the current rate of economy-wide progress is the fastest in human history and will become even more rapid in the future. The basic flaw in this faith in an acceleration of technological change is that even if the contribution of computers to economic growth were increasing, the share of total GDP represented by computers is too small to overcome the great majority of economic activity where the pace of innovation is not accelerating and, indeed, in many respects is slowing down.³⁷

Put simply, the IT-revolution has had a relatively limited impact on economic growth, which raises questions regarding its effect in the future.³⁸

But for sake of argument, assume both that IT continues to grow³⁹ and that it, eventually, results in a massive increase in productivity, leading ultimately to a world of "superabundance."⁴⁰ Even if that is so, Kelly's forecast runs into one further problem. Specifically, Kelly does not explain why that abundance—super or not—will be reasonably equally shared.

As an initial matter, wealth is not evenly distributed today. For instance, one study found that the wealthiest 10% of Americans own approximately 76% of all wealth in the United States.⁴¹ And it is simply not clear why, in Kelly's view, further IT growth will result in a more equitable distribution of that wealth.

More importantly, robots are capital.⁴² And lately, the owners of capital have been doing pretty well—often at labor's expense. In economics, the "labor share" is that portion of national income that goes to labor.⁴³ From 2001 to

²⁹ See, e.g., *id.* at 137-38 ("When masses of people who own the means of production work toward a common goal and share their products in common, when they contribute labor without wages and enjoy the fruits free of charge, it's not unreasonable to call that the new socialism.").

³⁰ *Id.* at 283.

³¹ *Id.*

³² *Id.* at 10-22.

³³ ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* loc. 186 (2016) (ebook).

³⁴ *Id.*

³⁵ *Id.* loc. 179-85.

³⁶ *Id.*

³⁷ *Id.* loc. 8545.

³⁸ Indeed, Dr. Gordon argues that "the power of [information and communications technology]-related innovations to boost productivity growth petered out after 2004," noting that "[f]or the decade 2005-2014, average trend productivity growth was just 1.30 percent and by the end of 2014 had reached only 0.6 percent per year." *Id.* loc. 6419.

³⁹ This may be an unwarranted assumption. See Tim Cross, *Technology Quarterly: After Moore's Law*, *ECONOMIST*,

<http://www.economist.com/technology-quarterly/2016-03-12/after-moores-law> (last visited Jan. 20, 2017) (noting that "[a]fter a glorious 50 years, Moore's law—which states that computer power doubles every two years at the same cost—is running out of steam" and identifying potential replacements).

⁴⁰ To be fair, Kelly implicitly recognizes one additional problem in this era of plenty: logistics. See KELLY, *supra* note 1, at 53 (discussing that as a consequence of a reduction in manufacturing costs, "the costs of transportation become a far greater factor").

⁴¹ Christopher Ingraham, *If You Thought Income Inequality Was Bad, Get a Load of Wealth Inequality*, *WASH. POST: WONKBLOG* (May 21, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/21/the-top-10-of-americans-own-76-of-the-stuff-and-its-dragging-our-economy-down/>.

⁴² See *Capital and Interest*, *ENCYC. BRITANNICA*, <https://www.britannica.com/topic/capital-economics> (last visited Jan. 20, 2017) (defining capital as "a stock of resources that may be employed in the production of goods and services").

⁴³ *ORG. FOR ECON. CO-OPERATION & DEV., THE LABOR SHARE IN G20 ECONOMIES 2* (Feb. 2015) [hereinafter OECD], <https://www.oecd.org/g20/topics/employment-and-social-policy/The-Labour-Share-in-G20-Economies.pdf>. National income is "the sum of all income available to the residents in a given country in a given year," while the capital share is "the part of national income going to capital." *Id.*

2014, the United States' labor share—which for the fifty years before 2001 was right around 62%—fell to 56%.⁴⁴ Yet from 2000 to 2007, the world's advanced economies' capital share grew.⁴⁵ Although the cause for this transition is disputed, several theories posit a role for technology.⁴⁶

Put simply, since 2001 at least, increases in the productivity of capital through technology has arguably led to a less equal society. Kelly's vision of the future seems to rely on even more massive increases in that productivity. But he does not explain how (or why) any gains from those increases will be more equally distributed than they are now. Put another way, Kelly does not explain why, if his future will be built by robots, its benefits will not, in the end, disproportionately go to the people who own the robots.

IV. Conclusion

The future is uncertain. Indeed even in a deterministic universe,⁴⁷ forecasters face two significant constraints, both of which were famously identified by former Secretary of Defense Donald Rumsfeld: known unknowns and, worse yet, unknown unknowns.⁴⁸ As a forecast's time horizon increases, even the "known knowns" can become unknowns. Consequently, there should be a relatively low degree of confidence in all forecasts. For a thirty-year forecast, that degree of confidence should amount to little confidence at all.

Yet, forecasting remains essential to planning, especially for the military officer.⁴⁹ Preparing for the next war requires forecasting the circumstances under which, and in which, that war will be fought. It is here that Kelly's work is valuable for a judge advocate. His view of the future—especially its forecast regarding the potential end of war—is likely very different from the forecasts mostly commonly considered by those officers. Yet, for that very reason, it is even more important to evaluate these ideas. Without such viewpoints,

officers can start seeing what they expect, as opposed to what is actually there.⁵⁰

Kelly paints a positive view of a future of collaboration, one in which people are freed from labor and are able to pursue those activities that are uniquely human. But in so doing, Kelly must necessarily ignore many of the past effects of the technology he trumpets: both in terms of their actual impact in the standard of living and in terms of the distribution of their material gains. In the end, this forecast—like any forecast—cannot be proven wrong today, but that does not make it right about tomorrow.

⁴⁴ Brian I. Baker, *The Laboring Labor Share of Income: The "Miracle" Ends*, BUREAU OF LAB. STATS. (Jan. 2016), <http://www.bls.gov/opub/mlr/2016/beyond-bls/the-laboring-labor-share-of-income-the-miracle-ends.htm>.

⁴⁵ OECD, *supra* note 43, at 12.

⁴⁶ Baker, *supra* note 44 (summarizing a research paper on theories, and noting that two of the three theories involve technology's effect on the labor share).

⁴⁷ Interestingly, this is not the version of inevitable that Kelly claims. KELLY, *supra* note 1, at 3 (discussing a "classic rewinding thought experiment" in which outcomes are deterministic and stating that the author "mean[s] inevitable in a different way").

⁴⁸ In response to a reporter's question regarding a link among Iraq, weapons of mass destruction, and terrorists, Secretary of Defense Rumsfeld stated:

Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if

one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.

DoD News Briefing – Secretary Rumsfeld and Gen. Myers, DEP'T OF DEF. (Feb. 12, 2002, 11:30 AM), <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>; see also TETLOCK & GARDNER, *supra* note 2, at 12 ("How predictable something is depends on what we are trying to predict, how far into the future, and under what circumstances.").

⁴⁹ It is worth noting that all forecasters also share a significant advantage, namely, when a forecast is made, it cannot be proven wrong. But sometimes accuracy is not the goal. See TETLOCK & GARDNER, *supra* note 2, at 4-5 (noting that forecasters are, "[w]ith few exceptions, . . . not in front of the cameras because they possess any proven skill at forecasting" and that "[a]ccuracy is seldom even mentioned").

⁵⁰ See, e.g., *id.* at 38 (discussing confirmation bias). This is hardly the only bias to which human judgment is subject. For a good overview of those heuristics and biases, see HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002).

Just Mercy: A Story of Justice and Redemption¹

Reviewed by Major Michael E. Gilbertson*

*The real question of capital punishment in this country is, Do we deserve to kill?*²

I. Introduction

For the past four years, violent and nonviolent protests have filled the streets of America and energized conversations at the dinner table, on the sports field, and in news studios across the country, demanding a fundamental change in how the police treat our African-American citizenry.³ While justifiable outrage reignites each time an unarmed black man is killed by a police officer, another less public form of premeditated and calculated state-sanctioned killing,⁴ the death penalty, continues “within the former borders of the Confederacy.”⁵

In *Just Mercy: A Story of Justice and Redemption*, Bryan Stevenson⁶ details the pervasive racial and class bias in the U.S. criminal justice system through the simple and personal account of his more than thirty years litigating post-conviction death penalty appeals in the South.

With only 316 pages across eighteen chapters, Mr. Stevenson introduces his audience to several of his clients he successfully and unsuccessfully defended as well as the local politics and perceived discrimination that unmercifully condemned his clients to die.⁷

Throughout the memoir, Mr. Stevenson not only introduces us to an innocent black man from Alabama who spent six years on death row before being exonerated, but he also calmly voices the larger—but complicated and enduring—bias within our criminal justice system which is seemingly stacked against minorities, the mentally ill, and the poor. It is through the story of Walter McMillian, however,

that the reader is shocked into realizing the weight of Mr. Stevenson’s argument—injustice is done in the name of the law and that today’s attorneys can make a difference in reforming our criminal justice system.

II. The Walter McMillian Case: A Study in Inequality

On August 17, 1988, the State of Alabama sentenced Walter McMillian, an innocent black man, to die for the 1986 murder and robbery of Ronda Morrison, an eighteen year old white woman.⁸ It was not until six years later, on March 3, 1993, with the help of Bryan Stevenson and the publicity that the case received on the CBS series *60 Minutes* that Mr. McMillian’s case was overturned and Walter was released from death row.⁹ Of the several cases that he introduces us to in *Just Mercy*, the story of Bryan Stevenson’s successful appellate defense of Walter McMillian gives the reader a sense that while inequality persists, one can bring about real justice for all in an otherwise imperfect criminal justice system.

A. Racially Biased Investigation or Noble Cause Corruption

The lack of a thorough and independent criminal investigation looms large throughout the cases discussed in *Just Mercy*. Mr. Stevenson suggests throughout the memoir that the heavy political pressure to make an immediate arrest in high profile cases taints justice early and throughout the process. People who can afford an attorney or understand their right to remain silent are better able to avoid issues like self-incrimination.¹⁰ The problem occurs, however, when

* Judge Advocate, U.S. Army.

¹ BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2015).

² *Id.* at 313.

³ Holly Yan, ‘Black Lives Matter’ Cases: What Happened After the Protests?, CNN (Jul. 27, 2016), <http://www.cnn.com/2016/07/13/us/black-lives-matter-updates/index.html>.

⁴ “Capital punishment keeps grinding on, out of sight of society.” Semon Frank Thompson, *What I Learned From Executing Two Men*, N.Y. TIMES (Sept. 25, 2016), <http://www.nytimes.com/2016/09/18/opinion/sunday/what-i-learned-from-executing-two-men.html?ref=opinion>.

⁵ Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. TIMES (Aug. 23, 2016), http://www.nytimes.com/2016/08/28/magazine/where-the-death-penalty-still-lives.html?_r=0.

⁶ Bryan Stevenson, EQUAL JUSTICE INITIATIVE, <http://eji.org/bryan-stevenson> (last visited Jan. 7, 2017). Bryan Stevenson is a Professor of Law

at the New York University School of Law and the founder and executive director of the Equal Justice Initiative in Montgomery, Alabama. *Id.*

⁷ See STEVENSON, *supra* note 1. Otherwise interspersed throughout the memoir are biographic details about Mr. Stevenson and his family, about his first foray into capital defense as a Harvard Law student in 1983, and his about successful effort founding the Equal Justice Initiative in Montgomery, Alabama. *Id.* In addition—and helpful in facilitating future dialogues about the need for meaningful criminal justice reform—the memoir is also filled with compelling and verifiable statistics relating to race, class, and the death penalty. *Id.*

⁸ *McMillian v. State*, 616 So. 2d 933, 935 (Ala. Crim. App. 1993).

⁹ Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES (Mar. 3, 1993), <http://www.nytimes.com/1993/03/03/us/alabama-releases-man-held-on-death-row-for-six-years.html?pagewanted=all>.

¹⁰ See generally *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not

dealing with the poor or uneducated who do not understand the system. For them, it is easy to make a mistake that can lead to devastating consequences for their cases.

We learn in *Just Mercy* that the Monroe County Sheriff, Thomas Tate, arrested Walter McMillian on an unrelated charge of committing forcible sodomy against Ralph Myers.¹¹ Afterwards, it appears that Sheriff Tate promised a jailhouse informant, Bill Hooks, an early release from jail and reward money if he could place Mr. McMillian's truck at the scene of the Ronda Morrison murder.¹² To wrap up the investigation, Mr. Stevenson argues that Sheriff Tate coerced Ralph Myers, an uneducated white man with a long criminal history, into testifying that Mr. McMillian was the triggerman for the Morrison murder in a story that seemed to change every time he told it.¹³ Ralph Myers would later testify about his coerced confession:

I kept telling these people that I didn't have anything to do with the murder of Ronda Morrison. They kept asking me did I have anything to do with Walter McMillian, was Walter McMillian there. Kept asking me all kinds of different questions about did I do this, did I do that. I kept telling them no, no, no. And it seemed like every day the pressure got more and more, worse and worse. And the next thing I knew, it had got so bad till I went ahead and started saying anything they wanted to hear . . .¹⁴

Moreover, Mr. Stevenson demonstrates that in our criminal justice system, there is often a bias against minorities. Simply put, the numerous cases throughout *Just Mercy* demonstrate to the reader that the assumption in our society is, if a black man did not commit this crime, he must have committed some crime to justify being arrested. Once again, we turn to the case in point with Walter McMillian.

Although Walter McMillian and Ralph Myers did not know each other, they both knew Ms. Karen Kelly, and Karen

and Ralph were implicated in an unrelated murder of a white woman named Vickie Pittman.¹⁵ According to Mr. Stevenson, Ralph Myers, Sheriff Tate, and the rest of the Monroe County Community, knew Walter McMillian had a previous adulterous interracial relationship with Karen Kelly, a white woman.¹⁶ The interracial adulterous relationship, as one reporter would later write, was proof enough against Walter McMillian.

Mr. McMillian, who had two jobs and no criminal record other than a misdemeanor charge stemming a barroom fight, did not have a history of violence, but he was well known in town for something else. Mr. McMillian, who is married with three children from his current marriage and has nine children altogether, was dating a white woman named Karen Kelly. And one of his sons had married a white woman.¹⁷

Consequently, when Ralph Myers finally accused Mr. McMillian of committing both murders, Sheriff Tate apparently latched on to the lead, no matter how conflated and contradictory was Ralph Myers' version of the murder.¹⁸ The fact that Walter McMillian was all but convicted of interracial adultery in the court of public opinion, apparently meant that he was the prime suspect for any unsolved crime in Monroeville.

When Ralph Myers later objected to implicating Mr. McMillian, let alone himself, in the Ronda Morrison murder, Sheriff Tate took the unprecedented act of placing both men on Alabama's death row.¹⁹ It is hard to imagine a similar case with financially well-off white defendants that would have proceeded in this way.

Although Mr. Stevenson does not mention the issue, it is important to note that there is also a phenomenon in policing called "Noble Cause Corruption."²⁰ This is the situation where police officers are "trying to do the right thing (noble cause), but due to bureaucratic red tape, a lack of evidence, or

physical intimidation, but it is equally destructive of human dignity." *Id.* at 457.

¹¹ STEVENSON, *supra* note 1, at 47-48. See also *McMillian v. Johnson*, 88 F.3d 1554, 1558 (11th Cir.), *opinion amended on reh'g*, 101 F.3d 1363 (11th Cir. 1996) ("There is evidence that Tate, Ikner, and Benson coerced Myers into falsely accusing McMillian of sodomy so that they could obtain custody of McMillian while constructing evidence inculcating McMillian in the Morrison murder.").

¹² *Id.* at 50.

¹³ *Id.* at 33.

¹⁴ *McMillian v. State*, 616 So. 2d 933, 937 (Ala. Crim. App. 1993).

¹⁵ STEVENSON, *supra* note 1, at 33.

¹⁶ *Id.* at 25-30.

¹⁷ Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES (Mar. 3, 1993),

<http://www.nytimes.com/1993/03/03/us/alabama-releases-man-held-on-death-row-for-six-years.html?pagewanted=all>.

¹⁸ STEVENSON, *supra* note 1, at 49-50.

¹⁹ *Id.* at 52-53.

²⁰ See Thomas J. Martinelli, *Unconstitutional Policing: The Ethical Challenges in Dealing with Noble Cause Corruption*, THE POLICE CHIEF (Oct. 2006), http://www.policechiefmagazine.org/magazine/index.cfm?fusection=display&article_id=1025&issue_id=102006.

Noble cause corruption in policing is defined as "corruption committed in the name of good ends, corruption that happens when police officers care too much about their work. It is corruption committed in order to get the bad guys off the streets . . . the corruption of police power, when officers do bad things because they believe that the outcomes will be good."

Id.

any other roadblock to ‘getting the job done,’ they feel forced to bend or even break the rules to catch the bad guy (corruption).”²¹

Although this issue does not excuse the wrongs committed by some rouge police officers who “rationalize constitutional violations for their own perceived greater good: a safer community,”²² it does explain an alternative view counter to Mr. Stevenson’s implicit position that racism drove the investigation. As applied to the Walter McMillian case, there is an alternative possibility that Sherriff Tate was not racially driven to fabricate evidence Mr. McMillian but that he was motivated by his skewed sense of justice. As hard as it may seem to believe for the reader, Sheriff Tate may have truly thought that Walter McMillian was guilty and that he simply had to find or manufacture the evidence that proved that fact. Unfortunately, we will likely never know Sherriff Tate’s true motivations in this case.²³

B. Pretrial Detainees: On Death Row

On August 1, 1987, a year before he eventually went to trial, Sheriff Tate inexplicably transferred Mr. McMillian, as a pretrial detainee, from the county jail to Alabama’s death row.²⁴ Mr. Stevenson alludes that this unprecedented pretrial incarceration of Mr. McMillian and his alleged co-accomplice, Ralph Myers, to death row was an attempt to pressure Ralph Myers into falsely testifying against Mr. McMillian.²⁵ The U.S. Court of Appeals for the Eleventh Circuit would later find that holding Walter on death row was intended “to punish him before he was tried” and “violated McMillian’s due process rights.”²⁶

As Bryan Stevenson would later detail, Ralph Myers had significant lingering psychological trauma from being

horribly burned in a fire as a child.²⁷ Consequently, the longer Ralph Myers spent on death row, as a pretrial detainee, hearing the electrocutions of his fellow prisoners and smelling their burning flesh, the more willing he was to falsely testify against Mr. McMillian.²⁸

In return for a pretrial offer that allowed him to plead guilty to a lesser noncapital offense, Ralph Myers promised to testify that he saw Mr. McMillian kill Ronda Morrison during a robbery. The Alabama Appeals Court would later say, “Myers was the key witness for the prosecution. Without his testimony, the state could not have obtained a conviction.”²⁹

C. A Jury of Your Peers

There were at least a dozen church parishioners and other witnesses who saw Mr. McMillian at a family fish fry during the time that Ronda Morrison was murdered. Despite the fact that there is no way a rational jury could find Walter guilty, his trial lasted for a day and a half with only three hours of jury deliberation before the jury found Walter guilty and the trial judge sentenced him to die.³⁰

Mr. Stevenson details how Mr. McMillian’s defense attorneys successfully transferred the case out of Monroe County because of pretrial publicity in order to avoid the probability that the jury was already decided against Walter. Unfortunately, and over the subsequent objections of those defense attorneys, the trial judge, Robert E. Lee Key, Jr., moved the trial to nearby Baldwin County, which was disproportionately whiter, politically conservative, and wealthier.³¹ In doing so, Mr. Stevenson argues that the trial judge intentionally avoided an otherwise appealable challenge based on the then-recent U.S. Supreme Court’s

²¹ Dr. Bruce Bayley, *Noble Cause Corruption: Do the Ends Justify the Means?*, POLICEONE.COM (Feb. 12, 2010), <https://www.policeone.com/chiefs-sheriffs/articles/2003646-Noble-cause-corruption-Do-the-ends-justify-the-means/>.

²² *Id.*

²³ See, e.g., Sandee Richardson, *Wrongfully convicted man recalls death row*, MONTGOMERY ADVERTISER (Dec. 14, 1997), <http://ejournal.org/sites/default/files/dp-mgm-mcmillian-wrongfully-convicted-man-recalls-death-row-12-14-97.pdf>. When Sherriff Tate was asked about the case after Walter McMillian was released, he would not comment except to say, “I’m not going to tell you anything You’re just going to twist this around. I know what you’re going to do.” *Id.*

²⁴ *Id.*

²⁵ STEVENSON, *supra* note 1, at 31-32, 57-58.

²⁶ *McMillian v. Johnson*, 88 F.3d 1554, 1565 (11th Cir.), *opinion amended on reh’g*, 101 F.3d 1363 (11th Cir. 1996)

There is evidence that Tate made threatening and hateful remarks to McMillian suggesting that Tate was more interested in punishing McMillian than in keeping him safe and secure. The DOC accepted custody of McMillian and Myers even though (1) the state court had no authority under Alabama law to order their transfers, (2) housing pretrial detainees violated DOC policy, and (3) housing pretrial

detainees on death row was unprecedented. In addition, Tate, Ikner, and Benson exercised some control over transfers to and from death row. While McMillian remained on death row, Myers was transferred back to the Monroe County Jail and then returned to death row about four months later.

Id. at 1560.

²⁷ *McMillian*, 88 F.3d at 1560.

²⁸ As the reader, we see a real-life example of the prisoner’s dilemma unfold before us. “In the traditional version of the game, the police have arrested two suspects and are interrogating them in separate rooms. Each can either confess, thereby implicating the other, or keep silent. No matter what the other suspect does, each can improve his own position by confessing But when both confess, the outcome is worse for both than when both keep silent.” Avinash Dixit and Barry Nalebuff, *Prisoners’ Dilemma*, THE CONCISE ENCYCLOPEDIA OF ECONOMICS, <http://www.econlib.org/library/Enc/PrisonersDilemma.html> (last visited Jan. 17, 2017).

²⁹ *McMillian v. State*, 616 So. 2d 933, 937 (Ala. Crim. App. 1993).

³⁰ STEVENSON, *supra* note 1, at 31-32, 57-58.

³¹ *Id.* at 59-62.

decision in *Batson v. Kentucky*.³² Consequently, the smaller black proportion of prospective jurors allowed the prosecutor to strike most of them without giving the defense sufficient support to argue that such racially-based preemptory strikes were unconstitutional.

D. The Judicial Override

Although the jury found the testimony from Ralph Myers and Bill Hooks was enough evidence to convict Walter McMillian, it did not sentence him to death. In fact, seven out of the twelve jurors recommended that the court sentence Mr. McMillian to life in prison but the trial judge overrode the jury and sentenced Walter to die.³³ Elected trial judges in Alabama had and still have the authority to override a jury's sentence of life and unilaterally impose a sentence of death.³⁴ However, Alabama trial judges overwhelmingly override cases from life to death when it involves a white victim.³⁵ This is still the case even though a recent study shows "override cases involve a disproportionate number of wrongful convictions."³⁶

E. Appeal, Exoneration, and Aftermath

In February 1993, the Alabama Court of Criminal Appeals reversed Mr. McMillian's conviction because, it held, "the state suppressed exculpatory and impeachment evidence that had been requested by the defense, thus denying [Walter] the appellant due process of law, requiring the reversal of his conviction and death sentence . . ."³⁷ Mr. McMillian later unsuccessfully sued Sheriff Tate and two other Monroe County officials for violating his federal constitutional rights.³⁸ Sheriff Tate is still at work in Monroe County.³⁹

In a recently released report into how the death penalty operates and endures in seven states in the South and West, the Fair Punishment Project found that "[r]acial bias infects every aspect of death penalty cases, from jury selection to sentencing, from the decision to seek death to the ability to access effective representation."⁴⁰ It appears that Mr. Bryan

Stevenson and the attorneys at the Equal Justice Initiative can be proud of their success in defending innocent death row inmates, like Walter McMillian, but their work is not finished.

III. Conclusion

Overall, *Just Mercy* reminds the reader that "[c]apital punishment means 'them without the capital get the punishment.'"⁴¹ Its ease of reading and lack of imperious legalese or self-indulgent inflammatory rhetoric makes *Just Mercy* a suitable study in Law and Society for most high school and college students or anyone interested in the politics propping up capital punishment.

The criminal justice attorney may be inspired to delve deeper into an underlying investigation before taking a questionable case to trial. For the fan of the documentary television series *Making a Murder* or the investigative radio program *Serial*, this memoir highlights the power that the national media can play in convincing judges and prosecutors to relook questionable convictions.

For all readers, this memoir is a tragic reminder that when the U.S. criminal system gets it wrong, real people suffer unnecessarily for long periods in heart-wrenching conditions.

³² *Batson v. Kentucky*, 476 U.S. 79 (1986) ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

³³ *McMillian v. State*, 594 So. 2d 1253, 1284 (Ala.Cr. App.1991).

³⁴ See *Judge Override*, EQUAL JUSTICE INITIATIVE, <http://eji.org/death-penalty/judge-override> (last visited Jan. 7, 2017) ("Nearly 20 percent of the people currently on Alabama's death row were sentenced to death through judicial override.").

³⁵ See *Id.* (Seventy-five percent of all death sentences imposed by override involve white victims, even though fewer than 35 percent of all homicide victims in Alabama are white.").

³⁶ The Editorial Board, *When Juries Say Life and Judges Say Death*, N.Y. TIMES (Sept. 16, 1993), http://www.nytimes.com/2016/09/16/opinion/when-juries-say-life-and-judges-say-death.html?ref=opinion&_r=0.

³⁷ *McMillian*, 616 So. 2d at 949.

³⁸ *McMillian v. Monroe Cty*, 520 U.S. 781, 793 (1997) (holding that Sheriff Tate could not be sued in his official capacity for his unlawful acts because he was not a Monroe County official).

³⁹ *Monroe County, ALA. SHERIFF'S ASS'N*, http://www.alabamasheriffs.com/county_map/county/50 (last visited Jan. 7, 2017).

⁴⁰ Fair Punishment Project, *Too Broken to Fix: An In-depth Look at America's Outlier Death Penalty Counties* (Aug. 2016), <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf>.

⁴¹ STEVENSON, *supra* note 1, at 6 (quoting Steve Bright, Director of the Southern Prisoners Defense Committee).

The Judge Advocate General's Legal Center & School
U.S. Army
ATTN: JAGS-ADA-P
Charlottesville, VA 22903-1781